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ARTICLE

Money Laundering, Political Corruption and Asset Recovery in the Spanish Criminal Code

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Abstract
This article analyzes the relationship between corruption offenses and money laundering with reference to the Spanish Penal Code. These two criminal categories lack a certain definition, as there is no such univocal concept of "political corruption" and "money laundering." The reasons for the denaturation of these criminal figures will be addressed. Then, the paper will expose how these criminal figures relate to each other. We argue that a real concurrence between both figures is possible, although it may lead, in certain cases, to double incrimination and its consequent punitive excess. Therefore, we will propose some criteria for a restrictive interpretation of "money laundering" to avoid confusion with other legal figures such as "confiscation." The paper will end with reference to the Spanish Criminal Code's regulation on "confiscation" and a brief review of the main critics.

Keywords corruption; political corruption; public corruption; money laundering; confiscation; organized crime

INTRODUCTION AND CONCEPTUAL DETAILS

This article intends to highlight the connection between corruption offenses and money laundering. To be more accurate, we want to focus on the relationship between these criminal figures since we have detected a pernicious tendency, especially in an international scope, of extending, unduly, money laundering contours. In other words, we want to address what is called by reputed authors a "paradigmatic manifestation of the expansion process of criminal law." In summary, this global expansion is characterized by the appearance of new crimes, the expansion of those that already exist, the anticipation of the punitive order intervention, the reduction of guarantees and the increase of penalties (Silva Sánchez 2011:131,133). This phenomenon has had a great influence on national laws and has led to an undue expansion of the outlines of money laundering (from a criminal perspective) in each legislative reform, turning it into an all-encompassing figure, distorting its

content and reason for being. Graphically, it has been said that what happens with the criminal offenses on money laundering is the same as the Big Bang and the creation of the universe: since their appearance, they have been expanding incessantly (Abel Souto 2017:242). For this reason, we want to propose a series of restriction criteria following the basic criminal principles and, more specifically, that of legality. Once we affirm the possibility of collective punishment for these crimes, we will expose the general asset recovery regulation in Spain and the main criticism that has been made to it.

However, before analyzing these issues, we need to reference the current conceptual framework briefly. In the first place, since we follow a sequential order, we must approach the phenomenon of political corruption from the criminal perspective as most times it operates as an antecedent crime of a subsequent money laundering. However, we are faced with a first obstacle when we verify that there is not a clear concept of corruption. In this way, it has been said that its lack of credence is an obvious and bordered problem and that we are dealing with an adjective that is common to many criminal modalities. However, it is not exclusive to any specific group. Hence continuous allusions to the word lead to its interpretations being varied and emptied of meaning (Quintero Olivares 2018a:29). Another author has written that its meaning has been denatured since "the label of corruption is superimposed on reality due to the condition of the author of the facts" (Boix Reig 2016). It should be remarked that the United Nations Convention against Corruption, adopted in New York on October 31, 2003, lacks a definition of the term "corruption" and refers to both public and private corruption. In a first doctrinal approach, we can refer to definitions of corruption that have been proposed that appeal to different parameters: morality, legal codes, public perception, economic rationality or culturally transmitted norms and institutions (Arjona Trujillo 2002:5,6).

Concerning political corruption, a synthetic definition would describe it as "the breach of a rule carried out by a person who performs a public function to obtain a benefit, either his own or of a collective, social or institutional" (Soriano Díaz 2011:385). Besides, it is portrayed as an omnipresent and persistent, extensive and intense phenomenon. According to the Dictionary of Legal Spanish of the Royal Spanish Academy (Real Academia Española), we observe that it does not contain a specific entry on political corruption, but rather defines "public corruption" as "bribery of an authority or public official who accepts or requests gifts from a third party in exchange for providing the latter with a benefit or advantage in the field of the functions that the active subject performs in the public administration," which places us in the sphere of specific types of crime (mainly bribery), but not in the general scope.

In order to provide a characterization of the phenomenon of money laundering, after having noted its progressive and irremediably (so it seems) expansive nature, we can assume an analytical description that conceives it as "the process by which assets of criminal origin are integrated into the legal, economic system with the appearance of having been acquired lawfully, so the crime tends to get the subject to obtain a legal title, apparently legal, on assets from a previous criminal activity" (De Vicente Martínez 2018:75).

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CRIMES RELATED TO POLITICAL CORRUPTION AS ANTECEDENTS OF MONEY LAUNDERING

Main Characteristics of Crimes of Political Corruption

As noted before, one of the initial problems that we find ourselves is the absence of an unambiguous definition of corruption, since this concept is detailed neither in the Spanish system nor in any procedural or substantive norm, although the Criminal Code mentions the term in various crimes (Rodríguez Tirado 2020:127). We must take as a reference the previously mentioned New York Convention, in whose preamble the relationships between the crimes under study are expressly noted. For example, when it states that it is "also concerned about the links between corruption and other forms of crime, particularly organized crime and economic crime, including money laundering and also concerned by cases of corruption involving vast amounts of assets, which can constitute a significant proportion of States' resources, and which threaten the stability of politics and the sustainable development of those States." This international rule confirms that corruption is a transnational phenomenon, which requires a broad and multidisciplinary approach and international cooperation to prevent and repress it. Within the European Union (EU), legal instruments also warn of the risks that corruption entails. For instance, we can cite *Council Framework Decision 2003/568/JHA, of July 22, 2003, on combating corruption in the private sector*. Following "Whereas no. 9", Member States attach particular importance to combating corruption in both the public and private sectors, in the belief that in both those sectors it poses a threat to a law-abiding society as well as distorting competition concerning the purchase of goods or commercial services and impeding sound economic development.

