



CRIMINAL LIABILITY OF LEGAL PERSONS IN ECUADOR

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ABSTRACT

The work analyzes the legal arguments about the criminal responsibility of legal persons, based on what is established in the Organic Comprehensive Criminal Code (COIP), which typifies criminal behavior not only against legal representatives or attorneys of persons. but against it directly, thus modernizing the Ecuadorian criminal legal system. The objective is to analyze the behavior and criminal liability of legal persons. The applied methodology has been bibliographical, qualitative, non-experimental, also using historical-legal, legal-doctrinal, legal-comparative methods, content analysis and an open survey questionnaire. Obtaining as a result that 52% of those surveyed agree that the criminal liability of legal persons has been incorporated into the Comprehensive Criminal Organic Code. Concluding that the socialization of the criminal responsibility of legal persons to all employees is required, as a method of preventing crimes of legal persons in Ecuador.

Keywords: Criminal responsibility, criminal behavior, legal personality, law reform

1. INTRODUCTION

This research presents an analysis of the criminal liability of legal persons. With the validity of the COIP, legal entities can be subject to criminal liability since the law entered into force on August 10, 2014, typifying criminal conduct for them, a situation that did not occur previously. Moreover, this law modernizes the Ecuadorian legal system overcoming the old aphorism *societas delinquere non potest* that established that companies could not commit crimes, only natural persons. With this penal reform in Ecuador, a historical precedent is set by imputing criminal conduct not only to the legal representatives or attorneys of companies, as natural persons, but also to the legal person as a subject of law.

This research has as its central objective the analysis of criminal responsibility that are typified against legal persons in the COIP and those that are not in the current criminal regulations so that there is a legal vacuum that allows impunity in certain actions. Above all, because, as Villegas (2009) said, today's society becomes increasingly complex due to a rapidly changing economic framework and extraordinary technological development without comparison in history. That same technical development in its negative face has caused it to be covered with new and great sources of danger (p. 11).

Criminal Law seeks a remedy to this evil that arises in society as a result of technological and scientific development that gives rise to new forms of criminality, given for reasons of criminal policy. In the words of Pariona Arana (2015), in these new times, a criminality that makes use of technology, scientific knowledge and modern forms of organization. Thus we have an organized crime, a computer crime, a crime committed under the protection of the exercise of power, an economic crime, among other forms of manifestation (p. 259). In this regard, Reyna Alfaro (2012) argued that, just as criminal behaviors are renewed, it is also necessary to change the paradigm that exists on individual criminal responsibility and design a legal system that allows the incorporation of criminal liability of companies.



The current relevance of the criminality produced in the business context provokes political-criminal demands that have motivated the previously exceptional discourse of criminal responsibility of the legal person itself to become a dominant trend that transcends the limits of *common law* (p. 32).

For many years, the tradition that societies were not capable of being criminally responsible was maintained, since only the natural person who administers it would have the capacity for action, guilt and punishment, as Díaz (2016) maintained. Under this definition arises the theory of crime applicable to all human behaviors considered later as infractions, but always referring to the actions of a human being. For this reason, several legal scholars, such as the specific case of Zúñiga (2009), have questioned whether or not the imputation of criminal liability for legal persons is appropriate (p.18).

The COIP when it entered into force in 2014 determines that not only natural persons but also legal persons may be responsible for criminally relevant conduct, thus establishing it in its articles 49 and 50. Likewise, the law includes in a single normative body the criminal conducts as well as the procedure to be followed in criminal matters; However, when it comes to criminal conduct attributable to legal persons, it does not include all the possible unlawful actions that may be incurred. Therefore, there is a legal vacuum regarding the crimes that these entities can commit and that, since they are not typified in the law, may not be considered crimes.

2. Doctrine regarding the criminal liability of legal persons

The author García Maynez (2000) noted: "Person is any entity capable of having faculties and duties" (p. 271). In the legal field, this entity is able to acquire rights and obligations, since it is not only the physical subject but also encompasses the concept of physical or moral subject with rights and obligations. In this way, doctrinally people would be divided into two groups: individual legal entities, which refers to natural persons; and, the collective legal entities, called legal or moral persons, which according to Domínguez Martínez (1989): "They were the associations endowed with personality also subject to rights and obligations" (p. 129). This author pointed to legal persons as real entities with personality and with rights and duties, despite not having the corporeality of natural persons.

Totally in agreement with the criterion of González Sierra (2012): "Criminal Law must face and control not only the criminality of natural persons but another kind of criminality, in this way it will take sides on the criminal political need to criminalize companies" (p. 20).

