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# La adhesión a la apelación en el proceso civil peruano: nuestra propuesta a propósito del Proyecto de Reforma del Código Procesal Civil peruano*

## *Adesão ao recurso no proceso civil peruano: Nossa proposta a respeito do Protejo Reforma do Código Civil peruano*

**Arturo Saúl Grau Castillo****

**Resumen:**

La presente investigación versa sobre una figura no muy novedosa al provenir de la antigua Roma, pero sí muy controversial como es la adhesión a la apelación en vista a que no existe un acuerdo paritario respecto de los límites objetivos de esta. En ese sentido, el objetivo principal a resolver mediante este trabajo es acercarnos a los límites objetivos de la figura denominada como adhesión a la apelación y analizar si es que al considerarla desde una visión amplia al impugnar extremos no apelados se contravendría principios y derechos procesales como la cosa juzgada y preclusión, igualdad procesal y buena fe. Sumado a ello, se toma una posición y se esboza cual sería nuestra justificación del porqué en el Proyecto de Reforma del Código Procesal Civil peruano se ha decidido eliminarla, comentando cada una de las posiciones que, por el contrario, han buscado mantenerla en los ordenamientos.
**Palabras clave:** Adhesión a la apelación. Cosa juzgada. Preclusión. Igualdad procesal. Buena fe procesal.

***Resumo:***

*Oriunda de Roma, a presente investigação trata de uma figura que não é muito nova, mas é bastante polêmica, assim como a adesão ao recurso, haja vista que não há acordo conjunto quanto aos seus limites objetivos. Nesse sentido, o principal objetivo a ser resolvido por meio deste trabalho é abordar os limites objetivos da adesão ao recurso, bem como analisar se considerar, sob uma visão ampla, que fins não recorridos violariam princípios e direitos processuais, como a coisa julgada e preclusão, igualdade processual, e boa-fé. Somado a isso, toma-se posição e apresenta-se nossa justificativa do motivo pelo qual o Projeto de Reforma do Código de Processo Civil Peruano optou por eliminá-la, comentando cada uma das posições que, ao contrário, buscaram mantê-la nos sistemas jurídicos.*
***Palavras-chaves:*** *Adesão ao recurso. Coisa julgada. Preclusão. Isonomia processual. boa-fé processual.*

## 1 Introduction

In the field of procedural challenges, adhesion is usually a figure that causes a lot of controversy because it should not be understood in its conventional meaning of joining or helping a party, but through it the challenge is allowed despite the fact that the term to appeal a judgment or order that causes injury has elapsed.

* Artigo traduzido por Inteligência Artificial.

** Maestrando en Sistema de Justicia y Racionalidad por la Universitat de Girona y la Università Degli Studi Di Génova. Abogado con mención por la Pontificia Universidad Católica del Perú.. Fue adjunto de docencia en los cursos de Responsabilidad civil y Postulación al Proceso. Código ORCID: 0000-0001-5854-9088. Correo electrónico: arturograu7@hotmail.com.

In addition to this, the substance in the investigation of this figure is that in the first place there is no regulation in the Peruvian Code of Civil Procedure that approaches the objective limits of this figure, all this added to the fact that in the second place at the level of the doctrinal and jurisprudential formant no agreement has been reached on whether with the cross-appeal it is possible to appeal unappealed extremes.

Without prejudice to the discussion on the meaning and limits of this figure, considering it as autonomous from the appeal and, as long as it can be appealed, even extremes that have not been appealed entails a violation of a series of procedural principles and rights such as res judicata and preclusion, procedural equality and the principle of good faith in proceedings.

For this reason, this work has been divided first on the history of the adhesion to the appeal, then on the adhesion to the appeal in the evolution of the Peruvian Civil Procedure Code and the conflicts that it has generated in the legislative, doctrinal and jurisprudential forms to define it and approach its objective limits. Thirdly, the principles and procedural rights that are violated by allowing this figure in our legal system will be addressed and, as a fourth chapter, our opinion will be given on the Draft Reform of the Peruvian Civil Procedure Code where we propose its elimination for being an unconstitutional figure.

## 2 Brief history of cross-appeal

The adhesion to the appeal is a very old figure that has its remote origin in the Constitution *Ampliorem* dictated by Justinian at the end of the first third of the sixth century. At this time, Justinian introduced the "principle of community" – which would dominate for a long time in Western legal culture – in resources, replacing the "principle of personality" as an individualistic conception of the Principate and the Late Empire.

As Loreto (1958) rightly states, in Roman law prior to the publication of the Ampliarem Constitution , in the second instance only the taxes denounced by the appellant could be taken into account in the decision, so that the appellee could never obtain a reform in his favor (personal effectiveness or principle of personality). However, Justiniano admitted to reform the judgment appealed only by the appellant even when the appellee had allowed the period to challenge to elapse, provided that the latter appeared and requested the reform of the judgment, in addition, the reform in favor of the non-appellant was allowed in cases of contumacy, resulting in the fact that in this second case the judge was not necessarily obliged to rule against the one who did not appeal and fell into contumacious (principle of community).

In this sense, in the *Ampliarem* Constitution of 530 A.D., a full devolutive effect could be observed because the appeal transferred to the judge of the second degree the full knowledge of what was decided by the *a quo* or judge of the first degree, thus opening the possibility of modifying the appealed sentence not only in favor of the appellant but also of the appellee. even if the defendant is absent or in default throughout the second instance proceedings.

For this reason, the ahesion to the appeal could have its essence in the old Justinian regulation, specifically in Law 39 of the *Appellationib Code*, which expressed the following:

> More careful, perhaps, than they themselves in providing for the interests of our subjects, we have thought it our duty to correct for their benefit a custom hitherto observed, which is, that in appeals only the appellant had the right to correct the sentence, while his adversary who had not appealed was bound to carry it out whatever the tenor of the sentence might be. That is why we order that once the dispute has come to the attention of the appellate judge by the appellant, his adversary may, after the appellant has stated his grievances, challenge the judgment if he does so in time, even if he has not appealed, and have his conclusions admitted if the judge finds them to be in accordance with the law and justice. If the non-appellant is absent, the judge must nevertheless look after his interests.

Casarino Viterbo (1984) states that after the time of Justinian, the Gloss written on the *Ampliarem* Constitution opened the debate on this figure that allowed a reform for the worse of the appellant. Therefore, it is that in intermediate law, modern and contemporary times, the cross-appeal appears and disappears, in view of the existence of diversity of opinions, such as those against and in favor of it.

However, Guasp (1956) states that the expression "adhere" was used by Spanish pragmatists, especially the Count of Cañada, who broadened its meaning to designate a contrary appellation. This was perhaps the beginning of this terminology of "adhesive appeal" or "cross-appeal", which had not been used before because in the time of Justinian, although it was the remote origin of the adhesion, it was not used with that denomination, but only the reform of the sentence in the worst of the appellant was allowed. In addition to this, in the canonical sources the term *"adhaerentes" was used* to denote the support of an intervenor to the appellant against the opposing party (the appellee), that is, it was used in its classic meaning which is "to join" and not in the sense in which it is used today.

