



Between Justice and Money: How the Covid-19 Crisis was used to De-Differentiate Legality in Ecuador

Katiuska King¹ · Philipp Altmann¹

Accepted: 14 December 2021 / Published online: 5 January 2022
© The Author(s), under exclusive licence to Springer Nature B.V. 2021

Abstract

Legality in the Global South suffers from problems of application by convenience. Some rules are applied, and some are not, depending on certain actors, such as the State, the stakeholders, or others. This undermines legitimation as constructed by legality and due process. These problems are connected to a wider complex formed by coloniality, internal colonialism, and a form of functional differentiation that limits autonomy of the different social systems. This complex of structural properties allows States and other actors to systematically use one system against the other or—within a given system—one level of rules against the other. This was the case in Ecuador: in the initial months of quarantine due to Covid-19, the government took decisions about external state bonds following international legislation—and quite contrary ones related to local work contracts. Once again, legality followed different paths in diverse cases. Ecuadorian economic authorities accept and respect conditions on external public bonds which are protected by some complex and specific clauses to secure the payment. The same authorities have different practices towards international and national legislation that were organized in the sense of legal subsidiarity. This text will explore reasons and effects of legal de-differentiation in the Global South in times of crisis. The Ecuadorian case in time of Covid-19 helps to understand how structural problems related to the lack of autonomy of the legal system are perpetuated and lead to effects of convenient political action.

Keywords External state bonds · Local contracts · De-differentiation · Legality · Lack of autonomy · Ecuador

✉ Katiuska King
katiuska.king@gmail.com; kkking@uce.edu.ec

¹ Central University of Ecuador, Ciudadela Universitaria, Av. América, 170402 Quito, CP, Ecuador

1 Introduction

In March 2020, when countries around the world began to close their borders due to the Coronavirus outbreak,¹ Ecuador found itself in a *sui generis* economic situation. Given the prioritization of political discourses and the lack of attention to economic problems [1], in March 2019 the authorities opted to sign an Extended Service Agreement with the International Monetary Fund [2], and due to the measures that were implemented as a result of that Agreement, in October 2019 protests broke out over a proposed rise in fuel prices [3]. As well as social conflict and urgent economic needs related to the pandemic, payment of the capital of the country's 2020 sovereign bonds came due that same month. In other words, in a context of need for resources, economic management was delegated to multilateral organizations whose policies promoted austerity, generating even greater social tension and problems in implementing a coherent public health policy² [4].

To aggravate the situation, a few days after the Covid lockdown began, the Minister of Health resigned, declaring that she had not received a budget allocation that allowed her to deal with the emergency. In addition, national government statements regarding the pandemic were issued in a context of conflict with the mayor of Quito, a doctor who had already implemented policies for controlling the pandemic, measures that were subsequently replicated by the central government. Meanwhile, in port city of Guayaquil the scenario was Dantesque; there was a lack of leadership both on the part of the municipal authorities, who invaded the airport and blocked a runway in order to prevent a humanitarian flight from landing, and the provincial governor, who in early March allowed soccer games to be played with the presence of the public, using the justification that "the worst virus is fear". In addition, the Vice-President of the Republic made statements minimizing the effects of the virus before his planned trip to China.

In the midst of the chaos, the Minister of Economy decided to prioritize the payment of the capital of the 2020 Bonds because, according to what was said, in that way more resources could be obtained. Likewise, and without publicly announcing the measure, the government also paid the 'repos', the derivative instruments that guaranteed the value of the Bonds; these had lost value due to the pandemic and had consequently turned into a very expensive losing wager. In other words, due to liquidity problems aggravated by a drop in the price of oil, the price of the Bonds plummeted in secondary markets and the State had been forced assumed these losses, as explained below.

The result was that in the midst of the urgent need for resources to attend to the health emergency, international obligations were prioritized based on the argument that in this way, greater resources would be obtained in the future. In practice this was not the case, but the government took advantage of the pandemic and the states of

¹ The country closed its borders on March 16, 2020, and decreed an austere confinement of three months.

² It later became known that public hospitals had been the subject of political agreements and that their management was consequently not under the control of the government.

exception that prevented the mobilization of social groups, to continue with the policy, arguing a supposed improvement in the economic situation, something that also did not happen.

This text is dedicated to understanding why the Ecuadorian State reacted to the crisis the way it did. In order to do so, it will explore the conditions of possibility for the actions of the Ecuadorian State and how they are related to the legal framework on both the national and the global level. In other words, it is about how the State can do things, based on social structures and semiotic constellations related, above all, to the multifaceted legal framework. With this, we will try to understand how the State or political actors around it used the crisis to push for certain changes and how it established different levels of obligatoriness in relation to different interests—instead of trying to mitigate the crisis itself. While the whole setting can be labelled ‘neoliberalism’ or even ‘post-neoliberalism’ [5], we will focus on the concrete practices and how they interrelate with and change different parts of society—and not on the programmatic texts or speeches that might exist. Our approach is inspired by the critique of the ubiquity of capitalism and its social impacts, outlined by classical and contemporary critical theories [6]. In this sense, the Global South, understood not geographically, but in relation to capitalism, is marked by more violent and informal practices that lead to forms of institutionalization that are unlike those in the Global North. Then, this article is relevant as it proposes a de-differentiation framework in the Global South with an empirical case analyzed during the Covid-19 pandemic.

This article uses the theory of functional differentiation as outlined by sociologist Niklas Luhmann and his followers to analyze the role of the State at the intersection of major social systems such as politics, legality, and the economy. This theory helps to describe the scope of the norms introduced, as well as the repercussion these had on both the structural level, on public opinion and the announced benefits. The article uses a reflexive methodological approach in the theoretical luhmannian part and a mixed methodological approach in the empirical one, with a qualitative part following the legality and used economic policy measures during the pandemic in Ecuador, measures that were trying to influence the economic variables over time for which we use quantitative information and economic narratives.

A first part of this article introduces the matter. A second one is dedicated to explain this conceptual framework of de-differentiation that is applied to the Global South with the concrete case of this text: the State in Ecuador at the intersection of different functional systems. A third section focus on the national consequences of economic policy of Ecuador. The fourth part discusses and analyzes what was behind the economic narrative at national and international levels. The last one brings together the effects of de-differentiation and Covid-19 in a conclusion.

