



Revista de la Facultad de Jurisprudencia

ISSN: 2588-0837

RFJ@puce.edu.ec

Pontificia Universidad Católica del Ecuador
Ecuador

Unda Mateus, Dominique

**La evolución del Derecho, como modo para regular la
vida diaria, un aporte desde la perspectiva ecuatoriana**

Revista de la Facultad de Jurisprudencia, núm. 5, 2019, -Junio, pp. 135-174

Pontificia Universidad Católica del Ecuador
Ecuador

Disponible en: <https://www.redalyc.org/articulo.oa?id=600263495013>

- Cómo citar el artículo
- Número completo
- Más información del artículo
- Página de la revista en redalyc.org

UAEH
redalyc.org

Sistema de Información Científica Redalyc

Red de Revistas Científicas de América Latina y el Caribe, España y Portugal
Proyecto académico sin fines de lucro, desarrollado bajo la iniciativa de acceso
abierto

La evolución del Derecho, como modo para regular la vida diaria, un aporte desde la perspectiva ecuatoriana

*The Evolution of the Law, as a Mode for Regulating
Everyday Life, from an Ecuadorian Perspective*

Dominique Unda Mateus

Coordinadora (investigadores en formación) GIDE-PUCE y autora corresponsal

Artículo Original (Miscelánea)

RFJ, No. 5, 2019, pp. 137-174, ISSN 2588-0837

RESUMEN: el presente documento se refiere a la evolución del Derecho como herramienta de regulación de la vida social durante las distintas épocas históricas, en las civilizaciones mesopotámica, griega, altomedieval, el incanato, y la de Roma, y sus sucesoras en el Derecho: la Recepción medieval y moderna, y la contemporánea. El objetivo principal es reconocer los motivos que desencadenan su cambio de perspectiva y, a partir de dicho análisis, detallar su proceso de transformación en la historia, teniendo en cuenta que, las diversas formas de hacer y entender al Derecho, han afectado los factores sociales, económicos e institucionales. La principal motivación para esta investigación, es reflexionar e identificar concepciones relevantes en la Historia que se manifiestan en el modo de producir y ejercitar el Derecho, y que en los momentos primitivos se relacionan con la extensión religiosa, hasta la legitimación de las clases sociales. Finalmente, aunque el Derecho se caracteriza por una naturaleza en cierto modo cambiante, solo cabe comprenderlo como realidad histórica, consecuencia de un pasado que, hoy más que nunca, lo vincula de modo muy similar en el mundo globalizado, a las concepciones que, desde Roma, se desarrollaron en el occidente europeo.

PALABRAS CLAVE: historia de la ley, reglas sociales, sociedad, sistema legal, civilizaciones.

ABSTRACT: this document refers to Law's evolution as a tool for regulating social life during the different historical ages—in the Mesopotamian, Greek, Early Medieval and Inca times, and Roman

civilizations, and their successors in Law: of the medieval, modern and contemporary receptions. Recognizing the reasons that trigger the change of perspective is this analysis's main objective and, from said analysis, detailing its historical transformation process, considering that the various ways of doing and understanding the law have affected the social, economic and institutional factors. This research's main motivation is to reflect and identify relevant Historical concepts that are manifested in the way of producing and exercising Law, and that in primitive moments are related to religious extension, and even to the legitimization of social classes. Finally, although Law is characterized by a somewhat changing nature, it can only be understood as a historical reality, a consequence of a past that, more than ever, links it in a similar way in the globalized world—to concepts that, from Rome, were developed in Western Europe.

KEY WORDS: history of Law, social rules, society, legal system, civilizations.

INTRODUCTION

The doctrine hesitates when it tries to define the law¹; there is no univocal definition, and it is coherent that the concept of law evolves as it develops within the social and global reality. In that sense, it is important to know how the law has been created and adapted to society's different realities. Its object and the interests that spawned it in the past are those which have influenced its current aspect. The evolution of law in societies deserves to be studied, given that its formulation and understanding are interrelated with the very functioning of society.

This paper's objective is to describe, in a synthetic way, the conception of law in its social context, at different historical moments of civilizations, from both a general and a specific focus. And, in a more detailed way, analyze its evolution, understand the reason that giving rise to the change of its perspective, and establish a general definition using the conceptualizations obtained through each civilization (Botha, 1962).

1 This paper is part of the GIDE-PUCE Project No. 5, "Legal Systems, Efficiency and Justice," an international research initiative on legal historical content which also includes junior researchers from the GIDE-PUCE Research Group under the supervision of University of Americas (UDLA) Professor Jesús María Navalpotro Sánchez-Peinado.

The study of this problem is motivated by the interest in expanding the knowledge of those who are involved in the field of law, thus creating conceptualizations that encompass the approach of jurisprudence, in its original sense of doctrine, in society.

The first section of the document describes the law in antiquity, most alien to our specifically legal culture, and specifically in Mesopotamia, where it was understood as a way of regulating human life out of the divine will, often written; and in which respect for the mandates of the king acquired particular relevance, as well as the determination of behavioral regulation mechanisms that prevented conflicts from arising within society, or, where appropriate, could be resolved with precision and ease. Therefore, in the face of conflicts, the type of punishment was based on the law of retaliation: "An eye for an eye, a tooth for a tooth."

The second section deals with law in Greece, where it is consolidated as a custom, and stages can be distinguished in its evolution, out of the rules with customary character, which were considered to be revealed by the gods to the monarch. Democracy existed thanks to an institutional system in which the assemblies and councils participated in the decisions of all citizens.

The third section of the document describes features of Roman law, which in its beginnings was understood as a cluster of traditional customs transmitted orally and then in writing, during the various stages of its civilization: monarchy, republic and the different phases of empire. The norms in Rome, created by different sources, were ordered and established in juridical bodies, in order to maintain the political and social balance and stability.

The fourth section deals with the law in the Inca empire, or *incanato*, in South America prior to its incorporation into the western cultural space. Regarding the data that can be used to speak of primitive law, in regard to religion, upon which the customary rules of social coexistence depended. The Inca was an absolute monarch, chosen by a divinity that gave him the power to dictate laws and impart justice.

In the fifth section we speak of Law temporarily in a very unequal historical epoch--the Middle Ages, in which two major moments can be distinguished: before and after the reception of the Common Law. The insecurity of the times and the instability caused by the

invasions and violence throughout Europe, facilitate a new order in which inequality and personal and social differences articulate a class-based society. This has its reflection in the norms that regulate the coexistence between different groups and classes, to which the influence of the Church, Christian religious thought, and the Canon Law are united. This, out of what is considered the Middle Ages, displays a remarkable development and influence, together with the Civil Law contained in the Justinian compilation; giving rise to an increasingly conceptually brilliant legal system that, under the name of Common Law, constitutes the legal basis for the entire West and, ultimately, for contemporary legal systems. Of the schools that are included in the so-called *mos Italicus*, especially those of the ultramontanes and the commentators, the main purpose was to understand, analyze and interpret that Common Law to adapt it to society and create a practical and positive Law that could be used to achieve greater legal security.

Throughout the sixth section some ideas are offered regarding the development of that Common Law, which during the Renaissance period underwent the development of a model of scholarly, theoretical study. It carries primordial interest for the historical and sociological areas, and is known as *mos gallicus*.

The seventh section deals with the transplanting of the Common Law prevalent in Europe to America, thanks to the Spanish colonizers. This organized life in the New World according to the Western model, although not without resistance and contradictions between its proclaimed charitable purposes and private material interests.

In the last section, the vision centers on contemporary civilization, focused on the Ecuadorian perspective: its evolution and its remarkable manifestations, in a unifying process. The law was used as an instrument for organization and implementation of triumphant political ideologies starting with the first independent constitutional text in 1830.

From that examined, we can see the concept of Law as an object for change and transformation with each civilization, which can be studied throughout history (Mosley, 1932). It results in different ways of seeing its origin and manifestations; that is, its sources and its purpose so as to harmoniously regulate social coexistence.

1. THE LAW OF ANTIQUITY: MESOPOTAMIA

The history of law has developed alongside the sociological evolution of human beings, and as humans implemented norms for healthy and peaceful coexistence within the society in which they existed according to the time; of course, this has been a long and complex process. In ancient times there were civilizations that, thanks to their great social progress, managed to leave a mark not only on human history, but on the history of law. Their methods were used by the doctrine and remain a source for study within universities around the world: this is the case of the Mesopotamian cultures (Westbrook, 2015).

