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Comprehensive Protection and Guarantee of Labor Rights in Colombia

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Abstract

The purpose of this paper is to analyze the normative and jurisprudential treatment of the reality contract theory in the public sector in Colombia, seeking to establish the scope and effects of its recognition, as well as the tools that honor it, which is sufficient to prevent the disproportionate and accommodated contractual practice. The study shows the employment contract in compliance with the legal mandates from the perspective of public law, which presents characteristic elements that distinguish it from other contractual forms, generating different obligations for the contracting party, despite the fact that in many events both agreements of wills involve similar objects.

Keywords: Judicial autonomy, labor contract, reality contract, judicial decongestion, provision of services.

1. INTRODUCTION.

The distortion and manipulation of the aforementioned contractual forms is regularly notable to the point of being able to affirm that the employment contract has become a business on the part of the employer, because on the occasion of the disguise with which it is usually dressed, such as the provision of services, the scope is transformed and the guarantees, which are relevant to the worker, are diminished. Thus, when it comes to the first contractual relationship (labor), it corresponds to the employer, among others, to guarantee the labor stability and the burden of payment of social benefits, aspects that are not mandatory for those who hire under the modality of provision of services.

Therefore, almost to the same extent that the aforementioned façade is presented, it becomes necessary to file lawsuits, which seek to avoid the adverse effects that emanate from the disguised contractual relationship. This implies the recognition of the supremacy of reality, so that the rights acquired by the workers are guaranteed, in accordance with the rules that regulate the matter (Constitutional Court, 2012) . However, the recognition that by virtue of judicial decisions is made, seems not to be enough to banish the abuses of employers, since the punishable practice of contractual disguise is still recurrent and very evident.

It is this problem, with no apparent real solution, which motivates the study intended to provide an alternative, by virtue of which state entities comply to full satisfaction with the recruitment of personnel and stop ignoring labor guarantees, with which, incidentally, deepen the demotivation of the worker and stain their interests (D Amato Castillo, Martinez Durango, & Guzman Posso, 2020). Another reason for this

study lies in the need to reactivate and strengthen an effective tool that contributes to the real protection and integral guarantee of the rights of workers, and that can even collaterally help to decongest the courts.

2. EVOLUTION OF THE EMPLOYMENT CONTRACT.

The right to work has been defined as the way to support oneself or family within society, which serves among other things, for a better quality of life, either through the exchange of service for a sum of money, or whether a company is created. In ancient times, it was called an exchange of services, whose objective was to benefit each other, according to the interest they had, and this they did as an obligation to each other. In any case, the obligation arose without recognition of any right to whoever exerted a force to get the minimum support, because only the need to do it arose (Lopez Fajardo, 2010) .

Now, to begin to speak of employment contract, it is necessary to note that such expression did not appear in the civil codes of the twentieth century, as they legislated on the hiring of services. This meaning was initially adopted in France, where it was first specified in the Law of 1901, incorporated into its Labor Code (Lopez Fajardo, 2010) . The creation of the civil code, in which all legal business was regulated, gave rise to the pragmatism of relations arising from commerce and man's work, conceiving then a main source in labor law, and being a precursor as a labor code.

In ancient terms, the leasing of services conquered its independence until it became the contract of employment, since, the labor relations were conceived as a kind of lease, holding Josserand and Planiol that the thing leased was not the human person as such, but his labor energy; thus, the freedom and dignity of man were saved so that his labor force was regulated by the rules governing the contracts (Lopez Fajardo, 2010)

It was the energy or labor force the basis for regulating, leaving aside the general principles of the Social State of Law where fundamental rights are recognized, which today are immersed in labor relations, or at least it is what should be intended for being recognized in the national Constitution and in the Universal Declaration of Human Rights. (de la Cueva, 2008) .

3. WORK AS A FUNDAMENTAL RIGHT.

It is from the Universal Declaration of Human Rights, and the issuance of the Political Charter of 1991, that work is recognized by the provisions that regulate that regime, and is recognized as a fundamental right. In this regard, the preamble to the Constitution reflects the protection of the work of all members of the Colombian people. The above is evident from Article 1 of the same constitutional text, which protects the respect, among other things, to work. Article 17, which enshrines the prohibition of slavery, suggests that every worker must perform the duties stipulated in the contract and those designated by his employer or immediate boss, but personal subordination cannot be considered as submission of the worker to the employer, because if so, it would be returning to the times of slavery, a mode of production otherwise abolished. Therefore, the worker must perform the work under the authority of the employer, as far as the assigned functions are concerned, but never go against his or her personal freedom. (Pérez, 1996) .