2 De-Differentiation, Legality, and the Global South

2.1 A Theory of Legal De-Differentiation

Society has been characterized by functional differentiation since the nineteenth century. This implies that the most relevant social systems—such as economics,

politics, religion, science—manage themselves autonomously corresponding to the rules they define by means of their own actions [7]. According to this logic, States are located at the crossroads of these different systems. On the one hand, we have the State as a system of organization: charged with organizing the decisions relevant for its members on the basis of a structure specifically designed for that purpose. On the other hand, there are global functional systems, such as the economy, that by definition go beyond the ambit of the State in terms of the scope of their communications. The possibilities of the State to act depends on its ability to manage the relations it has with the relevant functional systems: an economic policy can only be successful if the economic system works as expected, State funding for research will be fruitful only in the terms of the scientific system, and so on.

Social systems are not reduced to the structural aspects of society, they go beyond concrete actions or institutional settings and include what Luhmann calls semantics [8]. Based on the symbolically generalized means of communication that they establish, social systems define how people “make sense” of things in the concrete relations, defined by certain roles and associated knowledges [9]. Sociosemiotics as we know it is based on functional differentiation and everything it implies. However, from the perspective taken here, there is no coherent and all-englobing semiosphere, but rather different semantics that are defined by different functional systems. It is not up to people to make sense of their everyday-life as phenomenology has it [9], rather, this concrete sense-making depends on the social means of sense-making—what in a different framework would be signs and here are communications that are pre-defined by preceding communications and the expectation of future communications [7]. The State understood as social actor understands the surrounding society based on earlier contacts and interferences. The treatment the State gives to the noise of the rest of society defines how it can make sense of society—and produce meaningful communication.

The two most relevant functional systems for States are the political and the legal. In both cases, their structures are characterized by being both global and national at the same time: communications are clearly globally linked (the global division of political left and right, human rights, etc.), and communications clearly also take place nationally (particular political parties, national law enforcement, etc.). In this sense, it can be said that a necessarily global society is positioned in Nation-States and their territories through the State-politics-legality plexus.

Within this plexus, the political system in its different national forms deals with the control of the State, especially the government, its decisions being issued mainly in the form of laws. This plexus therefore attempts to exert political control over the other social systems [10]—with varying levels of success in each case. This use of national borders as political and legal borders, positions the State-politics-legality plexus in opposition to the inherently global tendency of modern society [11]. In other words, it exposes the problem of the limits of economic policy (and, equally, of artistic, scientific, religious policy, etc.): i.e., the form, and the extent to which the State and the national political and legal system exert influence over the economy. There is no doubt they can—Luhmann calls this structural coupling—as there is also no doubt that influence is never equivalent to control, as the economy is an operationally closed and complex system. The different systems that make up the

described plexus may consequently offer incentives—by legal means, through subsidies and/or public goods and services—but cannot guarantee that these incentives will have the desired effect on the economy, locally and how it is perceived outside.

2.2 De-Differentiation in the Global South

In the countries of the Global South, the situation is even more complicated. In Latin America, for example, functional differentiation developed in a particular way, creating organizations and networks based on personal contacts connected to specific positions. Mascareño and Chernilo describe this as informality: universal inclusion—the basis of functionally differentiated society—is limited by the control of specific groups [12]. This produces a double filter: what politics (and with it, the State) wants to decide has to not only pass through political games in parliament and other arenas, it also has to pass through networks of informal influence. The authors present this situation by means of the formula: “the system operates informally under a veil of formality” [12]. This same idea is formulated by Neves as systemic corruption: functional differentiation cannot operate adequately in Latin America because the different codes are constantly overlapping and blocking each other [13]. In a situation such as this, informal networks can determine how functional systems work [13]. In other words, what matters in the legal process is not only who has the soundest arguments, but also who has the best contacts, and for whose benefit the system itself operates.

In this context, it is the economy that determines the de-differentiation [13]. As all the levels involved—systems, organizations and interactions—act as if this systemic corruption or informality were something accidental and not a constituent element of society, they are not able to process corruption or informality in a way that is in itself not corrupt or informal. They are organized in an imaginary differentiation: acting as if there were functional differentiation, and thus making their obvious contradictions invisible.

This has two related effects. First, it spreads corruption. Multinational companies, for example, will most likely not resort to the national legal system if asked for illegal donations or something similar, but will rather take advantage,—thus consolidating the networks of corruption, influence, contacts, etc.—while following the supreme mandate of any economic actor: to make a profit. Secondly, it creates a local level that depends on the immediate influences of a global structure which functions according to the rules of each global functional system. For example, there is a national legal system that, as everyone knows, functions not only according to the nationally established rules of the State-politics-legality plexus, but also according to invisible local networks of influence, such as networks of contacts between people of influence. At the same time, we have a global legal system that includes networks of influence that operate in a functional and visible way as part of the State legal system itself: as in the definition of conflict resolution mechanisms whose biases are known beforehand.

The effects of functional de-differentiation include legal de-differentiation: through the influence of local, national and transnational informal networks, on the

one hand, and the influence of global functional systems on the other. The result is something not very common in the countries of the Global North but can frequently be observed in the Global South: a differentiated application of different levels of norms.

For example, during the Covid-19 epidemic in Ecuador we witnessed a differentiated application of internal regulations—both on a constitutional level, and with respect to legislation that governs local labor contracts—compared to sovereign bond contracts issued on international markets and the domestic debt that operated as guarantees with complex clauses.

Regarding external debt, there is no responsible multilateral institution; the area is dominated principally by financial actors. As a result, this differentiated application of contracts and, therefore, of the rules, allows elite groups to influence internal policies at their convenience, via what is known as the ‘elite veto power’ [14]. These groups use international regulatory frameworks to conceal themselves and delegitimize the Nation States of the South as being dishonest, inefficient, and not very serious. It is worth mentioning that this latter tactic is also useful in delegitimizing the intervention of states in the economy and the collection of taxes, thus favoring the informal networks established by these same elites. However, this does not develop in the radical case of “excessive, wasteful and violent power” [15] or authoritarian exceptionalism. Rather, it is about structural violence [16] that tends to become invisible.