It is important to emphasize that, in recent years, a plurality of rules, both criminal and extra-criminal, have been passed in the Spanish legal system in order to deal with the problem of corruption. This phenomenon is explained by both internal drives and the need to comply with international obligations contracted by Spain, in essence, from the EU. We can refer to the field of transparency and information (e.g. *transparency, access to public information and good governance Act, núm. 9/2013*, December 9) or those that regulate the requirements of economic activity and financial organization of the political parties (e.g. *Control of the financial-economic activity of the Political Parties Organic Act, núm. 3/2015*, March 30). However, as said before, the criminal remedies have also been used since the concern for the fight against corruption has been introduced in the Spanish Penal Code (CP). Therefore, this phenomenon is not limited to the rules on transparency and administrative control, but rather carried out criminal reforms by which the regime of some existing crimes has been expanded, and new types have been added, such as the crime of illegal financing of political parties (Gómez Rivero 2017:434). Indeed, in recent years, we have found ourselves in what we could call "the era of transparency in the public sector," which is characterized by a demand for greater visibility and oversight of the management of public affairs and, especially, the use of public funds. Following the remarkable increase of information channels – mass media and social networks – and political corruption news, a strong and critical public opinion has grown with a greater interest in monitoring the public sector's performance. In this way, a picture of the insufficiency of the formal – administrative and judicial – control systems has been transferred to the public debate, with a consequent

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general distrust in the democratic system itself. In some cases, this picture has been brought with spurious interests. Although it goes far beyond this paper's purposes, we cannot ignore the risks inherent in the distorted image of public institutions.

However, returning to our common thread, we must affirm that political corruption constitutes a serious problem, both for its present results and future consequences. In effect, corruption not only deprives the public powers of high economic resources but, consequently, state assistance benefits suffer: the funds initially provided to meet the population's needs are unduly reduced. Furthermore, there is a decrease in the population's trust in public institutions, with a general distrust, which spreads to any public function sector. Regarding public opinion studies, we can state that the vision of corruption by Spanish society is oscillating. In the barometer of the Sociological Research Center (Centro de Investigaciones Sociológicas; CIS) for September 2020, corruption and fraud were the fourth of the main current problems in Spain for 20.5% of the population (Centro de Investigaciones Sociológicas (CIS) 2020a:10), while in the study corresponding to October 2020, it was set at the fourteenth position, representative of 4.3% of the population (Centro de Investigaciones Sociológicas (CIS) 2020b:10).

However, it is necessary to recognize that, despite the efforts indicated, there are still many political corruption cases in Spain that cause enormous economic damage to the public coffers. There are no specific official figures on how much this forbidden activity reaches, although there are some alarming estimates. A report of the International Monetary Fund from May 2019 points out that countries with less corrupt governments collect, in general, 4.5% more of gross domestic product in taxes than those with the same level of economic development, but with significantly higher levels of corruption (International Monetary Fund 2019:43). This is because fewer taxes are paid in the most corrupt states since these are avoided through bribes. Therefore, such a percentage applied to Spain would represent an amount of 60,000 million euros per year. However, in other studies, this figure rises to 90 billion euros a year (The Greens/EFA Group in the European Parliament 2018:56,57). Despite the oscillation in the studies, the truth is that there is a high transfer of public funds to private interests in an illegal way in Spain. It has been pointed out that including the crime of money laundering is "essential" in the fight against corruption and that, for this reason, it is included as a "related crime" in various international anti-corruption conventions (Quintero Olivares 2018b:246).

Indeed, from a logical sequence perspective, the large amounts of money coming from corruption will require an appearance of legality. At this moment of the process, it will be necessary to go to the laundering of such assets and, therefore, the crime of money laundering may come into the scene. Thus, even though there is not an exhaustive list of which crimes are included in the concept of political corruption, we can refer to art. 19 of the Organic Statute of the Public Prosecutor's Office Act (no. 50/1981, December 30), which regulates the Prosecutor's Office against Corruption and Organized Crime. It is a special prosecutor's office that intervenes directly in criminal cases of high importance, according to art. 19.4: (a) crimes against the Public Treasury, against social security and smuggling; (b) prevarication; (c) abuse or improper use of privileged information; (d) embezzlement of public funds; (e) frauds and illegal levies; (f) influence peddling offenses; (g) bribery offenses; (h) negotiation prohibited to officials; (i) fraud; (j) criminal insolvencies;

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(k) alteration of prices in public tenders and auctions; (l) crimes related to intellectual and industrial property, the market and consumers; (m) corporate crimes; (n) money laundering and conduct related to the receiving, except when, due to its relationship with drug trafficking or terrorism offenses, other Special Prosecutor's Offices should be aware of said conduct; (n) corruption crimes in international commercial transactions; (o) corruption crimes in the private sector; and (p) offenses related to the above.

