

## LEGAL ANALYSIS OF THE LAW OF EXTINCTION OF DOMAIN AND CORRUPTION IN ECUADOR

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### Summary

*Due to the high levels of corruption in Ecuador, alternatives arise to reduce them, these are fragile when recovering money from corruption in crimes such as extortion, bribery, embezzlement, and others. Thus, the investigation proposes to identify the results achieved in the recovery of money resulting from corruption with the application of the Organic Law of Extinction of Domain (LOED), a legal tool that despite its validity has not achieved its objective. The investigation was developed with the purpose of determining the applicability of the (LOED) in the Ecuadorian context from the criminal field; This is how an extensive theoretical study was carried out based on the dogmatic analysis of the current regulations. The application of the positivist paradigm; the qualitative and quantitative modality; methods, analytical; synthetic; deductive; logical history, allowed to strengthen knowledge on the subject; In addition to this, the interview technique revealed that this Law presents a series of legal loopholes that facilitate the commission of acts of corruption; confirming the hypothesis that this mechanism is ineffective at the time of confiscating assets resulting from this type of act. The broad definition of illicit activity, and the pre-existence of an enforceable conviction in the crimes determined in literal a) article 7 of the LOED, configures a legal institution of prejudiciality, a legal obstacle that must be resolved before determining that has configured one of the conditions for domain extinction.*

**Keywords:** Legislation; crime, corruption, Domain

### INTRODUCTION

#### History of Corruption

Corruption, a phenomenon as old in human history as Civilization itself (Holmes, 2015). Some Catholic authors followers of the Bible claim that the first act of corruption occurs when Eve tempted by the serpent corrupts Adam. Other scholars instead maintain that corruption begins after the sacrament, when Jesus shared with his apostles in Jerusalem before his crucifixion. (Zavala, 2013) In the same vein, there are criteria that the first act of corruption occurs in lower Mesopotamia, in Sumer. The Hammurabi Code carved from a basalt block, and considered one of the oldest laws, established penalties for conduct related to corruption; others consider that it occurred in ancient Egypt; for, during the reign of Ramses, administrators manipulated the food rations that were given to the workers who worked in the tombs of the princes, providing rations in less quantity and quality. Likewise, corruption was also present in the history of China, for centuries nepotism and bribery were present in the daily life of its inhabitants, this occurred both in the court and in the bureaucracy; Studies report that, to counteract these illegal acts, officials were given an extra allowance called "Yang-lien", which means to feed non-corruption. (Brioschi, 2019).



Thus, in *Greece*, there are also some acts of corruption, such as when Solon, a Greek sage, to hide economic errors committed by his predecessor, abolished debts contracted until that moment, of this people close to the rulers learned, and in exchange for their silence they requested loans to buy land; another outstanding case in *Greece* is of Socrates, a philosopher who spoke in public squares, and among his religious speeches forgave the guilt of the listeners, this forgiveness depended on the quality of the offerings he received. (Coley, 2019)

The *Roman Empire* is also not exempt from corruption, despite being considered a reference of great historical value in humanity, had its stage of decline, authors argue that one of the elements for its fall was the loss of traditional Roman civic virtues; the public life of Rome was contaminated by acts of extortion and influence peddling, present in the common citizen, soldiers and officials close to the emperor. Another important record in the history of Rome is the case of Caligula, who came to occupy the throne of emperor illegally, annulling the will of the previous emperor Tiberius, arguing that he was insane when he signed the document, intentionally increasing his patrimony.

From the above, it can be affirmed and with certainty that corruption has always coexisted with humanity; The abuse of power, expressed through the use of opportunities from public or private positions in different social strata, to obtain one's own benefits or in favor of another, has been the easiest mechanism to obtain money and power.