It can therefore be argued that a dual globalization [14] exists: the one more visible, which supersedes states in multilateral spheres, and the other, underground and less visible, which can facilitate illicit financial flows (IFF). That is to say, there is a system in which the participation of the States is visible, even though certain countries are excluded from decision making, for example in the G7, the G20, or the OECD, and on the other hand, an underground institutional and atomized framework that defines rules in areas such as accounting, the stock market, financial regulation etc., with the participation of non-public international actors [17].

As the possibility of resorting to the multilateral sphere for resolving problems related to debt³ does not exist; the only option is the courts of the large financial centers such as London or New York.⁴ But in the case of Ecuador and its external debt, while sovereign bond contracts are public, the underground globalization that allows people with high net worth and other actors to hide their identity and ability to influence the country’s internal policies, is not. Conveniently for these elites, in Resolution No. 56/83 1949 of the General Assembly of the United Nations, the figure ‘state of necessity’ is introduced, which is referenced in article 25, (literal a) as the “only way for the State to safeguard an essential interest against a serious or imminent danger” [18] and thus establish the elimination of the illegality of an act.

³ In 1956 an ad hoc group called the Paris Club was created to facilitate negotiations between countries and creditors.

⁴ For example, in the case of the Argentinian debt vulture funds the sentence of Judge Griesa in New York was paradigmatic.

In Ecuador, this ‘state of necessity’ came into play when the decision was taken to prioritize international financial commitments, not only in terms of regulatory frameworks but also interests, and with direct implications for the sovereignty of the Ecuadorian State. While at the local level, concepts such as *force majeure* or fortuitous event were invoked using the argument that “reality has exceeded legality”.

For the expediency of certain particular interests what prevailed was the international aspect, which went through a minimal internal legislative process, while at the local level, certain norms were also modified. In reality, this differentiated application ended up serving key local players, as will be shown later. One of the questions this raises, is how the pandemic, the imminent serious danger as defined in a ‘state of necessity’, is related to the *force majeure* or fortuitous event concept used at the local level.

3 Economic Policy Decisions: Facts and Economic Narratives

A clearer example of the two system context and not only its value for national elites but negative consequences for the population in general, can be seen on the economic level. Economic policy is designed within the state-politics-legality plexus. This policy implies measures decided and implemented in state institutions through political debates, and expressed, at least partially, in laws and other legal instruments. A central element of this process is the capacity of the State to sustain a functional policy, something that may imply the acquisition of funds on international markets and by means of other financial instruments. According to this logic, decisions are constantly taken in order to obtain financing for the purpose of achieving particular goals within society, and thereby guaranteeing the inclusion and participation of citizens. For example, paying international debts in a timely manner will achieve a position on international financial markets that will supposedly guarantee the ability to raise funds in less onerous conditions.⁵

One of the variables that receives the most attention when countries issue sovereign debt, is the coupon or interest rate at which bonds are placed. In the case of Ecuador, the events of 2009—including the audit of the external debt, the declaration of illegitimate debt and the repurchase of debt securities through a market operation—had a negative effect on the country risk, and made debt issues more expensive.

As a consequence, and in order to not generate negative public reaction and to facilitate a return to international markets with new debt issues, the government negotiated swap or repo operations. These operations create financial derivatives which guarantee the value of the bonds in what basically amounts to a wager. If the price of the bonds rises, the State will receive resources, but if it falls, the State will have to pay any value lost.

⁵ Conditions that are mostly influenced by country risk.

In 2014, derivative operations were carried out with the gold of the Central Bank of Ecuador (BCE), called the Goldman Sachs gold swap,⁶ it came to an end in February 2017 and was re-contracted in October 2017. In the same month, October 2017, repo operations were also contracted with the investment banks Goldman Sachs (GS) and Credit Suisse (CS) for the 2022, 2023 and 2029⁷ bond issues. However, despite these additional guarantees, in January 2019⁸ the 2029 Bonds, with a 10 year maturity, were negotiated at a double-digit coupon of 10.75% which was higher than 2014 Bonds when Ecuador came back to international capital markets.

As of March 2020, these repos totaled US 3,016 million dollars [19], and were recorded as contingent liabilities. A month later this liability was reduced in the following manner: “Contingent liabilities were reduced by 2,410.5 million due to the Republic of Ecuador pre-canceling repo operations with GS, CS and [ICBC]”⁹ [20], and in April, the balance of contingent liability for derivative transactions with Goldman Sachs was US \$606 million. In June these liabilities were reduced to zero (US\$ 606 million) due to the “Assignment of Credit issued on June 19, 2020, in favor of the ECB.” [21].

These contingent liabilities refer to the issuance of local and international bonds as collateral for guaranteeing the issuer’s own debt (debt issuances), which gives rise to the figure of ‘confusion’ as the debtor and the creditor are the same. The repos that function as an additional guarantee also have major implications, not only due to the transaction costs that are obviously increased, but also because the State assumes the cost of any downward fluctuations of its own debt, even in the case that it cannot pay its obligations. It should be noted that these guarantees function as an extortionary condition as a way to maintain the price of the bonds, i.e., if the bond price falls, the guarantees required increase, that is, more collateral in bonds or gold is required.

⁶ In a meeting with the foreign press on June 4th, 2014, President Rafael Correa mentioned that the gold served as collateral for a loan of 400 million dollars. The Central Bank of Ecuador complemented its original statement on gold with the following information: “The Ministry of Finance has informed the ECB that the country has benefited from a loan of 400 million dollars at a rate of 4.3% per year, granted by Goldman Sachs, and that it is working on the preparation of other financing operations with this international bank and other relevant players in the global capital market” (ECB, 2014). On June 17th, 2014, the operations in the international markets were made known: “The Ministry of Finance placed US\$2,000 million in Ecuadorian sovereign bonds on the international capital market. The bonds have a term of 10 years and a coupon of 7.95%” (Ministry of Finance, 2014).

⁷ The years represent the maturity date for payment of the principal.

⁸ Two months before signing the Expanded Service agreement with the IMF, which had among its objectives the reduction of country risk.

⁹ ICBC Standard Bank Plc.

