

**THE POSITION OF THE SUPREME COURT
RELATING TO THE PROTECTION OF THE
FUNDAMENTAL RIGHTS OF THE CORPORATE
CRIMINAL LIABILITY IN THE CRIMINAL
PROCEEDINGS**

**LA POSICIÓN DEL TRIBUNAL SUPREMO EN LA
PROTECCIÓN DE LOS DERECHOS
FUNDAMENTALES DE LA PERSONA JURÍDICA EN
EL PROCESO PENAL**

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Abstract

The main idea behind this communication is to comment the Judgments of The Criminal Chamber of the Spanish Supreme Court, relating to how corporate criminal liability interacts with the criminal liability of the individuals within the company who may have committed a criminal offense.

Several fundamental rights that have been studied in these sentences are analyzed in order to verify whether the corporate liability is protected by the same rights as the natural person.

In particular, we will study whether the Fundamental Right of Defense, contained in the Spanish Constitution, is guaranteed to the corporate liability in the criminal procedure in the same way as to the natural person.

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Keywords:Supreme Court; The Fundamental Rights of the Corporate Criminal Liability.

Resumen

La comunicación, tiene como idea central, comentar las Sentencias de la Sala de lo Penal del Tribunal Supremo, en relación a cómo se articula la responsabilidad penal de la persona jurídica con la de los integrantes de la entidad que hayan podido cometer el delito.

Para ello se analizan diversos derechos fundamentales que se han estudiado en dichas sentencias con el fin de comprobar si a la persona jurídica se le ampara con los mismos derechos que a la persona física.

En especial, estudiaremos si en el procedimiento penal se garantiza el Derecho Fundamental de Defensa, contenido en la Constitución Española, a la persona jurídica de la misma manera que a la persona física.

The main idea behind this communication is to comment the Judgments of The Criminal Chamber of the Spanish Supreme Court, relating to how corporate criminal liability interacts with the criminal liability of the individuals within the company who may have committed a criminal offence.

Several fundamental rights that have been studied in these sentences are analyzed in order to verify whether the corporate liability is protected by the same rights as the natural person.

In particular, we will study whether the Fundamental Defense Law, contained in the Spanish Constitution, is guaranteed to the corporate liability in the criminal procedure in the same way as to the natural person.

Palabras clave:Tribunal Supremo; Derechos Fundamentales de la Persona Jurídica; Supreme Court; The Fundamental Rights of the Corporate Criminal Liability.

Summary: 1. Background. 2. The Criminal process with all guarantees. 3. The Fundamental Right of defense. 4. The Right to inviolability of domicile. 5. The Right to presumption of innocence. 6. Conclusions.

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1 BACKGROUND

The communication consists in discussing if the corporate body has in the criminal procedures the same rights and guarantees as the natural person.

In particular, we will analyze when the criminal procedure is against the corporate body, and if it is in the same situation of equality as the natural persons accused in the same procedure, or on the contrary, their rights are affected in favor of the natural persons.

The antecedents of this situation are found in the reform of the Criminal Code by Organic Law 5/2010, of June 22, which abolished from our criminal legal system the old Roman aphorism “*societas delinquere non potest*”, according to which a corporate body could not commit crimes.

With the Criminal Code reform, the legal persons should be criminally responsible for their acts apart from the natural persons that integrates them.

The legislator himself developed this new concept, through the reform of the Criminal Code, through Organic Law of March 30, 2015³.

In the same way, the State Attorney General's Office, in its circular 1/2016, of January 22, has set the guidelines that prosecutors must follow when raising the charge in cases of criminal liability of legal persons.

The Supreme Court, through the first Judgments that arise on the liability of the legal persons, has also wanted to discuss this subject.

These Judgments, sustains the fact that the same rights and guarantees that applies to natural persons should be applied to legal persons, without keeping aside any rights, although we will analyze that there are nuances about that equality that is being proclaimed.

In fact, nowadays, the question arises as if the legal persons really have in our procedural system the same constitutional guarantees as the natural person who is involved in the same judicial procedure.

Another issue that we will discuss, will be whether the properly exercise of the right of defense of a legal person is incompatible with the right of defense of the natural person who has committed the criminal offense.

