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Article

Economic crimes and determination of authorship. Discussion points and proposed solutions in Colombia

Delitos económicos y determinación de autoría. Puntos de debate y propuestas de solución en Colombia

Yonni Albeiro Bermudez Bermudez.[1]

ABSTRACT:
Criminality in the business environment has become a topic that currently generates much academic discussion, especially if the classic formulas for determining authorship and participation are adequate to respond to these new criminal phenomena. Various ideas for solutions have been proposed, but none of them has been free of criticism. In this context, we sought to analyze the formulas provided in the Colombian penal code to determine whether they are prepared to curb this new scourge. Based on a descriptive model of doctrinal and legal review, the results show that they must undergo a process of modernization to adapt to the new scenarios of criminality in the business context.

Keywords: Authorship, criminality, economic crimes, responsibility, enterprise, participation.

RESUMEN:
La criminalidad en el ámbito empresarial se ha convertido en un tema que actualmente genera bastante discusión académica, especialmente si las fórmulas clásicas para la determinación de autoría y participación resultan acordes para responder a estos nuevos fenómenos de criminalidad. Se han llegado a proponer variadas ideas de solución, pero ninguna ha estado exenta de críticas. Dentro de este contexto se buscó analizar las fórmulas previstas en el código penal colombiano para determinar si estas se encuentran preparadas para frenar este nuevo flagelo. A partir de un modelo descriptivo de revisión doctrinaria y legal, los resultados demuestran que deben sufrir un proceso de modernización con la finalidad de lograr adecuarse a los nuevos escenarios de criminalidad en el contexto empresarial.

Palabras claves: Autoría, criminalidad, delitos económicos, responsabilidad empresa, participación.

[1] Abogado de la Universidad La Gran Colombia. Especialista en derecho penal de la Universidad del Rosario. Magíster en derecho procesal penal de la Universidad Militar Nueva Granada y candidato a doctor de la Universidad de Lleida. Profesor de pregrado e investigador de la Universidad Cooperativa de Colombia Campus Bogotá, yonni.bermudez@campusucc.edu.co. Articulo resultado del proyecto de investigación INV 3291 el extraneus dentro del sistema penal colombiano con tendencia acusatoria. ORCID: https://orcid.org/0000-0001-8766-6953

1. Introduction

The characteristic and differentiating feature of economic criminality in comparison with traditional criminality is that it is not carried out by a single person, since in the context in which it takes place, in this case, in the business environment and other collectivities, it is more than evident that several people are involved. This has generated that the individualization and subsequent punishment of those responsible are not entirely easy, because there are great challenges for the administration of justice at the time of delimiting the criminal liability of each of the subjects that make up the corporate organization chart. After all, in the development of their functions, there may be a breach or overreach that ends up configuring an economic crime.

Under traditional criminal law, those who end up committing the punishable conduct deserve a greater reproach according to criminal law, and it is those who should be subject to an exemplary penalty. However, in economic criminal law, this general idea undergoes a profound transformation, since those who end up carrying out the prohibited conduct are mostly the employees. Those subjects are the ones who lack a privileged position in the corporate structure compared to those who make the decisions since they are the ones who obtain fewer benefits from the consummated punishable conduct; hence, they are the least important, without ignoring that their activity must have some legal-criminal consequence.

The differentiation between perpetration and participation is largely based on the concept of perpetrator adopted and pre-established in the law. However, there is a strong current that differentiates between perpetrators and participants taking as a point of reference the social reproach, since there is a latent desire to impose a greater sanction on the conduct of the perpetrators than on that of the participants (Caro & Reyna, 2016, p. 577). Taking the above problems as a starting point, it is necessary to carry out a doctrinal and legal review of the persons who concur with the punishable conduct in corporate crimes, to determine which of the proposals put forward by different academics serve to differentiate between perpetrators and participants in the Colombian corporate context.

2. Economic crime from a criminological approach

From the very beginning, man has tried to find an answer to the phenomenon of crime, hence, criminology arises as an alternative that serves to respond to the behavior of subjects who infringe on the norm. From the Classical School, criminological theories have been proposed, such as the *Routine Activity Approach* defended by Cohén and Felson to study the increase in delinquency during the 1960s in the United States. The main idea of this theory is that the social changes that took place at that time due to economic expansion forced a transformation of the usual activities of the population, as all family members were forced to work outside the home, which resulted in the absence of surveillance over certain assets, which generated an increase in crime in family homes (Cohen & Felson, 1979).