### **Corruption in Latin America**

In Latin America, bribes enrich the corrupt, who mercilessly seize the future of the next generations, robbing them of their dreams and sowing poverty and misery; This way of illegally acquiring economic gains hinders the development of a country characterized by growing social inequality, as well as weakness in social and political institutions. Together, these elements make the region a breeding ground for corrupt behavior and the search for private benefits over the general interest. (Seligson & Smith, 2010)

Similarly, corruption is particularly affecting democracies, beset by the effect that knowledge of grand plots has on them. In recent years, emblematic cases of corruption involving high-ranking politicians and numerous members of the political elites have been known, including the Odebrecht case. Thus, corruption has become one of the factors that most affects distrust in Latin American democratic institutions and explains why political reforms, of greater or lesser magnitude, are being carried out in order to improve the quality of the governments of the day and the perceptions of citizens. (Ramos & Javier, 2019)

However, the Odebrecht case has not only affected presidents of the republic, but has also exposed a large number of public officials who are involved throughout the region and, with them, incompetent public institutions have been evidenced. (Yuhui, 2021)

In this context, Transparency International's latest report on the perception of corruption in Latin America shows alarming results in many countries. Uruguay is the country in which citizens perceive lower levels of corruption, while in Venezuela the perception of corruption is higher. Unfortunately it is a universal phenomenon, where Latin America is no exception, on the contrary, the perception of corruption measured by Transparency International every year through the Corruption Perception Index (CPI) shows us how this region, along with Africa, is one of the most affected; Although it has democratic political systems that to a greater or lesser extent have been functioning electorally for some decades, with elections and alternation in power between parties, the institutions are often fragile and subject to political manipulation. (Salas, 2017)

In response to these considerations, the circle of Latin American Studies CELSA synthesizes through factor analysis, the information on the phenomenon of corruption provided by international institutions: World Bank, Transparency International, World Economic Forum, Heritage Foundation, Freedom House and Bertelsmann Foundation. The indicator is scaled at the maximum and minimum with extreme reference countries (Finland and Somalia). (CELSA, 2022)

Hence, the Economic Indicator of Corruption CELSA, prepared by the countries of Latin America, does not foresee improvements for the year 2022, on the contrary, there is an index of worsening in certain countries.

### **Corruption in Ecuador**



Throughout the investigation it is determined that corruption in societies is a cancer that affects the development of a country that must be confronted urgently if it is intended to restore an equitable and just society, this immoral conduct is intended to obtain profits by violating legal and moral rules; In this sense Novoa states that the most serious effects of corruption are those generated on the fundamental rights of citizens. (Novoa Curich, 2016)

Depending on the Region, corruption has different ways of manifesting itself, it is something that cannot be measured, because there are acts that go unnoticed or simply are not reported; Therefore, it is logical that exact data cannot be counted on to establish the percentage of acts of corruption in a given region. It is truly regrettable what is happening in the country, observing acts of corruption involving important figures such as presidents of the republic and officials close to the governments of the day; The lack of morals, ethics and indolence with their neighbor, put at risk the legal and administrative system. In addition, most cases of corruption have been detected in public sector institutions where power is used for the benefit of a few. .(Heredia & Gómez, 2010)

Corruption has spread like a veritable pandemic across the country. From processors in various agencies of the public sector, through the granting of titles irregularly in certain educational institutions, to millionaire bribes to be awarded contracts in the highest spheres of the State. ; For what has been stated, (Isaías, 2021) It is necessary to highlight the famous phrase of by Montesquieu "It is not that the State arises, reaches its greatness, degenerates and falls, but that it sinks and is lost, when men become corrupt."

The Corruption Perceptions Index (CPI), produced by Transparency International (TI), ranks 180 countries and territories according to their perceived levels of corruption in the public sector, based on 13 expert assessments and surveys of corporate executives. Use a scale from zero (very corrupt) to 100 (very clean). The 2020 edition of the CPI shows that Ecuador has obtained a score of 39/100 and is ranked 92nd among 180 countries evaluated.

This year the CPI notes that most of the countries assessed have not made progress in combating corruption for nearly a decade, evidencing a stagnation in governments' efforts to address the root causes of corruption. More than two-thirds of the countries assessed have a score below 50. .(IPC, 2020)

In view of these considerations, it is urgent to activate the established means of fighting corruption ; therefore it is imperative to analyze legal regulations related to the subject of research.

**Legal Framework against Corruption:** The enunciation of the legal framework in this research is relevant, through the analysis of current Ecuadorian legislation on corruption, the agreements signed and ratified by Ecuador, will allow to determine if the Law of extinction of domain, fulfills its objective that is to regulate the extinction of ownership of assets of illicit or unjustified origin or illicit destination in favor of the State.

