

STRUCTURE AND LEGITIMIZATION OF THE CRIME OF COLLUSION AND IMPUNITY IN THE JUDICIAL DISTRICT OF HUÁNUCO

Received: 04.02.2022; Revised: 29.03.2022, Accepted: 04.04.2022, Published Online: 13.05.2022

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Abstract

The purpose of this study was to determine the factors that affect the legitimacy of the crime of collusion provided for in article 384 of the Peruvian Criminal Code in force, according to the political-criminal principles of the Peruvian State. The type of study is applied under a quantitative approach, correlational level, non-experimental, and cross-sectional design. The population consisted of prosecutorial files on the crime of collusion processed in the Judicial and Prosecutorial District of Huánuco. A questionnaire was used for data collection. The reliability of the instrument was measured through the judgment of five experts, which was supported by reliability statistics of 0.801. The results show that the regulation of the crime of collusion to date is only a sign of a desperate measure but not a real solution and curb acts of corruption committed in government procurement and contracting; therefore, it is concluded that this fact leads to impunity and distrust in the regulatory system of Peruvian public procurement.

Keywords : legitimacy, political principles, criminal code.

INTRODUCTION

It is already known that the country suffers from corruption, which is present in several areas of its society (Villavicencio, 1990; Rojas, 1997). Within this field, one of the most significant problems is corruption in public contracting (Muñoz, 1990), whereby this process is altered to benefit the public official himself or a third party, causing serious damage to the State's assets. It is in the face of this criminal activity that the crime of collusion is presented, a criminal figure that punishes any act of agreement between a public official and a private individual that seeks to affect or affects

the public patrimony (Gen, 1993; Cabanellas, 2001; Roxin, 1997).

The crime of collusion is a special criminal offense that is required for the correct determination of imputation and the knowledge of extra-criminal norms to configure the illicit (Gaceta Jurídica, 2006). However, due to the complexity of the rules before the classification of the crime of collusion, and the need to punish this type of crime that seriously affects the normal development of the public financial system of the State, the legislator has had to resort to a set of legal amendments that as a result has generated that the current legal

formula that regulates the crime of collusion provided in article 384° of the Criminal Code (Soler, 1976; Villavicencio, 2005) is not structured within the framework of its source crimes such as the crimes of breach of duty, and it is not legitimate because it is intended to punish dangerous behavior, leaving aside the principles of ultima ratio and subsidiary that inspire the Peruvian Criminal Code (Mir Puig, 1998; Roy, 1998).

The present investigation entitled “Structure and Legitimization of the Crime of Collusion and Impunity in the Judicial District of Huanuco”, was developed motivated in the interest of searching and finding the epistemic-legal foundations that justify the existence of the crime of Collusion in the Peruvian legal-criminal system, and above all to understand from a historical analysis the current regulation of the crime of Collusion provided for in article 384^a of the Criminal Code, which to date and for the first time has divided the aforementioned crime from a position of unicity to one of duality; i.e., the crime of simple collusion and the crime of aggravated collusion, a normative regulation that went from being innovative to devastating (Prado, 1993; Escobedo, 2002), since in the framework of the political-criminal principles that inspire the Peruvian legal system, this modification becomes illegitimate, especially changing the structure of the ordinary or common collusion crime, being to date a crime of infraction of duty, but of result, typical of common crimes, and not of a risk society (Pavon, 1989; Bernal, 1996).

The objective of this investigation is to determine which are the factors that affect the legitimacy according to the political-criminal principles of the Peruvian State of the crime of Collusion foreseen in article 384° of the Peruvian Criminal Code in force, and what is its implication concerning impunity in the Judicial District of Huánuco. For this purpose, the study focuses on objective information from the Public Prosecutor's Office, specifically the Corporate Anti-Corruption Prosecutor's Office of the Huánuco District, which shows that taking into account the complex configuration of the crime of collusion, since this is a blank criminal norm, which leads to the use of extra-criminal legal norms, it is not possible to impose penalties in the judicial district of Huánuco. In this context, the authors propose the restructuring of the aforementioned crime by the structure before

its modifications, and to elevate the aforementioned crime to an unjust infraction of duty (Jaen, 2001).