Other criminological currents developed in the Positive School started to explain the phenomenon of delinquency based on certain biological characteristics of individuals, which were transmitted by inheritance. Among the main ideas presented to understand this problem was the proposal that criminals have a criminal predisposition, these were called *born criminals*. This theory was elaborated by Lombroso who, to demonstrate his hypothesis, analyzed the skulls of criminals deprived of their freedom in Italian prisons to conclude that they have features of primitive men, such as a protruding forehead, low cranial capacity, large jaws, among other physical aspects; hence, they are born criminals because of the inheritance they have received from their ancestors since this does not obey that of the human species, but they have remained in a previous state of evolution, which makes them prone to commit crimes (Lombroso, 1897).

Other theories have been called ecological, which have the Chicago School as their central scenario. These theories are based on the study of the criminal phenomenon based on the forms of human segregation, that is, the place where people live, which influences the commission of crimes. One of the most important criminological analyses was carried out by Shaw & McKay in their work *Juvenile Delinquency and Urban Areas*, in which they concluded that the more disorganized the area where people live, the more crimes are committed since these areas are dominated by serious social problems such as early school dropout, infant mortality and high levels of delinquency (Shaw & Mckay, 1942). Moreover, it is justified that the phenomenon of delinquency is not rooted in the place of origin of the population but is closely linked to the characteristics of the life of individuals in certain areas.

In addition to the criminological theories, a new one appears that seeks to question the explanations of the phenomenon of crime that had been created up to that time since they were based on explaining crime based on biological, psychological, or poverty-related aspects. Thus, Sutherland proposes the *white-collar crime* theory (1983), which studies behaviors contrary to the law when committed by individuals who have a privileged status in comparison with others, which is due to economic, social, or political contexts. In which there is an absence of clear rules or conflict of rules that they use in their favor, they manage to naturalize certain ways of doing business, which results in a conflict to determine several common business practices as criminal.

It is possible that up to this point, there is a feeling of uneasiness since concrete solutions have been sought to explain the phenomenon of crime. However, each of the theories raises a wide range of possibilities to address this problem that increasingly affects society in general, thus, with time it has been seen how the phenomenon of crime is permeating new scenarios, this is a reality that is currently being experienced in the business or corporate field, as there is a latent expansion of criminal law to new sectors that must be protected on pain of generating a certain degree of impunity. For this reason, is that the original idea that the phenomenon of crime is closely linked to poverty should be discarded, because today certain economic and business sectors are those who commit crimes in large proportions.

An approach to corporate criminality is approached with the neutralization theory defended by Sykes and Matza, who argue that criminality appears because criminals find reasons to justify their behavior, i.e., they neutralize it (Mata *et al*, 2018). Hence, the offender employs a series of techniques that allow him to justify his acts. A clear example of this theory in the business environment is presented when the superior officers justify their illicit acts with the clear idea that they had to execute them to save the company and thus save the jobs of the employees. However, since the behavior is justified, the offenders consider that their behavior is permitted and normalized.

We must start by differentiating between economic criminal law and corporate criminal law, for this purpose, it is necessary to resort to a broad concept that enjoys credibility in the legal community, which was proposed by Tiedemann, who states that this is a set of crimes that are closely related to economic activities and what they seek to protect is the economic life (Tiedemann, 1985, pp. 20-21). In other words, it not only protects the right of the state to direct the economy but also includes any activity in which economic goods are involved (Freyre, 2009). On the other hand, corporate criminal law refers to unlawful activities committed by employees and managers to favor the company (Mata *et al*, 2018). Hence, the doctrine affirms that corporate law is a part of economic law (Caro & Reyna, 2016).

3. Points of debate in the determination of authorship in economic crimes

The purpose of these lines is not to present a correct solution for determining authorship and participation in economic crimes. Well, my proposal is much more modest, since I wish to approach the study of some points of discussion on the different proposals that have been designed to resolve the conflict in the imputation of responsibility in business contexts, insisting on the urgency of finding comprehensive solutions to solve the problem of crime in the business environment, which implies leaving the traditional formulas of criminal law and going to thinking of complexity, which will allow me to warn from the outset that reaching a satisfactory solution is impossible to achieve.