The Constitution of the Republic of Ecuador provides a space for citizen participation and social control; Article 204 establishes that: The people are the principal and first overseer of public power, in the exercise of their right to participation; This is in accordance with article 61, numerals 2 and 5, which determines among other rights for Ecuadorian women: participate in matters of public interest and supervise the acts of public power. (Constitución, 2008)

In addition to this, the Magna Carta establishes an institutional structure in charge of this matter, for which it creates the Transparency and Social Control Function, made up of the Council of Citizen Participation and Social Control, Ombudsman's Office, Comptroller General of the State and the Superintendencies of Banks, Companies and Insurance, Popular and Solidarity Economy; Control of Market Power and Communication.

In this regard, the Transparency and Social Control Function is responsible for promoting and promoting the control of entities and bodies of the public sector and of natural or legal persons of the private sector, which provide services or execute activities of public interest, activities that will be carried out with responsibility, transparency and equity; encouraging citizen participation; In addition, it will protect the exercise and fulfillment of rights, prevent and combat corruption.

So too, instruments for the prevention and fight against corruption were created, and this is how the Inter-American Convention against Corruption was born, promoted by the Organization of American

States (OAS), in force since March 6, 1997. Subsequently, the United Nations Convention against Corruption, in force since December 14, 2005, emerged. (Rueda, 2010)

However, these conventions are intended to enhance international cooperation, where their purposes of investigating, punishing, and typifying crimes related to acts of corruption prevail, exercising their follow-up mechanisms to enforce compliance, these measures will help to restore confidence in the integrity of public officials and also in public management, in addition to recovering the stolen; by This, among one of the purposes of the United Nations Convention against Corruption established in numeral 1 article 3 states that: This regulation is apply, in accordance with its provisions, to the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of proceeds from offences established in accordance with this Convention. (CNUCC, 2005)

In this same context, in order to have information that allows better control of corruption crimes that threaten the state coffers, and that these do not remain in impunity, the Organic Law on Transparency and Access to Public Information is instituted, establishing Rights to those citizens who wish to access public information; Likewise, sanctions are established for public and private officials who refuse to hand over this information. The officials of the entities of the Public Administration and other entities indicated in article 1 of this Law, who fail to comply with the statements, will be sanctioned, according to the seriousness of the fault. . (COPFP, 2004)

Similarly, article 9, paragraph 2, of the Convention of the United Nations Against Transnational Organized Crime and its Protocols, states that: Each State Party shall take measures to ensure effective intervention by its authorities with a view to preventing, detecting and punishing corruption of public officials, including by providing those authorities with sufficient independence to deter the exercise of any undue influence on their actions. .(Convención de Palermo, 2004)

Linked to this in 2021, the Organic Law of Extinction of Domain (LOED) is issued, whose purpose is to regulate the extinction of ownership of assets of illicit or unjustified origin or illicit destination in favor of the State. ; Now it is striking that, despite the existence of abundant regulations that prevent and punish acts of corruption, these have not been eradicated and the assets obtained illegally are not returned, except in exceptional cases.(LOED, 2021)

#### **Organic Law of Extinction of Domain**

The reality in which we live today is indisputable, a society plagued by corruption; The fight against this cancer is not a subject of discussion, the issue is to seek solutions from different national or international jurisdictional fronts, which tend to toughen penalties or new sanctioning modalities such as the confiscation of assets, aimed at public or private officials, who enrich themselves illegally by acts of corruption; Thus, on May 14, 2021, the Organic Law of Extinction of Domain (LOED) enters into force, which aims to regulate the extinction of ownership of assets of illicit or unjustified origin or illicit destination in favor of the State.

In that same context, the state intends to apply the LOED against assets that come from illicit acts, either inside or outside the Ecuadorian national territory, for this it determines certain conditions for the extinction of ownership to be configured, these are:

1. The existence of any goods or goods presumably of illicit or unjustified origin or illicit destination;
2. The existence of an illegal activity;
3. The causal link of the two previous elements; and
4. The knowledge that the owner of the property has or should have had about its illicit or unjustified origin or its illicit destination, unless both the owner and the final beneficiary demonstrate that they were prevented from knowing it.