In Asia we find the oldest testimonies of law (Botha, 1962). One of the largest cultural groups was located in Mesopotamia, where the first societies were established, governed by laws promulgated by kings and backed by a priestly circle. The fertile plains that irrigate the Tigris and the Euphrates and which makes for an excellent communications hub, witnessed a multitude of peoples. Between 3200 and 2800 a. C., the predominant people were the Sumerians, organized into city-states, endowed as much for war as for commerce, and governed by a king, who was the high priest. The temple was the political and religious center, at the same time as it constituted an important economic nucleus. Centuries later, around 1900 a. C. a dynasty was established in Babylon, to which Hammurabi belonged.

Mesopotamia understood the law within an absolute regime, where priests had a preeminence of power, which allowed them to intervene in everyday matters, such as ceremonies or rituals, as well as in the acceptance of customs and legal reforms. The Sumerian society was one of the first societies to organize and codify norms into a single code, that of Hammurabi. This was an initiative of the king, focused on securing correct fulfillment of the laws (Westbrook, 2015).

In Mesopotamia one cannot properly speak of an idea of State, but of an absolute power, independent of external controls, with a domain over territories. It was considered that the power with which the king acted was divine, emanating from a divinity, from which the force of the oath was derived. This linked men with gods in submission to the rules of behavior. Due to their complicated geographical location, the Sumerians had to devise the most organized way possible to develop with limited resources. Their society does not seem to have a consideration of man as a person entitled to rights; the modes of

division of labor offer us an idea of a society in which each person had a specific function within social development, which was the ultimate goal. The temple was the political and economic center of the city-states, such that, consequently, the priest was the one who exercised full power and served as supreme judge and administrator of the public patrimony. It seems that in many city-states the priest was considered a kind of local god, at the service of a more powerful god of war (Botha, 1962).

The Mesopotamian kingdom of Babylon was one of the most powerful of the time, during the reign of Hammurabi, who was considered to be the God of Justice. It seems that he exercised a broad leadership and fostered a society in which laws had to be respected in order to achieve social stability.

He was the pioneer in “positivizing” the Law, in the sense that he used the scribes to transcribe his laws, which constitute the aforementioned Hammurabi Code. For the first time in our recorded history, the Law was put into writing, which implies open publicity before society (Westbrook, 2015).

The legal collection contained 280 articles, of civil, criminal and administrative law. Severe punishments abounded, with frequent repetition of the death sentences and mutilations. In short, the work

Consists of three parts: the preamble, the legal provisions and the epilogue. The first is largely dedicated to perpetuating the titles of Hammurabi and his glorious deeds. He begins by saying that Anu, the supreme leader, and Bel, lord of heaven and earth, entrusted Marduk with the care of Humanity, and Hammurabi, the one fearful of God, with the tasks of doing justice on earth, destroying the evil one, extirpating wrongdoing and keeping watch so that the strong do not oppress the weak. “They call me Hammurabi, the pastor, the one chosen by Belpara to bring happiness to human beings.”

After listing the most outstanding ephemerides of his reign, he closes the preamble with these words: “When Marduk sent me to govern men, to sustain and instruct the world, I established justice and law in my country, and I created men’s happiness.”

Among other noteworthy things, the provisions concerning the responsibility of the State or of the doubt, which guarantee people’s

security when it is not possible to find the wrongdoer, stand out. The procedure, both civil and criminal, rests on clear and precise rules. The condition of the witnesses is defined and whoever tries to cheat them is punished, as well as the magistrates. Establishing severe sanctions for the venal judges' compliant hearers of their duties, the cases are listed in which it is permissible to destroy the constancy tablets. (Franco, 1962, p. 333)

Criminal Law stands out as the main element of those which constitute it, based on the law of talion (eye for an eye, tooth for a tooth), with the idea of reducing retaliation for damages to payment equal the damage caused. This vision of a retributive justice and a rigorous criminal system highlight a conception of Law as an elementary instrument for balance and social order.

The civil administration, as described by Cramer in *History Begins in Sumer*, was an extensive hierarchy of officials, in charge of large hydraulic works, foremen, scribes, priests. There was a code copied by the scribes, where various subjects were collected, analogously, perhaps, to some notaries, which functioned as files that carried exemptions from debts, rights of the poor, contracts, ... The purpose that we are interested in highlighting is that which consisted of guaranteeing the *status quo*, a certain immobility, in which the laws were not changed, and which remained static in time.

2. THE LAW OF ANTIQUITY: GREECE

2.1. Stages of Law in the Greek City States

Law in Greece can be divided into three fundamental stages that constituted the evolution of a customary law. At first, law in Greece seems to have been conceived as a sacred custom, the fruit of a revelation of the gods to the kings. It emphasized the divine punishment of the contraventions of the laws. Law was part of theology. In order to understand the contribution of the Greeks to the concept of civilization, the evolution of their own legal systems, the creation of written laws, their reflection regarding justice and the constitutional systems of the city-states must be considered (Bernal, 2010, pp. 43-ss).

In the first stage, the gestation of classical philosophy by thinkers such as Socrates, Plato and Aristotle stands out, for whom the issues of law, justice and law were the subject of frequent reflection, to the point that they have special prominence in the Socrates' death.

In a second stage of technological and social advances, the city of Athens enjoyed the mandate of several legislators, whose laws were considered a model of wisdom in the creation of rules for social coexistence. It would seem that it was the enormous social inequalities that motivated Draco's laws --very rigid, to avoid injustices-- but they did not work. The reforms of Solón and Pisístrato would try to offer a more efficient social order (Bernal Gómez, 2010, p. 47).

The compilations of sacred customs that, before Dracón, surrounded by a certain legendary, mythical aura, were undertaken by Zaleuco de Locri and Carondas, and later Solon, by giving a written form to their codes, the *Zeismoi*, converted some sacred uses into *monoi*, or human laws. In this way the law was separated, to some extent, from religion, and "family responsibility is constituted by the individual and private revenge follows the legal punishment imposed by the state" (Tobio, L. 1945).

Sparta, despite being an eminently agricultural city-state, was renamed for its powerful army, which influenced its political regime: a militarist system. It was the first town that was regulated by a type of constitution (*Rhetra*). It had no development or commercial power, but with its agriculture it maintained its economy and with its army its influence. The *Rhetra* (700 BC), was part of Sparta's political structure, and was attributed to the wisdom of another great legislator, Lycurgus. In his formation process a supernatural element appeared constantly: the legend told that the wise man wished go to the oracle of Delphi, to listen to the opinion of the gods regarding his judicial work (Botha, 1962).

The main elements characterizing the laws of Lycurgus are: a) part of the Spartan political structure, which had a dual monarchy, that is, the supreme command fell to two hereditary kings, representing two noble houses, usually rivals, and that they functioned as high religious and military authorities, as supreme leaders of the army and political life; b) a council of elders, called *Gerusía*, composed of 28 nobles of advanced age, chosen among the aristocratic families, to which the two monarchs were added, by their own right.

The main function of the *Gerusia* was to prepare all matters that were to be brought to the attention of the Assembly, as well as to conform a superior court in matters involving the death penalty for a Spartan; c) an elective popular assembly, called *Apella*, in which resided the will of the people theoretically resided, and which was constituted by Spartans over thirty years of age, and met once a month under the command of various magistrates, the *ephors*, to approve the projects that sent for consultation (it had no power to initiate matters by its own initiative) and; d) five magistrates, called *Eforos*, true directors of political life, in whom resided the true government of the city-state.

They had the power of control, with unquestionable authority, to watch over the morals of the citizens. They were in charge of the diplomatic relations of Sparta with the other powers (they were the ones who received the foreign embassies) and, even, for specific cases of civil order, they could function as judges or be constituted in courts of justice (Bernal, 2010, pp. 44-45).

There followed a cumulative growth of the legal body, since, when legal confusion arose, a committee was appointed to determine the law that should prevail. It was considered that no magistrate could solve cases based on the unwritten law, but rather on those fixed norms.

As is customary in these first jurisdictions, the law's coverage is indistinct in regard to its provisions in both civil and criminal matters. In addition, law appears imbued with religious character, which implies that the evilness of the crime also signifies an offense to the gods, a blasphemy. Another frequent feature of the primitive orderings is also found within this system: autocomposition, that is, the possibility of resorting to private revenge in certain cases, the causes for homicide, according to the class and origin, passed through four courts that judged if it was voluntary or excusable.

The property right itself was absolute, demanded with full rigor, and a herald every year proclaimed that whoever possessed property would continue to be the holder and absolute owner of things (Tobio, L. 1945). A certain type of distinction can be identified between public law and private law; Greek law was in a certain way the base of Roman law, which would evolve in a unique form.

2.2 Political and Social Structure and Law

Of law in Greece, the political and institutional framework in which it appears is of primary interest (Gaudemet, and Chevreau, 2014). The types of government evolved and were subject of careful study, especially by Herodotus and Aristotle.