For this, I will analyze some of the Supreme Court Judgments in which it tries to give an answer to all the questions raised.

Supreme Court Judgment of September 2, 2015 No. 514/2015.

It is the first sentence in which the liability of the legal entity begins to arise. In this sentence, in its Third Law Foundation, it expressly states:

“This Chamber has not had the occasion to pronounce about the liability of legal entities, declarable under article 31 bis of the Criminal Code. However, if a model of liability is chosen for the fact itself, and for a formula of heterorresponsability, it seems clear that any conviction of legal persons must be based on the inalienable principles of Criminal Law. The extensive effect that article 903 of the Criminal Procedure Law imposes with respect to the favorable decisions that derives from the appeal, suggests important nuances when the exemption of liability for violation of the right to the presumption of innocence is declared in respect of the natural person who has acted on behalf of the corporate identity that has also been convicted. In the present case, however, the laconism of the sentence of instance regarding the foundation of the criminal liability declared in relation to the entity Grupo Boca de Restauración Integral, S.L, the silence of the appellants and, above all, the criminal irrelevance of the fact of reference, lead to declare also extinguished all criminal responsibility

³ Vid. ROSO CAÑADILLAS, R., Prevention: social and criminal responsibility of legal persons. *In: General Review of Criminal Law 33* (2020). Iustel Editorial, p. 18 et seq.

with respect to the receiving society of the transfers that were paid by the complainants”.

This is the first declaration made by the Supreme Court, even if it is isolated, about the liability of legal persons.

Meanwhile, what it does support and makes clear is that: **“any condemnatory pronouncement of legal persons must be based on the inalienable principles of criminal law”**.

2. THE CRIMINAL PROCESS WITH ALL GUARANTEES.

As the Supreme Court Judgment No. 514/2015 made clear, the natural person and the legal person have the same rights and guarantees in the criminal procedure.

This legal basis is developed in other Judgments of the Supreme Court, among them, in No. 221/2016, March 16, 2016, being the speaker, HE: Mr. Manuel Marchena Gómez, in his Fifth Law Foundation states:

“(…) The imposition of penalties on legal persons such as the fine, the dissolution and definitive loss of their legal personality, the suspension, the closure of their premises and establishments, the disqualification, and judicial intervention (article 33.7 of the Criminal Code), requires the Prosecutor, as representative of the State's ius puniendi, the same probative effort that is required to justify the origin of any other penalty when it is intended for a natural person. The criminal process is incompatible with a double evidence, the one which the evidence of the action of the natural person and the other through in which passes the declaration of criminal liability of the legal person.

(…) The regulation provided in article 786 bis of the Criminal Procedure Law is not without difficulties. It does not approach many of the imaginable problems. It will be the experience that sets the guidelines to avoid risk of collision of interests that results in a practice aimed at camouflaging the individual responsibilities of the natural persons who are the perpetrators of the crime of reference, doing so under the protective of a defense strategy to service of that one. In this case, it is clear that the legal representation of ANJUMA G.I. S.L., should not have been assumed by Blas. The judicial decision to accept for the representation and defense of both subjects of the imputation to the same professionals could have led to a functional excision that is not beneficial for one or the other accused. However, decisions of this nature should not be resolved with an automatism incompatible with the circumstances of each specific case. Only the finding that

this undesirable identity has produced detrimental effects should lead to the declaration of violation of the right of defense.

(...) The principles of the criminal process cannot be accepted or rejected, or even temper its validity, in response to the adherence or censorship that each one suggests the legislative formula conceived by the legislator to realize the prosecution of the corporate crime.

(...) There are, therefore, two subjects of the imputation, each one of them responsible for their own unjust and each of them called to defend themselves according to the constitutional statute that cannot void its content to the detriment of one or the other accused.

(...) The liability of legal persons –with a vicarial criterion, or of self-responsibility – can only be declared after a process with all guarantees. The imposition of any of the penalties –not measures – provided in article 33.7 of the Criminal Code, can only be the outcome of a jurisdictional activity subject to the principles and guarantees that legitimize the performance of the ius puniendi. Ultimately, the option for the vicarial model is as legitimate as any other, but it does not authorize to degrade the validity of principles called to limit the punitive capacity of the State.