Now, the above statements suggest that for the extinction of domain to be configured, 4 conditions must be met; the LOED also determines which offences are related to illicit activities and which are defined in the COIP, against which the aforementioned Law may be applied; These being: concussion, bribery, embezzlement, illicit enrichment, money laundering, production, marketing or illicit trafficking of scheduled substances subject to control, and trafficking in persons.

In the same way, guarantees and principles are established; these will be applied in compliance with the constitutional order and international instruments ratified by Ecuador, which are related to the nature of the procedure of extinction of ownership. The law delimits that the extinction of ownership will proceed against the property acquired illegally; For legal support, the parties may make use of the principles of contradiction, objectivity and transparency. In the crimes of corruption, the procedural subjects, the LOED determines:

- a) Office of the Attorney General of the State,
- b) The affected person(s); and
- c) The Attorney General's Office.

Therefore, in order to comply with the objective of this Law, it is essential to follow the respective procedure of extinction of ownership, to subsequently and if possible apply the respective sanctions against those who participate in acts of corruption.

### **MATERIALS AND METHODS**

The methodological procedure that was used in this research is mixed, this approach arises from the combination of the quantitative and qualitative method to have results that allow evaluating and determining values that support the initiative as such, this dissolution of methods provides a combination that allows to focus data that demonstrate qualities or traits that can be interpreted and that contribute to the investigation in an effective way, In general, there is a greater preponderance of the qualitative approach.

In this sense, the ideas that were expressed in the content of this research work are interpreted to access an overall approach and establish comparisons from the resulting content, in addition, the methods influence how the object is interpreted. Social research makes comprehensive use of viable and reliable methods and tools offered by qualitative and quantitative processes. In both cases, they are shown to have specific areas, but at the same time they can complement each other in terms of research.

### **RESULTS**

LOED Law, published in the fifth Supplement of the Official Register No.452, May 14, 2021. despite being in force, it does not fulfill the objective for which it was created, since there is no evidence that economic resources stolen as a result of corruption crimes have been recovered; It presents legal defects, for this reason it does not constitute an effective tool for The identification, prosecution and punishment of corruption, to date there are no statistics that determine whether the ill-gotten money resulting from the crimes of money laundering, bribery, concussion, embezzlement, illicit enrichment, organized crime, obstruction of justice, overpricing in public procurement, acts of corruption in the private sector, proxies, has been recovered. trafficking in persons and smuggling of migrants, terrorism and its financing, and crimes related to scheduled substances subject to control The presidential veto, the Constitutional Court ruling and the amendments included by the National Assembly at the end of the legislative process left us with another symbolic criminal norm that will have little and residual application.

Corruption is a social cancer that dates from the existence of man, there is historical evidence that determines that these negative acts occurred in lower Mesopotamia in Sumer; Greece; and Rome. The fastest way to increase their economic wealth was to belong to the state, either as part of the circle close to the rulers or in some government position, that is, corruption was perpetrated in the upper and middle spheres; This premise has been maintained to date. The research allowed to evidence, how unscrupulously they appropriate state money, this affects the economic growth of countries, their competitiveness and is closely linked to inequality in the distribution of wealth. Poor or developing countries are those that suffer most intensely the vicissitudes of corruption, by way of reflection we can quote what Plato said.





## DISCUSSION

Through a legal analysis of the Law of Extinction of Domain, it was determined that the applicability of the LOED in Ecuador, in relation to the recovery of economic resources stolen in corruption crimes does not comply with its objective and scope and even more with returning to the State the ownership of the stolen.

Indeed, before continuing to review the LOED, published in the Fifth Supplement to Official Gazette No. 452 of May 14, 2021, it is necessary to analyze why the Ecuadorian Criminal Law was not an effective tool to prevent and punish acts of corruption, and therefore the recovery of assets of illicit origin.

In this regard, one of the main means used against defendants in criminal proceedings to combat public and private corruption has undoubtedly been the application of precautionary measures of a personal nature; Pretrial detention is a mechanism for resolving this problem; However, these measures are palliative because they do not solve this social cancer. The anticipated penalty of deprivation of liberty against the defendant before a conviction is issued, does not guarantee comprehensive economic reparation in favor of the victims, in this case the state is the one who is affected in its state budget; The sentences do not comply with the purpose of restitution of the stolen, directly affecting its citizens, who lack social work.