The approach to authorship and participation in economic crimes makes it necessary to analyze the attribution of criminal liability not only to the immediate perpetrators but also to extend this liability to the persons who make the decisions, i.e., in García Conlledo's terms, to the *subjects at the top*. An economic enterprise is especially characterized by its hierarchy, the distribution of functions, and the division of labor, which means that it can be complex to impose criminal liability on each of the participants. This complexity of the organizational structure of the economic enterprise requires an analysis of the concepts of authorship and participation that appear in the Colombian criminal code to determine whether the figures of the codelinquency apply to the new phenomena of corporate crime.

The doctrinal positions on the liability of individuals at the privileged levels of companies are currently divided into two groups: i) those who consider them as true perpetrators under perpetration-by-means by organized instruments of power (hereinafter PBOIOP), co-perpetration or acting on behalf of another, and ii) those who consider them as participants, i.e., either as a perpetrator or an accomplice.

3.1 PBOIOP

The basic idea of the PBOIOP was developed by Roxin, this theory is based on the conception that in an organized apparatus the execution of an order can be ensured without force or deception since the apparatus has several persons who can carry out the order, which was called the fungibility of the immediate perpetrator (Roxin, 2014). This figure seeks a coherent solution in cases where a subject orders the execution of an unlawful activity and another who would be the material executor does not act in any cause of justification or absence of criminal liability, because if he does not comply with the order, there will be another who will carry it out.

The AMPIOP is characterized as a form of domination of the will, different from perpetration-by-means, which dominates the will through coercion or error. Considering this theory, it is intended to explain criminal liability in those events in which an individual is not involved, but rather an organized apparatus of power. Now, under this theory, it is possible to attribute responsibility to the subject who has executed the act by his hand, as well as to the one who is linked to the organized apparatus of power and has certain dominion or command over the apparatus, which allows him to transmit a series of orders that others must execute.

This theory has been transferred to the business environment to sanction criminal actions executed by superiors in companies and other hierarchical organizations. It is based on the idea that this figure finds a place in the business environment, since the superior uses another, in this case, an employee to carry out a punishable conduct. However, the critics of this position have not been left behind, since they consider that PBOIOP does not apply to business organizations, since they do not operate permanently outside the legal system, since corporate collectivities have a dual operation, i.e., preferably legal, and partially

illegal (Burjan *et al*, 2011). Hence, they do not operate permanently outside the legal system, as Roxin establishes for the PBOIOP to proceed.

Other strong criticisms that this position has received are related to the fact that the workers of a company act coerced by their hierarchical superiors because although situations of pressure may arise within the company, they rarely lead to insurmountable coercion by others, hence, the man in front acts fully responsible (Aponte, 2014). As regards the interchangeability of the executors, it is criticized that not in all cases is it easy to make a low-ranking official fungible, since his specialized knowledge of a certain art, profession or trade does not allow for easy substitution (Suárez, 2007). In the same sense, García Conlledo has stated that due to the full freedom and subsequent responsibility of the perpetrator, it is not possible to speak of perpetration by means (Díaz, 2007).

As to whether the Penal Code (hereinafter PC) allows the application of PBOIOP, it should be noted that in the terms in which Article 29 of the PC is written, it can be inferred that it only admits the two classic forms of perpetration-by-means, that is, coercion of others and deception. But it would not admit PBOIOP, because the frontman, i.e., the material executor of the act acts fully responsible (Aponte, 2014).

3.2 Co-authorship

German authors such as Jescheck, and Jacobs, among others, qualify as co-perpetrators the hierarchical superiors and low-ranking officials in the corporate sphere. Also, Conde Muñoz has been pointing out for some time that the figure of co-perpetration is the best option to impute criminal liability to the main responsible party who is not present in the execution, but who is in the capacity to control and decide its realization (Conde, 2002). This position is based on the structure of business organizations since the activities they carry out are executed through a complex organizational scheme in which the division of functions and a hierarchical relationship predominate. In this context, it is not correct to attribute responsibility as perpetrator only to the last link in the chain since there may be other participations equal to or more important than the executive ones.

Criticism of this position is based on two arguments: i) the lack of a common agreement to carry out the act (Roxin *et al*, 2000). ii) the person who gives the order does not act in the executive phase. Well, concerning the common agreement, some authors dispense with this requirement in co-perpetration, this is the case of García del Blanco, who states that the relevance that had been recognized to the common agreement in recent times has been progressively reducing its importance, since he states that the criminal liability either as perpetrator or participant is closely linked to his objective intervention, that is, executing or collaborating in the commission of the crime (Garcia del Blanco, 2006). Another part of the doctrine points out that the common agreement should not be understood as express and previous planning, since it assumes the pre-existence of a common network (Díaz, 2007).