In addition to the aforementioned articles, the impeccable Constitution continues to reiterate the protection of the right to work, so recognizing work as a right and a social obligation and that it is not only the duty of individuals but also of the State to provide special protection for this right, guaranteeing the

development of work in fair and dignified circumstances (Prieto Sanchís, 2007) .

With a tendency to a laborist idea, in the voice of the pedagogue Mariano Tissembaum, individual rights in the social framework are not limited to the only existing mutual relations of labor and capital, of labor and property, of labor and the employer, but it covers the totality of social life. In this way, individual rights with regard to work also become social rights to labor activity and thus to the economic and social activity of the community (Monero Pérez, 1996, p. 31) . Hence, their protection and honor constitute a postulate that matters to the superior norm. The recognition and guarantees by the State with respect to the right to work is what really matters. For this reason, the use of protective mechanisms such as the tutela action are daily observed in the judicial courts by virtue of which the honor of rights intimately associated to that labor guarantee is pursued, such as the vital and mobile minimum, or the protection of the right to work in optimal conditions, that is to say, dignified work, among others (Díaz Revorio, 2016) .

4. PRINCIPLE OF CONSTITUTIONAL RIGIDITY OR SUPREMACY

Colombia, as a social State governed by the rule of law, must adhere to various principles in order to fulfill its purpose, which is none other than the protection of the rights that have been recognized by law for all persons. Now, as far as the protection of legally recognized rights is concerned, it is worth noting that it is not a burden that has been imposed only on the State, but also corresponds to individuals. Hence, for the purposes of reflecting compliance with these higher standards, it becomes essential to the true fulfillment of the aforementioned obligations. With the appearance of the constitutional regime, the Constitution identified limiting tools of the overflowed power, integrating later "essential elements such as fundamental rights and the means of constitutional protection". By materializing in written text and containing defined means for their reform or addition, they formally asserted their status as supreme laws (Charry Ureña, 1993) .

One of the most distinctive characteristics of the constitution is that it is supreme, which lies in two important senses: 1) the formal, and 2) the material. (De la Cueva, 2008, p. 91). Thus, the first of these senses, i.e., the formal one, refers to the fact that the Constitution is so called "because it is a law which, unlike other laws, establishes and orders the validity of an entire legal system" (Prieto Sanchís, Apuntes de teoría del Derecho, 2007, p. 77) .

In the material sense, "the Constitution contains the fundamental values and principles that govern a political-social organization, which resolve the vital needs of justice of its members" (Zagrebelsky, 2002) . These values and principles are what give the constitutional system its raison d'être, since they express not only the most valuable social desires for a given political community, but also those that are universal and inherent to human beings.

The principle of rigidity allows justifying the existence of constitutional supremacy, thus, the value and the impetus of the constitutional text as supreme norm are invigorated among several aspects, due to the fact of being protected and imperceptible of any pretension or intention on the part of some organ of power that pretends to modify it without being empowered to do so. In fact, as a consequence of the superior value conferred to the constitution (in comparison with the rest of the norms), it means that its reform requires a more complex procedure than that of an ordinary law (Constant, 1968) .

Unlike flexible constitutions, every rigid system also has a body specialized in carrying out the modification of the fundamental law. This body is called the Congress of the Republic, whose objective is, in accordance with its powers, to ensure that the Constitution is

renewed in accordance with its formal parameters, without violating its material limits. Constitutional supremacy, integrated with the principle of rigidity, guarantees the absence of any kind of manipulation or excess on the part of individuals and the state, since without a different process exercised by a special body, its material aspect would be continuously affected.