In the most primitive monarchy, the king was absolute ruler, and administered justice in the polis; in some of these, such as Athens, the monarchical form was replaced by an aristocracy, in which power was exercised by a minority, constituted by noble families. Sometimes the cities had “tyrants”, who, with the support of the people, reached the government for a time.

The most significant Greek political model was democracy, characterized by isonomy, which made all citizens equal and free before the law (Bobbio, 1987), aside from non-citizens and the numerous slaves. The most notable democratic expression were the assemblies and councils, constituted and elected by the citizens, and which reserved the final decisions for the life of the polis and the control of public offices.

In the polis, there was a division between citizens, versus non-citizens and slaves, so that rights also depended on social class, in relation to the antiquity of citizenship: citizens whose parents were also citizens enjoyed a plentitude of political rights, while the *metecos* and *periecos* of Athens and Sparta, inhabitants of the outskirts of the city, were not considered citizens, nor did they participate in political rights, or even ownership of properties. Their life depended on commerce and craftsmanship.

The slaves, a generalized institution throughout antiquity, did not have legal personality; the law placed them among things which were the object of property. One fell into such a terrible state as a result of a debt sentence, by birth, or by being captured in war between enemies.

We can emphasize that law in Greece shows, as its most interesting feature, its dependence on the political and social structure, with the idea of equality identified with citizenship, and the consideration of law in relation to order and justice.

Classical Greek civilization - wrote Aymard and Auboyer (1958) -, in its essence, is a civilization of the polis and it was weakened when the city was unable to overcome the internal and external political difficulties that besieged it, demonstrating its inability to satisfy the aspirations of its citizens. Other more powerful civilizations would end up absorbing it: the Hellenic empire of Alexander and, later, the flourishing Roman expansion, that, in its origins, appears rooted in Greece.

3. FEATURES OF LAW IN ROME

It is not easy to provide sufficiently precise and synthetic features regarding law in Rome. Millions of pages have been written about it, during two thousand years. We only aspire to highlight certain considerations. Rome was a civilization constituted in part based on the Law. But also, to thoroughly understand, the importance that the Roman Empire had within the legal field, it is necessary to analyze the social evolution of the time (Kunkel, 2003).

The history of Roman law begins in a community of humble conditions, which is organized as one of the significant city-states of antiquity; which gravitated, in terms urban, social and political order, around a single fortified bastion, the scene of economic traffic and the totality of political life. Around it extends an area with isolated hamlets and small villages (Botha, 1962).

The Romans created a political structure, after various kings who occupied a legendary era, which was modified at successive moments. They never came to depersonalize the concept of state; for them, the state was not an abstract power, which appears before the individual, ordering or allowing something, but simply the set of people that compose it; that is, the state could not be explained without the citizens themselves. Hence, their own denomination indicated the community of citizens: *Populus Romanus*. The political structure incorporated aristocratic and monarchical elements, configuring it as a mixed regime (Bobbio, 1987, p. 44-ss.), which would remain, more in theory than in practice, until its collapse in the West in the fifth century. The aristocratic element, referring to the organ that welcomed the old families and the new ones, enriched, was used in thus identification of the republic (which subsisted until the low empire): *SPQR*, the Senate and the Roman People.

Roman Law was the system of norms that Rome created to regulate its life, but that, later, remained in the eastern part of its empire, in Byzantium, until its fall in 1453, and that constituted a formative element of the Law of the political units that were constituted in the West following Roman disintegration. Afterwards, it is notable how in the late Middle Ages this Law once again acquires a leading role and becomes an element that configures university studies and, in the end, the entire legal system, which would expand from Christianity (Western Europe) to ultimately include in some way the whole world (Fernández de Buján, 2016).

The social structure of the oldest Rome differentiated patricians and commoners. The first was the top of social classes, and its name comes from the Latin *pater, patris* --that is, father-- which is how the descendants of the oldest families were recognized. The plebeians welcomed the marginal, a *plebis* that was opposed to the *gentes* (plural of *gens*, lineage), among which the number continued to grow, among foreigners arriving to the city, inhabitants of nearby towns and a few emancipated slaves, who did not belong to any recognized *gens*.

The law and the social structure are at the base of the most significant political conflicts of ancient Rome. The patricians enjoyed exclusive rights in public office, and the Law *-Ius-* was applied by the pontiffs, members of the patriciate, according to a ritual process, publicly unknown. To the protests and attempts of segregation of the plebeians, it was told that the formulation of a first written law followed. It likewise was legendarily said that this had been inspired by the wise Greek laws.

Thus, the so-called Laws of the XII Tables were drafted, registering the tensions between patriciate and plebeians, who, gradually, were arriving to all public offices (Iglesias, 1993). The importance of this Law was to put into writing standards which were made public. This facilitated open knowledge regarding access to justice, which would be completed with the decrees of magistrates, called praetors, which determined the admissibility of pretensions. To these were added, with the passage of time, other laws of the political assemblies (elections) and dispositions of the Senate.

Roman law generated rules for social life, from the perspective of its exercise before the courts: family, business, labor, and private and public relations were the subject of laws, customs or decrees that

established criteria to reach a “just” solution“, appropriate to each case, as explained by Jaime del Arenal in his summary of jurisprudential history (2016, p. 15-16 y 21-34).

The subject of Roman Law was the citizen, the *cives*, but the flexibility of its legal system allowed it to be opened to other people: the *Latini*, initially inhabitants of the surroundings and of the provinces, who in civil and commercial matters resembled these. Moreover, Rome ended up having a magistrate to deal juridically with the lawsuits that affected foreigners, non-citizens, known as *peregrini*: the pilgrim praetor opened the way to the resolution of conflicts through the application of natural legal principles (*Ius Naturale*) or those common to the different peoples (*Ius Gentium*) (Arenal, 2016, p. 22; Gaudemet and Chevreau 2014).

The methods of acquiring Roman Law are different. The simplest distinguishes an archaic, a classical and a postclassic period: according to different criteria, the former embraces the political forms of the monarchy and the republic, the latter begins sooner or later, within the republican stage and it is understood to extend until the crisis of the third century (Iglesias, 1993, Fernández de Buján, 2017, Arenal, 2016).

The legal system in Rome, in its moments of splendor, was distinguished precisely by its great flexibility in the application of legal standards. The judge sought a just solution to the case; rightly explains Del Arenal (2016, p. 28) that followed a topical or problematic view of the Law: faced with a plurality of subjects, and legal situations, “the logical, ethical and normative elements that would best serve to order in justice, whether these are of a jurisprudential, legal or customary nature” were invoked. It was a requirement that the right of each individual be respected, and the public power had to accept its own limitations. This, in addition, led to a situation of greater security, confidence and peace, to the point of arousing the desire of other peoples, who would come to request the application of the same regime. The key was to, for centuries, maintain compliance with the realistic imperative of knowing and respecting that held by each individual. That is what Ulpiano would define as justice: *constans et perpetua voluntas ius suum cuique tribuere*.

The postrema stage of the creation of Roman Law takes place after the disappearance of half the empire: in the sixth century, the reign of Justinian involved an effort to revive a Rome, whose political center

by then was already in Constantinople (Byzantium), in the East. It is not that a part of the territories that had integrated the western empire would be recaptured, but, in an imperishable way, the formation of the most important compilation of all Roman Law was established, which, after centuries would come to be known as *Corpus Iuris Civilis*, perhaps the most important legal monument of all of Western civilization (Argüello, 2002, Petit, 1904).

4. LAW IN THE INCA EMPIRE

The law of pre-Inca societies is considered to be a primitive law. People in that time gave more importance to religion than to the political and social aspects. And with respect to the Inca empire, it must be noted, as Domenack (2014) does, that study is complicated. Since we have not received much information, who suggests asking “how was the law?”, instead of “what was the law?”

A Peruvian researcher, Pease, considered that the theocratic model of society and the divinization of the emperor could continually configured their version of the law: “the organization of the state is always a key to begin the study of the law of a people (...) in certain peoples where the state is theocratically organized, the law is subordinated to the interests that the ruler represents real or supposedly to the deity” (1964, p. 36).

On the other hand, it is understandable that it is believed that law among the Incas is a kind of pre-law or primitive law, since as Basadre (1997) states: the first Inca laws were given by the *scuti*, which refers to the things heard, and *smiriti*, to remembered things, and their first codes were compilations of customs. Because the memory of humans was poor, ways were devised to help remember them, so the first written laws were sometimes metrical rhymes (p. 237)

In this way, continues Basadre (1997), “the Incas also had to use proverbs as vehicles for the transmission of norms and as instruments to disseminate their authority. No public act could so easily and clearly the bring the enunciation of rights and obligations to the masses as the typical legal proverb” (p. 238). There were also sayings that marked the Inca society and that continue until our time, as the widely-circulated prescriptive synthesis: *ama bulla, ama sua, ama ciella ama*

sipix, ama mappa or maclla. (no thief, no liar, no lazy, no murderer, no pervert, no effeminate)” (p. 239).