(...) The complainant's complaint, when he censures not having been the subject of a formal complaint, must be addressed. And it is only a mandatory consequence according article 409 of the Criminal Code. It provides that "when the imputation of a legal person has been made, a statement shall be taken by the representative specially designated by the legal person, assisted by his attorney". That statement, as is clear from the legal statement, presupposes a formal, prior or simultaneous imputation, which must be addressed"... to the investigation of the facts and the participation in them of the accused entity and of the other persons who also had could intervene in its realization". The fact of the imputation could not dispense with the crime of reference attributed to the natural person. But it will have to focus on its investigation from a structural perspective. It will be, therefore, an inquiry into those organizational structural elements that have enabled a deficit of the control and management mechanisms, with decisive influence on the preventive systems called to avoid the criminality in the company".

According to the previous Judgment, the imposition of any penalty on a legal person can only be the outcome of a full jurisdictional activity, subject to jurisdictional principles and guarantees.

For that purpose, it is essential to take the statement of the legal person in the investigation phase, so the legal person knows which are the facts that are imputed to it, and give the option to it, so that from that moment it can exercise its right of defense with all the guarantees.

The Courts cannot consider that if the administrator of the company has declared in the investigation phase as a natural person and is the real holder of most of the shares or participations of the company, the company could be released from this prior declaration in the investigation phase, since it has been informed by its representative, so it would not cause defenselessness.

Nothing further from reality. Both investigated should have the possibility of designing their defense strategy from the beginning, in other words, since they have knowledge that the prosecution can go against any of them. And, that includes the statement as investigated in the investigation phase.

Our system, cannot accept objective responsibility formulas. The penalty imposed on the legal person can only be based on the previous proven declaration of a criminal act itself.

3. THE FUNDAMENTAL RIGHT OF DEFENSE.

The Eighth Law Foundation of the Supreme Court Judgment, No. 154/2016, February 29, 2016, being the speaker, *HE: Mr. José Manuel MazaMartín*, in his Fifth section states, delves into the concept of the right to defense of the legal entity. In this sense, one of the reasons for the appeal raised is the violation of the right of defense (Article 24.2 Spanish Constitution):

“(...) For not having respected the right of the appellant to the last word, provided in article 739 of Criminal Procedure Law, since only the appellant’s legal representative, also accused, was given a hearing at the corresponding procedural moment, which made use of this procedure in its exclusive interest and not in that of his represented (Eighth motive).

In this case, unlike the previous ones, it could be thought, at least initially, that the appellant’s reason assists him, since, in effect, he would have been deprived of the right to make use of the aforementioned procedure in his own defense, going even further, to be able to fully exercise the right to defend the interests that were their own and exclusive, distinct and even contradictory to those of the natural person who intervened in his name throughout the entire procedure.

We are faced with an important problem that LO 37/2011, October 10, on procedural expediting measures, which introduced the reforms in the Criminal Procedure Law considered pertinent to adapt the adjective regulation to

the presence of the legal entity, as an eventual author of crimes, which did not resolve in its day⁴.

It is about answering the question about what will be the regime to designate the natural person that must act on behalf of that legal person in the procedure in which his possible criminal liability is prosecuted, not only in the exercise of the strict representative function but also when directing and adopting the appropriate decisions in order to the defense strategy to follow as more appropriate for the interests of the represented, which obviously is of even greater importance.

The question logically arises especially in those cases in which there could be a conflict of procedural interests between those who, in principle, would be legally called to carry out such representative functions (representatives and administrators) and the own and independent of the legal person, which could even affect the rights of third parties, such as their workers, creditors, minority shareholders, etc.

More specifically, when the person to whom such task is entrusted is, in turn, possible responsible for the infraction that gives rise to the conviction of the represented, taking into account, as has been said, that his action also extends to decisions regarding the defense strategy to be followed, which will include the possibility of opting for a path of collaboration with the authorities responsible for the prosecution and punishment of the crime committed by the natural person within the collective, providing data and evidence on the identity of its author and the acts committed by him, in order to obtain for the legal person the punitive benefits derived from that option as a result of the application of the corresponding extenuating (Article 31 quater b) Criminal Code.)