Two important aspects should be pointed out regarding this Special Prosecutor's Office: first, its name, in which corruption and organized crime are connected, two areas closely linked to money laundering; and, second, the broad range of typical behaviors subject to investigation. In addition to crimes against the Public Administration included in the strict sense – those typified in Title XIX of Book II, arts. 404–445 of the Spanish Criminal Code – various other offenses are systematically located elsewhere in the punitive text. This list allows us to infer that, in effect, there is a plurality of criminal behaviors related to the public or political function, from which funds liable to money laundering can be found. We can add the crimes against real estate regulations, which constitute paradigmatic assumptions of administrative corruption, such as urban redevelopment, transfers of public land or other similar practices, which provide notable benefits to corrupters. This list also does not include the crimes of illegal financing of political parties, introduced in the Spanish Criminal Code in 2015, which constitute one of the greatest political corruption expressions whose benefits can also be laundered. Some authors have criticized that abstract elements in criminal offenses have increased, thereby reducing legal certainty. The legislative technique used has been contested because it leads to coordination difficulties between criminal figures (Berdugo Gómez de la Torre 2016:45; Boix Reig 2016). Also, it has been stated that the legislator has engaged in a "symbolic use of criminal law," which seeks legitimation in public opinion, forgetting the other branches of law and transparency policies. It has been predicted that if material and personal means are not created to apply the reform, the negative effects of corruption will be enhanced (Berdugo Gómez de la Torre 2016:45).

Regarding Title XIX of the Spanish Criminal Code, it has been stated that the Public Administration is not protected in an all-encompassing way. The Code only addresses specific aspects of it and, sometimes, not even that. It only constitutes the frame of reference in which conduct is evaluated, affecting the Public Administration indirectly. Thus, from a sociological point of view, it has been indicated that many of the crimes collected are related to "political and administrative corruption," which goes beyond said Title XIX, as it comprises a "complex phenomenology" – adding to those, already cited, documentary falsehoods. Francisco Muñoz Conde says that their common denominator is that on multiple occasions, they are "committed from power, or favored from positions of power and authority conferred by the exercise of public functions, and that, through the organization of complicity in power relationships, becomes one of the most worrying manifestations of organized criminality." He also says that, in turn, both the deviation of power and political corruption are incompatible with democracy and with the democratic control of administrative resolutions (Muñoz Conde 2019:880 and 887).

A separation between the notions of public and political corruption has also been proposed, and in any case, a strict interpretation of the word "corruption" has been advocated (de la Mata Barranco 2016:5–11). In this way, Norberto de la Mata

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Barranco writes that public corruption refers, on most occasions, to the crime of bribery and influence peddling. These crimes – and, to a lesser extent, the rest of Title XIX – are characterized, in the opinion of de la Mata Barranco, by the abuse of power and of a situation of privilege, with a deviation from the exercise of public function, economic enrichment and, ultimately, a "sale and purchase of public power."

De la Mata Barranco limits political corruption crimes to those committed by subjects who acceded to the exercise of public administration through elections or personal appointment by the hand of a political party. He says that these crimes are materialized in an illicit exercise of public power, to the detriment of those administered, for reasons of a spurious nature, fundamentally economic and in which the offer of a third party – the corruptor – is given. However, for this paper's purposes, we make a parallelism or equivalence between political corruption and public corruption, and we use them as synonyms.

With these details, we must continue to highlight that, in general terms, some of the crimes that fall under the scope of crimes against public corruption present ambiguous or imprecise profiles. These are offenses full of abstract elements in their regulations, with references to non-criminal rules that need to be complemented with complex and changing administrative regulations. It will always be possible to resort to complex administrative files, in which conduct is endowed with an excuse of procedural or formal legality, although they should be worthy of criminal reproach. Moreover, this is even more complicated in collegiate organisms or in those in which functions are delegated to other entities since responsibility for the facts is diluted, and the delimitation of individual actions becomes more difficult to establish.

Hence, Muñoz Conde has written that these crimes have a complex wording, which should be simplified "describing criminally relevant behaviors as clearly as possible, without resorting to an overwhelming casuistry that always leaves some 'loophole of penalty gap' that can be used to leave obvious cases of corruption go unpunished." Likewise, this author criticizes that the individuals who participate in these behaviors (the corruptors), who are graphically described as "the engine that encourages and favors political corruption" can benefit from the reduction of the penalty provided in art. 65.3 of the Spanish Criminal Code (Muñoz Conde 2019:913). This article is applied to the third party, an essential inducer or cooperator in a certain crime.