Constitutions, from their origin, by establishing the general criteria for the political and legal work of a state, were formed as supreme or superior legal norms, indicating that this character "is due to the fact that constitutions are the holders of the rules that confer competence on the organs of power to act, as well as the process that must be exhausted for the creation of ordinary laws" (Kelsen, 2005) . It is Hans Kelsen who admitted the Constitution as superior because it was the one that formed the entire legal system; therefore, the supreme rule is the one that establishes how the entire legal system should be created and clarifies that the constitution must indicate which is the competent body to issue them.

In line with the foregoing, and already at the close level of the subject that justifies this writing, it is through Article 53 superior, initial part, that Congress is determined as the competent entity to issue the labor statute, which must take into account at the time of issuing the Law, equal opportunities for workers, minimum vital and mobile remuneration, proportional to the quantity and quality of work, stability in employment, unrenounceability to the minimum benefits established in labor standards, powers of compromise and conciliation on uncertain and debatable rights, the most favorable situation to the worker in the event of doubt in the application and interpretation of the formal sources of law; primacy of reality over formalities established by the subjects of labor relations, guarantee of social security, training, education and necessary rest, and special protection for women, maternity and under-age workers.

In other words, the labor statute must guarantee all the guarantees recognized in the superior norm, and as this is of a predominant character, it is at the top of the legal system. The Constitution is the basis for the validity of all legal acts and, consequently, there is an adaptation of these acts, since they are dominant as a consequence of the aforementioned principles of validity. In the opposite sense, any legal norm that does not comply with the provisions foreseen at the constitutional level for its creation will be considered invalid.

Likewise, since the Political Constitution of Colombia is the norm of norms, its content will prevail in the face of any conflict between it and a legal norm or law, which makes it possible to rule out the admission of ignorance or erroneous interpretation of the same by those who make up the entire Colombian perimeter on the occasion of its violation. A corollary of the foregoing is the fact that all persons, whether natural or legal, public or private law, living in the Colombian territory, are forbidden to exceed the limits referred to in the Political Constitution. In other words, both individuals and the state must abide by the constitutional provisions in force, without attempting to exceed their scope. If this constitutional transit is altered, constitutional guarantees would be violated, which could even result in the undermining of fundamental rights, an aspect that would necessarily entail sanctions.

5. SUPREMACY OF REALITY OVER FORMALITIES IN THE COURTS.

As mentioned above, there are several principles that are reflected in the text of the Constitution, and in this regard, it is imperative to dwell on the supremacy of reality over formalities, recognizing the need for the existence of this provision due to the notable

violation, among other things, of the labor guarantees of individuals.

By virtue of this principle, which is generally applicable in court in the face of an intrigue that claims its application, the judge, when studying the probability of its existence, must examine with a magnifying glass the fulfillment of the basic elements of the employment contract, that is to say, that the plaintiff has performed a personal provision of service, receiving remuneration for his work and being under the subordination of the employer or whoever he has designated. Therefore, if the aforementioned assumptions are accredited, despite the fact that the clothing of another type of contract appears as formal, the administrator of justice must proceed to recognize the existence of the labor contract with the effects that correspond to it, because that is the reality and no other.

In support of the above, and trying to have truthfulness, coherence and transparency in the text that is now developed, in the words of the Constitutional Court, it is evident the importance of the constitutional parameters, referring to the supremacy of reality over the forms and to this, add the legal study that must exist by the judge when examining the requirements that by law are required when determining, if applicable, the configuration of a reality contract. Thus, it has said that "if the three requirements set forth in Article 23 of the Substantive Labor Code are met, the objective situation prevails over the legal form that the parties have adopted to govern a certain situation" (Constitutional Court, 2010) .

At a statistical level, the supremacy of reality over form constitutes, in a superlative percentage, the decisive reasoning of innumerable decisions by the competent authorities. The number of cases in which, after a reliable verification of the aforementioned elements, the recognition of an obvious employment relationship is established and automatically invalidates any other form of relationship is truly abysmal.

The judicial discussion on the aforementioned principle is daily bread, and its sentiment and treatment touches, in its different categories, most of jurisdictional bodies. Thus, for example, and as a way of proving that guidelines have been given from the highest levels of justice administration, the Constitutional Court itself (Constitutional Court of Colombia, 1997). studied numeral 3 of Article 32 of Law 80 of 1993, questioning whether a de facto labor relationship in service provision contracts not recognized by the contracting state entities has led to arbitrary practices against contractors and, therefore, undermines the labor guarantees and rights that they enjoy.

