Bases for applying the iter criminis notion in the Ecuadorian Environmental Criminal Law

Bases para aplicar la noción de *iter criminis* en la Ley Penal Ambiental del Ecuador

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Abstract

We analyzed the applicability of *iter criminis*. in the Ecuadorian environmental criminal legal framework, comparing doctrine and norms. We concluded that the irreparability of ecosystems notion and the preventive approach in criminology can create bases for criminal science in the matter. This formula is visible in the Constitution and in the Organic Code of the Environment, which makes its application pertinent. From a doctrinal point of view, the notion of guilt in the Integral Penal Code and the constitutional notion of nature as a subject of rights, also grant a normative specificity favorable to the inclusion of *iter criminis*.. We resolved the doctrinal antinomy about not penalizing unperformed behaviors, with an interpretation about the subsidiarity of other crimes during the *iter criminis*.

Keywords: Iter criminis; Crime law; Environment; Prevention; Ecuador.

Resumen

Se analiza la aplicabilidad del itercriminis en el marco jurídico penal ambiental ecuatoriano, comparando doctrina y norma. Se concluye que la irreparabilidad de los ecosistemas y el debate preventivista en criminología pueden crear bases de ciencia penal en la materia. Esta fórmula es visible en la Constitución y en el Código Orgánico del Ambiente, lo que hace pertinente su aplicación. Doctrinariamente, la noción de culpa en el Código Integral Penal y la noción constitucional de naturaleza como sujeto de derechos, también otorgan una especificidad normativa favorable a la inclusión del itercríminis. Se resuleve una antinomia doctrinaria acerca de no penalizar conductas no realizadas, con una interpretación sobre la subsidiariedad de otros delitos durante el iter criminis.

Palabras clave: Iter criminis; Derecho penal; Medio ambiente; Prevención; Ecuador.

Sumario

1. Introduction: framework and approach

Unlike the debate in criminal law, in criminal science and criminology particular importance is given to the nature and conditions of the criminal agent's intention. For criminology, it is crucial to identify the patterns that allow the framework of opportunities on which the crime is expressed. This approach gives rise to entire schools of criminology such as *problem oriented policing*, *environmental criminology, place criminology* and *situational criminology*[1]. In the case of criminal science, this

1 ECK, J. & WEISBURD, D. "Crime Place in Crime Theory" [online] in *Crime and Place: Crime Prevention Studies*. Hebrew University of Jerusalem. Legal Research Paper. Vol. 4. Willow Tree Press, 1999, pp. 1–33. https://acortar.link/z6IcWY

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debate has led neo–constitutionalism to the identification of the intentional nature of the crime and the debate on the centrality of *iter criminis*.

In relation to this last law figure, it is important to recognize two perspectives on this matter: one that is willing to presume the psychological intention of the offending agent, and one that, in honor of the centrality of the principle of innocence, ascribes to the *nullum crime sine conducta sine lege* rule.

Regardless of the viability and legitimacy of these two approaches, this article asks what are the normative aspects that confer legality to the idea of *itercriminis* in matters of environmental criminal law. In other words, identify the action harmful to the ecosystem as a legal right in the very preparation of an act or action of invasive intervention in nature. This article proposes that the notion of *itercriminis* in Ecuadorian environmental criminal law is perfectly valid for application with the existing regulations, and is necessary to sustain and guarantee the preventive principles that the norm of this country stipulates for the matter.

In keeping with the classic debate on the presumability of intent or culpability in the preparation of a crime or a secondarily criminal act, the approach that will be presented below tries to draw attention to the danger per se of the preparatory act when it comes to non–renewable resources or very difficult to repair, given the ecosystemic biological complexity of the threatened asset. Aspects related to the psychology of the transgressing agent will be secondary in the analysis presented, preponderating the notion of materiality of the criminal or transgressive will (conscious or not of the norm) on the part of the agent and the notion of dangerousness at the same stage of preparation.

Regardless of the viability and legitimacy of these two approaches, this article asks: What are the normative aspects that confer legal validity to the

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idea of *iter criminis* in matters of environmental criminal law? In other words, Is it possible to identify the action harmful to the ecosystem in the very preparation of invasive intervention in nature? This article proposes that the notion of *iter criminis* in Ecuadorian environmental criminal law is perfectly valid for application with the existing regulations, and that its application is necessary to sustain and guarantee the preventive of this country principles.