For instance, we can cite, in the case of bribery – as a crime of public corruption *par excellence* – the complexity of distinguishing between representation expenses and facilitation payments. Miriam Cugat Mauri says that it is due to the imprecise demarcation of the outlines of the forbidden conduct, where "evaluative criteria such as social adequacy or subjective criteria such as the motive or destination of the favor appear," without knowing exactly where to distinguish between the gift permitted and the one prohibited. However, even with low-value gifts, doubts arise about whether they are intended to strengthen ties, whether there is corrupting spirit, or whether the recipient will be "sensitive" to such gifts. On the other hand, it could also be argued that their business justification makes them outliers. In this vein, as the value of the gift decreases, and the more the beneficiary moves away from the circle of people who maintain direct and contrasting relationships with the competent official, greater problems arise in the evidence of the causal relationship and the viability of the criminal intervention. Cugat Mauri also attends to the

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intervention of administrative regulations, which represses the perks' perception, which is why "areas of extra-criminal relevance" appear, where gifts unrelated to the position's function or protected by social adequacy would be included. In any case, it is concluded that the complexity is given by the "relative inapprehensibility and fickleness of the criteria that place us in one field or another" (Cugat Mauri 2018:7–12).

Trying to gather some common notes of the crimes listed in Title XIX of Book II of the Spanish Criminal Code, it has been said that it collects crimes reserved, for the most part, to authorities and public officials, which when committed "subvert the proper functioning of the Administration in some of its aspects." Therefore, as a categorical legally protected interest, the Public Administration's correct functioning must conform to the provisions of art. 103.1 of the Spanish Constitution. However, we can find a specific legally protected interest. It is clear that two common elements in these offenses coexist: (i) in almost all of them, the active subject is an authority or public official; and (ii) there is a double sanction, administrative and criminal, on the same person and for the same facts (Orts Berenguer 2019:669–72). Likewise, Patricia Esquinas Valverde has proclaimed that, regarding such offenses, it is necessary to refer to the "cluster of corruption," which is made up of the set of offenses "that are usually committed in a chain or simultaneously by public officials or authorities when, in the performance of their positions and functions, they act guided by private economic interests and not impartially by the general interest of those administered." In addition to Title XIX, these types of crimes include money laundering and tax evasion (Esquinas Valverde 2018:363,364).

Money Laundering Specialties

At this point, we must address the specificities of the relationship between these offenses and money laundering. Firstly, both crimes may occur at the same time, which is undisputed. In such a case, each one of those protects different interests, since, in money laundering, we are faced with a multifaceted offense by which both the correct functioning of the administration of justice and the economic–financial traffic of legal tender, a manifestation of the socio-economic order, are protected (Abel Souto 2005:83; González Uriel 2019:7). Furthermore, even though money laundering presupposes a previous offense, it is necessary to emphasize its autonomy and independence. However, it deserves our severest criticism that in any crime in which there are economic benefits, nearly automatically, the accusations pursue the additional qualification of money laundering, emptying this last crime of its substance.

In many cases, there will be no legitimation of money, but the accusations will say that there is it, due to the existence of funds generated in the previous crime, increasing the penalty claimed. The field of public corruption is not an exception, quite the opposite. This overreach infringes legal security, proportionality and the *non-bis in idem* principle. The money that derives from corruption is no different from that which comes from other crimes so that it could be laundered by setting up a company or depositing it in a tax haven (Quintero Olivares 2018b:243,251), fulfilling the requirements of the money laundering offense.

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This starting point is soon distorted when considering that certain elements expand their scope to unsuspected limits, denaturating it. The offense definition's breadth fosters that almost any contact with goods of criminal origin may be considered money laundering. In this respect, the reform of the CP of 2010 deserves severe criticism as it expressly included the self-laundering and also introduced in art. 301.1 CP the modalities of "possessing" and "using" the assets of criminal origin. Thanks to this, practically any contact whatsoever with proceeds of a crime could, at least in theory, deserve a sanction for money laundering. In order to restrict these punitive excesses, the case-law of the Second Chamber of the Spanish Supreme Court has been outlining the scope of the offense through various correction requirements: it demands a specific intent in all laundering behaviors (to hide or to conceal the illicit origin of the assets or to help those responsible for the preceding crimes to avoid the legal consequences of their actions), which is opposed by an important doctrinal sector. The Supreme Court also requires that the money or goods so laundered have to be precisely identified within the launderer's patrimony, without generic or fuzzy references. Besides, among other clarifications, the Supreme Court is restrictive in the admission of laundering by use and by mere possession. It excludes from punishment neutral acts or socially acceptable behaviors and the usual expenses of daily life.

Indeed, if we consider these criticisms, we observe that, in the field of self-laundering, although it is legally feasible, the perpetrator of the precedent crime must carry out acts truly encompassed by the crime of money laundering. A combined interpretation of self-laundering with the modality of possession or use leads us to the fact that, with a literal reading of the crime, whenever the corrupt person handles the illicitly obtained funds, he would be committing a crime of laundering, since he would be using goods that come from a crime or if he does not move them and holds them in his possession, e.g. hidden in his house, he would at least possess them. With such an understanding, money laundering's political–criminal purpose is overwhelmed, and its scope is exaggerated. Therefore, we consider that, *de lege ferenda*, the modalities of "possessing" and "using" of the crime of money laundering should be excluded since they do not directly make an impact on the legally protected interests and only lead to interpretative distortions. Regarding self-laundering, we advocate a highly restrictive understanding. Money laundering is only committed when the money emerges or is moved, trying to instill an appearance of legitimacy in its origin and when it involves acts that do not constitute a mere completion of the precedent crime. Therefore, we exclude such cases as its consumption for daily use, neutral acts or socially appropriate behaviors.