In contemporary law, it is necessary to start from Spanish law where the cross-appeal was included in Article 734 of the Civil Procedure Law (hereinafter LEC) of 1881, which states that once the appeal has been admitted, the judge will notify the other parties so that they can file their response or cross-appeal briefs within a maximum period of 5 days.

Years later, as Montero Aroca and Flors Matíes (2005) point out, with the LEC of 2000 there is no longer any talk of "adhesion" to the appeal, but this term has been replaced by that

of "challenge of judgment by someone who had not initially appealed" to be raised within a maximum period of 10 days from the notification of the appeal. regulated in numerals 1 and 2 of Article 461.

In Spain, with respect to the objective limits of this figure, that is, on whether it can adhere only to the appealed or if it can even go further, there is a parity of development in the doctrinal and jurisprudential formants, by understanding it in a broad and autonomous way to be able to adhere and raise a challenge on everything that causes injury and not only to the extremes appealed[4].

On the other hand, in Italian law, the appeal is an ordinary remedy, which is decided by the *Corte di appello.* In the *1940 Codex of Civil Procedure*we can find in the first place the main appeal, which is filed by any of the parties within the period established for it. Secondly, Chiovenda (2008) points out that the cross-appeal refers to that challenge that is used by the appellant's lis consort, so it is not a means of challenging the appellee against that of the appellant.

On the basis of what has been stated above, in Italy the figure analysed in this text is not called cross-appeal, but by virtue of Article 334 of the 1940 Code of Civil Procedure the term "late incidental challenge" is used to designate the proposed challenge even when the legally granted period has expired. but it is subordinate insofar as if the main appeal is declared inadmissible, the incidental appeal will also have the same fate.

With regard to objective limits, in Italy, although it used to be held historically that the late incidental appeal should only be limited to what was challenged by the main appeal, there is currently no parity in the jurisprudential formant with respect to these limits, as some have been resolved in favour of the autonomous vision[5] and others on a still restricted vision of accession[6].

## 3 Cross-appeal: conflictive development in peruvian law

We must start from the fact that this figure of cross-appeal was regulated in regulations prior to the current Code of Civil Procedure of 1993 (hereinafter CPC), such as the Code of

[4] Judgment of the Provincial Court of Huelva, No. 70 of 22 April 2005. Judgment of the Provincial Court of Málaga, No. 1026 of 27 April 2003.
[5]Cassazionecivile. Sez. V. Sentenza N°. 15292 of 21 Luglio 2015
[6]Cassazionecivile. Sez. III. Judgment No. 19284 of 12 September 2014

Civil Procedure of 1912[7] which in its article 1091 briefly referred to this figure under the following wording: "The co-litigant may join the appeal in the first instance or before the superior, as long as the appeal has not been resolved".

On this article 1091 of the old Code of Civil Procedure of 1912, Sandoval Courriolles (1981) comments that:

> It is the appeal made by one of the parties, after having appealed the opposite and can be filed before the same judge who ruled or before the Reviewing Court. It is a matter of dispute whether the cross-appeal subsists if the appellant withdraws from the main appeal. It is considered to subsist when the adhesion has been formulated within the term set for the filing of the appeal, since once it has been filed and the term has expired, it would be an extemporaneous appeal (1981, pp. 265).

In reference to the above, there is no clarity about this figure since it seems that it is a mere second-order appeal filed after a primal one, but within the deadlines established for the appeal; however, we consider that the best way to understand it as that challenge raised within 5 days from the notification of the appeal of judgments and 3 days if a decree was appealed that is not of mere substantiation or orders (by virtue of article 1097 of the Code of Civil Procedure of 1912).

However, on the limits of this figure, Ferrer Guzmán gives us an indication when he points out the following: "As long as the appeal has not been resolved, there is no reason why the one who did not appeal cannot join the appeal granted to his opponent, as long as this does not disturb the substantiation of the second instance" (1969, p 849). In this sense, it could be understood that the cross-appeal in the old code was seen from a restricted approach since it could not disturb or modify the substantiation of the instance, that is, expand what was raised or discussed by the appeal originally filed.

In the opposite position is Pino Carpio, who points out the following: "The cross-appeal presupposes a diversity of interests between one party and the other, because if this does not happen, the cross-appeal does not proceed. The litigant who joins must therefore indicate from which part of the order or judgment he is appealing, or express that although his claim has been admitted, it has not been accepted in its entirety, (...)" (1965, p. 314). With this explanation about adhesion, it can be seen that this figure regulated in Article 1091 of the Code of Civil Procedure of 1912 did not exist clearly on the objective limits, since on the one hand some doctrinaires of the time argued that it cannot be extended to non-appealed extremes because

[7] In a very similar way to the Code of Civil Procedure of 1912, in the first Peruvian republican procedural code, "Code of Procedure in Civil Matters of 1852", the figure of adhesion was regulated in its article 1666 with the following content: "The co-litigant has the right to join the appeal, so that the superior may amend the order or sentence, in the part or parts that harm him".

this disturbed the substantiation of the second instance and, From the opposite position, others extend it to all extremes that cause injury and even point out that raising an adhesion with the same interests as an appeal entails its inadmissibility as the diversity of interests raised in these two appeals being a requirement.

For its part, at present our CPC grants the person against whom the appeal of the judgment or order is directed, who could also appeal and did not do so, the opportunity to join the appeal filed against him; despite this, there is no reference to its scope or breadth, as can be seen in Articles 373, 376 and 377 of the CPC.

In order to approach and discuss the scope of this figure for a better regulatory application, there have been positions in favor of the breadth of the cross-appeal and others that promote, on the contrary, a restrictive scope of this figure. Referring to adhesion could lead us to argue that an appeal would be admitted or supported, but this is not the case because unlike a literal meaning of the word adhere, in our legal system it can be concluded that the term adherence entails taking advantage of the appeal filed against it to also question the judgment or order originally challenged.

Regarding the position of cross-appeal from a broad perspective, Cavani (2018) points out that cross-appeal is strictly an appeal by the party that did not appeal within an initial period of time and that the purpose of this is for the judge to rule not only on the limits raised in the appeal, but also on the limits set out in the appeal. but also those expressed by the appellee (now adherent to the appeal). Therefore, it states, the cross-appeal would mean questioning unappealed points, since – otherwise – it would be nothing more than a mere acquittal of grievances.

In this same broad position, Ariano (2009) points out that cross-appeal is an appeal filed after its expiry, and also indicates that referring to whether there is any objective limit to cross-appeal is pertinent since, if a judgment is not appealed, it is consented to and, based on that idea, it would mean limiting itself only to what was appealed. However, in its position, any limitation on adherence must be a consequence of express regulation, therefore, any unregulated restriction would be arbitrary.

Lama More (2004) also argues, from a very particular position, that although the CPC has not expressly indicated its scope, this regulatory compendium gives indications of its autonomy of appeal since, in his opinion, according to Article 370 of the CPC, the judge cannot modify the judgment against the appellant, unless the appellee has adhered, which would go

against what is known as the prohibition of *reformatio in peus*[8]. This author also stresses that, because Article 373 of the CPC allows the adhesion to subsist even when the appellant has withdrawn, they lead to consider that the adhesion is an autonomous or broad figure.