In keeping with the classic debate on the presumability of intent or culpability in the preparation of a crime or a secondarily criminal act, the approach that will be presented below tries to draw attention to the danger *per se* of the preparatory act when it comes to non–renewable or very difficult to repair resources, given the ecosystemic biological complexity of the threatened asset. Aspects related to the psychology of the transgressing agent will be not touched in the analysis presented, preponderating the notion of materiality of the criminal or transgressive will (conscious or not).

2. Conceptual adjustments

The author Ramón Ojeda Mestre, in his work *El Iter Criminis de los delitos ambientales* ("The Iter Criminis of environmental crimes") indicates in a general way the concept of *itercriminis*, as the path of crime or a set of preparatory acts aimed at committing a crime. This crime must be understood within the set of stages in which the it takes place: Since the subject decides the crime until he commits it. This makes it difficult for us to know when the worthwhile stages begin. Since the same decision to commit a crime is not punishable, it will be necessary for the subject to carry out a legally ponderable action over a conduct. In environmental matters, however, the use of the figure of *itercriminis* is precarious or null: in this part of the preparation of the criminal act, the typified laws always lead us to slippery terrain or to quicksand[2].

This definition is useful for our purpose, but it should be noted that there is a thick debate that often analogizes the idea of *iter criminis* to that of *attempt*, generating positions such as:

2 OJEDA, R. "El Iter Criminis de los derechos ambientales" [online]. *Revista Iberoamericana de Derecho Ambienal y Recursos Naturales*. No. 1, agosto, 2011 https://acortar.link/1VryAR

> "a) The attack or attempt is analogous to the crime as long as there is a principle of execution.
>
> b) The attempt is an imperfect crime because it is subordinated to the consummated crime; in this sense it is also analogous to *iter criminis* and *per se,* deserves a lesser penalty.
>
> c) Unlawfulness begins at the psychological level because the will of the fraud is specified there.
>
> d) Although the attempt is a degraded or imperfect form of the crime, it adds an aggravating circumstance to the completed crime"[3].

These forms of analogy between the *iter criminis* and the *attempt*, however, produce a problem for the purposes of this paper objective: it is not common to think that the objective of an agent to damage nature is such, since the damage is usually a subsidiary result of an action with economic, military or political ends. For this reason, in the case, for example, of a company whose goal is to build a refinery, it is not understood that its objective, frustrated or not, accomplished or not, is to destroy nature *per se*. This leads to the reflection of separating the idea of attempt from the idea of *iter criminis* since in the first, the criminal objective is the final part of its preparation, and in the second, there is subsidiary damage in the very conditions in which the action was planned.

For this reason, it is important to use the definition that he himself offers us:

> "We must briefly refer to the iter criminis, which is nothing other than the phases through which the legal phenomenon that develops what we call crime [...]
>
> We distinguish two stages, the internal or subjective, which has the characteristics of not yet having been externalized, as the content of this phase we highlight the ideation, deliberation and resolution to choose to commit a crime"[4].

3 ZAMBRANO PASQUEL, A. *Derecho Penal Parte General. Fundamentos del Derecho Penal y Teoría del Delito*. Quito: Murillo Editores, 2017, pp. 530–563.

4 Idem, p. 535.

As can be seen in this quote, the author facilitates a different understanding of attempt, since the option to commit a crime appears in the subjective phase, although the final action may not be the crime itself. In other words, although *iter criminis* is associated with a preparatory phase of the crime, it is possible to choose to commit a different crime in the subjective phase, so that the malicious intent goes aside the economic, military or political objective from its ideation:

> "Initially, in the subject's psyche, the idea of committing a crime, a criminal act is thought of, a natural reflection arises that gives way to deliberation, in this there is an internal struggle between the idea and the moral rejection of the crime, man can by his inclination to good –according to our particular appreciation of human behavior– reject criminal reflection, as it can happen that the inhibition mechanisms are not sufficient and the man decides in his privacy (subjectivity) to commit a crime"[5].

In such a way that the proposed figure indicates the presence of a criminal act from the will to commit a crime, which can be expressed, for environmental criminal matters, in designs, plans, declarations and above all, manifest resolutions.