In the specific study, in order to solve the problem, the difference between the contract for the provision of services and the labor contract is made through the contrast of the founding elements, i.e., the contract for the provision of services is characterized because its purpose is to perform an activity related to the object and purpose for which the contracting entity was created and organized, and also the development of what is entrusted is autonomous and independent. On the contrary, the labor contract is a link through which "the existence of the personal provision of the service, the continued labor subordination and its remuneration as consideration is required" (Constitutional Court of Colombia, 2015) .

Following this well-known and correct line of thought, it is possible to affirm that the most notable difference between both types of contract mentioned above is the subordination, an element through which, in the legal sense, it must be conceived that whoever enters into a contract for the provision of services holds the name of independent contractor, without the right to social benefits. The opposite case occurs when the existence of a subordinate activity or

work is demonstrated, where the contracting administration gives orders to the person who provides the service regarding the performance of the contracted work. Therefore, in order to allude to subordination, it is required that the hired person is subject to a schedule and with the attentive availability to comply with the functions assigned to him/her and those that the superior or boss considers. The opposite occurs with the service contract, in which the contractor is not obliged to comply with a schedule, much less be at the imposed disposal of the boss.

Thus, the honorable Court has been reiterative in the latter sense, noting that being one of the characteristics of any contract for the provision of services, the notorious autonomy and independence that the contractor enjoys or should enjoy, does not give rise to the recognition of benefits derived from the employment contract. Now, if the essential characteristics of any labor relationship were to be accredited, the contract with which the development of the contracted object has been agreed upon would be disregarded and the social benefits to which the contractor is entitled by law would be recognized, that is, it is worth insisting, the evident rendering of the service by the contractor in a personal way, subordination and an economic consideration is agreed (Constitutional Court of Colombia, 2017) .

From the above, without fear of incomprehensible or confusing statements, it is diaphanous what is intended to bring to the reader, and more so when what is sought is supported by the constitution, the law and the various pronouncements by the high courts, especially by the Constitutional Court. Hence the importance of the theory of the primacy of reality over forms, to dismantle all facade that is used by the public administration, to fulfill certain state functions, whose labor obligations fall on it, a situation that ultimately what it seeks is to "ignore on the one hand, the principles governing the functioning of the civil service, and on the other hand, the social benefits that are proper to the labor activity". (Constitutional Court of Colombia, 2018)

Without any hesitation, then, it is the supremacy of reality over forms, perhaps the most important pillar that sustains, thanks to judicial recognition, the unveiling of contractual disguises, allowing the protection of the right to work and other labor guarantees. Now, it is worth asking: is all this enough to avoid the detestable practice of disguising contracts? The first answer that anyone could think of is "yes", but after delving a little into the factual reality of countless contracting entities, and after a quick visit to judicial courts, the conclusion seems to be that much is lacking, especially in public policies, and even sanctions, and jurisdictional disposition to banish abuses.

Another question could even arise: does the public administration believe that by hiring personnel for the provision of services (pretending in the end that they comply with all the demanding parameters of a labor contract), it avoids the payment of social benefits? It is evident that if the right to the recognition of a reality contract is not requested, the answer is simply "yes", the entity would avoid the payment of all social benefits. To find another alternative that was not begged, that is, not always wait for the contractor to sue, or to be under the obligation to do so to demand their labor rights, but that the same entities responsible for monitoring and controlling public entities by a lawsuit that demonstrates that the entity failed to comply with the duty to be of good practice in contracting.

Now, looking at it from another perspective, if the public entity intends to use the service contract for the obvious façade, so that the contractor in this way is giving up his labor rights, it has already been shown in pronouncements by the honorable Court that it is a resounding "no", as it has said that "the minimum rights and benefits of the worker are

unwaivable and the rules governing the matter are of public order" therefore, the alleged acceptance of the worker does not relieve the employer of his legal duties.