In the opposite position we can find Cruz Lezcano (2008) who comments that the cross-appeal must be treated from a restrictive point of view, that is, only extremes appealed by the initial appellant can be challenged. To support his position, he refers to the fact that in view of the fact that the deadline for appeal has already expired, so there should be no advantage and appeal points not appealed at the time. In addition to this, it is pointed out that the reason why the withdrawal of the appeal does not lead to the same consequence as the adhesion, is explained by the fact that the superior judge only resolves with respect to initial points and not to the disadvantage of the appellant.

Villa García adds to this restricted position, for whom: "(...) The appeal of cross-appeal empowers the *ad quem* to resolve by aggravating the situation of the appellant with respect to the point or points that were the subject of the appeal. It does not empower it to rule on those other points that were not the subject of the appeal because, since they were not challenged in a timely manner, they were consented to and acquired the quality of res judicata" (2015, p. 443).

As we can see, there is no unitary position in the doctrinal field on this figure and they even use the same arguments, but from divergent convictions or positions. Will there be uniformity in the jurisprudential formant? The answer is a resounding no, because there have been various opinions at the jurisprudential level on the limits of the appeal.

In the first place, we find the decision in Cassation No. 1056-2003-Camaná, the Civil Chamber of the Supreme Court starts from a broad vision of this figure by expressing in its second recital the following:

> The procedural figure of cross-appeal is that institute that takes place when a judicial decision is issued that causes injury to both parties, so that once the corresponding appeal has been filed and granted, the other party or its representative may join it, requesting, **like the appellant, that the contested decision be modified or revoked in so far as it is offensive or detrimental to the adherent and on the basis of the latter's own grounds or, even, of that invoked by the appellant**. The appeal for cross-appeal may be lodged with the judge of first instance, that is, after the concessionaire has been notified of the appeal

On the other hand, in Cassation No. 1066-2006-Lima, issued on May 8, 2007, by which the appeal filed by the defendant Inmobiliaria y Constructora Residencial S.A.C. was declared

[8] Regulated in Article 370 of the CPC, which states that the Judge of Second Instance is prohibited from modifying in his resolution the situation in which the appellant finds himself when filing his appeal. That is, the judge may confirm the judgment of the first instance or revoke/annul the extremes or sub-extremes that are part of the appeal, with this the appellant should not fall into a worse situation than the one he had before appealing.

to be well-founded, who had taken advantage of the plaintiffs' appeal on the unfounded point of the compensation and joined with respect to the point that declared the claim for nullity of legal acts to be founded. However, the Supreme Chamber annulled the judgment of the hearing and modified the thinking on the figure of adhesion, since the judges of second instance considered that the adhesion could not be invoked to unappealed extremes. In this sense, the Supreme Chamber in this judgment leans towards the broad position of the cross-appeal:

> **Fifth**. - That the civil procedural system does not regulate the concept of adhesion or the scope and objectives thereof, but neither does it limit it (....)
> **Sixth**.- That, by virtue of this, in the light of the doctrine and the provisions of the Code of Civil Procedure, **it can be concluded that the law grants a new opportunity through adhesion** to the party that has been partially defeated or that has partially expired, who did not appeal the judgment of the A Quo but his opposing party did, **to also question the appealed judgment in the extremes that offend it and that logically differ from those of the challenger**; which means that the Reviewing Chamber is obliged to rule not only on the grievances presented by the challenger but also on those introduced by the adherent (...) (The shading is ours).

On the other hand, we can find the judgment of August 10, 2010 in Cassation No. 4915-2008-Lima, by which the cassation filed by Stephen Thomas Quiroz Franckowiak, in his capacity as procedural successor of the deceased Manuel Quiroz Haro, is declared to be founded, alleging contravention of res judicata for having revoked in the second instance the point that had been declared unfounded in the first instance corresponding to the counterclaim against Manuel and Esther Quiroz, based on unappealed points.

It should be noted that Mrs. Francisca Gudelia Rivas Sagastizabal had counterclaimed, requesting that she be paid 300 thousand in compensation for suffering burns and that this be directed not only against the Santa Lucía Clinic but also against Manuel and Esther Quiroz. However, the judgment of first instance only declares the amount of compensation of 45 thousand dollars to be partially founded and unfounded that the counterclaim is directed against Mr. and Mrs. Quiroz. In view of this, the Clinic appeals only with respect to the sub-extreme of the 45 thousand dollars declared founded and Mrs. Rivas Sagastizabal adheres to and challenges the extreme declared unfounded and the sub-extreme unfounded of the 355 thousand dollars. Thus, the Supreme Court considers that what was resolved in the second instance falls into error since it is not possible to resolve unappealed points according to the following explanation:

> **Sixth**.- From the foregoing, it can be seen that the grievances of the challenger in that he maintains that the respondent infringes the principle of res judicata are only acceptable with respect to the point not appealed by the party to whom the decision was unfavorable, that is, the extreme of the judgment of the first instance on folios two thousand three hundred and twenty-one, dated November twenty-first, two thousand and five, which declared the counterclaim against Mr. Manuel Quiroz Haro

> and Mrs. Esther Quiroz Haro unfounded, that is, the counterclaimant Mrs. Francisca Gudelia Rivas Sagastizabal did not challenge said point of the aforementioned judgment that was adverse to her and that is also not prejudicial to the appellant; **This being the case, the decision issued by the A-quo in this regard is final because in due course the person who had the legitimacy and interest to appeal tacitly declined to make use of his right to challenge.**
> (….)
> since it is clear that having expired the time limit for filing the appeal in application of the principle reformatio in peius, contained in the first part of Article 3706 of the Code of Civil Procedure, the superior judge cannot modify the contested decision to the detriment of the appellant and in the particular case, although Ms. Francisca Gudelia Rivas Sagastizabal joined the appeal, **Such an adhesion by its very nature implies that the party that did not appeal adheres to the appeal of its adversary, insofar as it is unfavorable to it, a situation that is not configured in the file, as regards the aforementioned point of the judgment, since as noted above "the contrary would mean protecting a negligent attitude of the losing party to be able to question the judgment despite having allowed the period to elapse to appeal it" and without losing sight of the fact that our civil procedural system is of a preclusive nature, the same that is developed in stages and by virtue of which it is not possible to return the process to a previous stage that was overcome" (the shading is ours).**

Finally, the autonomous or broad nature of the adhesion is taken up with the judgment handed down in Cassation No. 1430-2016 in which it is resolved to declare unfounded the appeal of cassation filed by the defendants José del Carmen Rodríguez Rosas and Doris Victoria Sánchez Rosales de Rodríguez, since they state that the judge of second instance could not rule on unappealed points.

It should be noted that the appeal filed by the Notary Cesar Francisco Torres Kruger in the extreme that declared the first main claim founded and, meanwhile, the nullity of the first contract entered into between the plaintiffs, Ítalo Alegría Navarro and his spouse Rosa América Vidal Aurelio de Alegría, with the co-defendant Rosa Elvira Mantilla Paredes, arguing that there would be no liability in that regard. In view of this, the aforementioned plaintiffs proposed the adhesion and expanded on what was discussed, by challenging the points that had been declared unfounded regarding the other two contracts. In this way, the points that had been declared unfounded were revoked in the second instance and the first point that had declared the claim for nullity of the first contract founded was confirmed.