In addition to these guarantees, are the so-called *cross default* and *acceleration* clauses,¹⁰ which could make the repo and gold guarantees effective for all Bond issues. In other words, if the Government does not pay, the external debt would “automatically increase by at least 3.5 percentage points of GDP” [24]. Bond issues are covered by the cross default clause, which means that if one of the bonds cannot be paid for an amount greater than 50 million dollars, default is declared and all bonds are then payable, as the acceleration clause for debt payments due in other years is applicable, with certain exceptions.

On March 23, the Ministry of Economy paid out US\$324 million: i.e. the capital of the 2020 bonds, the decision being rejected by all members of the National Assembly, the Ecuadorian legislature, by means of a public statement. But this was not all. The government also paid the repo operations for one billion US dollars, although the Ministry affirmed that it had only disbursed an additional US\$ 798.8 million to the US\$ 220 million already amortized [25].

4 National Consequences of these Economic Decisions

This advance payment of derivative operations meant that the Ministry of Finance no longer had the resources to deal with the Covid emergency. Cuts were consequently made to public budgets despite the fact that Article 165 of the Constitution states that during a ‘state of exception’, which was in force at the time, the education and health budgets cannot be reduced. The Constitutional Court (2020) ruled that the article had been breached, as there was a reduction of US\$ 910 million [26] when this was expressly prohibited [27], but the Court did not go further, nor did it required that the budget be restored to previous levels.

On the national level, the global pandemic argument was used to ensure that contracts were not fulfilled for reasons of *force majeure*, a motive which in the previous case had not merited the slightest discussion. Following the advice of a former head of the Central Bank (in 1998) and until recently presidential advisor on economic matters footnote 11 Augusto de la Torre the Minister of Economy, Richard Martínez, facilitated agreements between the parties in the labor sector which involved an implicit withdrawal of the State.

This was made possible by the approval of the ‘Humanitarian Support Bill’ in May 2020, as a way to combat the health crisis provoked by Covid-19. Areas such as

¹⁰ “Ecuador fails to make any payment in respect of any External Indebtedness (other than Excluded Indebtedness) in an aggregate principal amount in excess of US\$50,000,000 (or its equivalent in any other currency) when due (as such date may be extended by virtue of any applicable grace period or waiver); the holders of at least 25% of the aggregate outstanding principal amount of any External Indebtedness (other than Excluded Indebtedness) having an aggregate principal amount in excess of U.S.\$50,000,000 (or its equivalent in any other currency), accelerate or declare such External Indebtedness to be due and payable, or required to be prepaid (other than by a regularly scheduled prepayment), prior to its stated maturity, as a result of Ecuador’s failure to pay the principal or interest on such External Indebtedness, and such acceleration, declaration or prepayment is not annulled or rescinded within 30 days” [22,23].

fees for private education, evictions, basic services and modifications were included in the scope of the legislation, which also regulates the labor sector. In article 16, “Of the agreements on preservation of sources of employment”, the legislation establishes the following:

Workers and employers may, by mutual agreement, modify the economic conditions of the employment relationship in order to preserve sources of work and guarantee stability for workers. The agreements may not affect the basic salary or the sectorial salaries determined for full time, or their proportionality in the case of reduced hours.

The agreement may be proposed by both workers and employers. Employers must present, clearly and completely, arguments supporting the need to sign an agreement, so that the worker is able to make an informed decision. Once the agreements are signed, they must be reported to the Ministry of Labor, which will supervise their compliance.

The agreement will be bilateral and direct between each worker and the employer. The agreement reached, during the period of its validity, will take preference over any other agreement or contract.

While in article 17 it is also established that:

In those cases in which a judge determines that the employer unjustifiably invoked the cause of force majeure or fortuitous event to terminate an employment relationship, the compensation for untimely dismissal provided for in article 188 of the Labor Code will be applied, multiplied by one point five (1.5).

In this case, article 169 numeral 6 of the Labor Code was interpreted, and the unforeseen event or *force majeure* argument invoked as a mechanism to facilitate agreements between parties in the workplace.

In addition, article 19 permits an ‘emergent special contract’ for a specific length of time and defined working hours: for a term of one year, 40 h 6-day workweek, and dismissal during the term of the contract without compensation. On the basis of this ‘special contract’, contractual modalities were also established in the tourism and cultural or creative fields: for 70 days during which for every 7 days worked 2 days of rest were granted (Ministerial Agreement MDT-2020–221).

If the activities performed require the rendering of uninterrupted services to meet the needs to be satisfied, the parties to the contract may agree to consecutive working days, which may be accumulated between twenty (20) twenty days and a maximum of seventy (70) continuous days. (p. 7)

The result has been increased labor conflict. The following Fig. 1 shows the number of complaints filed with the Ministry of Labor, which increased sharply as of May 2020.

In Ecuador another change in the labor market has been the gradual increase in the hiring of Venezuelan migrants (of registered migrants, 63% were employed) a situation that has been used to avoid paying employer obligations [28]. For example,

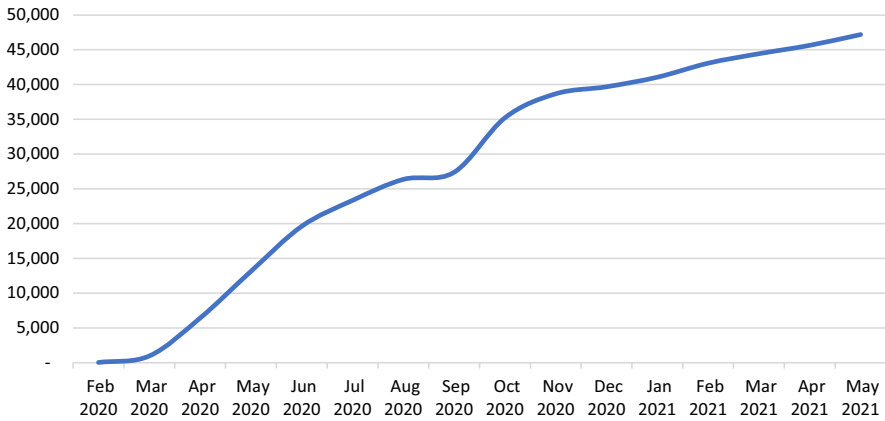


Fig. 1 Cumulative monthly evolution of number of labor complaints. *Source* Ministry of Labor. *Elaboration:* Authors

