EDITORIAL

REFLECTIONS ABOUT UNIVERSITY AUTONOMY

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As expected, within the scientific discourse of Law there are topics which have been investigated more than others. This is a common situation. However, I find it disappointing because there is a specific topic that is almost disproportioned because of the lack of more documented works in the field: I am referring to University Autonomy (hereinafter UA). Of course, there are a few things, good ones,[14] but due to the implications of this topic in the development of a country it should be better treated by the legal academy. It is precisely for such aridity, that I wanted to make a modest contribution to it, so I wrote, some years ago, a short text in order to defend the UA, due to its importance for the existence of culture, knowledge and quality higher education, but making it clear, obviously, that it has its limits; it is obvious that it is a collective freedom of universities[15], but it cannot end up being a carte blanche that affects, on the one hand, the legitimate interests of society in a higher education with quality, and on the other the members of the academic community, (Botero, 2005). As a matter of fact, I tried to interpret the component of the University Autonomy avoiding falling on a bad extreme: first, believing that UA allows the irresponsibility of the universities and their directives (Botero, 2005: 95-97), and second, believing that the UA is limited only to the rights of any legal entity (their authority and statutes in accordance with the law).

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[14] In order to motivate the reader, I bring a limited recount of the Colombian academic literature on the topic: Martínez & Castañeda, 2005, pp. 15-24; Amaya, Gómez & Otero, 2007, pp. 158-165; Linares, 2011, pp. 43-84. There are other more general texts in this respect: Ossa, 2005, pp. 7-9. Borrero, 2005, pp. 39-46; Gaviria, 2008, pp. 1-4.

[15] By legal command, in Colombia there are several types of entities that can offer the public service of superior education, denominated generically as Institutions of Higher Education (from now on, IHE), being universities of this type. In strict sense, by command of article 28 of the law 30 of 1992, the UA would only be spread in the universities, but the article 29 allows a limited exercise from the UA to the university institutions, technological schools and professional technical institutions. In this writing I won't make from this artificial differentiation and I will mention the universities and the IHE like synonyms.

The concern of avoiding those limits was captured in the definition of UA that I proposed at that time: "an effective process in the academic results by means of the responsible exercise of government, financial and normative powers that, by means of actions or omissions, constitute the vital environment of the university going beyond the rights and duties granted with occasion of the artificial legal status and that, as safeguard of the universities, and as guarantee of a minimum of autonomy, is legally consecrated " (Botero, 2005, p. 98).

Based on this definition I deduced, at that moment, that the UA cannot be understood as a constitutional law of absolute character (in a constitutional State and in "law as argument" there is no place for speaking of absolute rights)[16] and in no way as a mere right (without a component of duty or deontology) of the universities. In other words, the autonomy is, clearly, a right, but simultaneously it is a duty of the institution that seeks protection under that autonomy[17]. So, when an university alleges UA in its favor, it implies a commitment for the institution with the effective and responsible exercise of this autonomy in its own government, in its finances and in its normative regulation, all that with the purpose of creating a real and verifiable space that allows the development of the substantial missions of the university which have historically been teaching, researching and the extension (more recently internationalization has also been considered).

This is the only possibility in which to avoid the possibility of UA becoming an excuse for corruption that would generate the worst possible effects: a massive socio-political call for extermination because of its inappropriate use. Then, there is no better defense of the university, than openly expressing aloud what we say in hushed voices: that UA is being abused and taken beyond what law-duty implies, sometimes for an inappropriate use and other times because of a misunderstanding. It must be well understood, and for that I quote Sosa (2004), adducing that UA would allow the institution to bleed or the lazy comfort of the members of

[16] The Colombian Constitutional Court states in sentence T-141 2013 (M.P. Luis Ernesto Vargas): "however, the university autonomy is not an absolute power, because there are limits to its exercise that are given mainly by the law and the respect to the fundamental rights of the whole university center community."

[17] Constitucional Court, C-114 2005 Sentence (M.P. Humberto Antonio Sierra Porto).

the university community would end up in time placing the university at risk, due to the endemic weakness caused by the excesses, it cannot resist the strong challenges that it faces and those that are to come[18].

I also add that those challenges to which I refer to are not strictly external, in spite of what the majority may think. The tensions that the UA can go through are equally strong especially in the interior of the university with such individual rights as: freedom in research, teaching and that of education, to only mention three cases. For example, there are quite a few events where the professor freedom of teaching is faced with the autonomy of the institution where he or she works, when he or she does not agree with the institutional ideology, such as when he promotes critical-humanist spaces that challenge the institution.