The point that we want to highlight the most is this change of vision that the supreme judges had when ruling on this judgment, which – without a doubt – differs from what was resolved in Cassation No. 4915-2008-Lima and resembles, or at least returns, to the broad vision as it was in what was resolved in the judgment handed down under Cassation No. 1066-2006-Lima. in accordance with the following recitals:

> **Fourteenth.-** That, the procedural figure of the **cross-appeal is that institute that takes place when a judicial resolution is issued that causes offenses to both parties**, so that once the corresponding appeal has been filed and granted, the other

> party or its representative may join it, requesting, **like the appellant, that the resolution in question be modified or revoked in what is offensive or prejudicial** for the adherent and based on the latter's own grounds or, even, that invoked by the appellant**. (…)**
> **Sixteenth.-** That, according to the reasoning of the foregoing, the appeal of adhesion is a remedy dependent on the appeal insofar as the cross-appeal may only be feasible to be filed when the term for challenging the judgment of first instance has expired for one of the parties and, however **, it will have the possibility of questioning the appealed judgment insofar as it is detrimental to it, in that understanding, the arguments of the appeal as well as the arguments of the appeal of cross-appeal, must be the subject of analysis by the Ad Quem**at the time of issuing the respective pronouncement on the merits. (the shading is ours).

Despite this last interpretation of the objective limits on the cross-appeal, the judges of Arequipa had a different view in what was developed on November 26, 2018 in the District Jurisdictional Plenary in Civil Matters and Civil Procedure because in the approach to their third issue "the competence of the superior derived from the admission of an appeal of cross-appeal" they concluded that the superior judge cannot modify Extremes of the judgment that were not appealed, that is, they returned to a restricted view of the cross-appeal.

From what has been analyzed, we can see that there is no parity in what has been resolved at the level of the jurisprudential formant; however, we consider that the cross-appeal should be seen from a broad and autonomous position, which extends what must be resolved by the superior judge as it is an appeal itself, but raised at a different time.

This is because, following Vescovi (1988), the only dependence of the adhesion on the appeal is precisely that it must first be appealed and then only the appellee can join. It also states that the very essence of this appeal for cross-appeal is precisely to bring to the second instance points that have not been appealed, since the one who did not appeal benefits from the original means of challenge filed by his adversary to challenge on the basis of the grievances caused by the judgment.

In addition to this, we agree that, if we were to define adhesion from a restricted perspective, it would be merely falling into the figure of an acquittal of grievances because only one response would be given to the appeal and this would also contravene the very essence of the adhesion to which we had already referred. We consider that this position is supported by what is reflected in the fifth paragraph of Article 373 of the CPC when it details that: "With the acquittal of the other party or the appellant if there was adhesion, the process is expedited to be resolved, with the declaration of the superior judge in this regard, indicating a day and time for the hearing of the case." That is to say, a cross-appeal cannot be a simple acquittal of grievances because, in our position, the process will be expedited to be resolved with the acquittal of the

other party and/or with the cross-appeal of the appellee, but not understanding the second as an acquittal of what was stated by the other party.

In the same way, we conclude that the cross-appeal is an appeal itself – perhaps not with exactly that same *nomen juris* – but that when it is raised, the same requirements of admissibility or admissibility must be met, by virtue of Article 367 of the CPC, as for an appeal properly speaking and that it cannot be restricted not only by the essence of the appeal of the same, but also because there is no legal limitation that exposes the objective aspects of it, so it would be arbitrary to see it as a mere acquittal of grievances.

## 4 Procedural principles and rights violated by the cross-appeal

### *4.1 Res judicata and estoppel*

We must start from what we understand by res judicata, which has as its normative premise Article 123 of the CPC which states that a decision acquires the quality of res judicata when: 1) No other means of challenge are admissible against it than those already resolved; or 2) when the parties expressly waive the right to file appeals or allow the time limits to elapse without formulating them.

From this aforementioned article of the CPC, as a first premise, it is clear that it can be concluded that if a party were to let the time pass to challenge by appeal that or those points that caused him injury, it would lead to there being consent and, therefore, res judicata with respect to those extremes.

On res judicata, Cavani states that it is a: "Legal situation that qualifies the judgment with a high degree of stability, precluding the possibility of new challenges in the same process, preventing the rediscussion of the same controversy in another process and must be taken as a preliminary ruling for the resolution of future litigation" (2018, p. 205). Therefore, res judicata is understood as a high degree of stability of the judgment arising from the effectiveness of the judgment, which would lead to a preclusion of the parties to appeal and other requests or acts, without being immutable.

Therefore, there is no doubt that by not challenging extremes or sub-extremes, there will be res judicata with respect to what is not appealed, since these have acquired stability by having expired the term for filing the appeal against them, which – in our opinion – should be prevented from rediscussion.

It should be noted that preclusion is a legal institution different from res judicata, but that it has a relationship with the latter. Saavedra Dioses (2016) points out that preclusion occurs when the litigant allows the period granted by law to correct or challenge to elapse, which leads to the fact that - due to this inactivity of the party itself - it entails an impossibility of being able to correct that defect or exercise the right since the preclusion is not temporary but definitive.

Along the same lines, Chiovenda (2008) points out that preclusion is a general institution that consists of the loss of a procedural faculty due to the fact that a limit established by law has been reached to exercise that power. In the specific case in which there is a definitive preclusion of the alleged issues, that is, when there is a judgment and, in one of the cases, it is not challenged, there will be a judgment with the authority of formal res judicata. Now, since res judicata contains the preclusion of any future discussion, it would be the effectiveness of material res judicata, that is, the obligatory nature or effect in future trials.

Without interfering in this difference of formal and material res judicata but only as considering res judicata as a high degree of stability of a judgment, we consider that properly by not appealing it, the power to challenge is precluded - by having allowed the period established by law to elapse - and, therefore, this leads to the formation of res judicata, since it results in the judgment having a certain degree of stability. In addition, it is necessary to ensure the outcome of the process in order to provide security for the disputed good or right.

On the other hand, by virtue of Article 146 of the CPC, the deadlines in our civil law are peremptory; For this reason, the legal term for appeal is precluded because automatically after the deadline has expired, there will be no possibility of continuing to exercise, in this case, those extremes not appealed when they should have been exercised will be consented to. In the same sense, we agree with Villa Garcia, for whom with the adhesion "(..) the parties are granted an additional opportunity to appeal the extreme or extremes of the judgment that cause them injury; It is also true that this additional opportunity that is granted must be interpreted in accordance with the peremptory and preclusive nature of the procedural terms and with the principle of res judicata that establishes that the resolution or point not challenged acquires the quality of final and immutable" (2015, p. 445).

Finally, with respect to the orders and as in articles 376 and 377 of the CPC it states that the adhesion can also go against orders, here we could not speak of res judicata since the substance of the controversy is not resolved as it is in the judgment; Notwithstanding the foregoing, we consider that failure to appeal an order within the specific period would lead to a preclusion, so that the appellee, if he were to adhere to extremes that caused him injury but

that were not grounds for appeal of the order, would contravene the principle of preclusion already detailed.