Regarding the criticism of the lack of intervention in the executive phase, it should be noted that several proponents do not consider this requirement indispensable for co-perpetration to be established (Conde & Aran, 2010). However, another sector points out that in co-perpetration two elements must be present, namely: a subjective one, which takes the form of the common plan, and an objective one, which lies in the objective participation that takes place during the commission of the crime. Thus, if these two elements do not concur, it is not possible to speak of co-perpetration but of another form of perpetration. In any case, if the subject does not intervene in the phase of the execution of the crime as established in the common plan, there is no co-perpetration, even if the intervener is a director of the board of directors of a company, who does not carry out the act he has conceived (Suárez, 2007).

3.3 Acting on behalf of another

Article 29 of the PC in the penultimate paragraph enshrines the figure of acting for another, thus expressly states

> [I]s the author who acts as a member or body of authorized or de facto representation of a legal person, of a collective entity without such attribute, or of a natural person whose voluntary representation is held, and performs the punishable conduct, although the special elements that underlie the criminality of the respective punishable figure do not concur in him, but in the person or collective entity represented. (Law 599, 2000: article 29)

From the reading of this article, it can be concluded that the representative of another must perform the punishable conduct, in this case, what is sought is to fill a loophole that occurs in the special crimes, because, in the absence of this clause, the represented party would not be liable for any crime, since by not executing the crime it is not relevant to state that he is a perpetrator, as this would violate the principle of liability for the act. In turn, if the principal is the one who carries out the act, he would not be criminally liable either, since he does not meet the quality required in the criminal type (Díaz, 2007).

This modality of liability known as the liability of the representative is considered by the academic sector as a fair imputation rule (Barranco *et al*, 2018). It allows attributing criminal liability to a person who was not initially established by the legislator as a possible perpetrator of the crime (Hurtado, 2015), but is punished because of the close relationship with the principal, i.e., not in all cases the representative or administrator of the company is the owner of the company; however, in some cases, the company tends to be identified as his because of the position he holds on behalf of the company. In this situation, when a subject performs typical conduct on behalf of another, he may be subject to criminal liability.

In Spain there is a recent inclination in the doctrine to define models that support the criminal liability of legal persons, hence, a sector of the doctrine states that the legal person will only be liable for those facts if it is proven that the natural persons seriously failed to comply with the duties of supervision, monitoring and control that corresponded to them (Galán, 2017, p. 74). On the other hand, there is another current that affirms that legal entities may be perpetrators of crimes and sanctions may be imposed on them as on natural persons (Gascón, 2012).

Other authors consider it appropriate to criminally punish as perpetrator or accomplice, those who are responsible for the adoption of compliance within a company have not done it, and as a result of this omission a crime is consummated within it (Gómez, 2016). But when a legal entity has several branches in different countries, where each one has different regulations, it can be complex for the legal entity to adopt a compliance model that covers all compliance risks, hence, what should be done is to try to reduce criminal risks by adopting the best practices and recommendations contained in ISO and UNE standards (Manacorda, 2022).

In short, to attribute criminal liability to the legal person, the natural person must concur. In terms of Gonzalez (2020, p.118), it becomes the central axis from which important legal consequences are drawn. However, a major problem arises at the time of attributing liability to the legal person when these are foreigners because if it is a national, a sanction can be imposed, but when it is a foreigner, there is a doubt whether it is appropriate to impose a punishment. Thus, Frago (2017) considers that, if a sanction is not applied to the legal person, this implies impunity and that the only ones who would respond would be the nationals, which would allow foreign persons to commit crimes in other people's territory.

Well, in the Italian doctrine, two positions have been proposed, namely: Minimalist and maximalist. The first position considers that the liability of the natural person and the legal person cannot be separated at all. Therefore, the place where the crime is committed by the natural person will be the place where the legal person incurs liability. The second position states that the place where the company is liable cannot automatically be the territory where the natural person commits the crime. Hence, the place where the legal person's decision-making center is located and where the wrongful act of the legal person is committed will be competent to attribute criminal liability to the legal person (Manacorda, 2012).

As we have seen, the clause of acting for another will serve to automatically establish the liability of the representative, manager, or administrator who represents another in specific cases. However, this position falls short, since it does not solve the problem of attributing criminal liability to the other participants involved in the execution of the punishable conduct in the business environment, since in this type of scenario not only the one who holds the representation should be subject to criminal reproach, on the contrary, other subjects may participate and contribute in an essential or accessory manner in the execution of an economic crime and their participation should be subject to punishment under penalty of generating impunity.