So, the UA is far from being a peaceful topic in the *world of the life*, in such a way that, I say it once again, I can't explain to myself the relative silence that there about it in the scientific speech of law.

It is because of all these circumstances that we face the current disturbing scenario in Colombia, especially because there is certain widespread and growing sensation that many universities, both public and private, have abused their UA and have sought shelter from social demands, especially from the state ones, because of the outrageous situations they have created. Before, the reports of corruption in universities were rare (but they were heard). Nowadays this situation has become a daily situation, not only in public institutions[19].

[18] I think, for example, that the onslaughts of globalized capital and of coarse entrepreneurship, among others, that look to universities as sources of reproduction without critic of the devices of power and as headquarters of business about any other consideration (Botero, 2005, pp. 133-160). About how the superior education loses its critical component to favor the new govern models, consult: Michéa, 2009, pp. 39-48 (Chapter VII).

[19] Vid.. Restrepo, Trujillo & Guzmán, 2012. This text advises, summarizing, about serious problems of the university administrative administration, especially of the private ones: (i) HEI that have "owners" with profit motive, generally their founders or family, that bleed the institutions internally when serving as suppliers or employees with excessive remunerations without necessity, in some occasions, of lending the service for which is hired; (ii) sale and purchase of positions in the directive advice that benefit, many times, with excessive remunerations or with the control on the recruiting of the entity; (iii) abusive tributary practices that can convert them in small fiscal paradises and, even, tempting entities for the bleach of capitals; (iv) extraction of rents of the SEI by means of dark accountants passageways, to finance other activities different to the academic ones or, simply, to augment private bills of those "owners" and directives; (v) collection of tips for the recruiting; (vi) recruiting that are not dedicated to the execution of the academic aims; etc.

Let us remember that, in the eighties and nineties of the last century, the dominant neoliberal sector sold (and very well) the idea that would bring disastrous consequences for the Colombian culture, science and higher education institutions: that the state university has been a source of inefficiency and corruption, while the private universities, ruled by an open market with a weak government control, would represent an appropriate and profitable solution to the problems of this sector. (See Botero, 2003, pp. 23-40). And it was so that in facing this ideology marked the policies to stop and suffocate the public university on one hand, and to sponsor the private initiative, with the State weakness in the inspection and supervision of the system, on the other.

What was the result after a few decades? The public university has barely grown (unable to handle the growing claim for culture, education and science) and, due to the contempt attitude of the State, it has rooted, even more, in its own evils, while the private university, because of the good business expectations and the low effective state control, established a breeding ground not only for the university-business (the famous "garage universities" that usually start with law programs because of their high demand, low costs and good profit margin) but also for worse things that only a criminal attorney could properly discuss[20].

But this is not only an institutional matter. The fact that institutions like those have multiplied in Colombia evidences that there is a social sector that is willing, for many reasons, to purchase their bad services, considering we live in a society where, in several scenarios, a degree is more worthy than knowledge, a piece of paper is more valuable than reality. Thinking deeply about it, one can observe that some private institutions´ excesses are not more than the reflection of a complex network of causes that happen because (i) the weakening of the public university; (ii) the neoliberal policies that weakened the social role of the state regarding culture, education and science; (iii) the increasing demand for higher education without a corresponding increase of a quality offer; (iii) the difficulty of sustainable financing of the system and demand; and (iv) the social favor towards certain irresponsible practices of many people who

[20] There is a wide literature that analyses the development of higher education in the last years, clarifying, especially, the lack of support that the public university has experienced. In that regard, I recommend, just to provide one possible case, this work: Rodríguez, 2011.

are looking, , for higher education in poor quality institutions just because they give the option of a degree without further delay, which is their main interest.

And what has been the support of those who are questioned? The so called AU and, even the famous idea that the market regulates itself (as if in Colombia there were "perfect market" conditions that would allow self-regulation, and if these kind of public services, considered worthy and of great interest for society did not deserve special monitoring by the Social State[21]), which, apparently, would legitimize all the abuses that promises a catastrophe.

Many universities especially those that are being questioned, have not understood what the AU is. The Colombian Constitutional Court itself has indicated that the AU is limited by "(i) the power that the Article 67 (constitutional) gives to the state authorities to regulate and perform the supreme inspection and supervision of education and guarantee an appropriate service coverage; (ii) The power that the Article 69 (of the Constitution) attributes to the legislator to issue the general dispositions in which universities may be able to be administered and ruled by its own statutes, (iii) the wide range of political configuration that article 150-23 recognizes to the Congress to issue laws that will govern the effective delivery of public services, education among them, and finally, (iv) the respect for the legitimate exercise of fundamental rights, derived from the requirement that Article 2 of the Constitution imposes to the Republic authorities to ensure and tend to the effectiveness of the right of all citizens."[22]