*4.2 Parity of arms and procedural equality*

In our Peruvian legal system, article 2, paragraph 2, of the Peruvian Constitution has provided for the constitutional principle of equality before the law. To speak properly of "equality" entails an arduous task to give it meaning; however, we can emphasize that in Peru, in addition to understanding equality as a principle without a specific rule but that structures our legal system, it has also been recognized as a fundamental right with horizontal effectiveness between private parties and, above all, with vertical effectiveness to be made effective before the public authorities, in order to respect and protect it.

Now, the highest interpreter of the Constitution of Peru, the Constitutional Court, in the resolution containing the Judgment issued under File 06135-2006-PA/TC on procedural equality or parity of arms, has expressed the following:

> The right to procedural equality or equality of arms derives from the systematic interpretation of Article 2, paragraph 2, (equality) and Article 138, paragraph 2 (due process), of the Constitution. In this sense, any proceeding, whether judicial, administrative or private, must ensure that the parties to the proceeding have the same opportunities to plead, defend themselves or prove, so that neither of them is disadvantaged with respect to the other. Such a requirement constitutes a component of due process since no process that fails to comply with this imperative can be considered "due.

On procedural equality, De vis Echan día comments that: "The equality of the parties in the process refers not only to the free exercise of the right of action and of contradiction, but also to having the same practical opportunities to assert them and to their adequate development throughout the process of the same, in terms of evidentiary debate, allegations, appeals, etc" (1995, p. 18).

In this sense, the right to equality has been translated into procedural law to eradicate any unjustified differential treatment and parity of conditions among litigants is sought. This can also be extracted from Article VI of the Preliminary Title of our CPC, through which the right to procedural equality emerges as an outstanding aspect of the socialization of the process.

In addition to this, it is a duty of the judge by virtue of article 50, paragraph 2 of the CPC to make effective the equality of the parties in the process. For these reasons, we consider that this right is violated by resolving taking into consideration points raised in the accession, which

will not only be affected by res judicata, but will also be formulated within a longer period, which undoubtedly benefits the adherents to the detriment of those who have appealed.

Along the same lines, as Cavani points out: "(...) with respect to parity of arms, since the adhesion is a genuine appeal, while the appellant has ten (or less) days to appeal, the counterparty could have several *months* (until the appeal is brought to his attention), without there being any real justification as to why he did not appeal at the time if the resolution had partially harmed him" (2018, p130).

In this way, the parties in a process must receive equal procedural treatment so that they can develop in the same way and under equal conditions. In this sense, let's take an example, if a judgment or order with reciprocal expiration is notified at the beginning of September to the parties, the deadline to challenge will run from its notification and they will have 10, 5 or 3 days to do so, so before the end of September the parties should have appealed. However, the adherent to the appeal will have a period to challenge from the notification of the judgment in September until he is notified of the appeal of his counterparty, which may be months apart.

So, is there equality or parity of arms by allowing a challenge with more benefits? The answer is no, because in practice the adherent will always have a longer period of time to file his challenge against the judgment that has caused him damage.

In the first place, regarding the cross-appeal of judgments we can differentiate: a) *cross-appeal in abbreviated and cognizance proceedings*, the appellee may join when acquitting the transfer of the appeal, which is granted a period of 10 days from notification of the appeal; b) *cross-appeal in summary and executive proceedings,* despite the fact that our CPC does not expressly regulate the deadline, in summary proceedings the procedure to appeal the judgment is the same as in the appeal of orders in accordance with article 558 of the CPC, so that according to article 376 of the CPC it may be joined within 3 days of notification with the original appeal. Finally, with respect to the single enforcement process based on Article 691 of the CPC, which regulates the appeals granted against the final order, the 3-day period is applicable to it as established in Article 376 of the CPC.

Now, in the second place, on the cross-appeal in the present case: *a) adhesion of orders with suspensive effect*, if these refer to orders granted outside a hearing, the period will be, in accordance with Article 376, 3 days from the granting of the order and if the order has been expedited in a hearing, normally the appellant usually reserves the right to make use of the period of 3 days and, in such a case, this period shall also be used to join; b) *cross-appeal of orders without suspensive effect*, in accordance with Article 377 of the CPC, must take place within the third day of notification of the granting of the appeal.

In summary, the deadlines established to join the CPC are 10, 5 and 3 days, whether against judgment or order, but it must be added that the adhesion - as we have already established - is an extemporaneous appeal and, therefore, from the notification of the judgment it would be possible to challenge extremes that are detrimental to them; Therefore, the adherent not only has 10, 5 or 3 days to join, but also the entire period that begins from the time he or she became aware of the judgment or order must be added to this.

In this sense, as Marinoni (2015) states, the process can only be considered fair if the parties have the same opportunities or weapons to participate in it, with the exercise of procedural rights and powers, means of defense, burdens, duties and the application of procedural sanctions. This can be contravened by erroneous application of the rule, without an adequate structuring and conduct of the process and also by allowing procedural figures that violate this right, being one that allows one party to have more time to file its appeal than another without any reasonable justification.

"That is why this figure is questioned, stating that it violates the equality of the parties by the fact that the litigant who allowed the period to appeal a decision to elapse is granted another way or way to challenge it, thus giving greater facilities and/or advantages to those that the litigant has than if he observed the legal term to appeal the resolution that produces a burden" (Hinostroza, 2013, p 96).

To all this it must be added that, in view of the fact that the appellee is allowed to join, using this second opportunity, since he did not appeal, he will do so using a much longer period than his counterpart had and will also contravene - without any reasonable reason - the principle of prohibition of *reformatio in peus* or prohibition of reform in worse and the brocardo "*tantum devolutum quantum apellatum*" all for the benefit of the adherents and against the initial appellant.

With respect to the aforementioned principle, it should be noted that Article 370 of the CPC states that "the contested decision may not be modified to the detriment of the appellant, unless the other party has also appealed or has joined". Thus, although the superior judge could not go against the limits or extremes raised by the original or initial appellant, this would have as an exception that there is another appeal or that the appellee has joined. Thus, specifically, the cross-appeal would be an exception, but it would make the adherent benefit from the breadth of the devolutive effect, that is, to judge on what has been delegated not only with the appeal, without any justification other than to give the opportunity again and in better conditions to the untimely appellant.

As Cavani (2018) rightly points out, this dimension of the devolutive effect under the name of *tantum devollutum quantum apellatum* leads to answering what is submitted to the adjudicatory body, that is, only what is challenged by the parties. However, the adherent benefits from the extension of this dimension because the judge will also rely, despite having res judicata and having a longer period to challenge, on the points that have been challenged by the counterparty through adhesion.

In this sense, it is obvious that procedural equality and parity of arms are contravened, because it benefits the adherents that they can, through their negligent or simply cautious actions, cause there to be a worse reform against the initial appellant in what is resolved in the second instance and expand the extension of what is going to be resolved. since what the adherents argue that they have been violated is also submitted to the adjudicating body.

On this point, it is thought that it becomes "egalitarian or fair" to make the adherent, despite the fact that he had the opportunity to appeal and did not do so, be able to expand the object of the second degree since he did not want to appeal and waited to see if his opponent did so, resulting in that later he would only use this beneficial position to adhere; however, we consider that this figure, instead of being fair, perverts the purpose of the process and could even generate the perverse incentive of always waiting for the counterparty to appeal first since we know that the one who has a grievance will do so, also knowing that by adhering you will be, constantly, in a beneficial position in terms of time and even in the possibility of expanding the object of the second degree.