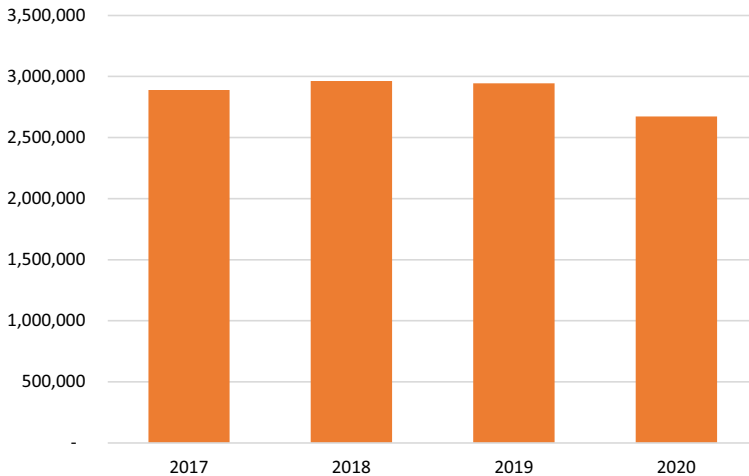


Fig. 2 Evolution of compulsory Social Security. *Source* Ecuadorian Institute for Social Security (IESS). *Elaboration:* Authors

it is known that workers have been hired under the following conditions: “I will pay you the minimum wage, but without social security affiliation” [29]. However, this type of approach has not always been well received by the public. And while it is not possible to affirm that expressions of hatred towards migrants, such as those that exist in Europe, have become the norm, [30], various cases of xenophobia have been noted. This was particularly evident after the murder of a pregnant woman in the north of the country [29]. In Fig. 2 we can see how compulsory social security affiliation decreased in 2020 because of layoffs and informal hiring.

This graph clearly shows that while the contractual conditions of the external debt were met and honored, agreements between private parties and the State permitted

Table 1 Mean country risk - Emerging Market Bond Indicator for Ecuador (EMBI in points)

Year	Mean
2017	621
2018	641
2019	678
2020	2412
2021*	950

* Available data until 29/09/2021

Source Central Bank of Ecuador (BCE)

Elaboration: Authors

lax control of social security, especially for the non-Ecuadorian population; this can be interpreted as informal networks not respecting the Ecuadorian legal system. The message was that the situation of the bondholders and businesses had to be taken care of, and that the government had consequently withdrawn from managing public health and allowed more informal management with “seriously flawed negotiations and corruption in contracting” to take place [4].

The authorities’ argument was that this had to be done in order to maintain the possibilities of future financing, while at the same time the government itself was using hospitals and their contracts as a way to achieve political arrangements. In the meantime, the State, as part of the tripartite tradition that prevails in the labor sector, assumed a passive attitude, even though in some cases this implied directly ignoring international and local regulations related to social security affiliation, or the five day work week.

Although the two areas might appear unrelated, this is not the case when the elites who keep their resources abroad are able to enforce external debt contracts that favor them, allowing them to keep their capital abroad, and at the same time, and in certain cases, to also benefit from the modification of the terms of labor contracts. In other words, not only does the economic structure apply as a system apparently detached from political organization, but also as a global system that represents the only legitimate form of law that must be respected. As a result, the debt will finally have to be paid by those who maintain economic activity in the country, while the lesson to be learned is that the purchase of debt is a good way to keep capital outside the country, even more so when differentiated conditions are guaranteed with respect to the internal debt [2].

In Table 1 we can also observe that even after the debt restructuring operation, the Ecuadorian country risk remains higher than in preceding years.

An additional factor to be taken into account, is that the person who led the debt renegotiation process was later appointed Vice President of the Inter-American Development Bank (IDB), despite the fact that this is specifically prohibited by Article 153 of the Ecuadorian Constitution. This was achieved with the help of an interpretation provided by the Ecuadorian State Attorney, who affirmed that the IDB “is not a foreign financial institution but an international

organization (or organism)” [31]. This once again demonstrates an interpretation reached in accordance with the political system rather than the legal interests of the country, highlighting the fact that in practice the two systems are not separated.

The major difference between the application of economic measures to deal with external debt and the application of the fortuitous event or *force majeure* argument in the national and international spheres is discussed below.

5 Discussion and Analysis

In economics there is an institutional discourse or economic narrative [32] of legal security, respect for regulatory frameworks and institutional consolidation, for example, in order to generate economic growth and attract foreign investment. However, the way in which in Ecuador the internal regulatory framework was disrespected in the areas of debt and labor contracts, as well as constitutional frameworks in budgetary and revolving doors issues, reveals a ‘legal security’ that is oriented towards the exterior and corresponds to a ‘subway’ or underground globalization that even facilitates illicit financial flows. This legal security represents legal insecurity for others, especially, workers and the Global South.

As mentioned above, this makes evident the existence of not one global system, but at least two: the visible framework, and the virtual or invisible framework that operates to maintain the veto power of the elites through an expedient application of the law. Thus, two different and opposing logics within the same state-politics-legality plexus invalidate each other: the attempt to demonstrate legality to external actors actually demonstrates a lack of interest in the principles of legality. And that is obviously also visible to external actors.

Covid-19 and the regulatory frameworks were interpreted differently, as the virus is invisible, it was in Ecuador, but not on the outside. Thus, Ecuadorian authorities differentiated the regulations and communicated an economic narrative of a better future that should indirectly be reflected in the country risk. These differentiated uses of normative frameworks if analyzed from neoliberalism or Davies’ mobile sovereignty [15] would simplify the communications, the economic narratives, and the differentiation.

A characteristic of opaque financial maneuvers is the invisibility of the final beneficiaries who operate in the shadow of the investment managers. This invisibility has proven advantageous in the case of the holders of Ecuadorian debt, who are direct beneficiaries given that Ecuadorian bonds are currently trading above 28% [33] due to the increase in oil prices and the surge of optimism that followed the victory of Guillermo Lasso and the success of his vaccination plan. The those in favor quote the following:

The Ashmore Group, one of the biggest owners of Ecuador’s debt, is holding on to its bonds, encouraged by Lasso’s pledges to shore up the economy. “We still find it attractive but it’s not cheap anymore,” said Gustavo Medeiros,

deputy head of research at Ashmore. “It’s hard to be short or underweight in a bond with such high yields in a country that’s doing the right thing.” [33]

In ‘subway’ globalization, states do not participate in the regulation of financial derivatives, which is the responsibility of the international Swaps and Derivatives Association (ISDA), not even falling within the scope of the Financial Stability Board in which the G20, the IMF and the OECD participate. It is apparatuses such as these that operate opaquely and may even facilitate IFFs.