In these cases, leave in the hands of the author of the original crime, the possibility of carrying out actions such as those of seeking a quick compliance of the legal person,

⁴ *Article 786 bis. 1. of Criminal Law Procedure: ““When the defendant is a legal entity, he may be represented for a better exercise of the right of defense by a person whom he specially designates, having to occupy in the Chamber the place reserved for the accused. The person in question may declare on behalf of the legal person if such evidence had been proposed and admitted, without prejudice to the right to remain silent, not to testify against himself and not to confess guilty, as well as to exercise the right to the last word at the end of the act of judgment. The person to declare at the trial as a witness cannot be designated for this purpose. 2. Notwithstanding the foregoing, the non-appearance of the person specially designated by the legal entity for representation shall not in any case prevent the holding of the hearing, which shall be carried out with the presence of the Attorney and the Attorney General of the legal person.*

proceeding to the compensation charged to the legal entity of the eventual damages and, obviously, not collaborating with the authorities for the full clarification of the facts, it would be an intolerable limitation of the exercise of their right of defense for their represented, with the sole objective of hiding the representative's own responsibility or, at least, of discouraging the interest in pursuing the complex proceedings aimed at finding out the identity of the physical author of the initial offense, even for those harmed by the crime once they have already satisfied their right to reparation.

In addition, in accordance with the provisions of article 31 ter CP (previous 31 bis.2 CP), the legal person will respond "... even if the specific responsible natural person has not been individualized or has not been able to direct the procedure against it "And, according to section 3 of the same precept, even before the" ... fact that said persons have died or have been removed from the action of justice ..."

Such a question, of as much procedural significance as can be noted and that is resolved in other systems with different formulas, such as the designation for this purpose by the corresponding court of a kind of "judicial defender" of the legal entity, the assignment of such responsibilities to a collegiate body composed of independent persons together with others representing the interests of third parties affected by the possible penalizing consequences arising from the illicit of the legal entity, etc. or as it was also in our own country in the Draft Criminal Procedure Code of 2013 (art. 51.1) by assigning these defense functions, as a priority, to the "director of the entity's internal control system" (the also referred to as "compliance officer"), evidently it cannot be resolved, in general, by this Chamber.

However, nothing would prevent, if not quite the opposite, the fact that, in a case in which the possible effective violation of the legal right of defense of the legal person was actually appreciated, having been represented in court, and throughout the entire procedure, by a natural person object itself of accusation and with interests different and opposed to those of the natural person, it could proceed to the estimation of a motive in the line of the present, arranging the repetition, at least, of the Oral Judgment, in which the prosecution of the legal entity refers, so that it was represented with the extensive functions already described, by someone outside any possible conflict of procedural interests with those of the entity, which in this case should be designated, if this would be possible, by the organs of representation, without intervention in such decision of those who were to be judged in the same proceedings".

In my opinion, there is a conflict of interest in the defense strategy that should lead to the nullity of the procedure in any case. When it is the same

professional who defends, in the same matter, the natural person who has committed the crime and the legal person, who is also a party of the same procedure, for his lack of diligence in the organization of compliance measures, of management and control of the company.

I consider that in that case, the right of defense of the natural person or of the legal person would be violated, depending on the assumption, although, according to the judgments analyzed, is that the right of defense of the legal person is violated.

Because the lawyer appointed for the defense of both, can only defends correctly one of both, having to choose who to defend and proceeds to the resignation of the defense of the other investigated from the moment that his first statement is produced in the investigation phase.

I also believe that the person who should be designated by the legal person as their representative for the criminal procedure, should be the compliance officer or in the case that there is no such person in the company, the one who has sufficient knowledge and power in the company to be able to declare about the control systems that could have been applied in the corporation.

In addition, the person chosen for this function must have decision-making power to develop a defense strategy with the sole purpose of suiting the company, regardless of the legal person or natural persons who are also prosecuted in the same criminal procedure.