In view of the foregoing, we consider that the cross-appeal is a figure that, when used, contravenes the principle of procedural equality and parity of arms, since the judges, by allowing it, reflect a clear favoring of those who did not appeal at the time, thus causing better opportunities to develop in the process.

*4.3 Procedural good faith*

Our CPC establishes in its Article IV of the Preliminary Title that one of the principles that is promoted is that of good faith in the procedural conduct of all participants in the process. Along the same lines, this same code in its article 109 paragraph 1 that it is the duty of the parties to proceed in good faith in all actions and interventions in the process.

In addition, our CPC has exhaustively established in its article 112[9] some cases where it could be concluded that there has been bad faith: 3. When any part of the file is removed, mutilated or rendered useless; 4. When the process or procedural act is used for clearly illegal purposes or for malicious or fraudulent purposes; 5. When the performance of evidence is obstructed; and 6. When by any means the normal development of the process is repeatedly hindered; "7. When, for unjustified reasons, the parties do not attend the hearing, causing delay.

According to Pico i Junoy (2003) the concept of good faith is indeterminate, but from a generic perspective it can be defined as a socially accepted as correct conduct that must be required of any person who acts in a process, so it would be necessary to resort to casuistry to know when a certain action infringes this principle or not.

From the above, it can be deduced that in our Peruvian legal system any conduct of the parties, third parties or of the judge himself that goes against the normal development of the process or that renders useless the purpose of this instrument to protect material rights. As Priori rightly states, "the purpose of the process is to satisfy material rights with respect for fundamental procedural rights" (2019, p.16).

In this sense, anyone who participates in a process, although they have a direct and indirect interest in what can be resolved, must act and collaborate in accordance with the rules of good conduct. In addition to what has been said, good faith presupposes an action that must not only serve as a guideline for all procedural subjects, but also as a criterion for the interpretation of all procedural rules.

Consequently, with respect to procedural good faith in appeals, Pico i Junoy states: "The first manifestation of procedural good faith in appeals is their formulation at the appropriate procedural time and under the legally established conditions because, otherwise, if the application of the mandatory rules relating to deadlines and forms of remedies is left in the hands of one of the parties, it would create an intolerable legal uncertainty for the other, since it would not know with certainty when the resolution becomes final" (2003, p. 164).

Although the above is closely related to what has already been said about res judicata and preclusion, we must point out that it is also a clear opposition or violation of the principle of procedural good faith, since the one who joins the appeal filed by the counterparty will do so on points that will have become final, since the deadline for appeal would have already expired.

[9]It should be noted that our CPC makes the mistake of not differentiating recklessness from bad faith, the former being that conduct of the person who adduces claims, affirmations or defenses without any sense or legal support. While the one that malice or procedural bad faith is to arbitrarily use procedural acts, as opposed to the purposes of the process.

On the matter in question, Rodriguez Camacho (2013) states that the conduct of one of the parties in wanting to seek a second opportunity to file an appeal when, due to its passivity in not appealing, it has already become final constitutes a clear violation of the principle of good faith.

Therefore, by not formulating its appeal at the appropriate time and waiting for the other party to appeal so that it can only join and benefit from it not only from its breadth but also from having a longer term, it constitutes a clear situation of violation of this principle.

As Chiovenda rightly points out about adhesion: "The peculiar function of this form of appeal is to allow the complete reproduction of the controversy before the judge of appeal, so that it is intended to serve mainly anyone who does not intend to appeal except as soon as the opponent appeals. But this does not exclude that this form of appeal may be used by anyone who, in any case, has also appealed on his part" (2008: p. 583).

In this sense, the adherent can appeal because he waits for the other party to appeal (if he does) or because he was simply negligent and the deadline to appeal against the extremes that were detrimental to him expired; Notwithstanding this, in both cases the adherent uses this extemporaneity and longer period of preparation to his advantage, added to the broad object on which his appeal may fall, thus contravening the principle of good faith as it is a conduct carried out with malice.

## 5 Analysis of the draft reform of the code of civil procedure

Our CPC in its more than two decades of validity was placed, by Ministerial Resolution No. 0299-2016-JUS dated October 17, 2016, in the hands of expert professors in the field to a necessary review and proposal of improvements, which resulted in the Working Group having reached the MINJUSDH with the CPC Reform Project on November 20, 2017.

In this Draft Reform of the CPC, it has been decided to eliminate the figure of adhesion as can be seen in its article 373 with respect to the appeal of judgments under the following fragment: *"(...) If the appeal is filed out of time, the judge rejects it. Against this resolution there is an appeal of complaint (...) Once the orders have been received by the appellate judge, he verifies the requirements of the appeal and, if they are met, he grants the appeal brief for a period of ten days for the appellant to make the respective acquittal (...)"*

In this sense, it can be seen not only that the old figure of adhesion to the appeal of sentences is eliminated, since only the appeal will be acquitted and, another outstanding point is that it is explicitly established - emphasized in our understanding - that when an appeal is

filed after the deadline it will be rejected by the judge as it is untimely. In addition, with reference to the appeal of orders, any reference in Article 376 and following to the cross-appeal is eliminated, so that there is no allusion in the CPC Bill to the late appeal or cross-appeal.

Unfortunately, there is no comment in the Explanatory Memorandum of the CPC Project that specifies or justifies the reason for this proposed elimination. Despite a lack of explanatory statement, Cavani had already outlined his opinion on this figure that can outline the justification for its elimination:

> My opinion is that the adhesion to the appeal, understood not as a mere acquittal of grievances but as an authentic appeal, capable of challenging any extreme, is revealed as unconstitutional because it violates res judicata. Thus, unlike Villa García, I think that the adhesion should not be interpreted as an appeal on the same point but, simply, not be applied as unconstitutional (2018, p131).

In view of this, can this figure be eliminated? We are of the opinion that the adhesion to the appeal is a figure that generates more problems than benefits, if there are any, and therefore we share its elimination as has been done in the CPC Reform Project.

However, we know that making the decision to eliminate it or not is a controversial issue, so we will give our comment to the opposing positions on the problems we have encountered. As Loreto (1958) points out, from a perhaps historical justification for a supposed search for equality and justice, in Roman law prior to the publication of the *Ampliarem* Constitution, as we detailed in the first chapter, only the taxes proposed by the appellant could be taken into account in the second instance and the appellee could never expect a reform in his favor. Whereas, with the arrival of Justinian to power, the reform of the judgment against the appellant was allowed even if the non-appellant had allowed the initial term to elapse.

Under this idea, for Professor Ariano: "(...) The cross-appeal of the opponent constitutes (*rectius*, it should be) a subtle mechanism tending, even if it seems otherwise, to avoid the prolongation of the *litis* in the seat of challenge (I do not appeal if you do not appeal, but if you appeal I join; if you want to prevent what I have challenged with the cross-appeal from being retried, withdraw your appeal..; if you withdraw your appeal, the process is over, in accordance with the interest regulation of the judgment of first instance)" (2015, p. 168).