3. Nature as a subject of law

In the Ecuadorian jurisdiction there are regulations and laws regarding the importance given to nature in the country. This framework moves from the classic anthropocentric conceptions where nature must be well managed for the purposes of development, sustainability and/or biodiversity, to an ecocentric one in which it is considered a subject of rights. This is visible in article 71 of the Constitution of the Republic of Ecuador (CRE), which specifies that:

> "Art. 71.– Nature or Pacha Mama, where life is reproduced and fulfilled, has the right to full respect for its existence and the maintenance and

5 ZAMBRANO PASQUEL, A. Op. cit., pp. 535–536.

> regeneration of its vital cycles, structure, functions and evolutionary processes. Any person, community, people or nationality may demand that the public authority comply with the rights of nature. To apply and interpret these rights, the principles established in the Constitution will be observed, as appropriate. The State will encourage natural and legal persons, and groups, to protect nature, and will promote respect for all the elements that make up an ecosystem"[6].

So, nature is not only granted the right to respect its existence, maintenance and care in general, but also demands care from nature, assigning it a unique right of citizens/human beings. This implies that nature has the right to be an independent entity. The CRE continues to establish a kind of duty or responsibility in which all people can demand compliance with the rights that belong to nature. For its part, in the following article, it is mentioned that:

> "Art. 72.– Nature has the right to restoration. This restoration will be independent of the obligation of the State and natural or legal persons to indemnify individuals and groups that depend on the affected natural systems. In cases of serious or permanent environmental impact, including those caused by the exploitation of non–renewable natural resources, the State will establish the most effective mechanisms to achieve restoration, and will adopt appropriate measures to eliminate or mitigate harmful environmental consequences"[7].

The constitutional notion that allows the assignment of independent rights to nature facilitates the understanding of the use of *iter criminis* as part of the guilty or fraudulent action, this is due to the responsibility of citizens to maintain, prevent, guarantee the conditions of sustainability of nature equals interpersonal responsibility. In a certain way, the difficulty of assigning the idea

6 ECUADOR. Constitución de la República del Ecuador (CRE) [online]. La Constitución Política de la República del Ecuador. *La Asamblea Nacional Constituyente de la República del Ecuador.* Quito, 1998, p. 36. https://acortar.link/eGFmDd

7 ECUADOR. Constitución de la República del Ecuador. Op. cit., p. 36.

of *iter criminis* to environmental criminal law stems from the idea that nature is only a resource to be managed, so that the damage done to it is dangerous for society but not for the nature *per se*. But here, harming nature, it would be like harming others. However, from the Ecuadorian legal perspective, an action for damage to nature must correspond to an action for damage to human beings, with a similar criminal weight.

It is possible, then, to consider to settle, for example, a refinery in a place where there would be obvious damage to the ecosystem, involves preparation phases for an illegal act. The very consideration of overcoming the moral inhibitors that society imposes is like to prepare a murder.

The Ecuadorian Constitution observes equidistance between the fact of eliminating an irreparable human life to eliminating an irreparable ecosystem. This equidistance makes the concept of reparation the source of the importance and danger of the crime (regardless the design of the penalty).

4. The importance of prevention in cases of irreparability

The issue of reparation is fundamental: if the damage caused acts on non–renewable things, such as human life or ecosystems, the judicial system is expected to place the transgressors on a plane of greater unlawfulness and punishability. But in the case of nature as a victim, it is not so:

> "It is believed in good faith that the inclusion of so–called environmental crimes has a more preventive or educational purpose than a truly sanctioning or punitive one to discourage behavior or punish transgressors"[8].

Many crimes that threaten nature are committed daily, and the stages or phases, whether subjective, intermediate or objective, of the environmental *iter criminis* are not considerable. This is the case, for example, of sewage discharges into rivers, or the accumulation of highly polluting waste with no or little repairable effects, such as lithium from batteries, or infectious wastes from dentists, butchers, infirmaries, hospitals, markets, all of them collected without selection

8 OJEDA, R. Op. cit., p. 16.

or elimination, carried out by the same entities of the local state power that should prevent it.

In none of these cases, the phases were not foreseen, because the consummation of polluting acts is perceived as indirect crimes, that is, they can indirectly affect the population, depending on the context and time. This the way we argue that prevention is not considered.