However, article 69 of the Organic Integral Criminal Code (COIP) establishes penalties restricting property rights, including criminal confiscation, which is appropriate in all cases of intentional crimes and falls on property, when these are instruments, products or revenues in the commission of the crime. There will be no forfeiture in the culpable criminal types. In the conviction, the competent judge shall order the confiscation of:

- (a) Property, funds or assets, or computer instruments, equipment and devices used to finance or commit the criminal offence or punishable preparatory activity.
- b) The goods, funds or assets, digital content and products derived from the criminal offense.
- (c) The property, funds or assets and products into which the proceeds of the criminal offence are transformed or converted.
- (d) Proceeds of crime that are mixed with property acquired from lawful sources; may be confiscated up to the estimated value of the intermingled product.
- (e) Income or other benefits derived from the property and proceeds derived from the criminal offence.
- (f) Property, funds or assets and proceeds owned by third parties, when these have been acquired in the knowledge that they are derived from the commission of an offence or to make it impossible to confiscate the property of the sentenced person.

When such property, funds or assets, products and instruments cannot be confiscated, the judge shall order the payment of a fine of the same value, in addition to that provided for each criminal offence. . (Asamblea Nacional, 2014)

Adding to the above, the COIP determines that in the convictions issued within criminal proceedings for crimes of money laundering; bribery; concussion; embezzlement; illicit enrichment; organized crime; obstruction of justice; overpricing in public procurement; acts of corruption in the private sector; frontmanism; trafficking in persons and smuggling of migrants; terrorism and its financing; and, offences relating to scheduled controlled substances; property, funds or assets, products and instruments; If it is the case that assets derived from these unlawful acts cannot be confiscated, the administrators of justice shall order the confiscation of any other property owned by the sentenced person, ensuring that it is related to the value stolen, even if these assets are not related to the crime. The COIP also establishes sanctions for legal persons.

In this context, the Criminal Law establishes that, prior to the imposition of the penalty (criminal confiscation), in the course of the criminal process, precautionary measures may be imposed on the assets of the person prosecuted, whether natural or legal; these measures may be kidnapping, seizure, retention and prohibition of alienation, as determined by article 540 of the COIP. These measures do not only apply within the procedural stages; but also, in the pre-procedural phase (Preliminary Investigation). The prosecutor, as the owner of the exercise of public action, may



execute urgent acts, in order to obtain, preserve, preserve evidence, or prevent the consummation of a crime, this in compliance with the provisions of article 583 *ibidem*, for which he requires judicial authorization.

It is striking that despite existing Sufficient legal tools for the criminal prosecution of corruption crimes and actions to avoid impunity, there is no evidence of relevant results, since the freezing of the assets resulting from these illicit acts has not been achieved, despite the existence of prisoners who received convictions against them for attacking the coffers of the State and others who are fugitives from justice. Corruption affects legal certainty, equality, breaks the law and puts democracy and its institutions at risk. Therefore, the role of the judge in the fight against corruption is reliva, which, in addition to guaranteeing due process, effective judicial protection and not allowing impunity, contributes to the construction of secular ethics, in the strengthening of democracy and the confidence of citizens in the justice system. (Saquicela Rodas, 2019)

Therefore, in order to curb impunity in acts of corruption, the Organic Law on Asset Forfeiture is approved. The LOED in its relevant articles states: Art. 1. Purpose. - The purpose of this Law is to regulate the extinction of ownership of assets of illicit or unjustified origin or illicit destination in favor of the State. Art. 2. Scope. - This Law shall apply to assets of illicit or unjustified origin or illicit destination located in Ecuador and assets located abroad. Art. 3.- Extinction of domain. - The extinction of ownership consists of the declaration of ownership in favor of the State by means of a judgment of a judicial authority, without consideration or compensation for its owner, or who holds or behaves as such and is applied to assets acquired through actions or omissions contrary to law.