Laws among the Incas extended to the private and moral area, as defined by Basadre (1997): there were laws, for example, that as stated, punished the whisperer, the gossip, the effeminate, the idle; and laws that imposed rigid rules on the use of clothing and the arrangement of hair to demonstrate a superior or inferior social situation or to identify the regional origin of each individual” (p. 247). Regarding the breach of laws, there were very extreme and rigorous punishments. The punishments acquired their rigor when they were cases concerning anything that defrauded the state.

As we mentioned earlier, the Inca empire was a theocratic state, which defines how punishments were exercised and how laws were formulated, so that “Inca law theoretically had its origin in the Inca themselves (Grossberg and Tomlins, 2008, v. 2). Before his subjects, the sovereign ruler always appeared as the creator and never as the subject of the Law; he was a divinized being who could not commit a crime and who was not only authorized to dispose of the persons and property of individuals and collectives, but who was also authorized to repair any grievance and offense in his palace or on his frequent trips for the imperial territory” (Basadre, 1997, p. 241). Some advisers influenced his decisions: the *orejones* or blood nobility, related to the Inca, received military commands, administrative positions, and property.

Thanks to the texts of chroniclers and lawyers, one can have an approach to the idea of what was understood as law among the Incas: customary and rigorous laws, dictated by the king, who had divine origin and was responsible for imparting justice (Moore, 1958).

The law of the Inca theoretically had its beginning in the Inca itself. Before his subjects, the Inca always presented himself as the creator and never as the subject of the Law; he was a divinized being who could not commit any crime and who was not only authorized to choose above the people, the collectivities and property of the villagers, but who also had the power to repair any grievance and offense in his palace or during his trips through the territory of Tahuantinsuyo.

The Inca had all the power and the people, who were the majority, obeyed all orders dictated by the Inca. Despite all the social classification that existed and the rules that governed the Inca state,

it is believed that there was no law as such because there was a lack of rights for the citizens in the face of obligations that were imposed by custom or imposition, and with which they were obligated to comply.

It is thus spoken of more as more of a pre-law than a law in and of itself, since it does not look like nor did it have characteristics similar to the law we know today (Moore, 1958). Then said pre-law was governed by the set of rules and customs that were moral, religious and economic.

These were not written, since the Inca did not have any writing. They did however have a tool several functions, which was called the quipu. In the relation of the *quipucamayos* to Vaca de Castro of 1542, it is mentioned that “the quipu system, as can be seen from these observations, allowed for two relatively different uses. On the one hand, it served to store useful data for the government and the state administration. On the other hand, the data inscribed in the knots facilitated the production or reproduction of historical discourses”

The Inca norms can thus be understood as customs that have a customary character. Among the Incas there were punishments for the breach of the rules that governed this region. One of the clearest examples were the penalties for lack of respect for the Inca deities and the men who ruled the town as well as the elderly, who deserved special treatment and respect (Grossberg and Tomlins, 2008, v. 2).

Since their rules were customary and strongly influenced by religion, they were not written, but they were promulgated in the sayings, sentences and commandments of the people and the citizens knew the rules that governed them.

“The way to give this news to the Inca and to those of his Supreme Council was by knots in different colored cords, which were understood by them as numbers. Because the knots of such and such colors said the offenses that had been punished. And certain threads of different colors, which were attached to the thicker cords, read the penalty that had been given and the law that had been executed” (Pease, 2007, p. 92).

The types of crimes that existed were first against the state and the sacred person who was the Inca. The state had a divine character and because of said condition of divinity, there was an extra protection. This was demonstrated in the punishments that were inflicted for crimes

committed against the state, which were heavily punished. A clear example of a crime against the state in that time was uprising, which was considered a serious crime due to going against the divine will.

There were also crimes against the person: crimes that were committed against people's health and life were punished. One of the most serious crimes was homicide, but it took on far more relevance and was punished more severely if the person against whom the offense was committed was considered sacred. If so, the crime had very serious consequences towards the individual who committed it (Grossberg and Tomlins, 2008, v. 2).

The penalty among the Inca had greater veracity if a recidivism was committed for a minor offense; but if the crime was of great importance and had caused notable damage, the penalties were still more severe, to the point of reaching the death penalty. The most relevant penalties that existed, and of greater veracity, were: the death penalty, corporal punishment, deprivation of liberty and economic penalties.

It should be emphasized that the punishments that were imparted were not of a criminal nature, but of a divine nature. The perception was that breaking a law was not a fault towards the social order, but rather towards the divinity, which in this case was the Inca sent by the sun father.

In conclusion, the Incas were governed by rules of a distinctly customary nature and were strongly influenced by religion, since in this historical period the divinities and their influence in the community were considered, and the crimes committed against them were strongly punished.

5. MEDIEVAL LAW: FROM LEGAL DISPERSION TO COMMON LAW

Medieval law was marked by diversity. As correctly explained in a masterpiece by Prof. Rafael Gibert (1982), its formative elements were Germanic, Roman and Canonical Law. The first of these was consequence of the invasions that inundated Western Europe from the 5th century on. The second was the legal system in force even after the fall of the Roman imperial political structure in the West. And the third is the Law of the Church (then identified with the

Catholic church); it is the legal system that regulates the behavior of its members. Christianity did not stop expanding from the first century onwards, through the preaching of its faithful. It can be considered the first religion in history that was created for purposes of universalization and protection of the disadvantaged. In Roman times Christians had been persecuted, but since the year 380 it had become the official religion of the Empire (Musson, 2001).

From then on, the Law of the Middle Ages is created in a space that would come to be known as Christianity. Far from a mere sociological observation, Christianity came to be configured as a community with political consequences, especially when its spiritual head, the Pope, considered it necessary or convenient for the Church's own freedom that there be an emperor, such as the Roman emperor, but raised as the political head of Christianity (Musson, 2001). That is what the coronation of Charlemagne meant, firstly, in the year 800, and, in the eleventh century, the *renovatio Imperii* which had as its center the German territory, in what, with time, became the Sacred Germanic Roman Empire. In this way, there was originally a close alliance between the emperor and the pope. However, there was soon cause for dissent, which would end up undermining the authority and prestige of various dignities (Botha, 1962).

That consequence, of the inequality, by birth, by profession or situation, there were nobles, clerics and workers. These three orders structured the society, but the places of origin, the trades, the personal conditions, all implied differentiated, "privileged" legal statutes (Mosley, 1932).

That society that had emerged in the midst of invasions of diverse peoples, which gradually, except in the case of the Arabs, managed to become evangelized and inserted into the community of peoples that made up Christianity. Society in the so-called High Middle Ages was insecure, cities were depopulated and its cultural past was guarded only in monasteries. This is how a way of organizing society emerged, using private and public criteria (Harding, 2002). It is what is known as feudalism. That violent era would be sweetened at its extremes by legal institutions that, coming out of the Church's religious influence, mitigated the harshness of the times: the truces and peace of God, the very spirit of chivalry, which inserted into the war professional a spirit of justice and protection towards the underprivileged, and constituted norms of action that are only later reflected in legal texts (Musson, 2001).

Self-composition and autonomy in the creation of Law were the consequence of the lack of a consistent real power. The normative diversity, coming from the reiteration of uses in small rural communities, gave rise to a multiplicity of rights, with each small community having its own, without a written fixation. And where the value of seniority or precedent was considered the highest authority. As explained by Bernal (2010, p. 100), in the High Middle Ages we must speak of a heterogeneous and atomized Law; all a mosaic of legal statutes that were applied in attendance to ethnic, religious or regional reasons, what then was called “of nation” (Harding, 2002). In addition, each kingdom or lordship was governed by three different types of legal statutes: the royal one, derived from the legislation issued by the king; the lordship, which depended on the rules imposed by the feudal lord on his vassals, and the district, practiced in the cities through the municipal codes. The lack of technique in the elaboration of the Law and its sacralized meaning are the other features that ultimately configure an era without legal studies, or doctrine, or books or codes, since the only written work available was from a vulgarized Roman law. Everything affects the backward movement to primitive legal customs, such as the ordeals or “judgments of God.”