3.4 The determination

There is a sector of the doctrine that affirms that the determination is appropriate to solve the problem of perpetration by means and participation in the corporate sphere (Agustina & Ovalle, 2019). This position appears as a response option to the possible case where perpetration-by-means is not considered sustainable since it is based on the general idea that if the executor or the person who ultimately carries out the punishable conduct has full freedom, i.e., is not coerced or acting under an error, as the person who gives rise to an illicit idea in another to commit certain behavior cannot be considered a perpetrator-by-means (Mir Puig, 2008), he must respond as a determiner, while the person who executes the act is a perpetrator.

However, it is imperative to validate the observance of the following requirements for the determination to be configured, these are: i) There must be intent (Wessels, Beulke & Satzger, 2018), ii) adequacy of the determination, and iii) Lack of control of the fact (Castro & Ramirez, 2010). About the first requirement, it is important to specify that the determination only admits the modality of malice, since a culpable inducement is not pertinent (Velasquez, 2020). Therefore, the cognitive and volitional elements that make up malice must be verified in the perpetrator. The second requirement is that the inducement must have been suitable in that it could interfere with the will of the perpetrator since a simple insinuation cannot be considered an inducement. The third requirement is undoubtedly the most important since the perpetrator must lack control over the act. As Conde Muñoz points out, the principal is the one who can decide on the execution (Conde & Aran, 2010).

The main criticism that has been made about this type of imputation is linked to the fact that the person who gives the order does not always give the order directly to the executor, hence, it may well happen that several people know the order to be fulfilled in the organizational structure of the company until it finally reaches the material executor, so that there would be an induction or chain determination. The consequence of this is that we are faced with an endless number of perpetrators, which can have repercussions on the determination of the true perpetrator of the punishable conduct, since with the participation of several people who give the order, it can be difficult to identify the true perpetrator.

3.5 The complicity

Complicity can be defined as those contributions or contributions that serve to carry out a punishable conduct. Among accomplices there are two types of complicity: i) primary complicity and ii) secondary complicity. Primary complicity also called necessary cooperation constitutes a contribution made to the punishable conduct without which it could not have been consummated (Zafaronni, 2006), while secondary complicity also called simple complicity occurs when a contribution is made for the consummation of the crime (García, 2012). In the business sphere, there are two positions on complicity: on the one hand, there are those who affirm that the intermediate links in the pyramid of command are accomplices, while the one who gives the order is an inducer or determiner (Gimbernat, 2006).

On the other hand, some affirm that the intermediate links in the business sphere should be considered necessary cooperators and not accomplices (Díaz, 2007). The reason lies in the fact that when there are a multitude of *links* these are the ones that finally end up guaranteeing the fulfillment of the activities of the criminal enterprise and, therefore, these links have a primordial character for the correct performance of the enterprise, hence, the contribution that each one makes must be considered as an essential contribution for the execution of the punishable conduct.

Concerning the jurisprudential development on the criminal liability of legal entities, we must start from the decisions issued by the Second Chamber of the Spanish Supreme Court (hereinafter, the Court), which has exposed striking aspects that should be considered. The most relevant rulings are (i) S 894/2022 (ii) S 949/2022 and (iii) S 1014/2022. In the pronouncement S 894/2022 came to the Court a case where for the year 2014 a partnership contract was signed with the entity El Cajón de la Tele S.L. A month later the defendant offered clothes that he indicated to be of the brand *Amelie Arnour*, this claimed that this was a prestigious brand that was created in the year 1976 in Paris by the designer and actress Agueda. In any case, it was discovered that the garments had been manufactured by a wholesale store and subsequently relabeled as Amelie Arnour, a trademark that had not yet been registered at that time. For this conduct, the defendant and El Cajón de la Tele S.L. were convicted of the crime of swindling.

The court acquitted the commercial entity through which the crime of fraud was committed, stating that it does not have the necessary complex internal structure to provide it with its relevance, hence, to speak of a corporate crime we must refer to a crime that must be specific to the commercial entity. In this pronouncement, the Court goes deeper into the criminal liability of legal entities in the light of the concept of corporate imputability, in such a way that only those legal entities that have an internal organizational complexity will be imputable. In the absence of such complexity, it will suffice to sentence the administrator, if the natural person is the exclusive owner of the business entity since imposing two penalties violates the principle of non-bis in idem.