What should not be consent is that the compliance officer or the chosen person, as a defense strategy, decides to invoke his right to not to declare when he considers it necessary and does not have an obligation, as is the case with the witness, obligation to tell the truth, which could harm the legal person.

In any case, what the Investigating Courts should not allow, because there is a clear conflict of interest in the exercise of the right of defense, is that the same lawyer, exercise the defense of the natural person and the legal person that are in the position of investigated in the same criminal procedure.

In fact, in this culture of regulatory compliance and transparency with which companies want to set an example to their clients, the compliance officer himself, when he detects this possible risk situation, should immediately notify the administrative body of the legal entity, with the intention of preventing it from occurring and, appointing different professionals to defend contradictory interests in the same criminal procedure.

In this way, the Fundamental Right of Defense of the natural person and the legal person would be guaranteed.

The Supreme Court Judgment 827/2016, November 3, 2016, also deals with the criminal liability of legal persons.

In this Judgment, it can be seen how the defense strategy and conflicts of interest arises when the same lawyer leads the defense of the legal person, whose legal representative to act in court, is the person who participated in the alleged criminal acts.

Subsequently, the natural person cannot be condemned when his only participation in the procedure has been as legal representative of the legal

person, but has never been personally investigated as a natural person regardless of the procedure.

In this sense, the sentence referenced above is pronounced, in its First Law Foundation,

“(...) 2. – He is not convicted because he was not directly accused, no individual statement was taken after the complaint was filed, nor in the succession of interventions and acts that the accusing parties directed against him they did so with such personal character. They always did it as the legal representative of the legal person on behalf of which he acted. The motive cannot prosper. “

In its Second Law Foundation: “(...) A person acting in the status of accused (now investigated) as the legal representative of the defendant society cannot be convicted on an individual basis. The condition appeared clear and being able to act in one way or another, the legal representative of the legal person had to be careful to avoid confusion. In the complaint the condition in which he acted was limited and the subsequent proceedings occurred in the same direction.

It is acquitted for not having been cited as an imputed natural person”.

In the Fifth Law Foundation, it continues in the same direction:

“(...) In that sense, Justo has not had the status of personally accused, other than the representation of the society “Era de Puig”, and therefore, having not denounced and accused him in such concept, he cannot be convicted without causing him helplessness.

For the rest, it is obvious that whenever the behavior of an individual person is judged, since legal persons cannot act otherwise, procedural relations with their representatives must be understood, but in any case the character with which is considered the behavior of the accused, either personally or as a representative of the company”.

In this particular case, it was an error from the individual accusations and the Prosecutor not to call the administrator of the denounced society, to declare as a natural person, as investigated and, in this way continue the procedure against him.

I do not consider that the strategy of the company was the right one, because it could not state that the culprit of the events was the administrator of the company that acted for his own benefit and, that in this way the company had a compliance system that was intended to prevent crimes within the entity.

The legal person could not exercise its right of defense with all the guarantees, since its defense implied the indictment of the administrator of the company, who materially did the acts for which the company was convicted.

The only person who handled a perfect defense strategy was the lawyer of the natural person which was able to declare as representative of the legal person, and in this way he always declared on his behalf, taking control of the investigation and getting rid of his statement as a natural person in his investigated status. Reason why he could not be convicted, despite the fact that in the proven facts he does appear as the material author of the facts for which the legal person was convicted.

In my opinion, the Investigation Court should not have allowed the natural person on whom there were indications of having committed the crime, to declare as a representative of the legal entity.

At that time, they were supposed to ask the entity to designate a natural person as legal representative of the legal person, outside the investigated facts, and to enable the company's defense right with all the guarantees.

The next Judgment to analyze is the **Supreme Court Judgment, No. 1217/2017, February 23, 2017**. In this Judgment there is no conviction of the legal person since article 318 of the Criminal Code does not refer to the article 31 bis of the same legal text.

Crimes against workers' rights are not included in the list of crimes that can be committed by legal persons.

With this Judgment we cannot analyze our problem originally raised.

The Supreme Court Judgment No. 3210/2017, July 19, raises several issues. In this section we will analyze the first one, which affects the right of defense of the legal entity.

In the First Law Foundation of the referenced Judgment, the right to the last word of the legal person is analyzed again.