But, although, as Cannata narrates (1996, p. 141), between the sixth and eleventh centuries a legal science could not be found, from that century onwards the situation changes. The Church conserved the proper ideas and means to allow for a technical reflection on a normative system. In relation to the Church, in the north of Italy, a monk, Irnerio, began to recover the texts of the *Corpus Iuris Civilis* to study them and teach class. It was the beginning of the university institution. In it, the study of Justinian Roman Law and Church Law would flourish. The universities that are gradually implanted in the different European kingdoms are founded by kings, bishops and popes in the cities, population centers that increase their inhabitants (Harding, 2002); while artisans, merchants and various professionals, encouraged by the certain sense of security spread by the Crusades throughout Europe, begin to settle in them.

The first scholars who, in Bologna, began their dedication to the texts of Roman Law were known as lecturers. Later their method would be surpassed by that of the commentators, striving to find in these texts, and in those of the municipal statutes of the cities, answers to the new demands proposed by social life and the economic unfurling. Their method is known as *mos italicus* (Botha, 1962).

6. THE COMMON LAW IN THE RENAISSANCE

The Renaissance is a movement that sought to leave behind the ideas of the Middle Ages and the art, culture, literature and politics of ancient times such as Greece and Rome slowly began to make an entrance. In the Renaissance, the first states are formed before a monarchy, along with an idea of the modern state in which the power of the monarch is above the power of the nobles.

For Floris (1967) the national states were ruled around the monarchs, and provided as justification the power of rebirth. This did not deprive them of their benefits and advantages, but simply limited political power for the benefit of the monarch. Feudalism is left completely obsolete, except in countries like Germany and Italy that will turn to it in later years, leaving behind their centralized governments. Machiavelli (1935) in the work "The Prince" indicates the need to unify and decentralize the state so that peace could come to the Italian territory of that time.

For Voltaire (1450) the Renaissance consisted of a return to classical antiquity. It was a liberal movement and a reaction of the authorities in the Middle Ages based on the Church and the emperor, where feudalism was finalized with the beginning of new national states, thus giving way to a new stage of the modern age. There was also the great system of the Catholic Church and the emergence of a new philosophical current which was based on Cartesian rationalism, and introduced a new physical and spiritual mobility.

In this period, we can observe the formation of national states around a new crown, with feudalism disappearing definitively (Botha, 1962); however, these doctrines did not coincide with the division of Western Christianity into Catholics and Protestants, as there were Catholic Jesuits who picked up critical ideas regarding the untouchability of kings even when they had received power directly from God.

For Truyol and Serra, A. (1995) were several social, economic, religious and philosophical causes that produced this rebirth. Among these is the bourgeoisie, which gave rise to a young capitalism that would emerge in contrast to the previous medieval-union environment, and which was nourished by the great discoveries of that time, mainly by the kingdoms of Spain and Portugal. These discoveries and the

final colonizations saturated Europe with gold and silver, allowing for the achievement of a stable economy.

The Renaissance thinker, based on all ideas, holds an idea about a social organization that was totally and strictly supported by reason and human nature. The *Mos Gallicus* was a new orientation regarding the studies of Roman law, very important in the Renaissance, and which was typically Renaissance in nature. Its main exponents were the jurists of the school of the French humanists. The objective was the knowledge and interpretation of Roman law, given a primary interest in the historical and sociological areas. In the *Mos Italicus*, the purpose was mainly to know, analyze and interpret Roman law to adapt to the society that was present, create a practical-positive right and that can be used in order to grant society a broader level of legal security.

During the Renaissance, a period of separation of man with his religious ideals was experienced. Religion ceased to be the center of the thoughts of the civilization of the time, and more importance was given to the human being as the focal point of everything. This is a time in which we could observe the disappearance of the feudal regime and the interests that favored the Catholic Church, under the tutelage of the pope and the monarch, in turn forming what we know today as the centralized modern state. The territories were unified and they formed an identity as a nation.

Once at this point, the questions that mark this investigation in an important way arise: does law come from the divine? Can a monarch dictate laws without any legal basis or prior consultation? In their time, these questions were of great controversy, since throughout the medieval period religion and arbitrariness were the common denominator.

For Floris (1967) with these questions on the table the anti-monarchical movement began to emerge in Europe, embodied in Dutch, French, and German literature, among others, thus reaching the concept of sovereignty that essentially dictates that power basically lies with the people, and not in the monarch. However, it was not achieved that sovereignty be respected as such, but prior consultation with the people before any decision that would be called deliberate was agreed upon.

The influence of Roman law in this period, called the renaissance, was very important at the moment of forging bases and consolidating the interpretation of law. It tended to replace the abstract dialectical method of medieval jurists with a philosophical and historical interpretation of the sources of Roman law (Botha, 1962).

Once again, the society was taking a giant step forward as far as legal matters were concerned, with the panorama clear and free of fear from the repression of the Middle Ages. The idea of a utopia was the ideal pursued by all the managers of the illustration: create a society centered on human nature as the axis. However, it was not possible to conclude and consolidate the ideas of a utopia, as there were still selfish interests of power appropriation.

Canon Law developed to a large degree in the Renaissance, with the study of *Corpus Iuris Canonici*, the body of laws that had been formed in the Middle Ages as a compendium similar to the work of Justinian, and which accepted the rules of coexistence in the Catholic community. Exponents had conformed a canonical doctrinal elaboration parallel to what lecturers and commentators had done with the Civil Law.

The religious persecution that took place in France forced a part of the French thinkers to emigrate to Holland at the University of Leiden; this led to the emergence of several important Romanists, such as Hugo Grotius, Ulrich Huber, and Noodt, among others, which led to the arrival of Scottish students--hence the reason why the Scots have a mixture of Anglo-Saxon and Roman law.

In England, the Renaissance was characterized mainly by centering power in a totalitarian form, and for the benefit of the king (Harding, 2002). So much so that the well-known phrases like "the emperor is not bound by the laws" such as for example Enrique VIII. It was a way of exculpating oneself from the obligations imposed by the Magna Carta. Roman law was only established in the so-called Royal Dignities, which had features of Roman and neo-Roman law.

As happened in Holland; Germany had become a country of French migrants due to religious persecution, thus enriching the legal context. "The Carolina" 5, which was a law dictated by King Charles V, had great influence with progressive features in criminal law, thus providing a state of arbitrariness. It was a mix of some criminal Roman law with Germanic traditions.

Later when the Hundred Years War was won against the English, the French state was unified and named as a modern state. Although France did not participate in the conquest of other territories, the attributes are given in political theory: constitutional, procedural, private and criminal law; these were grouped into the Ordinance of Blois (1579).

During the Renaissance era, Spain created a large number of rules established by the king and his councilors, and power was centralized for the benefit of the king. Compilations of laws such as the Royal Ordinances of Castile or Ordination of Montalvo (1484), the Laws of Toro, approved in the Courts which took place in that Spanish city in 1505. Felipe II commanded the formation of and promulgated the *Nueva Recopilación* (1567), that two and a half centuries later still will try to perfect itself, with the same system, already surpassed, and that constitutes the *Novísima Recopilación* (1805).

7. COMMON LAW IN AMERICA: INDIAN LAW

The event of Christopher Columbus' arrival to what later became known as the New World would not have been especially significant in the course of history if it had been characterized by the subjugation of the aborigines, exploitation, cruelty and the abuse of the peoples that inhabited the American lands. All history, including that of the American continent, had experienced these phenomena. The Inca empire itself or, in the north, the Aztec, had carried out an expansion at the cost of violence and forced submission of other peoples. But it was not like that (Grossberg and Tomlins, 2008, v. 2).

It is true that the proportions of the tremendous mortality rate of the indigenous population are spoken of, initially in the Caribbean, and then throughout the Americas, which, either as a result of abusive treatment or disease, ended up consuming it (Garavaglia and Marchena, 2005, pp. 11-129). The indigenous people were deprived of their idolatrous practices, which included human sacrifices and, not infrequently, even anthropophagy. The population was organized in "reductions" for the collection of taxes and the forced recruitment of indigenous labor for work in manufacturing and mines, as well as to facilitate the educational process and evangelization. Those erected by the Jesuits in Paraguay still preserve traces of an artistic splendor that was likewise cultural and implied social experimentation.