In this sense, a justification of permanence of the cross-appeal could be obtained; However, we consider that the figure of the cross-appeal as a mere extemporaneous appeal leads to the violation of procedural principles and rights that hinder, perhaps, this detailed functionality, and makes it unconstitutional.

It is worth highlighting Veramendi's opinion in favor of this figure: "Thus, we are of the opinion that since it is the legislator - for reasons of justice, speed and economy - who authorizes

the appellee to file the appeal after the appeal of cross-appeal, the term for joining has not expired, therefore, this principle is respected. As a consequence, the principle of formal res judicata does not apply. Likewise, we are of the opinion that the principle of procedural equality is not violated, since in the abstract "both" parties to the proceedings have the same conditions to formulate adhesion under equal conditions, which is why we consider that this guarantee is not violated (...)" (2016, p. 52).

In view of this, in the first place, it is not true - in our opinion - that the cross-appeal leads to equality of parties, but on the contrary violates parity of arms and procedural equality, as we have already explained, because it may be that the cross-appeal has been created in search of a supposed judgment in the second instance that is more equal for both parties because it allows that, even when it was not appealed, the appellee can do so after the deadline, that is, the appellee would have the opportunity to pronounce himself; however, in practice what this does is to grant greater benefits to those who did not challenge because they waited for the action of their counterpart or because they were simply not diligent and the deadline expired, which generates that the appellee has much more time to be able to file their appeal extemporaneously and have the possibility that the judge, Despite the late approach, it can also refer to points appealed by cross-appeal.

With respect to the alleged justification for celerity consisting of the fact that the party who did not appeal wishes the termination of the *litis* and would be willing to bear the grievance, but that this would be contradicted by the appeal filed by the initial appellant, it turns out to be untrue. This is because, in the words of Diego Jarque (2003) to which we add, this alleged justification does not withstand further analysis since if one party is interested in the rapid conclusion of the litigation and the other is not, it must continue along the natural channels of the process and if, on the other hand, both parties want a speedy conclusion, they must consent to the judgment of first instance or eventually culminate through other means such as a settlement.

In the same way, we believe that the cross-appeal – on the contrary – undermines procedural economy since "the subsequent opportunity in the filing of the adhesive appeal privileges this appellant insofar as it allows us to know the strategy and recursive support of the main appellant, and ultimately if what was sought with the appellate omission was speed, the opposite result is obtained by overloading the second instance process with new transfers" (Jarque, 2003, p. 5).

In this sense, from the point of view of procedural economy and celerity, it is not a valid justification to maintain this figure in our Peruvian system because the process, from a

Constitutional State perspective, aims to give them adequate, effective and timely protection of rights and, in view of this, if one of the parties considers that a decision has caused him injury, he has the right to appeal. For its part, the counterparty cannot and should not take that situation to obtain an advantage and put itself in a situation in its favor as is the case with adhesion, but rather it should continue through the traditional route that is the appeal or, simply, if it does not want to continue with the process, only answer the original appeal.

In addition, we consider that admitting a figure such as the adhesion would cause greater wear and tear as there would be a delay in the process, since the procedure of the second instance will be overloaded while the adhesion is an appeal itself, in which its extemporaneous approach is erroneously accepted, and must go through an examination of admissibility and then be transferred for response.

In addition to this, the simple fact of saying that since the legislator of 1993 regulated an unconstitutional figure such as adhesion, it could not be modified or eliminated, would not lead to proposals for improvement being made or that a rule could be disapplied for contravening the supreme norm such as the Constitution.  or that its unconstitutionality can be declared.

In the same way, although it may be that the operation of the adhesion was found in making the appellant desist when he saw that the appellee could file his appeal and make there be a reform for the worse, there is no doubt that this does not always happen in practice because if one has had an unfavorable judgment, one will seek to revoke or annul it in what causes injury and not simply to desist because the counterparty through adhesion may cause a reform against it, since if what is affirmed can be proven, it leads to giving security to appeal.

Likewise, this figure contravenes res judicata and preclusion since they are matters not challenged by appeal and, therefore, consented; in addition, the litis is left in the hands of the appellee, because he would have a second opportunity to challenge what has been contrary or prejudicial to him, thus acting against procedural good faith. In any case, the adhesion is the most burdensome measure because although it can remotely cause the appellant to desist, it is a figure that to achieve that end allows procedural principles and rights to be violated.

On the other hand, to say that because both parties can adhere - with respect to which we do not agree either - would lead to procedural equality is a serious mistake. To maintain this, according to our point of view, would be to misunderstand the figure because, in the first place, following what was stated by Didier Jr and Carneiro da Cunha (2011), if there is a judgment with reciprocal succumbence and both appeal, neither will be able to adhere because a requirement for adherence is that it has not been appealed before.

In addition to the fact that the figure of adhesion itself contravenes procedural rights and principles, under the same idea, Cassasa (2016) states that if the person appeals, he or she must record all his or her claims there, since if he or she wishes to expand it through adhesion, it would be in contravention of the principle of integrity of the appeal. For all these reasons, we believe that an adhesion could not be considered if the same party appealed, since this situation would reaffirm procedural bad faith and the search for a second chance, either to correct the original appeal or to extend it.

In the same way, as we have already stated, the cross-appeal is a procedural figure that benefits from the term since, regardless of the procedural route, the adherent will always have a longer period than the appellant and will also contravene the principles of prohibition of reform in worse and the extension on what is going to be decided without any plausible justification.

Finally, Yamunaqué Moreno (2022) states that the adhesion to the appeal would have its basis to maintain it in the right to plurality of instances, since there is a judgment with reciprocal expiration or succumbence causes there to be an injury to both parties to the procedure. In addition, he points out that saying that only the appeal opens the second instance, leads to leaving aside the appeal of the counterparty raised in a second moment because if there is already a primary appeal, the second appeal would not open a second instance.

However, we do not agree with the above because starting from the fact that the right to the second instance is a fundamental right that presupposes the existence of a process that contains at least two instances (understood as procedures) before different judges, so – following Cavani (2018) – it is the legislator who must consecrate the means of challenge against the resolution that ends the first instance.

Given this, is the cross-appeal a strictly regulated remedy to go against resolutions that put an end to an instance? The answer is clearly no, however, in the case of the appeal that is exhaustively regulated as an appeal, even if it is filed within a different period, that is, at the same time as the other appeal or later but within the period for appeal, it will go against the judgment of first instance and will have the purpose precisely of opening a second procedure that can obtain a new pronouncement. That is, when there are appeals from both sides, plaintiff and defendant, raised within the period granted by law to challenge, they will open the second instance defining what the judge will hear.

In this sense, as we have already stated, the purpose of the cross-appeal is not to open a second instance, but to challenge an extreme or sub-extreme that is prejudicial to it and, in the

meantime, only to expand the scope of the *cognitio* of the tribunal *ad quem*. Breadth of this figure which, as has been mentioned, leads to the violation of procedural principles and rights.

For all the above, we see no reason to maintain this figure in our Peruvian legal system and therefore, given its unconstitutionality, we believe that it is appropriate to delete our CPC.

## 6 Conclusions

By way of conclusion, we can summarize: Although there are two positions on the cross-appeal, it must be understood as a mere appeal filed extemporaneously, which gives the appellee a new opportunity to challenge points not raised in the appeal**.**

The cross-appeal must be understood from a broad perspective, that is, a means of challenge capable of challenging points not raised in the appeal, because to consider it from a restricted perspective would be to liken it to a mere acquittal of grievances and, therefore, would go against its very nature.