The research reached interesting results given by the contributions of the Public Prosecutor's Office of Huanuco, which specifies that in the judicial district of Huanuco the number of cases of collusion crimes is growing arithmetically, even though the modifying norms of the crime of collusion pursued purposes contrary to it. This is due to the complexity of achieving proof of the crime of collusion “the white-collar crime leaves no traces”, which makes reaffirms that it is necessary to address the regulation of the crime of collusion from the perspective of the crime of breach of duty.

Finally, the difficulties encountered in the present investigation have been innumerable, the most important being the scarce bibliography on the study of the subject and its correlation concerning international anti-corruption standards; likewise, another limitation is the lack of implementation of a government plan or criminal policy that addresses the study of the crime of collusion that allows it to provide timely and necessary responses following the demands of the operators of law, and not only normative measures such as increased penalties, which do not solve or remedy the social demand.

Materials and methods

The study was conducted in the Judicial and Prosecutorial District of Huánuco. The research was of the applied type (Carrasco, 2009; González, 2003) and under a quantitative approach (Hernández et al., 2006), with a correlational level. It corresponded to a non-experimental and Transectional design (Paragua et al., 2008).

The population consisted of prosecutorial files on the crime of collusion processed in the Judicial and Prosecutorial District of Huánuco. The representative sample (Supo, 2014) was processed using the sampling technique and was selected randomly:

- 05 files on collusion were analyzed.
- Surveys were applied to 07 Magistrates (Judges and Prosecutors) of the locality.

- Surveys were administered to 08 professors of criminal law and criminal procedure at both the undergraduate and graduate levels.

- Surveys were administered to 30 local lawyers.

A questionnaire was used for data collection, and the reliability of the instrument was measured through the judgment of five experts, which was supported by the reliability statistics of 0.801

Results

The results show that in the Specialized Corporate Prosecutor's Offices for Crimes of Corruption of Public Officials of Huánuco - FPCEDCF, 2014 a total of 293 cases have been processed, corresponding to crimes charged against public officials, including the crime of collusion. The Specialized Corporate Prosecutor's Offices for Crimes of Corruption of Public Officials of Huanuco, resolved in the Appeal Hearing the largest number of their cases, because the decisions adopted by the judges are subject to appeal and the same reviewed via appeal that acquires the quality of *res judicata*. The second crime with the highest incidence of investigation in the Specialized Corporate Prosecutor's Offices for Corruption of Public Officials in Huanuco during 2014 is collusion.

Those reported for collusion constitute 16% of the total number of cases processed by the Specialized Corporate Prosecutor's Office for Corruption Crimes of officials of Huánuco, during 2014, with a total of 57 cases, of which only 02 cases were successful in determining criminal liability, which represents 1% of the total, a fact from which the first conclusion can be drawn. There is a 99% probability that a case denounced for collusion in the Specialized Corporate Prosecutor's Office for Corruption of Public Officials in Huánuco will be filed and criminal responsibility will not be determined. This leads to impunity and a lack of punishment for acts of corruption such as the crime of collusion.

48% of the respondents have identified the main causes of impunity for the crime of collusion are the legislative deficiency contained in the criminal type contained in

Article 384° of the Criminal Code, and also the lack of evidence is another factor contributing to the lack of punishability. The requests of the Specialized Corporate Prosecutor's Office for Corruption of Public Officials of Huanuco - FPCEDCF, 2014 concerning the indictment of the corruption of public officials had a success rate of 59% in a regular process.

In the Huánuco Public Prosecutor's District, the second crime with the highest incidence of investigation in the Specialized Corporate Prosecutor's Offices for Officials' Corruption Crimes of Huánuco during 2014 is collusion; however, the same is inversely proportional to the number of convictions to this crime. Therefore, it is inferred that there is a 99% probability that a case denounced for collusion in the Specialized Corporate Prosecutor's Offices for Officials' Corruption Crimes of Huánuco is filed and criminal responsibility is not determined, therefore, it generates impunity.

The findings coincide with Peña (1995), who argues that the main cause of impunity for the crime of collusion is the legislative deficiency contained in the criminal type contained in article 384° of the Criminal Code, and Silva (2000) argues that the lack of evidence is another factor that contributes to the lack of punishability. The crime of collusion is a special crime, considered by the authorized international doctrine as a type of crime or infraction of duty, being the quality of the agent a condition *sine qua non* of differentiation, so the theory of authorship of the dominion of the fact, is not applicable, but the imputation by the quality of agent determined by the criminal norm itself.

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