As for the Law, we must first mention the integration of the American space in a developed and culturally expanding world; and, in addition, the birth of a protective ordination for those who considered themselves in an unprotected situation. Jorge Basadre, the historian of law, said that

Spain, which had just proved its assimilating and creative legal capacity, dictated a special law for America, with no precedent other than that of Rome. This law is in some ways ahead of its time and is a forerunner of the so-called social law, an increasingly broad set of doctrines and precepts which sprung out of the most lacerating problems of our time. (1997, p. 40)

The lands of the New World, or the Indias (in the confused expression that remained their name) were considered legally acquired by virtue of a pontifical concession, by the Catholic Monarchs, in part, with the demand that the monarchs take charge of the inhabitants' evangelization. In 1519 they were incorporated into the kingdom of Castile, such that the Law of this kingdom, imbued with Common Law, spread to the new continent, integrating the legal substrate, in regard to which specific norms were granted (Dougnaç, 1994). It is what has been called Indian Law. For the administration of justice, hearings were soon instituted, with greater powers than those already existing in the Spanish kingdoms, and which also enjoyed significant government powers. They were collegiate bodies composed of judges, to administer justice over the territories of a constituency that, in some cases, as in Quito, was presumed to have a pre-existing personality as a kingdom (Grossberg and Tomlins, 2008, v. 2).

In addition, in an occurrence for which few precedents can be found, the Crown itself accepted consideration of the ethical manner in which its process of incorporation of lands and men took place. A classic study by a noted historian, Lewis Hanke (1949), evoked the title *The Fight for Justice in America*. And thus, out of the protests and denunciations of the religious Spainards in the Caribbean, the Monarchy decided to investigate the royal and legal situation of its presence in America. And, consequently, there were many laws issued to guarantee the natives a treatment according to their status as free subjects. The Laws of Burgos and the New Laws (García-Gallo, 1987) foresee a tutative system of the weakest, but the violent opposition by the Spaniards settled in Quito and in the territory of the Viceroyalty of Peru, ended up relaxing their application.

The political-administrative institutions established by the Spaniards, from the two initial viceroyalties of Lima and Mexico to the circumscriptions of the audiences and corregimientos, and the Indian Law centralized the political and economic management of the American territories, in the hands of the Crown, but in turn, they also established protection mechanisms for indigenous people. The Law created for America maintained its constituent community elements and even its ethnic authorities, such as the caciques, assimilated to the minor nobility and those who were given functions of government and tax collection (Ayala Mora, 2008). Thus, even among the system of legal sources, the custom of the American peoples was integrated, except that it did not threaten morals or the other laws (Suárez Bilbao, 1997-1998). This lasted as such throughout the Spanish stage of government of the Indies.

Although the Indies cannot be considered properly as colonies, as explained in detail by the Argentine historian Ricardo Levene (1973), the opinion is widespread that the political powers since then subdued the indigenous peoples, limiting their participation in political life, and, above all, to establish an administration of justice alien to their reality (Castro, 1999). Cultural aspects were maintained, and, when it has been possible, in the 20th century, this has been manifested in the most characteristic juridical element: indigenous justice (Santos and Grijalva, 2012). The originality of said justice remains to be determined, and to what extent it has been influenced by the vicinity of the common law inheritance system.

Krotz (2002), in contrast to Tamami (2017), assures that indigenous justice was not considered or recognized as justice between individuals. It is based on a highly heterogeneous system, according to the communities, characterized by elements and patterns with great variety among them, depending on the way they were organized (Pazmiño, 2011).

Outside of the indigenous communities, there was an active municipal life in the American cities, organized around the town councils that ran them. Society regulated situations with norms of constant validity, perceiving that forced regularity is worth much more than occasional arbitrariness or inconstant irregularity (Cevallos, 1969).

8. THE LAW OF THE REPUBLIC OF ECUADOR

Jumping in time, 1830 is the moment in which the constitution of the Ecuadorian state is decided, independent of the Gran Colombia into which it had been integrated following its secession from Spain (Grossberg and Tomlins, 2008, v. 3). Through a constituent assembly convened in Riobamba, the constitutive legal text was approved. The large landowners, in a more uncontrolled way than under the Spanish viceroyalty, managed the power and kept peasants and indigenous peoples subject to their rules and devoid of the guarantees and rights, which, at least under the Spanish Crown, were recognized by legislation. Independence allowed -as was not infrequent in other liberal revolutionary phenomena- for the installation of the dominion of an economic elite over minorities. For decades, the new republic failed to overcome its conflicts and social contradictions (Ayala, 2008).

With the beginning of the republic, the lands of the Spaniards and their descendants, converted into criollos themselves or acquired by the republican oligarchy, made up the haciendas, in which the exploitation of the natives was barely mitigated until as late as the second decade of the twentieth century, or the agrarian reform in 1964. The liberal revolution of Eloy Alfaro at the beginning of the century had been achieved by reaching an agreement with the oligarchies of landowners of the mountains and the coast (Ayala, 2008).

The incursion of the oil industry created aspiration towards national growth and social improvement, but ultimately failed. The legal system accused the defects of a government that for a century had achieved an effective administration of neither lands nor men (Grossberg and Tomlins, 2008, v. 3). The distrust of the law and the republican institutions, due to the manifest corruption of judicial officials and lawyers, generated an awareness of the lack of justice. It was also branded as bureaucratized, slow and without the necessary means to make it effective, due to geographical distances between courts, discriminatory treatment and even, as García-Sayán (2009) states, to an ignorance regarding the life and reality of the members of the numerous rural communities.

An important occurrence is the beginning of the transformation of the legal State of Law into the Constitutional State, with the fundamental element being the power to grant the Constitution the main function for which it was created: as an entity for the organization of the State

and the elements, institutions and legal systems that compose it; thus, one of the most important elements of the beginning of the republic is suffrage, an example of a representative system, improving by the date of 1929 when the optional vote of the literate woman was achieved, as a sketch for the recognition of minority rights; followed by the modernization of the criminal procedure system with more efficient oral models (Cordero, 2010).

In terms of Civil Law, the Ecuadorian State has a long history, characterized by difficult elements, which improved greatly as a result of the advent of the Congress of the Republic (Grossberg and Tomlins, 2008, v. 3). This occurred in 1970, and the achievements made in previous times were channeled, thanks primarily to the contributions of General Eloy Alfaro and the Code of Andrés Bello, among others, which allowed for important advances in the area of justice and equity, norms of coexistence and social rights; as a result of these efforts, and in view of the imperative need for justice, the foundations of civil law are established to improve collective existence and relations among the community citizens, and municipal life is activated through the Cabildos, jurists and congresses in order obtain a local civil code. (Cevallos, 2010).

Since the new Ecuadorian Constitution came into force, the possibility exists that Ecuador could be included in the so-called constitutional guarantee; however, many affirm that it is important to bear in mind the risks and threats that may arise against the legal order when imposing a model that for some is disconnected from the national reality, distant from the country's traditions, and which continues to be exclusionary by failing to take into account minorities. (Benavides and Escudero, 2013).

The importance of now establishing a true Ecuadorian Constitutional Right is highlighted, for which it is necessary that the municipalities have autonomy but that the concept of nation be conserved. It is necessary that the main function of the Congress be made known, which must fulfill its purpose of orientation and illustration for laws of a technical nature, which must pass the prior review of their representatives to be able to be approved, while nonetheless maintaining the sovereign character of the people. (German, 2005).

In agreement, Morales (2010) also assures that the Ecuadorian constitutional moment is debated between opposing juridical perspectives: one is that referring to legal positivism and the other

is based on the foundations of the natural law approach, which is why caution with the possibility of including foreign models that do not adapt to the country's legal and social realities is important. This author suggests the realization of a series of discussions regarding the true concept of law and the meaning it has regarding the cultural entity, laying the foundations of legal positivism and its defense as the main basis for the legal system in general.

In Ecuador, following approval of the 2008 Constitution, fundamental rights are included, and the rights of minorities are recognized--among these, priority attention groups. However, it is important to consider that inmates have had little representation in matters of law, resorting to the protection of internationally established rights (Post, 2011)

In constitutional matters, the model of Ecuador is not rupturist. To the contrary, it has innovative elements, with deeper roots in each innovative case, with a marked reference to rights and their protection through the approval of the constitution of 2008, with a participatory democracy. (Martínez, 2009)

The transition from the colonial era to the present Republic went along a very tortuous path, characterized by large revolts in favor of the vindication of the rights of ignored minorities, at first by the conquerors and following independence, by the Creoles themselves, who continued with the slave-like and exploitative practices of their predecessors; among them, the indigenous, women, peasants and the working class.

The constitutional reforms and in some cases by measures of forces between sides, achieved the winning of spaces for these individuals, who were gradually recognized as subjects of law.

The constitution required strong changes and modifications over time, until the drafting of more pluralistic laws, including the rights of ordinary citizens, women, the indigenous, and the rights of workers, among others. However, it is important to maintain the autonomy of the provinces without losing the vision of a united nation, as well as the implementation of local laws without foreign interference.