Another restrictive criterion, in our opinion the most important one, is to understand the offense based on the *de minimis* principle and a teleological interpretation that, taking into account the legally protected interest, demands a relevant impairment of the socio-economic order and the suitability of the behavior in question to enable the integration of the assets of illicit origin into the legitimate economic system (Abel Souto 2012). In this way, the *de minimis* rule would exclude trifle behaviors in which the amounts at stake are negligible. However, it is necessary to recognize that this principle leads to a certain legal uncertainty in the absence of monetary amounts that function as a border or limit. In some Judgments of the Second Chamber, e.g. no. 642/2018, the 15,000 euros figure has been employed

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as an indicative measure set by the Financial Action Task Force (FATF) as the amount that requires special vigilance concerning money laundering operations also included in European Directive 2015/849.

Nor can we ignore that the modality of reckless money laundering included in the CP can lead to an undue extension of the offense scope, so a very restrictive reading is needed to avoid the risk of enabling the pursuit in an elliptical way of conducts with no justification whatsoever. In any case, it is conceived as a form of common offense, which does not take place when we are faced with the form of money laundering represented by carrying out "any other act" – included in art. 301.1 CP – which requires a specific intent –hiding or concealing the origin of the goods or helping those responsible for the precedent crime.

On the other hand, and closely connected with the subject mentioned earlier, we need to mention the aggravated laundering contained in art. 301.1 CP, which takes place when the assets in question have their origin in any of the crimes included in Chapters V, VI, VII, VIII, IX and X of Title XIX of Book II CP, or in Chapter I of Title XVI. These offenses are, respectively, bribery, influence peddling, embezzlement, fraud, malfeasance and abuse of power in office within Title XIX, with the exclusion of Chapter X, which refers to the general provisions and, in Title XVI, those concerning land use and urban planning. In both cases, we can offer the same basic criticism: if we start from the autonomous and independent nature of the offense of money laundering, there is no justification for aggravating the conduct due to the nature of the precedent crime since, in such a case, the first one would act as a reinforcement of the protection given by the second one, an outcome that we expressly reject (Núñez Paz 2013:276). Also, despite the emphasis by some authors on the need for these aggravated modalities given a situation of generalized corruption, the truth is that, if the data of the Annual Reports of the State's Attorney General's Office are checked, there has not been an exponential increase in its application. Consequently, although corruption cases carry an intense mass media interest and provoke great social alarm, their number certainly does not justify the persistence of unjustified aggravated modalities.

Therefore, with all the precautions mentioned earlier and restrictive criteria, both of case-law and doctrinal origin, it is possible to apply the money laundering offense in connection with crimes related to corruption, as long as the acts of laundering take place. However, it should be added that money laundering is not a public corruption offense, although cases of this nature can lead to money laundering. Alas, if we contend that everything is corruption, this offense ends up being deprived of its true importance (de la Mata Barranco 2016:11).

However, the doctrine has indicated some borderline cases in which the facts' legal interpretations are complex. At this point, we are referring to the assets of unknown origin, which can give rise to various offenses such as corruption, tax fraud or money laundering since they all have a common field. The starting point is that a subject has assets of an unknown origin and, secondly, that said individual is linked to acts of corruption. Several hypotheses arise, as Maria Belén Linares says. First, all of the assets resulting from a specific and determined crime, in which case the subsequent acts of handling them, would be considered acts of completion of the original crime since they are absorbed by it and constitute later acts co-sanctioned. Thus, if the crime of corruption is punished and includes a conviction on the entire

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illicit patrimony, double criminality is not possible since there has already been a criminal punishment and establishment of legal consequences.

Second, there are assets linked to a person investigated for corruption but without their origin in such criminal activities and over which acts of laundering are carried out to mask their origin. Both offenses could be applied. Third, it is possible that neither the origin of the assets nor the criminal activity from which those owned by an authority or public official derive can be proven, in which case one could speak of a crime of passive facilitation bribery, provided that sufficient evidence exists, Belén Linares writes that since the offense "does not require demonstrating the existence of a criminally relevant connection between the patrimonial advantages and the acts with whom are related." Fourth, when the disproportionate and undeclared assets cannot be linked to a previous criminal activity without the possibility of proving a money laundering offense, in that case, the criminal conduct could be classified, in a subsidiary way, as a tax crime (Belén Linares 2017:975–81,1001,1002).