On the other hand, the clear and guaranteeing protection that the legislator makes to the worker prohibits "entering into contracts for the provision of services to permanently perform the functions of existing positions in accordance with the respective decrees of plant" (Congress of Colombia, 2002) . Then, having a perfect legal system and impeccable sentences on the subject, it is not possible that so many violations of the labor rights of workers continue to occur, so it is necessary a really expectant control and surveillance and at the forefront of the forms of contracting in the public administration, in order to not continue to transgress the proper functioning of public order, of the recognized fundamental rights, and avoid the demands that are presented by contract reality, and of those who never dare to sue for very political situations, but that also violates their labor rights.

In fact, this writer considers, and to a great extent it is part of great censure, that there are honestly misunderstood aspects, that result in a nonsense when trying to avoid the harmful effects of labor contracts entered into under the disguise of any other contract that turns out to be different. Such aspects, all of which are related to judicial practice, could easily be eliminated if some of the precepts that are brought up for comment and briefly studied below were applied in the correct way.

6. THE NEED FOR THE CORRECT APPLICATION OF PRECEPTS INHERENT TO JUDICIAL ACTIVITY

Before the French Revolution, a different treatment was given to the so-called judicial autonomy, giving application to certain models of justice that conditioned the application of the Law. Interpreting Montesquieu's vision, both in Spain and in Colombia they would apply the cases "the judges of the nation are, as we have said, nothing more than the instrument that pronounces the words of the law, inanimate beings that can moderate neither the force nor the rigor of the laws. That part of the legislative body which we considered as a necessary tribunal, formerly, is so also on this occasion: to its supreme authority it belongs to moderate the law in favor of the law itself, ruling with less rigor than it" (Montesquieu, 2002) .

In 1971, with the French Constitution, the jurisdiction was established as an authority but not as a power, because with the aim that the jurisdiction did not take the political power, it was assigned a function consisting of the prohibition to make interpretations and of course the impediment to create law. Thanks to the political power invested in judges, the above was fully guaranteed, i.e., judges were nominated by the executive, which implied their appointment without career or professional training. They were completely inanimate and mechanically representatives of political power, or rather apolitical because they lacked any political ideology, or lack of interest in related issues.

It should be noted then, that the judge was elected to pronounce the Law, only for that, because he was the mouth of the law, and therefore, no one should judge at his discretion or interpret the law (Constitutional Court of Colombia, 2009) . Therefore, the task of the official, that is, the judge, was to listen to everything for which he was subjected, and from this he had to pronounce on the literal text of the Law, since it is understood that he is a judge not because of his brilliant mind or because his will induces him to judge the actions of those who commit crimes, but because he is the mouth that must pronounce the law; that was the true judge. In the words of "the rule of law and the principle of legality entailed the reduction of law to law and the exclusion, or at least the submission to

law, of all other sources of law" (Council of State, 2014) .

Looking carefully in the rearview mirror, and trying to make a quick comparison, anyone would say with a strong tone and without hesitation, that indeed it has evolved on the matter; in the words of the Court: the role of the judge has changed transcendentally, to such an extent that this is autonomous to make their decisions, provided that it is in accordance with the Constitution; because it is responsible for the proper application of justice, concerned about a peaceful coexistence. This independence in which the judge acts freely, consciously and impartially before the law (Constitutional Court, 2011) .

There is much to be emphasized in terms of independence, even though in many matters we still raise our eyes to heaven and between sighs we whisper the yearnings of having truly autonomous officials and not simply "mouths of the Law". Sometimes the dispute, which on many occasions has to do with our subject of study (the disguise of contracts), calls for a proactive judge, capable of creating law and applying the corresponding precepts in a fair way. Sometimes the dispute calls for, and here is the first of our criticisms of the judicial officer, a judge with his pants on and an open mind, capable of looking beyond and resolving when the matter is immersed in a twilight zone. It is at this point that the autonomy of the judge, the well understood, the not deficient, the one that does not shine because it is lacking, must emerge as a spell of abuse.

It is not that it is hailed by an omnipotent judge or one with super powers, but only by one who knows the exact measure of his autonomy. One who knows that he owes respect and abidance to legal and supra-legal provisions, but who does not fear and does not languish when in search of true justice, he has to go beyond a normative body.

Now, by virtue of autonomy, the Constitutional Court has said, the judge is granted the right to be impartial, which implies that the judicial operator should not be intentionally inclined to benefit or harm any of the parties or any of the petitions in the lawsuit. If so, he should declare himself impeded, but how far does such autonomy and impartiality go, when everything has already been said about the judicial debate that is being heard? Can the judicial officer, without the pretext of being autonomous and a maker of law, contradict the vertical precedent?