In the Global South, economic systems may have elements that function in conjunction with political systems, even operating against their own interests when they facilitate the outflow of capital: as Keynes said, in that case macroeconomics ceases to make sense. In other words, the global system operates to the detriment of the Global South, and this can generate instability in the system as a whole, as happened in the crisis of 2008, while in countries of the Global South such as Ecuador, the law is applied as is convenient with no expected benefit on better debt conditions and so on.

In Ecuador there is an imaginary differentiation of institutions. Some bondholders, such as the international financial markets that impose their positions through the risk rating agencies and the investor risk rating of each country,¹¹ operate on the level of the ‘subway’ globalization mentioned above. In effect, this latter characteristic makes these institutions little more than imaginary, while the interpretation of local norms is governed by informality and systemic corruption, as already explained.

On the local level, this ‘subway’ globalization had the effect that Ecuadorian workers were exposed to asymmetric negotiations with their employers on the basis that “reality has surpassed legality”, and forced to accept the new conditions described above.

In the area of debt, criteria of collective future welfare were used, while in the labor sphere the individualization of the worker was resorted to, in a type of disciplining and partitioning of bodies, as analyzed by Wagner, Matulewska, & Marusek [34], and of course, as a form of punishment.

This differentiated application of law at the local and international level, demonstrates the opportunistic application of norms and concepts regarding what is to be respected and what not. This is accepted in the same way as provisions to avoid further contagion are complied with, and recommendations obeyed as if in a modern panopticon.

The docile bodies subordinate themselves to recommendations and orders, adapt to the life in a modern panopticon and accept immobility. They do it because they are able. The conflicting bodies relegated to the sidelines of economic, social and family lives either rebel against inequality or give up and try to persevere. Those whose survival is threatened must oppose, fight and make their struggle visible [34]. A debt negotiation with extortionate clauses is distant and assumed to be unrelated to the causes for which people were dismissed. The one was legal and successful,

¹¹ ECLAC is promoting a public investment risk rating agency.

the other necessary and required by a reality that had 'surpassed legality'. The consequences are not quite so distant, however, and in highly informal environments such as those in Latin America [35], those who have lost formal employment can be considered in this way as second class, while those on the outside fight for their survival.

In short, external regulation is protected to ensure the payment of the foreign debt and thus legitimize its use, even though costs are higher than internal debt, and in this way restrict local sovereignty. As mentioned by King & Samaniego (2020), this may cause local capital to mimic external capital in order to obtain its benefits.

If external debt is guaranteed and the internal debt is not, capital holders will withdraw resources and lend them from abroad, an operation known as 'capital round-tripping' (Beja, 2005). This is even clearer when the debt holders are the banks themselves. [2]

To obtain public approval for the implemented policies, especially those related to debt renegotiation, the economic authorities stated that "It was crucial for the government to maintain good relations with the IMF" [36] as even the country's non-cooperation with the Fund can be considered as debt default.

In this way, existing pressures are used to legitimize an economic policy that contradicts the interests of the Ecuadorian State in order to maintain governability and the political system (and to maintain communications related to the symbolically generalized means of communication power). This is an expression of imaginary differentiation: on the basis of an effective de-differentiation in favor of informal networks maintained by the local elite, the State—controlled by this same elite—acts as if it were interested in maintaining its capacity to act in the future. But this is not in reality a matter of State interests, but rather the interests of an informally organized elite. Criticism of the State for an inconsistent policy is therefore misdirected. Rather than criticizing the government for what it is doing, what needs to be investigated are the interests that government is responding to. For example, whether the interests are those of a particular political party seeking to increase its chances of winning elections, or whether they are interests that due to incompetence or inability to resist the elites or other interests that control it, could destroy the very political party that is putting a policy into practice in parliament and government.

6 Conclusions

Ecuador is characterized by an imaginary differentiation of the State-politics-legality plexus. While at first glance, and formally, the three instances are separate and autonomous, there are in fact barely visible individual networks that breach this autonomy. This affects the processes of sense-making around the State—to the inside, the informal and invisible structures are clear and well-known, but to the outside, decisions are presented as defined by the logics of the different functional systems and not by the interests of individual networks. The Covid-19 crisis was, for these structures, the ideal opportunity to impose their interests, interests that are

not guided by the State, politics or law, but by informal networks of the country's elites. In this way, the crisis has strengthened the lack of differentiation in Ecuador and increased the influence of informal networks, and has even demonstrated power abuses such as the disrespect for constitutional norms.

Sustaining the idea of institutional differentiation is therefore not possible: the same signs and events are judged on the one hand as external, and on the other as an opportunity to influence the priorities of the government of the day. In reality this corresponds to those same interests that are hidden behind 'making the best decisions for the economic system' under the pretext of the interests of the majority, when in reality they are the interests of bondholders whose identity is hidden.

The purpose is to maintain an external formality that veils underground informality and even obscure practices. What can be said in terms of the present external situation, is that the country risk indices show a deterioration since 2020 and formal hiring was reduced in 2020. The visible winners were bond holders, and the visible losers were the workers. But the official discourse could make people believe that these decisions were actually taken in order to benefit them.

Covid-19 has therefore not only left Ecuador with thousands of deaths and thousands of bankruptcies, but also a crisis of statehood that will not be overcome in a long time. Without overcoming this crisis, a more robust defense against the next pandemic [30] -and to a much lesser degree, bringing about a reduction of inequality- will not be possible.

Author contribution All authors contributed to the study conception and design. Material preparation and analysis were performed by Katuska King and Philipp Altmann. Data collection and data analysis were performed by Katuska King. The first draft of the manuscript was written by Katuska King and all authors commented on previous versions of the manuscript. All authors read and approved the final manuscript. This article was written in the context of a Covid-19 UCE research project.

Funding The authors did not receive support from any organization for the submitted work.

Data availability Data are public at <https://www.icpsr.umich.edu/web/pages/deposit/index.html> in the project "openicpsr-151241", <https://www.openicpsr.org/openicpsr/workspace?goToPath=/openicpsr/151241&goToLevel=project#>

Code availability Not applicable.