Criminal Law changes as society does, so much so that at the beginning of human history there were no behaviors that are currently reprehensible, and likewise today behaviors that were frowned upon in ancient times are very common. For this reason, in the face of a changing world, changes are also necessary to adapt these behaviors to the current reality. In this way, several criteria are evidenced regarding the imputability of legal persons, and according to what Alcides Morales (2012) mentions, the material acts constituting a punishable act can only be executed by the natural person, endowed with physical existence. Although the legal person, endowed with his own will, different from that of the individuals who make it up, can determine the commission of criminal offenses for which he must respond. (p. 53).

With the aforementioned criterion, the material act attributable to the natural person who commits it is separated, without ignoring that there are infractions that can also be attributed to the legal persons that commit them. Saleilles (as cited by Bustamante, 1997), was in favor of the criminal liability of legal persons arguing that:

An institution functions juridically, from the point of view of law as a reality as certain as the human person himself. For this reason it is logical that legal persons as "real beings", respond in law for the fulfillment of obligations, for the acts that correspond to their activities that cause damage or injury to the person or property of another, and finally for the violation of prohibitive laws. (p. 57).

Thus, although the legal person is considered a fictitious entity in civil matters, this legal figure acquires responsibility for its actions through law. In its foundations Jakobs (1995) stated that societies or collective persons could be criminalized by indicating: But it cannot be substantiated that in the determination of the subject the system to be formed must always be composed of the ingredients of a natural person (mind and body) and not of those of a legal person (statutes and



organs). Rather, the statutes and organs of a legal person can also be defined as a system, in which the internal - parallel to the situation in the natural person - does not interest, but the output is interested. The actions of the bodies in accordance with their statutes are converted into own shares of the legal person. (p. 183).

Thus this author unifies the criterion of real person and legal person as a real or fictitious being that through its parts can act and these actions are those that will subsequently be subject to review to determine an imputability or criminal responsibility, the fact that they are fictitious entities -not "physical" persons-, it does not prevent them from being held guilty for acts that may merit criminal sanctions.

Legal persons of any kind may be criminally liable for committing a crime, their company figure does not prevent them from being charged with guilt for acts or omissions that involve the legal entity in criminal liability to: owners, directors, legal representatives, operators or third parties with or without a contract, with any management activity in the legal entity, and even collaborators who follow superior orders. All these persons whose actions or omissions may criminally involve the company, will also be liable in the criminal field on an individual basis.

The COIP refers to a dual responsibility, which means that the criminal responsibilities of both the legal person and the natural persons involved in the crimes are independent of each other, and the criminal liability of legal persons does not prescribe when they suffer some dissolution or modification in the Law.

3. METHODS

This is a bibliographic, qualitative, non-experimental research. Several methods were used for data collection such as: historical-legal, legal-doctrinal, legal-comparative method, content analysis, open survey questionnaire, which served to collect data from the units of analysis that in the present case are the judges of criminal guarantees, prosecutors and public defenders according to a predetermined sample. The survey was conducted among 56 servants of the Judicial Branch. The answers of the respondents allowed to obtain various criteria regarding the criminal liability of legal persons and the criminal offenses that are contemplated in the COIP.

The universe of the population consists of the Judges of Criminal Guarantees of Guayaquil, Prosecutors of Guayaquil and Public Defenders of Guayaquil in criminal matters. Since the population size is greater than 30 individuals, probability sampling was applied, with its variant simple random sampling without replacement, whose formula for calculating the sample size is:

Where:

$$n = \frac{Z^2 \times P \times Q \times N}{\infty^2 (N - 1) + Z^2 \times P \times Q}$$

= Sample size.

Z = Typed value with a 95% confidence level = 1.96

95 % = Trust level

N = Population size

P = Probability that a certain characteristic is present in the population = 0.5



Q = Probability that a certain characteristic is not present in the population = 0.5

∞ = Statistical error = 10 % = 0.10

Emblematic cases of criminal liability of legal persons

Terrabienes Case

The Prosecutor's Office began the investigation of the Terrabienes case on February 2, 2015, given the alleged damage caused by the false promise of delivery of homes in the Arcos del Río urbanization, belonging to the real estate company Terrabienes, located at kilometer 1.5 of the Terminal Terrestre-Pascuales road, north of Guayaquil, to 770 people who reported the fact.

The only one arrested for this crime was Jorge Ortega Trujillo, former manager of the real estate company Terrabienes, whom the Eighth Court of Criminal Guarantees of Guayas found guilty and sentenced him to 10 years in prison for the crime of massive fraud.

On September 12, 2016, the Criminal Chamber of Guayas ratified the sentence in grade and issued the resolution in which it is provided that the sentenced is responsible for the payment of 24 million dollars as reparation in favor of the 1,200 injured. This amount was established based on the evidence presented by the Attorney General's Office.