9. CONCLUSIONS

The Law of Antiquity includes features such as the confusion of the legal and the religious, the predominance of absolute political powers, rituality, orality, social differentiation, and the primacy of the maintenance of order through a rigorous punitive system (Arenal, 2016, pp. 21-22). This was the case in Mesopotamia, where, however, the law began to be written; in Greece or in pre-Columbian America. The primitive Law of the Inca Empire was neither written nor secularized, and can be subsumed in this category.

In Greece it is worth noting the reflection on justice, and its relationship with the community; as well as the development of political formulas of open participation, though limited to the minority that constituted the citizens. The idea of equality of law for all citizens had its foundation in government institutions.

Rome was able to perceive the strength of the *Ius* as the backbone of society and its coexistence, on a flexible basis, capable of adapting to social changes. The realism of the Romans caused them to accept that the difficulties between men would never cease. Legal problems are always human problems and they occur regularly, and therefore require solutions to restore the just order guaranteeing peace and the future of the society. The instruments that were used were diverse legal sources, which, far from any rigid or hierarchical pretension, operated to provide solutions to the specific case. This system is that which characterizes the Roman legal system in its era of splendor.

The decadence of Roman Law, as well as, centuries later, that of the legal creativity of the *mos italicus*, goes hand in hand with the systematization, order, simplification and control of the imperial public power of the creation of Law.

The most remarkable legal inheritance of Rome is condensed in the *Corpus Juris Civilis*. The work commissioned by Justinian neatly gathered together the primordial doctrine and the Roman imperial dispositions. A great legal monument which literally embraced the sixth century imperial law. It was that which, in the West, shows an unusual interest from the Late Middle Ages on. But, below that Law, covered with interpolations, additions and deletions, there is another, classical Roman Law, which is rediscovered by Renaissance humanism.

The successive invasions of Germanic, Slavic, Asian, and Arab peoples, were those that determined a heterogeneous and unequal legal and social order, which has its expression in the feudal system (Arenal, 2016).

Medieval is also the renovation of law studies, which imply a great social and political impact. The city and its aftermath, commercial law and municipal rights, came to break the stratified medieval world from the eleventh and twelfth centuries onwards. The merchant and the lawyer are the social classes that most protagonize the changes of the Late Middle Ages (Harding, 2002). And, emerging from the Church, the study centers that welcome students and professors, which will come to be called universities; in which the teaching of Law, both the Roman law of the *Corpus Iuris Civilis*, and the set of norms of the Church, the Canon Law, have a special role. Both constitute a formidable basis upon which all systems for regulation of coexistence will be erected in the following centuries. It is the *Ius Commune*, whose first scholars, in various waves of schools, create a method of approaching the texts that, in a generic manner, is called *mos italicus*.

The Renaissance, a moment of special cultural effervescence, also implied social changes. In the dawn of the new national states, the bourgeoisie gave rise to the emergence of the first models of capitalism, while the interest for the human, and economic and geostrategic causes gave way to great discoveries in which Spaniards and Portuguese extended the confines of the known world. In Law, moreover, humanism facilitated a new way of approaching the texts which, from medieval times, had been the focus of university scholars. That new school is what is known as *mos gallicus*, a critical attitude toward the ancient Roman texts, concerned with a more systematic, clear and simple vision than the one that had characterized its precedents, the scholars of the *Ius Commune*. Out of these theoretical activities a model for legal thought is developed, which conceives Law as a fundamentally rational reality. It is the moment of political absolutism, for which the rationalism of the Protestant countries will serve to design the legal bodies.

On the other hand, the discoveries of the 15th century and the colonizations that followed them, implied a singular phenomenon in the History of Law (Moore, 1958). After a violent clash of interests and mentalities among the subjects who arrived at the New World, the Spanish Crown itself reconsidered the methods and their legitimacy for the control of the lands. Thousands of dispositions, issued from the royal

court, and from the administrative headquarters founded in America, formed a Law that, as a characteristic, tended towards protection of the weak and the guarantee of the dignity of indigenous subjects. The reality of the applicants of the laws and the interests of the colonizers themselves relativized, to a large extent, those legal purposes.

The American nations' independence processes meant that struggles between peninsular Spaniards and those born in these lands were not easy. The new republics maintained the previous Law, gradually replaced according to the new postulates of the liberal society, which demanded legal equality and political decision for those who enjoyed economic primacy. Therefore, situations of exploitation were not reduced with the new regimes. Only in the twentieth century governments, marked by ideas of social progress, as that begun in Ecuador by García Moreno, and later the constitutional reforms developed by the Marxist revolution, and the governments of Ayora and General Enríquez Gallo, prior to the periods of presidency, always cut short, of Dr. Velasco Ibarra (Salvador Lara, 2010), allowed inclusive spaces for the disadvantaged, for the sake of an equality that legally equated to all nationals. That task is what determines the constitution of a State which is not only based on, justified and exercised through Law, but which is also a Social in nature. Since the twentieth century, the Law tends to be considered an unrenounceable objectives, a guarantee for social life with respect to the rights considered proper and natural to every person.

10. REFERENCES

- Acosta, A. y Martínez, E. (2009). *Plurinacionalidad: democracia en diversidad*. Quito: Abya-Yala.
- Aguilera Barchet, B. (1999). *Historia y Derecho. Manual de iniciación I*. Barcelona.
- Alarcón, G. (2011). *Estado de derecho, derechos humanos y democracia. Pautas para la racionalidad jurídico-política desde Elías Díaz*. Madrid: Dykinson.

Arenal Fenochio, J. (2016). *Historia mínima del derecho en Occidente*. México: El Colegio de México.

Argüello, L. R. (2002). *Manual de Derecho Romano*. Buenos Aires: Ed. Astrea.

Ayala Mora, E. (2008). *Resumen de Historia del Ecuador*. Quito: Corporación Editorial Nacional. 3ª ed. (Disponible on-line en <http://www.comunidadandina.org/bda/docs/EC-CA-0001.pdf>)

Aymard, A. y Auboyer, J. (1958). *Oriente y Grecia Antigua*. Barcelona. Ediciones destino.

Basadre, J. (1997). *Historia del Derecho Peruano*. Lima: Librería Studium Ediciones. 7ª ed.

Benavides, J. y Escudero, J. (2013). *Manual de justicia constitucional ecuatoriana*. Quito, Ecuador: Corte Constitucional de Ecuador. (Disponible on-line en https://www.corteconstitucional.gob.ec/images/stories/corte/pdfs/manual_de_justicia_constitucional.pdf)

Benito Ruano, E. (2000). *Tópicos y realidades de la Edad Media*. Madrid: Real Academia de la Historia.

Bernal Gómez, B. (2010). *Historia del Derecho*. México: Nostra Ediciones, Universidad Nacional Autónoma de México.

Bobbio, N. (1987). *La teoría de las formas de gobierno en la historia del pensamiento político*. México: Fondo de Cultura Económica. 2ª ed.

Botha, C.G. (1962) *History of Law*. Londres.

Cabedo, V. (2004). *Constitucionalismo y derecho indígena en América Latina*. (Vol. 3). UPV.

Cannata, C. A. (1996). *Historia de la ciencia jurídica europea*. Madrid: Tecnos.

Castro, M. (1999). *Confederación de Nacionalidades Indígenas del Ecuador*. Las Nacionalidades Indígenas y sus Derechos Colectivos en La Constitución (1era ed.). (CONAIE, Ed.) Quito.

Cevallos Arizaga, B. (1969). *Historia del Derecho Civil Ecuatoriano*, 3 vols. Quito: Editorial Casa de la Cultura Ecuatoriana. (Disponible on-line en https://books.google.com.ec/books/about/Historia_del_derecho_civil_ecuatoriano.html?id=TR4IAQAAMAAJ)

Cordero, D. (2010). *Nuevas instituciones del derecho constitucional ecuatoriano*. Tomo II. Quito: Fundación de Asesoría en Derechos Humanos, INREDH. (Disponible on-line en https://www.inredh.org/archivos/pdf/derecho_constitucional_ii.pdf)

Cramer, S. N. (1985). *La Historia comienza en Summer*. Barcelona: Orbis. (Disponible on-line en <http://www.manuelosses.cl/VU/La%20Historia%20Empieza%20en%20Sumer.%20Samuel%20Noah%20Kramer.pdf>)

Domenack, M. (2014). *¿Existió o no existió el Derecho Incaico? Tesis para la obtención del título profesional de abogado*. Arequipa: Universidad Católica de Santa María.

Dougnac, A. (1994). *Manual de historia del derecho indiano*. México: Universidad Nacional Autónoma de México.

Fernández De Buján, A. (2017). *Derecho Romano*. Pamplona: Aranzadi Thompson Reuters.

Floris Margadant, G. (1967). *El derecho en el Renacimiento*. México: Universidad Nacional Autónoma de México.