From the pachydermic and old-fashioned judge who limits himself to being the "mouth of the Law", we move on to an unbridled judge who believes he has supra-autonomous convictions, and who therefore has the capacity to "invent law", even in cases that do not merit it. This is a judge who disobeys the clear and indisputable vertical precedents, in the face of which, he always tends to have excuses that are detrimental to the labor rights of those who claim the solution of a conflict. In any case, it should be clarified that it should not be understood that it is the intention of this writer to criticize judicial autonomy. The censure is, as stated above, against the extent to which this autonomy is applied, which cannot be insufficient, but neither can it be excessive.

All of the above assumes, without any doubt, that there is no impediment for the judge to pronounce in his judicial decisions under his own measure of autonomy, which leads to say, and this is what our proposal is aimed at, that it is entirely viable that in the judgments where there is recognition of a reality contract, the protection of the rights of the workers is better guaranteed, by referring the respective file to the competent authorities to impose the sanctions that may be applicable and to carry out surveillance and control of the condemned entity. This, for having manipulated the figure of

the contract for the provision of services or similar.

The authorities referred to are none other than those that, by virtue of their powers and functions, are responsible for exercising various controls over State bodies. Thus, for example, it would be incumbent upon the judge to order copies to the Office of the Attorney General of the Nation, so that it may decide, if it deems it necessary, to impose disciplinary sanctions. The judge should also, when the circumstances so require, order copies to the Office of the Comptroller General, in order for that entity to investigate and punish fiscally, if necessary (in case of detriment to the treasury). The compulsory submission of copies to the Attorney General's Office is another of the orders that are imperative for the judge who unveils the contractual façade, leaving it in the hands of the investigating entity to arrange the relevant proceedings to determine the eventual criminal liability.

All of the above, added to the probable submission of copies to the Ministry of Labor, or any other Ministry to which the contracting public entity may be attached, so that it may analyze and proceed to take the measures it deems pertinent, is the logical call that society makes to a truly autonomous judge and true creator of law. It is a call to try to truly and thoroughly solve a problem that has arisen from a practice that does not seem to have any control.

Bearing in mind that all judges, at the time of making the legal study of any case that corresponds to them, must have as a basis the compliance with the rights recognized in the Constitution, the proposal made in this article would not be an imposition, but on the contrary, they would be complying with all the rights recognized in the aforementioned provision.

The lack of fear to take measures such as those proposed in this document, should be within the independence and autonomy of the judge, who as an operator of justice and guarantor of constitutional rights and therefore labor rights, and all those recognized in the legal system, enforces and satisfies the real needs of the society eager for justice, instead of, on pain of not harming a certain state entity, only end up being accomplices of the denaturalization of the whole contracting process.

7. EXTRA PETITA DECISION AND THE CONSTITUTIONAL INVESTITURE OF JUDGES

Perhaps in large part related to judicial autonomy, the need arises for a brief study of the famous extra petita decisions, which, as has always been explained to us, break with the procedural principle of congruence, by granting, eventually, more than what has been demanded. In effect, ascertained truth is that judges, as a general rule, should not make extra or ultra petita decisions; only in exceptional cases are they empowered to do so. On this occasion, reference will be made only to the exceptional power of the judge to make decisions extra petita, since it is through this power that the judge can rule on matters that were not the subject of the controversy and that could not be contemplated ex officio.

It is understandable that certain concerns arise as to whether the alternative proposed in this article may become an inconsistent decision, or that the judge would be acting in a de facto manner by making decisions that were not requested in the process, or having taken a power that has not been assigned to him, such as extra petita. However, it is also understandable, and we are sure of it, that in order to protect labor rights, which are also constitutional guarantees, it is perfectly plausible to make use of tools that promote a true and complete material justice.

In this regard, it is worth bringing up a clear example that supports the position we have assumed. In it, it can be noted that the highest constitutional body empowers the tutela judge to make decisions that go beyond what was

requested in the introductory brief. The Court then said: "The tutela judge is vested with the power to issue rulings extra and ultra petita, when from the facts of the petition it is evident that a fundamental right has been violated, even when it has not been requested by the plaintiff (Constitutional Court, 2015) .