In its resolution, the Chamber granted the Eighth Court of Criminal Guarantees of Guayas the competence to enforce the payment, since it was this judiciary that issued the sentence of 10 years in prison against Mr. Jorge Ortega.

Odebrecht Case

One of the many cases related to the Brazilian company Odebrecht that has made a milestone in the history of corruption in Ecuador serves as a model to determine the criminal responsibility of legal entities in Ecuador with the validity of the COIP on August 10, 2014. The case surrounds the association between several public officials of the Ecuadorian State in order to award public works, related to strategic sectors, to this company receiving in exchange bribes through offshore companies and altering the public procurement system that Ecuador has implemented some time ago. To carry out this illicit activity, the State officials involved generated companies and created bank accounts to ensure the collection of bribes in their favor. The process concluded with the oral, public and adversarial hearing, held from November 24 to December 13, 2017, before the specialized Criminal, Military Criminal, Police Criminal and Traffic Chamber of the National Court of Justice against Mr. Jorge David Glas Espinel, Mr. Ricardo Genaro Rivera Arauz, Carlos Alberto Villamarín Córdova Edgar Efraín Arias Quiroz, Ramiro Fernando Carrillo Campaña, Gustavo Massuh Isaías, José Rubén Terán Naranjo, Kepler Verduga Aguilar; and, Diego Francisco Cabrera Guerrero. After the allegations and the evidence requested by the procedural subjects were practiced, the prosecution was able to prove in accordance with the law that the crime of illicit association was proven, finding a direct relationship between the state officials and the following companies: *Innovation Research Engineering And Development Ltd*, *Klienfiel Services*, *Construtora Internacional Del Sur*, *Select Enginerring Consulting And Services*, *Columbia Management*; *Equitransa*, *Tramo*, *Columbia Management and Glory International*.

In a sentence, the magistrates of the National Court of Justice decided to declare the defendants guilty, to set a custodial sentence for each of them and with respect to legal persons, it ordered: That certified copies of the pertinent procedural pieces be sent to FGE, in order to carry out an investigation that allows the corresponding criminal prosecution. The investigation and criminal prosecution of the legal entity ODEBRECHT is ordered for the facts presumably constituting crimes, which would have been perpetrated as of August 10, 2014 in which the COIP was fully effective, which allows and empowers criminal prosecution against legal persons. (National Court of Justice, 2017)

4. DISCUSSION

4.1 Analysis of the results of the COIP regulations.



Article 49 of the COIP emphasizes the determination of the criminal liability of legal persons in the commission of a criminal offense, responsibility that due to its particularity falls on the person who exercises the legal representation or direction of the same, unless, in case of being committed for the benefit of a third party, this is exempt from the determination of criminal responsibility.

However, because of the particularity and nature that governs legal persons, it is clear that a special type of sanction is needed within the framework of consistency and reasonableness. In this order of ideas, article 50 of the norm in question, makes it very clear and established that the criminal liability of legal persons is not extinguished by certain legal operations that are made to try to evade criminal responsibility in the commission of the crime, that is, the norm will always be applied even when the aspects mentioned in the final paragraph of the aforementioned norm exist.

It should be noted that this type of criminal liability in legal persons is not extinguished and is not modified. Its sanction, rather, is applied tacitly and article 71 of the COIP presents a whole catalog in this regard that goes from the fine, through the prohibition of the financial year, to lead to the dissolution.

4.2. Analysis of the results of emblematic cases regarding the criminal liability of legal persons

The Terrabienes case is a clear example of the criminal liability of the legal person, which should have been sanctioned in accordance with the legal precepts that have been previously enunciated. What happened in that event is that the prosecution focused on the criminal responsibility of the representative of the company and seek a severe sanction against the person as such. However, the duty to sanction the legal person as such was omitted, since none of the sanctions established in article 71 of the COIP were imposed on it; despite the fact that as the holder of the criminal action he had the obligation to request the judge a sanction specifically to this entity. This creates a negative precedent because by persisting the company despite the fact that it was the object of a criminal offense, it could in the future repeat the participation of the criminal offense.

In the Odebrecht case, unlike the aforementioned case, the corresponding investigations are already in place against the legal entity that took a substantial part in the unlawful acts committed by its representatives. This means that the participation of this legal entity is not omitted but rather seeks to determine its criminal responsibility to subsequently apply a penalty or sanction according to the nature of the infraction.

In this way, strict compliance is given to the legal provisions established by the COIP due to the participation of legal persons in punishable acts, consequently, what is sought is to avoid the existence or malicious operations of legal persons in private economic years of public consequences.

Analysis of the results of the survey questionnaire carried out to judicial servants regarding their criteria on the criminal liability of legal persons with the validity of the COIP.

Question 1.