Franco, G. (1962). Las leyes de Hammurabi. Versión española, introducción y anotaciones. *Revista de Ciencias Sociales*. Universidad de Puerto Rico. Vol VI (3), pp. 331-356.

Garavaglia, J. C. y Marchena, J. (2005). *América Latina de los orígenes a la independencia*. I. América Precolombina y la consolidación del espacio colonial. Barcelona: Crítica.

García-Gallo, A. (1973). *Manual de Historia del Derecho*, Español. 2 vols. Madrid: AGESA. 5ª ed.

García-Gallo, A. (1987). *Los orígenes españoles de las instituciones americanas. Estudios de Derecho Indiano*. Madrid: Real Academia de Jurisprudencia y Legislación.

García-Sayán, D. (2009). *Estado de la relación de justicia indígena y justicia estatal en los países andinos*. Estudio de caso en Colombia, Perú, Ecuador y Bolivia. Lima: Editorial C. A. Juristas. (Disponible on-line en https://www.cejamericas.org/Documentos/DocumentosIDRC/98CAJ_Estadodelarelacion.pdf)

Gaudemet, J. y Chevreau, E. (2014). *Les institutions de l'Antiquité*. París: L.G.D.J (Précis Domat). 8ª ed.

German, J. (2005). *Derecho Constitucional actual en Ecuador*. (Disponible on-line en <https://www.derechoecuador.com/derecho-constitucional-actual-en-ecuador>)

Gibert, R. y Sánchez de la Vega (1975). *Elementos formativos del Derecho en Europa*. Germánico, canónico, romano. Granada: Imprenta Román.

Grossberg, M. and Tomlins, C. (2008). *The Cambridge history of law in America*. 3 vols. Nueva York: Cambridge University Press. (Grossberg & Tomlins, 2008, v. 2).

Hanke, L. (1949). *La lucha por la justicia en la conquista de América*. Buenos Aires: Editorial Suramericana.

Harding, A. (2002). *Medieval law and the foundations of the state*. Nueva York: Oxford University Press.

Hespanha, A. M. (2002). *Cultura jurídica europea*. Síntesis de un milenio. Madrid: Tecnos.

Iglesias, J. (1993). *Derecho Romano: Historia e instituciones*. Madrid: Ed. Ariel.

Krotz, E. (2002). *Antropología jurídica: perspectivas socioculturales en el estudio del derecho*. Barcelona: Anthropos. (Disponible on-line en <https://books.google.com.ec/books?isbn=8476586167>)

Kunkel, W. (2003). *Historia del Derecho Romano*. Barcelona: Editorial Ariel.

Levene, R. (1973). *Las Indias no eran colonias*. Madrid: Espasa-Calpe. 3ª ed.

- Maine, H. (2001). *El Derecho Antiguo*. México: Editorial Campo Raso.
- Martínez, R. (2009). El proyecto de Constitución de Ecuador, ejemplo del nuevo constitucionalismo latinoamericano. *Revista del Instituto de Ciencias Jurídicas de Puebla A.C*(23). (Disponible on-line en <http://www.redalyc.org/articulo.oa?id=293222963011>)
- Moore, S. F. (1958). *Power and property in Inca Peru*, Nueva York: Columbia University Press.
- Morales, J. (2010). El momento constitucional ecuatoriano. Una aproximación desde la filosofía del derecho. *Revista del Instituto de Ciencias Jurídicas de Puebla AC* (25), 116-127. (Disponible on-line en <http://www.redalyc.org/articulo.oa?id=293222977006>)
- Morineau, M. (2008). *Derecho Romano*. México: Ed. Progreso.
- Mosley, O. (1932). *The greater Britain*. London: BUF.
- Musson, A. (2001). *Medieval law in context: the growth of legal consciousness from Magna Carta to the Peasants' Revolt*. Manchester: Manchester University Press.
- Pazmiño, E. (2011). *Cuaderno para la Interculturalidad*, N°4. (P. y. Dirección de Comunidades, Ed.) (Disponible on-line en <http://biblioteca.defensoria.gob.ec/bitstream/37000/437/1/LIBRO%20%23%204%20INTERCULTURALIDAD.pdf>)
- Pease García-Yrigoyen, F. (1964). *El derecho y la aparición del estado inca*. Lima: Editorial Lima.
- Pease García-Yrigoyen, F. (2007). *Los Incas*. Lima: Editorial PUCP. 4ª Ed. p. 92.
- Peñaranda, R. (2008). *Democracia, Interculturalidad, Plurinacionalidad y Desafíos para la Integración Andina*. La Paz: CEBEM.
- Petit, E. (1904). *Traité élémentaire de Droit Romain*. París: Arthur Rousseau Ed. 14ª ed. (Disponible on-line en <https://gallica.bnf.fr/ark:/12148/bpt6k5738741b.texteImage>)

Post, D. (2011). *Las Reformas Constitucionales en el Ecuador y las oportunidades para el acceso a la educación superior desde 1950*. Análitos de Políticas Educativas, 19(20). (Disponible on-line en <https://epaa.asu.edu/ojs/article/view/814>)

Reig Satorres, J. y Larrea Holguín, J. (2018). *Manual de Historia del Derecho en Ecuador*. Quito: Corporación de Estudios y Publicaciones.

Salvador Lara, J. (2010). *Breve Historia Contemporánea del Ecuador*. Bogotá: Fondo de Cultura Económica.

Santos, B. De S. (2012). *Derecho y emancipación*. Quito: Corte Constitucional para el Período de Transición.

Santos, B. De S., y Grijalva, A. (2012). *Justicia indígena, plurinacionalidad e interculturalidad en Ecuador*. La Paz: Fundación Rosa Luxemburg, Abya-Yala. (Disponible on-line en https://www.ces.uc.pt/iframe/publicacoes/outras/201216/SantosGrijalva_Justicia_indigena_plurinacionalidad_e_interculturalidad_Ecuador.pdf)

Suárez Bilbao, F. (1995-1996). La costumbre indígena en el Derecho indiano. *Anuario de la Facultad de Derecho de Alcalá de Henares*, vol. 5, pp. 119-152.

Tamami, A. (2017). Aplicación del Derecho Constitucional a la Justicia Indígena. Defensa y Justicia. *Revista Institucional de la Defensoría Pública del Ecuador*, 28. (Disponible on-line en <http://www.defensay-justicia.gob.ec/?p=2260>)

Tobio, L. (1945). *La vida de Grecia*. Buenos Aires: Ed. Sudamericana.

Truyol y Serra, A. (1995). *Historia de la Filosofía del Derecho y del Estado*. Madrid: Alianza Editorial.

Westbrook, R. (2015). *Ex oriente lex: Near Eastern influences on ancient Greek and Roman law* Baltimore, EE.UU., Johns Hopkins University Press.

Recibido: 15 de julio de 2018

Aceptado: 22 de abril de 2019

Dominique Unda Mateus: Coordinadora del equipo de investigadores en formación del GIDE-PUCE

Investigadores (en formación) del Grupo de Investigación GIDE-PUCE

Alegria Alvarado Cristopher Darrin
Anatoa Peñafiel Joyce Nataly
Arias Factos Marco Vinicio
Bastidas Morales Jonathan Andres
Bedón Naranjo María José
Cagua Rubio Karla Belen
Calderon Barbosa Diego Nicolas
Casamen Nolasco Julio Andres
Catota Almachi Alexis Marcelo
Cayo Nuñez Luis Enrique
Cisneros Achig Kevin Alessandro
Coffre Diaz Mayomi Dicori
De La Calle Avila Jose Julio
Donoso Rosero Luis Fernando
Fuela Morales Shirley Nicole
Garay Riera Daniela Fernanda
Guamán Coyago Daniel Alexander
Hidalgo Valle Esteban Andres
Mejía Rueda David Nicolás
Mina Benalcazar Leonela Milene
Morales Imaicela Viviana Domenica
Morocho Ceron Leonardo Edilberto
Nuñez Proaño Viviana Lisette
Ortega Paredes Jimmy Ariel
Oviedo Suarez Jimmy Mateo
Pazmiño Ochoa Tommy Joel
Pérez Mendoza Paola Belen
Proaño Lara Stefany Carolina
Quilligana Salan Johanna Estefania
Romo Hidalgo Paula Alejandra
Ruíz Goyes Jeremy Sebastian
Ruíz Leon Jessica Mariela

Salas Villarroel Jimmer Stalyn
Salazar Muñoz Itati Paulette
Solórzano Pastaz Alisson Esthefania
Tello Guaman Alexis Guillermo
Ulloa Pinos Victor Manuel
Vizcaíno Llánez Raúl Alejandro

Correo electrónico: daunda@puce.edu.ec