Subsequently, the Court received a case in which the crime of false documentation and fraud was investigated in which the commercial entity Swiftair S.A., which is dedicated to the development of activities in the air transport sector, began a commercial relationship with Helitt Líneas Aéreas S.A., which consisted of the rental or transfer of the use of aircraft to develop activities at the Badajoz Airport. Because of the economic operation, in December 2012, Helitt Líneas Aéreas S.A. incurred a debt of more than 80,000 euros in favor of Aena Aeropuertos S.A.U., which was guaranteed with a stamped guarantee from Banco Santander. Subsequently, the bank office confirmed that the guarantee dated December 17, 2012, was fraudulent.

The Court ruled through decision S 949/2022 in which it issued a judgment of acquittal, stating that the mere condition of exercising powers of direction or management within a company or acting under their authority is not sufficient to make the legal person liable for the acts of such persons. Hence, in light of this pronouncement, to hold the company liable, it is necessary to prove a serious breach of supervisory duties. In other words, the basis for the criminal liability of legal persons lies in "those organizational-structural elements that have made possible a deficit in the control and management mechanisms, with decisive influence in the relaxation of the preventive systems called to avoid the criminality of the company" (STS 221, 2016).

In a more recent ruling, the Court heard a case of sports corruption in the Club Atlético Osasuna that occurred in the period 2012 - 2013 where the members of the board of directors allowed cash from the club's accounts and cash to be allocated for purposes other than those provided for in the statutes and without their destination having been proven. In this decision, the Court highlights that behaviors contrary to commercial entities can be reduced or eliminated if compliance models are adopted to prevent managers or people assigned to the commercial entity from committing this type of behavior or less, it is more difficult.

Adopting organizational and management models aimed at crime prevention has the effect of exonerating or mitigating criminal liability, which is consolidated as an incentive for companies to implement these compliance programs, which will allow employees and bodies Managers not to comment on crimes so easily, hence a position of self-regulation is adopted (Faraldo, 2019). Now, when they are forced to establish control measures, they are the ones who commit the criminal act, it is not pertinent to exclude their responsibility due to the existence of adequate prevention models, since this culture of prevention must be real and not just a formality (Fernández, 2019).

In the case of an individual criminal act, i.e. one that has not been agreed with the management bodies of the company, the culture of prevention will make sense, since it will be able to detect possible failures in the company that may favor the commission of a crime or anticipate the commission of a crime. It is precisely the lack of adoption of effective control measures in the company that ends up becoming the core of the liability of legal persons (Fernandez, 2019). Contrary to what happens with individual liability, a more complex problem arises as to whether criminal liability can be transferred to the parent company for acts committed in a subsidiary since there is a latent risk of transferring the crime when a dominant manager has transmitted instructions at first imputable to the subsidiary (García, 2019).

The liability of legal entities has (3) prerequisites, namely: (i) a typical and unlawful action of a natural person, (ii) a serious breach of duties, and (iii) an organic-structural defect. The first assumption is presented when, through the criminal act committed by a natural person, the legal person has benefits, hence, a functional relationship must exist between the natural person and the legal person. Regarding the second budget, which lies in the serious violation of duties of supervision, surveillance, and control; Well, if there had been a surveillance body, the crime could have been avoided. The last assumption, this is, the organizational-structural defect related to the culture of prevention, since if this had existed, the criminal liability of the legal entity could have been excluded (Feijoo, 2016).

4. Proposed solutions in the Colombian case

Contemporary societies are characterized by constant transformation processes due to social demands, and technological and economic advances, among others. Now, the theory of punishable conduct must keep

pace with these new developments to be able to respond to the changes occurring in society. Currently, there is a relative consensus that punishable conduct involves a typical, unlawful, and guilty action (Roxin, 2008). This theory maintains that the object of sanction by criminal law is the human act, therefore, this is the only one that can be subject to criminal reproach.

The various conceptions of action that have been formed in the field of dogmatics, namely: (i) causal, (ii) final, and (iii) social. They have not succeeded in proposing a general concept of action (Atienza, 1987). However, there is a scheme that may be useful when analyzing the structure of an action, namely: (i) the agent, (ii) the opportunity, (iii) the form, (iv) the content, and (v) the result. The first refers to the subject who carries out the conduct. The second element refers to the conditions that must be present for the subject to be able to act. The third element is the form under which the action can be performed, either through a positive action consisting of doing or a negative action consisting of refraining from doing. The fourth element is the activity performed or not performed itself. Finally, the fifth element is the changes or not that have occurred (Atienza, 1987).