By conceptually transferring the problem of the irreparability of the human condition to nature, through its assumption as a subject of rights, the seriousness of the act is illuminated. But it is the same notion of reparation, since it is the source of criminal seriousness, which becomes the most important criminal measure. In this sense, the article 397 of the Constitution mentions that:

> "Art. 397.– In case of environmental damage, the State will act immediately and subsidiary to guarantee the health and restoration of ecosystems. In addition to the corresponding sanction, the State will repeat against the operator of the activity that produced the damage the obligations that comprehensive reparation entails, under the conditions and with the procedures established by law. The responsibility will also fall on the servants or servants responsible for carrying out the environmental control"[9].

Not only the CRE, but also the Ecuadorian Integral Organic Criminal Code (COIP, in Spanish) itself allows the State to be responsible for the restoration and repair of ecosystems, and direct it to the citizen or legal entity:

> "Art. 257.– Obligation to restore and repair. – The sanctions provided for in this chapter will be applied concomitantly with the obligation to fully restore ecosystems and the obligation to compensate, repair and indemnify the people and communities affected by the damage. If the State assumes this responsibility, through the National Environmental Authority, it will repeat it against the natural or legal person that directly or indirectly causes the damage. The competent authority will dictate the norms related to the

9 OJEDA, R. Op. cit., p. 177.

right of restoration of nature, which will be mandatory"[10].

In these cases, it is visible that the rule was designed to have a deterrent effect, as is the very nature of criminal law since Beccaria. Therefore, irreparability must always be understood as the damage caused by an action that should have been prevented. Especially since prevention is the only condition that allows non–repairable things to be kept in existence. Hence the importance that the justice system considers, observes, supervises and penalizes a legal situation in light of environmental *iter criminis*.

5. Correspondence between the notion of *iter criminis* and the Ecuadorian norm on environment

The Ecuadorian norm is explicit about the notions of prevention in nature. It consistently includes concepts of sustainability, comprehensiveness and, clearly, prevention. To maintain nature as it is, is the very notion of its warrantee, rather than penalizing acts against nature.

Article 83 of the constitution of that country puts it this way:

> "Art. 83.– The duties and responsibilities of Ecuadorians, without prejudice to others provided for in the Constitution and the law: […] 3. Defend the territorial integrity of Ecuador and its natural resources. […] 6. Respect the rights of nature, preserve a healthy environment and use natural resources in a rational, sustainable and sustainable way. […] 7. Promote the common good and put the general interest before the individual interest, in accordance with *good living*. […] 13. Preserve the cultural and natural heritage of the country, and care for and maintain public goods"[11].

The State has the objective of avoiding causing more damage, in addition to ceasing what is already occurring. Something important to mention is that, unlike most processes, in cases of environmental crimes, the burden of proof

10 ECUADOR. Comprehensive Organic Criminal Code, 2021, p. 100.

11 OJEDA, R. Op. cit., p. 42.

is reversed, that is, the responsibility for the burden of proof will fall on the defendant. This makes it easier to act quickly and expeditiously in favor of revealing some harmful act, before is consumed the destruction of an ecosystem.

In numeral 2 of Art 83 it is mentioned that it is the responsibility of the State:

> "2. Establish effective mechanisms for the prevention and control of environmental pollution, for the recovery of degraded natural spaces, and for the sustainable management of natural resources"[12].

And, in article 6 of the same code, it is specified that:

> "Art. 6.– Rights of nature. The rights of nature are those recognized in the Constitution, which encompass the integral respect for its existence and the maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes, as well as restoration. To guarantee the exercise of their rights, territorial environmental criteria will be incorporated in territorial planning and ordering by virtue of ecosystems. […]"[13].

All these indicated concepts redound to the centrality of prevention: planning, "integral respect", control, maintenance of vital cycles, etc.

Additionally, from the perspective of general criminal law, the Ecuadorian concept of guilt coincides in a vision prior to the offense. As established in article 27 of the same COIP, it is characterized as follows:

> "Article 27.– Guilt. – The person who violates the objective duty of care, which personally corresponds to him, acts with fault, producing a harmful result. This conduct is punishable when it is classified as an offense in this code"[14].