Finally, we cannot fail to note that, in line with the money laundering offense and its purpose, Jacobo Dopico Gómez-Aller exposes that sometimes the criminalization of the legitimization of capital constitutes "a way of preventing the offender from benefiting from the loot," which leads to confusion between the political versus criminal functions of money laundering and forfeiture, which have "radically different" meaning and mechanics. This confusion is evidenced, above all, in defense of self-laundering carried out by some authors (Dopico Gómez-Aller 2010; Quintero Olivares 2018b:263). Indeed, sometimes there is an overlap between both figures, leading to unsustainable dogmatic postulates. In order to avoid such situations, Caty Vidales Rodríguez has proclaimed that the punishment of the precedent crime, with the consequent asset forfeiture, or with the corresponding civil liability, where appropriate, constitutes, if not the best option, at least the one that leads to "more acceptable results." For this author, this solution faces the "current hyper-repressive trend," and forfeiture becomes a limit to the concurrence of a laundering offense. It is stated that with it overlaps and problems in the concurrence of crimes are avoided, which may be "openly contradictory" (Vidales Rodríguez 2017:152,153).

THE ASSET RECOVERY

Concept and Legal Regulation

Regarding asset recovery, it has been said that, in recent times, based on a scenario of globalization of the economy, there has been a globalization of crime, which requires states to "globalize the criminal response." In this global strategy, asset forfeiture has been renewed as a "magical legal instrument," which has been presented in public opinion tied to "a new criminal policy that seeks to achieve higher levels of effectiveness in combating all serious and complex criminal forms which, directly or indirectly, produce huge amounts of economic resources." To this is added that the criminal field in which asset forfeiture can be best studied is that of public corruption, so closely linked, among other various offenses, to that of money laundering, both due to its public dimension and by the effects it generates on the stability of a Rechstaat (Rodríguez-García 2020:22,23). On the other hand, we must note that various authors say that there is a large "black figure" in terms of the effects of

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corruption, which means that only a tiny part of the existing cases is known. Therefore, many public funds would remain in the shadows that cannot be recovered logically since their entity is unknown.

Suppose we want to give a brief definition of asset forfeiture. In that case, we can conceptualize it as a legal consequence of the crime that consists of property seizure from a person with a specific relationship with those responsible for a criminal offense or with its commission (Cuello Contreras and Mapelli Caffarena 2015:376). In this area, the reform carried out in the CP in 2010 by Ley Orgánica (LO) 5/2010 introduced important new features as a result of the transposition of EU regulations contained in the *Council Framework Decision 2005/212/JAI, February 24, 2005, relative to the confiscation of the products, instruments and assets related to the crime*. Those new features include the possibility of confiscation for the reckless modality with a penalty of up to one year in prison – which is fulfilled in money laundering, according to art. 301.3 CP – and the "extended confiscation," of optional adoption in the case of effects, assets, instruments and proceeds from criminal activities committed within the framework of a criminal or terrorist organization or group, or from a crime of terrorism. Javier Gustavo Fernández Teruelo writes that this provision enables a "looser" adoption of the measure since there is a presumption *iuris tantum* of patrimonial illegitimacy. It is a criminal policy measure that aims to "obtain efficiency at any price" since assets are confiscated "whose criminal origin is not proven, but is simply supposed or presumed," which constitutes in effect reversal of the burden of proof. For this reason, it configured an expansive accessory consequence, which had to be interpreted restrictively, when the unlawfulness of the assets is based on a criminal activity and not on a mere administrative offense, since "it could become an expropriating criminal mechanism by mere fiscal reasons" (Fernández Teruelo 2011:7–9).

In 2015, LO 1/2015 modified the confiscation regime and introduced several precepts in the CP, expanding its scope. With the new wording, we can conclude that confiscation covers the effects, assets, means and instruments that derive from the crime and that it also includes the asset forfeiture of the profits and the equivalent value. In turn, it has been said that it has a civil nature based on the prohibition of unjust enrichment. This modification is based on EU regulations, which have forced the domestic regime to be modified. It has had two consequences: the extension of its natural material and a lowering of procedural guarantees. According to the authors that we follow – Enrique Orts Berenguer and José Luis González Cussac – such reforms "border on unconstitutionality" because the Spanish legislator has gone "beyond" what is required by the European regulations. Thus, the extended confiscation, art. 127 bis CP, allows the confiscation of assets that do not come from a criminal activity but from previous activities. The exception has become the general rule because the catalog of offenses that allow it has been extended. In this respect, the confiscation without conviction, art. 127 ter CP, makes its adoption possible even if criminal conviction has not been achieved. Another possibility is the confiscation of third-party assets located in art. 127 quater CP, which regulates "effects" and "profits" differently, is based on a presumption and "collides with the crime of money laundering." Another particularity is the confiscation for continued criminal activity of art. 127 quinquies CP, which requires a conviction for any specified crimes, contains its concept of continued criminal activity and refers to the "well-founded indications" that a part of the subject's assets derives from a

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previous criminal activity which is complemented by the presumptions of art. 127 sexies CP. Provisions have been established to ensure its effective execution in art. 127 septies CP, which only affect the assets of those criminally responsible and not third parties. There is a specific application of confiscation for equivalent value and in art. 128 octies CP, the measures that previously only applied to crimes related to drug trafficking have been generalized: the precautionary seizure, the anticipated liquidation or the provisional use of assets. Finally, when the assets in question have been forfeited by a final resolution and should not be applied to the payment of compensation to the victims, they will be awarded to the State, which will assign them the corresponding destination by law or regulation (Orts Berenguer and González Cussac 2019:560,561).