It also establishes the mechanism to ensure that the ownership of assets of illicit or unjustified origin or illicit destination located in Ecuador or abroad will be judicially affected in favor of the State; in this context, article 4 of the aforementioned Law refers to the legal nature, determining that the extinction of ownership is patrimonial, autonomous, distinct and independent of any other process or matter.

In addition to the above, articles 3 and 4 of the LOED highlight the independence of the judgment of extinction of ownership from another process, the implicit reference to criminal proceedings being evident; however, in the legislative process this was modified, Opinion 1-21-OP/21 of the Constitutional Court, issued in response to the partial objection for reasons of unconstitutionality presented by the President of the Republic, Lenin Moreno Garcés, with respect to articles 4, 8, 71 and 72, is recognized as a criminal legal nature to the extinction of ownership being part of the state *jus puniendi*; and, subsequently, the National Assembly, upon learning of the presidential veto, eliminated in practice (although it is formally maintained in the text of the LOED) the autonomy of the action by creating an obstacle to the exercise of the criminal action of the extinction of domain. In the same vein, article 5 of the LOED, establishes conditions for the extinction of domain; that is, for these to be configured, the concurrence of the following conditions must be verified:

1. The existence of any goods or goods presumably of illicit or unjustified origin or illicit destination.
2. The existence of an illicit activity.
3. The causal link of the two previous elements; and
4. The knowledge that the owner of the property has or should have had about its illicit or unjustified origin or its illicit destination, unless both the owner and the final beneficiary demonstrate that they were prevented from knowing it.

However, the Constitutional Court with respect to the definition of illicit activity held in its Opinion the following:

77. It is for this Court to determine whether the definition of unlawful activity that would give rise to the extinction of ownership meets the element of certainty required by the right to legal certainty and the principle of legality, according to which the rules establishing sanctions must be drafted in sufficiently clear and specific language so that individuals can understand the consequence that will follow if the prohibited conduct is committed, and how it differs from other non-prohibited conduct.

79. The Court observes that the definition of unlawful activity that would give rise to the restrictive sanction of the right to property, contained in the Bill, is extremely broad and indeterminate in that

it refers in a general and abstract way to any type of activity contrary to the legal order, which can cover an infinite set of situations. This definition does not clearly set out the constituent elements of the conduct that will give rise to the sanction. Activities contrary to the legal system may constitute criminal offenses, civil offenses, administrative offenses, tax offenses and the Bill does not determine the scope of the conduct that could result in the extinction of the right of ownership. 80. Furthermore, the broad and indefinite nature of the proposed definition would allow it to be applied to cases disproportionate to the penalty of termination of the right of ownership. By defining as an illicit activity any activity contrary to the current legal system, the extinction of ownership would be activated against conduct that clearly does not comport with the sanction to which they would be subjected. The Court observes that this disproportion is manifest if one analyzes the first cause of origin of the action of dominance established in Article 19 of the Bill. This ground indicates that the action of extinction of ownership will proceed with respect to a) the good or assets that do not meet the requirements for the acquisition of ownership", and would allow the State to extinguish the domain over goods in whose acquisition there has been, among others, the following breaches of requirements that, under the terms of the project, would constitute illegal activities contrary to the legal system in force.

In addition to this, paragraph a) of Article 7 of the LOED, in its pertinent part on the definitions states: For the application of this Law, the following definitions shall be taken into account:

a) Illicit activity. - Actions or omissions related to the offences defined in the Comprehensive Criminal Code of: concussion, bribery, embezzlement, illicit enrichment, money-laundering, production, marketing or illicit trafficking of scheduled substances subject to control, and trafficking in persons, established by an enforceable conviction.

It is necessary to emphasize that, by demanding that there be a previously enforceable conviction in the crimes determined in paragraph a) of article 7 of the LOED, a legal institution of prejudiciality is configured, creating a legal obstacle that must be resolved before it can be determined that one of the conditions for the extinction of ownership has been configured. Otherwise, it could lead to the declaration of procedural nullity, or proceed with the archiving of the case.

therefore, the Organic Law of Asset Forfeiture is not an effective tool to combat corruption; this regulation can be considered as another symbolic law due to its low applicability. The purposes for which it was created are not fulfilled; Nor does it meet the expectations of a people who watch calmly and powerlessly as they take away the hope of living with dignity.

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