“The appellant is a legal person declared responsible, since the authors (natural persons) have used it for the commission of money laundering. Protest for not having been expressly granted to it and as such legal person the possibility of realizing final allegations in the procedure provided for in article 739 Criminal Procedure Law.

The same issue was studied in the Supreme Court Judgment No. 154/2016, February 29, which we have previously analyzed.

The Judgment of July 19, 2017 uses the approach previously given in Judgment No. 154/2016 to its specific factual assumption. In this sense:

“Preserving those general considerations that are assumed again, it must be specified that its projection to the case now examined is not feasible: it is difficult to see contradictory interests between a company in the form of a limited company and the natural person to whom the judgment attributes the full ownership of the company; or

to those others that hold the majority of their social capital, at least formally”.

This Supreme Court Judgment considers that the legal person identifies with the accused natural persons. There is no conflict of interests between them.

For what it considers that there is no defenselessness to the legal person, the fact of not having had the possibility of using the right to the last word, since the representation of the legal person and the natural person was the same and, the natural persons who are the real owners of the legal entity did use the right to the last word, so if the legal person had also used it, nothing would have changed their right of defense.

But, perhaps, as we have previously mentioned, if the representation of the natural person and the legal person had been different from the beginning, the interests of both parties would not have been the same and, that the entity does not have the possibility of using the right to the last word would have violated the company's right of defense.

In my opinion, in order to guarantee the right of defense of the natural person and the legal person, there should be two fundamental questions:

1.-A natural person who is not being investigated in the same criminal procedure and who cannot have any conflict of interest with the company, must be declared as a representative of the entity.

2. – The legal person must be defended by a different lawyer than the one who defends the natural person.

4. THE RIGHT TO INVIOABILITY OF DOMICILE.

The Supreme Court Judgment No. 3210/2017, July 19, analyzes the right to inviolability of domicile contained in article 18.2 of the Spanish Constitution. This right does not protect natural persons and legal persons the same way.

This difference is evident from the study of article 18.2 of the Constitution⁵. The Seventeenth Law Foundation of the Judgment analyzed: *“In another order of things it cannot be forgotten that in the case of the domicile of legal persons we move in a different plane from the domicile of natural persons. (Judgment 202/2007, March 20). Protection is weaker for legal persons, as evidenced by article 554.4 of the Criminal Procedure Law, which it only requires the judicial order for the main dependence of the legal entity, but not for all. The Judgment 125/2014, February 20, showed that there is no equal jurisdictional protection either for the domicile of legal entities not imputed or for all the establishments of an imputed legal person.*

⁵ “Article 18.Principio del formulario
Final del formulario

2. The domicile is inviolable. No entry or registration may be made in it without the consent of the owner or by a judicial resolution, except in the case of flagrant crime”.

The judicial authorization is designed to protect the privacy of the domicile, not to put obstacles to the criminal investigation. The inviolability of domicile also applies to those not imputed and also in non-criminal proceedings. This is obvious. It is not totally understood what additional reasons are needed, in order to get a reinforced guardianship, when we are before an imputed legal entity, who also do not attend when what is registered is the dependence of a non-imputed legal person. The same guardianship should be dispensed to the legal entity imputed to the non-imputed.”

Article 554.4 of Criminal Procedure Law, precept added by Law 37/2011, extended the concept of domicile in order to include the imputed legal person.

Therefore, there are differences between the protection given to legal persons imputed to the protection given for those which are not imputed. In this latter case, judicial authorization would not be necessary to enter to the establishment.

Yet, we also do not find that the imputed legal person enjoys the same right as the natural person. Because as we said before, judicial authorization is only required for the entry and registration of the main establishment of the imputed legal entity not for each of its establishments or dependencies⁶.

5. THE RIGHT TO PRESUMPTION OF INNOCENCE.

The Supreme Court Judgment No. 3210/2017, July 19, in its Law Foundation Twenty eighth, analyzes if the necessary elements to convict the legal entity concur or not.

For this, it carries out a study on whether the requirements contained in article 31 bis of the Criminal Code are included in the Judgment mentioned before.