Mr. Lawyer, do you agree that the criminal liability of legal persons has been incorporated into the COIP?

Table 1.

Question	Lawyers
Yes	87
No	10
TOTAL	97

Figure 1.



Analysis Of the 97 legal professionals where they are, judges, prosecutors, secretaries, public defenders, and lawyers in free practice, including lawyers from several companies representing 100%, 87% consider favorable the incorporation of criminal liability of legal persons in our legal system. Contrary to this, 10% of respondents oppose this figure because it is seen as unnecessary.

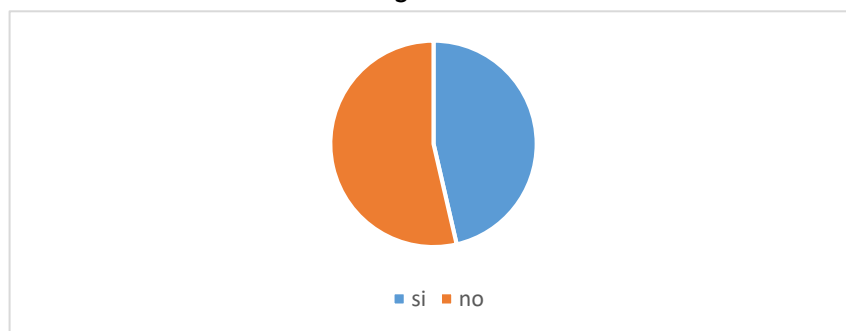
Question 2.

Mr. Lawyer, do you agree with the sanctions presented by the COIP for legal persons in the case of criminal liability?

Table 2.

Question	Lawyers
Yes	45
No	52
TOTAL	97

Figure 2.



Analysis

The results obtained with this question are striking. Of the 97 legal professionals where they are, judges, prosecutors, secretaries, public defenders, and lawyers in free practice, including lawyers from several companies representing 100%, 45% of respondents consider that criminal sanctions of legal persons are consistent and respond to the requirements of the rule of law. On the other hand, 52% see these sanctions as inappropriate because the legislator has focused on punishing rather than directing its efforts to repair the victims.

Question 3.

Mr. Lawyer, with reference to question 2, do you think it is necessary to reformulate the sanctions presented by the COIP for legal persons?



Table 3.

Question	Lawyers
Yes	95
No	2
TOTAL	97

Figure 3.



Analysis

The data that this question arrogated are interesting. Of the 97 legal professionals where they are, judges, prosecutors, secretaries, public defenders, and lawyers in free practice, including lawyers from several companies representing 100%, 95% agree that the sanctions expressed in the COIP should be reformulated in their form and substance. The 2%, an obvious minority, assumes that sanctions are and should not be reformulated.

Question 4.

Mr. Lawyer, bearing in mind the classic civil liability, do you think it is necessary for our legal system to have another type of responsibility, in this case criminal responsibility?

Table 4.

Question	Lawyers
Yes	7
No	90
TOTAL	97

Figure 4.



Analysis



The answer to the fourth question is undoubtedly somewhat paradoxical. Apparently, the Ecuadorian lawyer and the legislator have overlooked the roles that the institution of civil liability can fulfill. Of the 97 legal professionals where they are, judges, prosecutors, secretaries, public defenders, and lawyers in free practice, including lawyers from several companies representing 100%, 90% do not see it necessary for our legal system to have two different types of liability (criminal and civil) and more than anything, when the only relevant difference between these is the temporary closure and dissolution of the company (art. 71 numerals 3 and 5 COIP). Although a clear minority represented by 7% is right that these two institutions exist, it is still latent that it seems superfluous that Ecuador has two responsibilities when the purpose is only one, to repair damages to individuals or the State.

CONCLUSIONS

Through doctrinal sources, jurisprudential bases and practical cases, the correct incorporation of the criminal liability of legal persons in the COIP has been based throughout this study, presenting a criterion consistent with all those who indicated that although the legal person lacks conscience and will, it can benefit from the proceeds of the illicit act, thus substantiating the complete disappearance of the principle *societas delinquere non potest*.

The current criminal regulations are very limited with respect to the criminal liability of legal persons, so it is important to reform with exemplary penalties and proportional to the fact, in such a way as to avoid the misuse of the creation of these people to commit crimes and thus avoid impunity in the commission of the same, This situation must be immediately implemented by the legislative function.

It can be affirmed that of 348 crimes that the COIP has typified in its normative body, those that the norm considers criminally relevant for legal persons are still very limited.

In addition, it can be concluded that it becomes necessary to socialize the criminal liability of legal persons to the entire workforce of employees of financial institutions and companies, in order to raise awareness and prevent the crimes in which legal persons would incur in Ecuador, without neglecting also the individual responsibility that may exist as a result.

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