Declarations

Conflict of interest The authors declare that they have no conflict of interest.

Reference

1. King, Katuska, and Pablo Samaniego. 2019. A río revuelto, ganancia de varios pescadores. *Ecuador Debate*. 106: 17–34.
2. King, Katuska, and Pablo Samaniego. 2020. Ecuador: Into de abyss thanks to the structural adjustment policies of the Extended Fund Agreement with the IMF. *Cuadernos de Economía*. 39 (80): 541–566.

3. Altmann, Philipp. 2020. Eleven days in October 2019 – the indigenous movement in the recent mobilizations in Ecuador. *International Journal of Sociology*. 50 (3): 220–226.
4. Velasco, Margarita, Hurtado, Francisco, and Jesus Tapia. 2020. Estaba preparado el sistema de salud para enfrentar la pandemia?. Quito: Observatorio Social del Ecuador—FES Ildis. Available from: <https://www.covid19ecuador.org/post/salud-publica-pandemia-1>
5. Davies, William, and Nicholas Gane. 2021. Post-neoliberalism? An introduction. *Theory, Culture & Society*. 38 (6): 3–28.
6. de Sousa Santos, Boaventura. 2011. Epistemologies of the South. *Etudes rurales*. 187 (1): 21–49.
7. Luhmann, Niklas. 1998. *Die Gesellschaft der Gesellschaft*. Frankfurt am Main: Suhrkamp.
8. Morales, Francisco X. 2021. Society and the moral semantics of the COVID-19 pandemic: a social systems approach. *Kybernetes*. <https://doi.org/10.1108/K-11-2020-0762/full/html>.
9. Berger, Peter L., and Thomas Luckmann. 1990. *The social construction of reality: A treatise in the sociology of knowledge*, 219. New York: Anchor Books.
10. Luhmann, Niklas. 1977. Differentiation of society. *Canadian Journal of Sociology / Cahiers canadiens de sociologie*. 2 (1): 29.
11. Luhmann, Niklas. 1982. The world society as a social system. *International Journal of General Systems*. 8 (3): 131–138.
12. Mascareño, Aldo, and Daniel Chernilo. 2012. Obstáculos y perspectivas de la sociología latinoamericana: universalismo normativo y diferenciación funcional. In *La teoría de los sistemas de Niklas Luhmann a prueba: horizontes de aplicación en la investigación social en América Latina. Primera edición*, ed. M. Estrada Saavedra and R. Millán, 25–68. México, D.F: El Colegio de México, Universidad Nacional Autónoma de México, Instituto de Investigaciones Sociales.
13. Neves, Marcelo. 2012. Komplexitätssteigerung unter mangelhafter funktionaler Differenzierung. In *Durch Luhmanns Brille: Herausforderungen an Politik und Recht in Lateinamerika und in der Weltgesellschaft*, ed. P. Birle, M. Dewey, and A. Mascareño, 17–27. Wiesbaden: Springer VS.
14. King Mantilla, Katiuska. 2021. Hacia una analítica de los flujos financieros ilícitos América Latina, 2000–2017 [Tesis doctoral]. [Bilbao]: Universidad del País Vasco. Available from: <https://addi.ehu.es/handle/10810/51071>
15. Davies, William. 2021. The revenge of sovereignty on government? the release of neoliberal politics from economics post-2008. *Theory, Culture & Society*. 38 (6): 95–118.
16. Galtung, Johan. 1969. Violence, Peace, and Peace Research. *Journal of Peace Research*. 6 (3): 167–191.
17. King, Katiuska. 2016. *Scopy Study on International Architecture*. Quito: Latindadd.
18. Díaz Inverso, Rodrigo. 2015. El estado de necesidad como circunstancia que excluye la ilicitud en la responsabilidad internacional de los Estados. *Revista de Derecho Público*. 24 (47): 49–68.
19. Ministerio de Economía y Finanzas. 2020. Base de datos Boletín de Deuda marzo. Quito: Ministerio de Economía y Finanzas; 2020 Mar [cited 2020 Oct 27]. (Boletín de Deuda). Report No.: marzo 2020. Available from: <https://www.finanzas.gob.ec/wp-content/plugins/download-monitor/download.php?id=9741>
20. Ministerio de Economía y Finanzas. 2020. Base de datos Boletín de Deuda abril. Quito: Ministerio de Economía y Finanzas; 2020 Apr [cited 2020 Oct 27]. (Boletín de Deuda). Report No.: abril 2020. Available from: <https://www.finanzas.gob.ec/wp-content/plugins/download-monitor/download.php?id=9796>
21. Ministerio de Economía y Finanzas. 2020. Base de datos Boletín de Deuda junio. Quito: Ministerio de Economía y Finanzas; 2020 Jun [cited 2020 Oct 27]. (Boletín de Deuda). Report No.: junio 2020. Available from: <https://www.finanzas.gob.ec/wp-content/plugins/download-monitor/download.php?id=9953>
22. The Republic of Ecuador. 2014. Prospectus—Offering Circular. Available from: <https://dl.bourse.lu/dl?v=Ta9G/irkm4OlxAN/bJZSstPtzwB62PFeO97X2nGZSn8cR649v3lseXlbzvASpm/4ss6V8lbrokOx8RzPALlqpwYbcQ9braHMkOQpfnYgmQkIwWYNcOeEIFU12MzMI0epQLwjDocoLljb+rKfG4LkfUYIwRbFnE/Sxa3RApMg4E=>
23. The Republic of Ecuador. 2019. Prospectus—Offering Circular. Available from: <https://dl.bourse.lu/dl?v=/FeAc4uFb8DJKcjmAl+klaHjqDNvmEwQIIgX8d97PubCY2DGu7r6zUKBmURTQdpaQABN1RqnmjYp+OxPUZrHsJHhUMeqeWAaHDW4lVAtCDqrYYMyV/SI/7CXE5moVX0umWGFco/trqv8XhNdPKGVbLnVxhFe/yEavSX4vmM0oDM=>
24. King, Katiuska. 2020. El pago de los Bonos 2020. Available from: <https://www.katiuskaking.com/2020/03/24/el-pago-de-los-bonos-2020/>