Objections to the Reform of the Year 2015

A prominent author, Fernández Teruelo (2018:266–76), exposes a series of well-founded criticisms. He comments that in the explanatory memorandum of LO 1/2015, a disagreement exists because the modification is labeled as a "technical review," although, later, it is stated that the regulation of said figure is "subjected to an ambitious revision." The attitude of the convicted subject in this area has great relevance in the suspension of the sentence and its revocation according to arts. 80 and 86 CP, since if it hinders the effectiveness of the confiscation or its execution, this entails, respectively, the non-adoption of the suspension or its revocation. Also, as novelties of the reform, the cases of confiscation without conviction, of art. 127 ter CP, based on two characteristics: the current requirement is the "absence of a conviction sentence," and the cases in which it can be applied have increased, which is "debatable from guarantee parameters." Regarding the asset forfeiture of third-party assets, the requirement that a third party "in good faith" has been removed is not contained in art. 127 quater CP, so the protection of third parties has its limit in art. 122 CP, regarding participation for profit. Likewise, third parties who have acquired goods for free or for a price lower than the market value lack protection (art. 127 quater, section 2), although this must be complemented by the reform introduced in the Criminal Procedure Law, in which a new Title VIII was incorporated into Book IV, the heading of which, Chapter I, reads "*Intervention in the criminal process of third parties that may be affected by the confiscation*," and covers arts. 846 bis a) to 846 bis d). Another detail is that, in lowering the assets' value concerning the time of their acquisition, art. 127 septies, these are to the detriment of the subject even though it does not depend on his free will.

Focusing on money laundering, we make our own the correct considerations formulated by José Manuel Lorenzo Salgado (2019:585–8). First of all, there has been a great expansion of extended confiscation (art. 127 bis CP), since now three criteria need to be examined in a particular way, with the possibility of taking into account other data. The list of offenses that constitutes the basis for this type of confiscation is criticized for its excessive breadth since it includes more than those mentioned in the Directive that motivated the reform. It has also been highlighted that there are notable absences in the list, among others, the offenses of smuggling or illegal financing of political parties. We must point out that reckless laundering could be adopted through the direct confiscation of art. 127.2 CP, which implies judicial

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discretion since it refers to "may agree." However, with the formula of art. 127 bis.1, letter i) CP, which refers to "crimes of money laundering," that includes both the fraudulent and the reckless modalities, and whenever the precept is expressed in mandatory terms ("the judge or court will also order the confiscation"), there is a duty to always and in any case order the confiscation and so we are faced with "a truly disproportionate criminal reaction."

If we follow section 2 of art. 127 bis CP analysis, the numbers 2 and 3 refer to conduct of concealment and transfer. They have their place in the context of a money laundering offense. Hence, there is the paradox that, at the same time, they constitute indications to order confiscation and, on the other hand, they configure the offense for which a doctrinal sector has proclaimed that the *ne bis in idem* principle is infringed. We may overcome such a stumbling block if we consider the preamble of LO 1/2015, emphasizing the patrimonial nature of confiscation, distancing it from its criminal nature. However, this vision is not convincing to many specialists, who continue to view it as a punitive reaction in which the patrimonial significance and the preventive aspect – both general and special – may simultaneously concur. Finally, the extensive confiscation, introduced in art. 127 quinques and sexies CP, is worthy of objection by Lorenzo Salgado, in order to its systematic location, since it should follow art. 127 bis CP, and given that it has an "extremely cumbersome wording," which leads to "considerable doses of confusion in the matter." We are facing an optional modality, although it is possible to predict that there will be overlaps and dysfunctions between the precepts as mentioned earlier, for which its repeal is advocated, since "it would have been advisable not to have incorporated this second extensive confiscation into our punitive text;" particularly since, on the other hand, it was not mandatory, according to Directive 2014/42/EU.

Ignacio Berdugo Gómez de la Torre (Berdugo Gómez de la Torre 2017:41,42) has said that asset forfeiture constitutes a "test-bed" for some of the questions raised by the new Criminal Law. Given that economic criminality has reached new levels and, within it, the most serious cases of corruption, together with the perpetrators' responsibility, the need to recover illicitly obtained assets is placed in the foreground. Among the proposals on the matter is a lower use of liberty deprivation and a reduction in the guarantees to recover the economic benefits. A review of the relationships between criminal and administrative law has even been proposed. Nevertheless, in the paper we have cited, Berdugo Gómez de la Torre has written that it is criticized that the reform implies a relaxation of the guarantees, as reflected in the introduction of presumptions that "hardly overcome the constitutionality filter," and that this is due to a "misunderstood effective criminal policy, with an important symbolic content." Also, it is argued that, despite the legislator's terminology, confiscation constitutes a "non-criminal" institution of a civil nature when it does have such material content in many cases, which is why it is described as "label fraud" (Berdugo Gómez de la Torre 2017:42). It is rejected that we are facing a technical improvement of this figure, in continuous reform since 1995, and it is concluded that the introduction of efficiency in the fight against organized crime cannot be done at any price.