By considering the adhesion from a broad perspective, res judicata and preclusion are violated since issues that have already reached finality are rediscussed.

Procedural equality and parity of arms, understood as the duty to guarantee that the parties have the same opportunities in the process and not unjustified differential treatment, is violated by the true nature of the cross-appeal, since they are allowed to have had more time to prepare their appeal without any justifiable reason. also violating the principles of prohibition of reform in worse and the dimension on which the judge of second degree will decide.

The cross-appeal also violates procedural good faith since it allows there to be a second opportunity for the adherents to be able to challenge everything that was unfavorable to them, regardless of the fact that there was already finality and that they do so knowing that their opponent appealed or due to negligence in their actions.

Finally, when referring to the Draft Reform of the CPC, we are of the opinion that the cross-appeal is a figure, although it can achieve the disincentive of the appellant, it turns out to be the most burdensome figure to seek that end since it violates procedural rights and principles that make it unconstitutional.

**Bibliography**

ARIANO Deho, E. (2009). On the powers of the appellate judge. **Journal of the Master's Degree in Procedural Law,** [S. l.], v. 3, n. 1, 2009. Retrieved from https://revistas.pucp.edu.pe/index.php/derechoprocesal/article/view/2071

ARIANO, E. **Procedural Challenges.** Lima: Instituto Pacífico, 2015.

AVENDAÑO VALDEZ, J. The interest to act. THEMIS **Revista de Derecho,** [S. l.], n. 58, p. 63-69, 2020. Retrieved from https://revistas.pucp.edu.pe/index.php/themis/article/view/9118

CASARINO VITERBO, M. **Manual of Procedural Law.** v. IV. Santiago: Editorial Jurídica de Chile, 1984.

CASSASA CASANOVA, S. **The adhesion to the civil appeal, In The appeal in the civil process.** Lima: Gaceta Jurídica, 23-34, 2016.

CAVANI, R. **Challenge Theory:** Appeals and review of res judicata in civil proceedings. Lima: Gaceta Jurídica S.A., 2018.

CHIOVENDA, G. **Institutions of Civil Procedural Law** (E. Gómez Orbaneja, Trans., Vol. 3). Mexico: University Legal Press, 2008. (Original work published in 1948).

CRUZ LEZCANO, C. The Appeal of Adhesion in the Peruvian Code of Civil Procedure: An Approach to the Subject. **Revista Oficial del Poder Judicial**, [S. l.], v. 3, n. 3, p. 199-220, 2008.

DEVIS ECHANDía, R. Right and duty of jurisdiction, and the equality of persons before it and in the process. **IUS ET VERITAS,** [*S. l.*], v. 5, n. 10, p. 15-20, 1995. Retrieved from https://revistas.pucp.edu.pe/index.php/iusetveritas/article/view/15471

DIDIEr Jr; CUNHA, Carneiro da. **Corso de Direito Processual Civil: meios de Impugnação as decis6es judiciais e processo nos tribunais**. São Paulo: Editora IusPodivm, 2011.

GRAU PÉREZ, J.A. **The challenge of the initially appellee.** Cross-appeal. Madrid: Dijusa, 2005.

GRAU CASTILLO, A.S. Intervening intervention and its powers in Peruvian legislation: what are "acts of opposition to the intervener"? **Revista Brasileira de Direito Processual – RBDPro**, Belo Horizonte, year 29, n. 113, p.81-106, jan./mar. 2021.

GUASP, J. **Civil Procedural Law.** Madrid: [s.n.], 1956.

GUZMÁN FERRER, F. **Code of Civil Procedure (Explanatory Memorandum- Background-Concordances-Reform Projects-Comparative Legislation-Jurisprudence).** Volume II, Lima : [s.n.], 1969.

HINOSTROZA MÍNGUEZ, A. **Appeal.** [*S. l.*]: Importadora y Distribuidora Editorial Moreno S.A., 2013

JARQUE, D. (2003). The cross-appeal and the prohibition of reformatio in pejus. In.: NATIONAL CONGRESS OF PROCEDURAL LAW GUARANTEES. 5., 2003, Buenos Aires. **Proceedings** […]. Buenos Aires: [s.n.], 2003.

LAMA MORE, H. (2004). Cross-appeal: Autonomous or dependent. Scope of this means of challenge. **Dialogue with Jurisprudence**. Lima, n.72, p. 85 – 97, 2004.

LORETO, L. "Adhesion to the appeal", **Taken from *Siudia Jurídica,* annual publication of the Faculty of Law of the Central University of Venezuela**. [*S. l.*], n. 2. Year 19, p. 97-141, 1958.

MARINONI, L.G.; CRUZ ARENHART, S.; MITIDIERO, D. (2015) ***Novo curso de processo civil: teoria do processo civil.***Volume 1, Editora Revista dos Tribunais.

MONTERO ARONA, J.; FLORSMATÍES, J. (2005). **Treatise on Remedies in Civil Procedure**. Tirant lo Blanch, Valencia.

PICÓ I JUNOY , J. (2003). **The principle of procedural good faith.** J.M.Bosch: Barcelona.

PINO CARPIO, R. Notions of procedural law and Commentary on the Code and Civil Procedures. **Tip**, Peruvian, v. 4, 1965

PRIORI, G. (2019). **The process and the protection of rights**. Lima: Pontificia Universidad Católica del Perú, PUCP Editorial Fund.

RODRÍGUEZ CAMACHO, N. **The cross-appeal of the civil appeal**. Barcelona: J.M Bosch, 2013.

SAAVEDRA DIOSES, A.F. Comments on Article 123 of the Code of Civil Procedure. **Code of Civil Procedure Commented by the best specialists**. Lima: Gaceta Jurídica, 2016.

SANDOVAL COURRIOLLES, J. (1981). **Code of Civil Procedure**: Text in force with notions about the main institutions of civil law and civil procedure and recommendations for their modification. Lima: Sesator

SUPREME COURT DECISION **No. 1056-2003-Camaná** (31 March 2004)

SUPREME COURT RULING **No. 1066-2006-Lima** (May 8, 2007)

SUPREME COURT RULING **No. 4915-2008-Lima** (August 10, 2010).

SUPREME COURT RULING **No. 1430-2016-Lima** (March 21, 2018)

VERAMENDI FLORES, E. The appeal of cross-appeal. **In The Appeal in Civil Proceedings.** Lima: Gaceta Jurídica, 35-66, 2016.

VESCOVI, E. (1988). **Judicial remedies and other means of challenge**. Buenos Aires: Depalma, 1988.

VILLA GARCÍA, J. E. R.(). **The Appeal of Cross-Appeal**. Process and Constitution - Fifth International Seminar on Procedural Law The Role of the High Courts and the Right to Challenge, p. 435 - 450. Lima: [s.n.], 2015.

YAMUNAQUÉ MORENO, K. A. An interpretative proposal of the object of the appeal against judgment in Peruvian civil proceedings. **Revista de Derecho**, [*S. l.*], v. 22, n. 1, p. 11–40, 2022.

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