Typicality refers to the description of behaviors that are considered socially reprehensible, i.e., those behaviors that endanger a protected legal right (Fernández, 2017). Hence, the first valuation exercise to be carried out is the typical adequacy of the behavior to the norm. In terms of Reyes (2017), it consists of determining whether the conduct fits within the criminal type. For its part, unlawfulness is considered as a disvalue of a typical conduct, which is in the capacity to injure or endanger a protected interest (Welzel, 1970). The first classification refers to the contradiction between the conduct and the norm (Manzini, 1961). As for the second classification, it is a complement to the first, since it is not enough to predicate unlawfulness only that it goes against the law, but it must also be capable of violating the protected legal interests protected by the legislator (Mayer, 1923).

The punishable conduct, in addition to being typical and unlawful, must be culpable, i.e., it must be subject to reproach. Therefore, it is considered an essential presupposition for this judgment of reproach that the subject is imputable, i.e., can understand his acts and behave under that understanding (Roxin, 2008). Likewise, he must be aware of the unlawfulness and enforceability of other conduct.

As stated above, it is impossible to reach a satisfactory solution. However, it is necessary to approach our classic figures of co-criminality contemplated in the PC. Article 29 of the PC contains the so-called perpetrators, including perpetration-by-means, co-perpetration, and acting for another. In the terms in which the figure of perpetration-by-means is drafted, it seems that from the normative point of view, it is only possible to admit the classic forms of perpetration-by-means, i.e., coercion by another, error, and imputability. However, it would not admit PBOIOP, because the executor acts fully responsible and according to the provisions of the rule, it is required that the executor is used as an instrument by the man behind the scenes. In the corporate sphere, it is fully identified that the order goes through several persons, hence there would have to be chain perpetration by means, which is improper from the dogmatic point of view.

The perpetration-by-means by organized power structures cannot occur in the corporate environment, for the following reasons: i) it is exceptional that the workers of a company act under coercion, because although there may be situations of pressure within the company, they rarely cause insurmountable coercion, insurmountable fear, etc., and ii) the fungibility of the executors is not entirely easy, because it has been demonstrated that certain workers have specialized knowledge that does not allow their easy substitution. In this case, perpetration-by-means may occur, if the perpetrator ends up acting in a cause of the absence of criminal liability, such as a type error, coercion of others, insurmountable fear, etc.

Regarding co-authorship, it is specifically enshrined in Article 29 of the PC establishes that to constitute co-perpetration, three requirements must be met, namely: i) prior agreement, ii) division of labor, and iii) importance of the contribution. Regarding the first requirement, there is still some doubt as to whether the physical presence of the worker is required or whether it is sufficient for him to know what has been agreed to speak of prior agreement. However, it is pertinent to state that not all cases where the higher levels make a decision that will later be executed by a worker are present or that they are aware of the repercussions that the decision may have. The division of labor is a clearer requirement, because while some make the decision others execute it and it is important to emphasize that the contribution of each one is important, since if the order is not given the crime will not be executed and if the order is given the executor does not carry it out the punishable conduct would not be consummated.

The problem would arise with the intermediate links since it is well known that in the hierarchical structure of companies, the order from superiors must go down through several levels until it reaches the material executor. In this case, it would be worth questioning whether those intermediate levels that only transfer the order to the material executors should be considered co-perpetrators of the crime. In the Colombian PC, the theory of dominion of the act was adopted, hence, the contribution must be fundamental, one must have that dominion to be able to predict co-perpetration. However, in the corporate sphere, it is complex to determine whether the fact of having transmitted an order can be classified as a co-perpetrator, in my opinion, I do not consider it relevant.

The purpose of the clause of acting for another in the terms defined in the PC is to fill a regulatory gap that arose when a punishable conduct was carried out on behalf of a legal or natural person and the representative did not have the qualities provided for in the law. While it is true that this figure will serve to automatically establish the liability of the representative, manager, or administrator who represents another. The same cannot be said about the other participants involved in the development of illicit activities in the business environment, hence, the figure gives us a partial but not comprehensive response to the criminality that occurs in companies or other organizations.