Unless there is a better criterion, the guideline given by the high court obeys the type of rights that by virtue of the discussion could be transgressed, that is, rights with constitutional roots. It is possible to emulate this criterion in the contentious judicial proceedings where the reality of the contractual relationship is discussed, since it involves labor guarantees and therefore it is also of a superior nature.

However, we know perfectly well that making use of an extra petita power, consisting of the referral of judgments to different authorities for the purpose of their office, as has been proposed in this article, constitutes a real inconvenience, because by freeing ourselves from the trappings and being frenetic, it would be easier for the judge to abstain from doing so, even if it means administering justice half-heartedly. Despite being aware of the above, we are convinced that we can bet on strengthening the duty of the judge, and therefore we insist on the externalized proposal, considering it appropriate to suggest a change of reasoning in the judicial operator and a real awareness about the effects that generate their decisions and the need for them to be in line with the need of the user and owner of the vilified labor rights.

The awareness that is referred to must be comprehensive, tending to memorize and highlight the constitutional power that all judges have; the same one on account of which in every action or decision they must abide by and safeguard in principle the constitutional and therefore fundamental rights. In other words: the judge must know, be aware and completely convinced that, whether or not he is facing a tutela action, he must always guarantee the protection of fundamental rights, adopting the necessary measures (e.g.: the referral of the proceedings to the competent authorities, so that the corresponding sanctions can be imposed).

It should be recalled that in our legal system, the judicial operator pronounces only when he has been called upon to intervene in a specific context that falls within his competence, acting under the legal precepts, that is, in accordance with the rule of law. This suggests that when the judicial operator proceeds as a judge in the ordinary sphere of his specialty or powers, or when he acts as a constitutional judge, that is, hearing and deciding tutela actions or other constitutional actions, he must not only be subject to the provisions of the law, but also to the provisions of the Political Constitution and constitutional jurisprudence; therefore, there must be awareness that the pronouncements, whatever they may be, on a given subject, have their original genesis in the Political Constitution.

In other words, to be more clearly understood, every judicial decision, in any type of process, must ensure, primarily, the protection and non-infringement of the fundamental guarantees of the parties. It is not in vain that it has been said that "From a simple mechanical applicator of the law through the syllogism of subsumption, the judge must assume the challenge of becoming the first and main protector of rights and the daily creator of the Law. Beyond the law are fundamental rights and the judge must protect them even when they are not expressly recognized by ordinary law". Thus, and this is insisted upon, under this investiture that every judicial operator has, it is unquestionable the feasibility of referring the sentence or similar decision adopted in a process to the competent authorities so that they can impose a sanction.

8. CONCLUSIONS

Undoubtedly, Colombia is a State that,

under its Social State of Law, has, at least formally, a legal system that seeks to guarantee the rights of all workers. However, thanks to the abusive practice of entities that tend to disguise labor contracts with other types of denominations, and to the, many times, complicit look of judicial officials, this normative body full of good intentions is being diluted, to the point of seeming insufficient in the face of the dire reality.

The work of the judge cannot continue to be that of a simple operator of the Law; rather, proactivity and true constitutionality must reign and be the basis for judicial action. The well understood judicial autonomy or independence and the extra petita faculties that accompany the true guarantor judge that develops a sacrosanct activity, among others, are tools that are necessary for the honor and protection of labor rights, which, by the way, also have a superior lineage.

In the development of the principle of the supremacy of reality over forms, the judge cannot be so limited and obtuse. Being a rigid spearhead in the procedural scenario means for the judge to be the owner of methods and instruments that really put in check those who trample on the essential postulates of the Social State of Law. The judicial operator must go beyond the simple reprimand and reprimand in his decision, to even compel copies to the authorities that have the competence to impose exemplary pecuniary, criminal and similar sanctions, in favor of an integral honor of the labor rights flouted with the disguised hiring. If there is something that really teaches, it is by example, and surely when the first fines and sanctions materialize, there will be many who will think twice before incurring in abusive contractual practices again. This will inexorably lead to a decrease in the amount of litigation that revolves around this same area, which in turn will, to a large extent, decongest the judiciary.

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