In this particular case, it concludes that the grounds for presumption of legal persons falls, because:

- “a) Its administrators and executives acting on behalf of the company have carried out a continuous activity that fits into article 301 of the Criminal Code, which is precisely one of the criminal figures in which the legislator foresees the imposition of penalties for legal persons.*
- b) There is an undeniable direct benefit to the society.*

⁶ *Article 554.4 of Criminal Procedure Law: “In the case of imputed legal persons, the physical space that constitutes the center of it domicile, whether it is their registered establishment or a dependent establishment, or those other places where documents or other supports of their daily life, are reserved of knowledge of third parties”.*

c) Finally, the negative face of this attribution of responsibility is also covered: the legal person lacked an effective control system implemented to cancel or, at least, efficiently reduce the risk of commission of crime within the company. It is clear that in a company whose sole administrators commit a criminal offense in concert, acting on behalf of the company with the collaboration of most of the formal owners of the share capital (also convicted for malicious conduct), it is not possible to imagine another hypothesis other than the shared criminal liability of the collective entity. The judgment of instance stands out: it would be a contradiction for those who control the legal person which they use to channel their criminal activity in turn to implement measures to prevent their own purposes or plans”.

It seems that in this case, the fundamental right to the presumption of innocence of the legal person is analyzed and protected in the same way as that of the natural person.

The only doubt would be what happens with minority partners, those who have not been convicted of any malicious or reckless conduct and, instead, are convicted of belonging to a collective entity, in which they do not have any majority in the entity, nor they were able to implement any regulatory compliance protocol that would have prevented the commission of the crime of the legal person to which they belong.

But, as part of a collective entity, its right to the presumption of innocence cannot be analyzed separately from the legal person to which they belong.

Perhaps, later, they may use the civil court to compensate for these damages caused by the directors of the company and the rest of the majority partners.

6. CONCLUSIONS

From the Supreme Court judgments analyzed we can reach a series of conclusions:

1. So far there are a few judgments that have reached the Supreme Court on this matter.
2. Article 31 bis of the Criminal Code is a very new article (although the reform of the Criminal Code is from 2015 and four years have passed). There is still no awareness of a corporate culture of transparency and that legal person can be criminally responsible.
3. The general conscience of the Supreme Court is that natural persons and legal persons must have the same rights and the same constitutional guarantees within the criminal procedure.

4. The reality nowadays, is that legal persons do not have the same constitutional rights and guarantees as natural persons.
5. A clear example of the above is the right to inviolability of domicile. It is not guaranteed even in the same way as natural persons and, in addition, it distinguishes whether the establishments are of the legal entity accused or investigated in the procedure, or the establishment belongs to a legal not investigated in the procedure, in which case is not considered as it domicile.
6. The legal defense of the legal person and the natural person should not be entrusted to the same lawyer, unless it is a very clear case in which there is no conflict of interest. In the slightest doubt, it should be treated with different professionals. This would ensure that the two parties have a defense strategy designed only to protect the interests of their respective clients.
7. The representative of the legal person in the procedure cannot be, in any case, the natural person that is being investigated for the same facts, in the same procedure or, the one that could be harmed as a result of the judicial investigation. It must be a person outside the facts investigated and have independence, in order to prepare the defense strategy always in the best interest of the company.
8. Draws attention, in the new criminal framework of legal persons, the legal paradox of the compliance officer whose mission is to prevent criminal and corporate risks and to promote the positive preventive effects derived from surveillance and control, which demonstrate their professionalism, Optimal business management and organization, in short, to become a participant, including a model of good practices in relation to the business or traffic of the company, which allows obtaining the absolution. At the criminological level, it cannot be ignored that there is a long way from consulting to preconstituted evidence, not without obstacles and interests that are not very transparent and less compatible with apparently legitimate purposes. The compliance boom should not be a licency, as demonstrated by modern unconventional property crime, its different forms of participation and stereotypes ... of such unique corporate criminology. Criminal criminological and political considerations on the ideological background, controversy on the efficacy, justification and opportunity of the deprivation of liberty sentence for these criminals and other legal consequences, are outstanding topics to be dealt with and that exceed the limits of the present investigation.

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