12 Idem, p. 177.

13 ECUADOR. Código Organico del Ambiente [online]. *Asamblea Nacional. Registro Oficial*. 12 de abril de 2017. Suplemento 983/Lexis Finder, p.12 https://acortar.link/pF93YT

14 ECUADOR. Código Orgánico Integral Penal (COIP) [online]. *Asamblea Nacional. Registro Oficial.* 10 de

That is to say that, regardless of the criminal type (which is usually tied to the objective "infraction"), the Ecuadorian crime law is placed in the notion of "care", and not of the offending act itself. In other words, there is a fault when there was no care and, therefore, the offense occurred. The infraction indicated by the criminal type establishes a possible legal action against the person who "violates the objective duty of care". Therefore, again, the object of the analysis of the evidence begins before the infraction, both in the general and environmental part of criminal law, so that the criminological notion attended by the preventive schools indicated at the beginning of the article, allows or makes the use of environmental criminal *iter criminis* possible.

6. Conclusions

In short, the criminal importance of environmental criminal law resides in the fact that the legal assets to be protected, while perceived as part of ecology, are irreparable. In this sense, traditional preventive criminology converges with environmental criminal law, since both protect irrecoverable assets: ecology and human life.

The irreparable forces to the penological analysis to be placed itself before the consummation of a crime, that is, at the moment in which a manifest action will bring environmental damage, for which the notion of environmental criminal *inter criminis* becomes pertinent.

There can only be coincidence with the figure of "attempt" if it is recognized that the crime is a subsidiary consequence of another action, since many of the actions against nature do not seek to harm it *per se*, but, generally, for economic, military or political motivations. This means that the notion of attempt, as an "imperfect crime", or its other different definitions observed in the introduction to this manuscript, does not adequately respond to the nature of environmental crime.

Another problem is that the neo–constitutionalist notion based on the *nullum crime without conduct sine lege* principle, would seem to contradict our proposal, because penalizing the *iter criminis* would correspond to penalizing an action that

febrero de 2014. Suplemento 180/Lexis Finder, p. 19. https://acortar.link/el9Tdb

has not yet had conduct. But Zaffaroni solves this problem with the idea that other crimes can occur in the course of an action with a different intent:

> "The successive acts in the advance of the iter criminis are interfering with the typicity that is produced; the attempted murder interferes with the typicality of the injuries that the victim suffers in its course: the consummation interferes with the typicality of the attempt. If some circumstance eliminates the interference, the interfered typicity re–operates: the withdrawal means that the attempt no longer interferes with the typicality of the lesions. If for some factual reason it is proven that the passive subject did not die as a result of the conduct (he died of a heart attack), the consummation ceases to interfere with the typicality of the attempt"[15].

From him, we can say that injuries (subsidiary crimes) acquire central relevance as criminal types, when the objective of the crime has given up and, therefore, the subsidiarity condition is subtracted. Subsidiary crimes to an economically motivated environmental intervention acquire criminal relevance by themselves, especially if the environmental intervention were to become legal or if its illegality were to be abandoned. In other words, the subsidiary crimes of the *iter criminis* do not cease, even when the action that carried them is desisted or not consummated.

To continue with the first example: an action consisting of building a refinery in an ecologically vulnerable area, should not interpret ecological crimes as part of inadequate project planning, but as crimes in themselves. This would make it possible to understand ecological crime in all its seriousness, even from the point of view of *inter criminis* (as Zaffaroni pointed) and not as an administrative problem (that must be dealt with by state environmental or law enforcement offices, for example). The refinery must understand that it cannot be planned with any consideration of ecological damage, because it will be penalized.

The notion of guilt in Ecuadorian law also allows for the incorporation of environmental *iter criminis*, since it defines that, regardless of the criminal type, whoever "violates the objective duty of care, which personally corresponds to

15 ZAFFARONI, R. *Estructura básica del derecho penal.* Buenos Aires: Ediar, 2011, p. 188.

them", is guilty, so that the harmful result of the *lack of care* would produce a responsibility in that person, legal or natural, who did not have the objective duty of care, that is, before the consummation of the crime.

Finally, the Constitution indicates that nature is subject to rights in various ways, allowing to become nature as a criminal victim, as the classical criminological reading of is understood.

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