The proposal to apply the figure of participation, for the case as a determiner in corporate crime, is not correct from the approach of the criminal policy that the superiors are considered as determiners, since they have real control over the organization, since the decision to commit the behavior contrary to the law or not falls on them. In turn, these individuals are the ones who obtain the profits from the illicit acts consummated. Therefore, it is not socially viable to consider a participant the person who holds control of the act, while the material executor, who would be a worker, is considered a real perpetrator. However, from a punitive perspective, there are no contrasts in the PC between the punishment of the perpetrator and the perpetrator.

Regarding complicity, article 30 of the PC states that complicity may occur in two possible scenarios: i) participating in the commission of punishable conduct or ii) providing subsequent assistance. Thus, the legislator contemplated primary and secondary complicity within the article. In the terms in which it is drafted, the contribution must have certain importance to carry out the punishable conduct or secondary complicity may occur when aid is provided if it is not consecrated as another independent crime, since in the end, it would no longer be a participant but a perpetrator of another crime punishable by law.

Our classic figures of authorship and participation do not serve to solve the problem of imputation of liability in the corporate sphere, since these figures were designed for a different time than the one, we are living in today, where crime has adopted new modalities. Thus, our classic figures must: i) waive certain requirements and adjust to the new realities through a structural modification of the same or, ii) propose

a new figure that covers criminal liability in the corporate sphere. I do not consider the latter proposal viable, since the classic figures that we have can undergo a modernization process and comply with the proposed purposes in a new reality that is being experienced within the country.

Regarding the waiver of the requirements, I will refer to the two positions that enjoy greater support, that is, co-perpetration and perpetration-by-means. The first of these, as it is currently contemplated in our criminal law, should waive the consideration of the subject who participates in a common agreement as a co-perpetrator, hence, only the division of functions and the fundamental contribution should be required. In the case of a crime committed in a business environment, if the fulfillment of these two requirements is verified, it will be enough to attribute liability to those who participate with control of the act. On the other hand, those who lack this control, but contribute to the commission of the crime may be considered as participants, either as perpetrators or accomplices.

On the other hand, PBOIOP will have to renounce that the instrument must always act under duress or in error, since the classic figure is not so easy to apply to the business environment, hence, the idea that whenever a third party is used as an instrument it acts in the grounds must be renounced; in this way, the criticism that this position has received could be replaced. Likewise, the fungibility of the material executors should be reformulated, since in the business environment it is not so easy to replace them, since they may have certain specialized knowledge that makes it impossible to be easily replaced.

The most plausible solution that will allow a comprehensive response, but not entirely accepted by the academic community and of course the scientific community, will be to rethink our classic figures of authorship and participation to adjust them to the new realities that are experienced with the so-called expansion of criminal law. In this case, co-perpetration as we have defined it should be reformulated and the prior agreement should be abandoned to privilege the degree of participation in the punishable conduct. This would imply a legal reform to Article 29 of the PC, which states that one is a co-perpetrator when there is a prior agreement, division of labor, and its importance. If these requirements are reconsidered, mainly the prior agreement, it will be possible to accommodate this modality in a more accurate way to the business environment.

5. Conclusions

The authorship and participation in economic crimes in the corporate sphere is a complex issue that requires a detailed analysis of the specific circumstances of each case. For this reason, finding a comprehensive solution that covers the whole range of possibilities that may arise from criminality in the corporate organization is a very difficult, if not impossible, task. However, there are several proposed solutions, but none of them is generally recognized, hence, when reviewing our classic figures of authorship and participation enshrined in the PC, these are not prepared to face the new scenarios of criminality that arise in the context of companies, and this is since these were created to respond to very different needs than those experienced today.

The modalities of concurring in the punishable conduct as they are currently foreseen must undergo a modernization process to meet the new realities that are currently being experienced. Thus, the requirement of prior agreement can be dispensed with so that it can be applied in a better way in business contexts, especially where there is a subject who gives the order and another who executes it, who is not always present at the time of making a certain decision to be executed. In this hypothetical case, there is a division of labor and a fundamental contribution of each one, which would allow the imputation of co-perpetration.

As for the PBOIOP, I consider that applying it to the corporate sphere may be more complex, since it implies a total blurring of its bases, as it would imply a major reform in the fungibility and responsibility of the executor, which would end up destroying the bases of perpetration-by-means. Now, the road is not easy, but we must begin to travel it until we find a solution following current needs, this is a basic approach that will undoubtedly be subject to criticism in the future, which I will receive with the greatest possible pleasure, as this will allow me to improve my approach.

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