25. Orozco, Mónica. 2020. Finanzas liquidó dos operaciones de deuda con Goldman Sachs y Credit Suisse en abril. El Comercio. Available from: <https://www.elcomercio.com/actualidad/negocios/finanzas-liquidacion-deuda-goldman-sachs.html>
26. Corte Constitucional. 2020. Sentencia No. 37–20-IS/20. Acción de incumplimiento respecto del Dictamen No. 1–20-EE/20 Aug 31, p. 44. Available from: http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhenBldGE6J3RyYW1pdGUlNCB1dWlkOic3ZjA4MzExYS0zZGRILTRlOTYtYTk3YS03ODkzNDY0ZjlyMDEucGRmJ30=
27. Asamblea, Constituyente. 2008. *Constitución de la República del Ecuador*. Montecristi: Registro Oficial.
28. El 11 % de venezolanos tiene contrato en Ecuador. El Universo. Agenda noticiosa del miércoles. 2020 Jan 22 [cited 2021 Jul 20]; Available from: <https://www.eluniverso.com/noticias/2020/01/21/nota/7702065/agenda-noticiosa-hoy-miercoles-22-enero-2020-ecuador>
29. León Cabrera, José María. 2019. La xenofobia en Ecuador empuja a migrantes venezolanos a salir del país. *The New York Times*. 2019 Jan 28 [cited 2021 Jul 20]; Available from: <https://www.nytimes.com/es/2019/01/28/espanol/ecuador-ibarra-venezolanos.html>
30. Doliwa-Klepacka, Anna, and Mieczysława Zdanowicz. 2020. The european union current asylum policy: selected problems in the shadow of COVID-19. *International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique*. <https://doi.org/10.1007/s11196-020-09744-3>.
31. Procuraduría General del Estado. 2020. Oficio 10669. Quito: Procuraduría General del Estado
32. Shiller, Robert. 2021. *Narrativas económicas : cómo las fake news y las historias virales afectan la marcha de la economía*. Barcelona: Deusto
33. Vizcaino María Elena, and Stephan Kueffner. 2021. Ecuador Defaulted Last Year. Now Its Bonds Are World's Best - Bloomberg. Available from: <https://www.bloomberg.com/news/articles/2021-08-02/ecuador-defaulted-last-year-now-its-bonds-are-the-world-s-best>
34. Wagner, Anne, Matulewska, Aleksandra, and Sarah Marusek. 2021. Pandemica panoptica: biopolitical management of viral spread in the age of Covid-19. *International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique*. <https://doi.org/10.1007/s11196-021-09821-1>.
35. Aguilera, Roberto. 2020. COVID-19 in Latin America: were we doomed from the start? | LSE Latin America and Caribbean. LSE Latin America and Caribbean blog. Available from: <https://blogs.lse.ac.uk/latamcaribbean/2020/08/19/covid-19-in-latin-america-was-the-region-doomed-from-the-start/>
36. Here we go again. *The Economist*. 2021 Mar;57–8.

Legislation

1. Acuerdo ministerial MDT-2020–221, [Ministerial Agreement MDT-2020–221] 30 de octubre de 2021: <https://www.trabajo.gob.ec/acuerdos-ministeriales/>. Last Accessed on 17 July 2021.
2. Código del Trabajo [Labor Code] <https://www.trabajo.gob.ec/wp-content/uploads/downloads/2012/11/C%C3%B3digo-de-Trabajo-PDF.pdf>. Last Accessed on 17 July 2021.
3. Constitución de la República del Ecuador [Ecuadorian Constitution], 2008, 20 de octubre 2008: <https://www.gob.ec/regulaciones/constitucion-republica-ecuador-2008>. Last Accessed on 17 July 2021.
4. Corte Constitucional. Sentencia No. 37–20-IS/20., 37–20-IS/20 Acción de incumplimiento respecto del Dictamen No. 1–20-EE/20 § (2020), 31 de agosto de 2020: http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhenBldGE6J3RyYW1pdGUlNCB1dWlkOic3ZjA4MzExYS0zZGRILTRlOTYtYTk3YS03ODkzNDY0ZjlyMDEucGRmJ30=. Last Accessed on 17 July 2021.
5. Ley Orgánica de Apoyo Humanitario para combatir la crisis sanitaria derivada del Covid-19 [Humanitarian Support Bill], 19 de junio de 2020: <https://www.registroficial.gob.ec/index.php/registro-oficial-web/publicaciones/suplementos/item/13070-suplemento-al-registro-oficial-no-229>. Last Accessed on 20 July 2021.

Websites

1. Torres, Wilmer. 2019. Ashmore Group interesado en invertir en monetización de activos en Ecuador. *Primicias*. <https://www.primicias.ec/noticias/economia/ashmore-group-invertir-ecuador/>. Last Accessed on 8 August 2021.
2. King, Katuska, 2020. El pago de los Bonos 2020. <https://www.katiuskaking.com/2020/03/24/el-pago-de-los-bonos-2020/> Last Accessed on 15 August 2021.
3. Orozco, Mónica, 2020. Finanzas liquidó dos operaciones de deuda con Goldman Sachs y Credit Suisse en abril. *El Comercio*. <https://www.elcomercio.com/actualidad/negocios/finanzas-liquidacion-deuda-goldman-sachs.html> Last Accessed on 16 June 2021.
4. Rueda de Prensa Richard Martínez, min. de Finanzas y Juan Sebastián Roldán, secretario de Presidencia <https://www.youtube.com/watch?v=fFiUgYWAIV4> Last Accessed on 30 July 2021
5. King, Katuska, 2014. El ping pong de las operaciones en los mercados internacionales <https://www.katiuskaking.com/2014/06/18/el-ping-pong-de-las-operaciones/> Last Accessed on 15 September 2021.
6. King, Katuska, and Pablo Samaniego, 2019. The crisis narrative of Ecuador's Lenin Moreno has obscured the real winners and losers of recent economic policy [Internet]. LSE Latin American and Caribbean blog. Available from: <https://blogs.lse.ac.uk/latamcaribbean/2019/09/12/the-crisis-narrative-of-ecuadors-lenin-moreno-has-obscured-the-real-winners-and-losers-of-recent-economic-policy/> Last Accessed on 15 June 2021.

Publisher's Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.