Thus, we can conclude by stating that, as in money laundering, in the matter of asset forfeiture, the legislator has incurred in the same two excesses: although it justifies its expansion by the need to comply with international obligations, it has notably expanded its field of action, an extension not required by international or European commitments. The legislator has used a disastrous legislative technique,

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with too long precepts, devoid of any system, full of enumerations, making the interpreter's work difficult. We share the doctrinal concern regarding reducing procedural guarantees and the reversal of the burden of proof. Likewise, the fact of appreciating certain criteria of patrimonial unlawfulness when a conviction has not yet been delivered brings us closer to the postulates of the Criminal Law of the author, as well as to the adoption of a regime similar to the pre-criminal security measures – in this case, accessory pre-criminal consequences. At risk that the advancement of the punishment barriers entails a relaxation of the fundamental rights of a procedural nature, we must, from these short lines, ask for restraint and reflection from the legislator. The effectiveness in the prosecution of criminal assets cannot be achieved at any price. It would be necessary to give a twist to the famous and popular anti-money laundering formula that says "follow the money" and, indeed, in our opinion, it could be added that such pursuit should be carried out "with full respect for fundamental rights, both substantive and procedural."

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TRANSLATED ABSTRACTS

Abstracto

Este artículo analiza la relación entre los delitos de corrupción y blanqueo de capitales con referencia al Código Penal español. Estas dos categorías penales carecen de una determinada definición, ya que no existe un concepto unívoco de "corrupción política" y "blanqueo de capitales". Se abordarán las razones de la desnaturalización de estas figuras criminales. Luego, el artículo expondrá cómo estas figuras criminales se relacionan entre sí. Sostenemos que es posible una concurrencia real entre ambas figuras, aunque puede conducir, en ciertos casos, a una doble incriminación y su consecuente exceso punitivo. Por tanto, propondremos algunos criterios para una interpretación restrictiva del "blanqueo de capitales" para evitar confusiones con otras figuras legales como "decomiso". El artículo finalizará con una referencia a la regulación del Código Penal español sobre "decomiso" y una breve reseña de los principales críticos.

Palabras clave corrupción; corrupción política; corrupción pública; blanqueo de capitales; decomiso; crimen organizado

Abstrait

Cet article analyse la relation entre les infractions de corruption et le blanchiment d'argent en référence au Code pénal espagnol. Ces deux catégories criminelles manquent d'une certaine définition, car il n'existe pas de concept univoque de «corruption politique» et de «blanchiment d'argent». Les raisons de la dénaturation de ces figures criminelles seront abordées. Ensuite, l'article exposera comment ces personnages criminels sont liés les uns aux autres. Nous soutenons qu'une réelle concordance entre les deux chiffres est possible, bien qu'elle puisse conduire, dans certains cas, à une double incrimination et à son excès punitif qui en résulte. Par conséquent, nous proposerons certains critères pour une interprétation restrictive du "blanchiment d'argent" afin d'éviter toute confusion avec d'autres chiffres juridiques tels que la "confiscation". Le document se terminera par une référence au règlement du Code pénal espagnol sur la «confiscation» et un bref examen des principaux critiques.

Mots clés corruption; corruption politique; corruption publique; blanchiment d'argent; confiscation; crime organisé

抽象的
本文参照西班牙《刑法》分析了腐败犯罪与洗钱之间的关系。这两个犯罪类别缺乏确定的定义，因为没有“政治腐败”和“洗钱”这样明确的概念。这些犯罪人物被降级的原因将得到解决。然后，本文将揭露这些犯罪人物如何相互联系。我们认为，尽管在某些情况下，可能导致双重犯罪及其随之而来的惩罚性过度，但两个数字之间可能真正达成共识。因此，我们将提出一些限制性解释“洗钱”的标准，以避免与“没收”等其他法律数字

腐败；政治腐败；公共腐败；洗钱；没收；有组织犯罪。

خلاصة
تحلل هذه المقالة العلاقة بين جرائم الفساد وغسيل الأموال مع الإشارة إلى قانون العقوبات الإسباني. تفتقر هاتان الفئتان الجنائيتان إلى تعريف معين ، حيث لا يوجد مثل هذا المفهوم الأحادي "للفساد السياسي" و "غسيل الأموال". ستتم معالجة أسباب سحب الجنسية من هذه الشخصيات الإجرامية. بعد ذلك ، ستكشف الصحيفة كيف ترتبط هذه الشخصيات الإجرامية ببعضها البعض. نحن نجادل بأن التوافق الحقيقي بين كلا الرقمين ممكن ، على الرغم من أنه قد يؤدي ، في بعض الحالات ، إلى التجريم المزدوج وما يترتب عليه من تجاوز عقابي. لذلك ، سنقترح بعض المعايير لتفسير مقيد لـ "غسيل الأموال" لتجنب الخلط مع الشخصيات القانونية الأخرى مثل "المصادرة". ستنتهي الورقة بالإشارة إلى لائحة القانون الجنائي الإسباني بشأن "المصادرة" ومراجعة موجزة للنقاد الرئيسيين.

الكلمات الدالة الفساوالفساالسياسي والفساالعام وغسيل الأموال والمصارة والجريمة المنظمة

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