

Concepto y clasificación de la infracción penal en el COIP

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1. Según el art. 18 COIP, “infracción penal es la conducta típica, antijurídica y culpable cuya sanción se encuentra prevista en este Código”. Formal y conceptualmente, esta definición es errónea, pues la culpabilidad no puede ser en ningún caso elemento de ninguna “infracción” de ninguna especie. De lo contrario, habría que negar el carácter de infracción a las conductas *contrarias a las normas* que realizaran quienes obren sin culpabilidad. Infracción significa inobservancia o contravención de una norma —obviamente mediante un hacer o un omitir humanos, y por tanto, dolosos o imprudentes— independientemente de si el autor ha obrado culpablemente o sin culpabilidad¹. Infracción “penal” es una especie de contravención de una norma que se caracteriza por que la conducta infractora está *tipificada por la ley penal* independientemente de la culpabilidad de los hipotéticos infractores. Así lo asume también el COIP, pues desdiciendo y contradiciendo —ahora correctamente— la inicial definición del art. 18, en el art. 36 parte de la base de que el sujeto que padece un trastorno mental que le impide comprender la ilicitud de su conducta o de determinarse de conformidad con esta comprensión, *no es culpable* (art. 34) por la *infracción* que ha cometido. Lo que en realidad define el art. 18 COIP es, pues, el concepto total de “delito”, que comprende a la totalidad de los presupuestos de la punibilidad (la tipicidad, la antijuridicidad y la culpabilidad)².

2. El COIP formaliza ahora explícitamente en su art. 18 el concepto de delito, como conducta —acción u omisión— *típica, antijurídica y culpable*, el cual ya se encontraba implícito en el Código penal anterior (arts. 2 pfo. 1º, 10, 18 ss. y 32 ss.) y también era el asumido por la doctrina penal ecuatoriana en sus exposiciones y desarrollos conceptuales y sistemáticos de la teoría del delito³. El COIP dedica luego tres secciones de su articulado a definir los contenidos de cada uno de los mencionados elementos constitutivos del concepto del delito, y así, a la tipicidad le dedica los arts. 25 a 28, a la antijuridicidad los arts. 29 a 33, y a la culpabilidad los arts. 34 a 38. Aunque generalmente, basta la realización de una conducta típica, antijurídica y culpable para fundamentar la responsabilidad penal del autor e imponerle la pena establecida en la ley, en algunos pocos casos ésta condiciona la *punibilidad* del delito (de la conducta típica, antijurídica y culpable) a la efectiva concurrencia de una condición objetiva de

¹ Sin embargo, *Aschoff*, al entender que no hay injusto sin culpabilidad, tiene que incluir a ésta en su concepto de infracción de la norma; véase *Aschoff*, ZStW (107) 1995, p. 86-4. Afortunadamente, la concepción de *Aschoff* no es objeto de la mínima atención en la doctrina; pero contra ella, véanse las severísimas críticas y el rotundo rechazo de *Roxin*, InDret 4/2012, pp. 18 s., quien advierte que el sistema de *Aschoff* da lugar al derrumbe del mayor logro de la Ciencia penal, que, como dijo ya *Witzel*, fue precisamente la fijación de una clara distinción entre injusto y culpabilidad, y la categorización de estos conceptos en tipicidad, antijuridicidad y culpabilidad; véase *Witzel*, JuS 1966, p. 421: “Voo” —expresó *Witzel*— “en la descomposición del delito en los tres elementos tipicidad, antijuridicidad y culpabilidad el progreso dogmático más importante de las últimas dos o tres generaciones”.

² Cfr. no obstante lo que se dice en la siguiente nota.

³ Véase al respecto, *Zambrano Panquef*, Manual de Derecho penal, 3ª ed., Quito, 2008, *passim*; el mismo, en Temas de Ciencias penales, Guayaquil, 1996, pp. 152 ss. (no obstante, para *Alfonso Zambrano* la culpabilidad no es elemento del concepto del “delito”, en lo cual no le falta razón —actualmente sostiene la misma opinión *Bustos/Hormazábal*—, si bien ello carece de toda consecuencia sistemática para la teoría del delito); *Franco Loor*, Fundamentos de Derecho penal moderno I y II, Quito, 2011, *passim*; *Araujo Granda*, Derecho penal económico, Quito, 2010, pp. 91 ss.

Concepto Y Clasificaci N De La Infracci N Penal En El Coip

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Concepto Y Clasificaci N De La Infracci N Penal En El Coip:

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