[21] I remember a debate on the topic I held once, at the beginning of this century, with a politician from Antioquia, who has been a congressman in many occasions. He pointed out that it was best to leave the higher education in private hands. First, because a private institution could work with less resources (he compared, for example, the budget of two universities divided by the number of students registered in each one of them, a private one with low academic prestige and a public one, the prestigious Universidad de Antioquia) and second because the market itself will regulate the institutions, leaving only the "best ones". It does not take a lot to observe the mistakes of comparing a low quality education with one that possesses the best standards, choosing the first one because it is cheaper. I am more concerned about the second argument: Does Colombia have the social and economic conditions that would allow that the demand itself regulates the offer and this way only the "best ones" remain? And, even worst, what do we understand for the "best ones"? This well known person indicated that the ones that survive the market rivalry would be the best, this does not mean, of course, that they would be the ones with the best quality but the ones that adapt better the social immediate needs that are not usually in accordance with the ideals of education for democracy and, especially, for the enlightened university.

[22] T-933 of 2005, M.P. Rodrigo Escobar. The text in parenthesis is ours. Likewise, sentences T-310 de 1999 (M.P. Alejandro Martínez) and C-1435 de 2000 (M.P. Cristina Pardo). An analysis of constitutional jurisprudence regarding AU can be found in: Martínez & Castañeda, 2005, pp. 15-24 and Botero, 2005, pp. 109-125.

However, there is the need to clarify, that the AU does not only protect the university that is academically responsible in state related issue, such as censoring interests, but also from other issues, for example, the intention of reducing the university to a center for labor training in the best case scenarios (Botero, 2005, pp. 91-95).

Under such critical situation there are voices calling to reduce (or even to eliminate in the worst case) the AU, to show, and to mistakenly hold it responsible for the crisis that is already evident. But those who think like that, do not possibly know, that in this way they contribute to the dismantling of republican and democratic ideals that require universities to be centers of critical and humanistic education (1). In this sense, I think it is necessary to start navigating between waters so that it can continue being progressive but without being naive.

It is in these moments of crisis where you have to support (not eliminate) the UA, before a censoring state as well as other forces such as global capital seeking to turn universities into work instruction centers, since it is only possible through the UA to develop a critical and humanist higher education. This brings us to the task, and there I call the legal scientific discourse, to rethink the value of public universities for culture, science and higher education; to clarify the concept of UA in order to avoid misunderstandings; and to differentiate the necessary censorship from state control because only the state can, but it should also have effective controls on higher education institutions.

The latter because it is legitimate to ask the democratic state to avoid the corruption of a system that suits us all, that works well, through clear, valid, justified and effective procedures. This way, it would prevent the necessary controls system from falling into the "symbolic efficiency" (Garcia, 1993, pp. 79-110). Well, look for, in practical cases, a balance between the UA and state control is a pending task, among other actors, from the legal academy.

And finally, I would like to propose the following for an academic discussion, based on all that was said:

Which reminds me about the wise annotations by: Nussbaum, 2010: 19-31.

1. Create a statute that conceptualizes the AU as a basic right and duty. The Constitutional Court has stated that such issues are not ones that should be regulated by this kind of special laws[23], criterion that I do not fully share. But even accepting the position of the Court, the AU is continually brought into conflict with fundamental legal rights (such as: rights of education, teaching and research) and it is an essential part of republicanism and democracy, all of which could justify to adopt a special law on the matter that is protected in the ordinary laws.
2. A greater linguistic clarification and a better constitutional justification for state control standards especially for universities and higher education institutions in general, based on good corporate governance practices.
3. More effective control measures, which call for a strengthening the monitoring and controlling responsibilities of the state and an abandonment of free market policies that have so far dominated and which have increased the evils which nowadays are so much spoken of in relation to the higher education system. At this point, for example, it is a good idea to refer to the appropriateness of controlling the number of law programs, to mention one case, which could be admitted in a country like ours, to control the irresponsible actions of many universities that open and open these programs regardless of their social cost, under the passive attitude of the State.
4. Questioning the responsibilities of both the members of the university community and the general public regarding the appropriate management of the UA and how to achieve a higher quality education.

[23] "[A]s we have seen, the law 30 of 1992, does not cover the necessary features to deserve being described as a statutory law (not treated in the regulation of a fundamental constitutional right) and it is impossible to be framed under the called general laws (for lack of constitutional authority that allows it), then it must be concluded that the sub-examine regulations applicable to the so-called ordinary laws enacted by the legislature "(Judgment C- 311, 1993, MP Fabio Moron Diaz).

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