CONFISCATION OF ILLICIT PROFITS IN THE SPANISH PENAL CODE. HISTORICAL AND CONCEPTUAL ANALYSIS

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Abstract

The historical and conceptual analysis of the confiscation of the proceeds of crime in Spanish legislation shows that it has emerged from the shadows of legal policy to become an important institution which has been the subject of dynamic change. Thus, it has evolved from its traditional consideration as an accessory penalty or an accessory consequence of a penalty, to its current consideration as an institution halfway between criminal and civil law. In just a few years, many articles of the Criminal Code have been affected by this change, making some of the principles of criminal law such as culpability and proportionality, or of criminal procedure such as the presumption of innocence, inapplicable. This extraordinary evolution bears testimony to the difficulties suffered by the scientific and legal subsystem to conform to inputs from the political system which is committed to complying with international and EU organisms with a permanent legal harmonization oriented towards facing the challenges of complex criminal acts motivated by economic reasons.

Key words: *Criminal Law, Confiscation, Illicit Profits, Spanish Penal Code.*

I. INTRODUCTION

Although criminology and criminal law studies promoted the investigation of criminal sanctions and their repercussions on criminal recidivism and criminality during the 60s and 70s of the 20th century, confiscation of the proceeds of crime remained largely unattended. Explanatory theories of crime did not deal with the economic incentives and the dimension of benefits.[1]

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1 See Albrecht (2001), p. 56. In effect, the idea of depriving offenders of the economic benefits of their crime was not adopted as criminal policy in Europe until recent times. See Van Duyne, Groenhuijsen y Schudelaro (2005), p. 120. Regarding the scarce attention that seizure of profits has received until recently in Germany, despite existing legislation in §§ 73-73d of the StGB, Hetzer (1994), p. 181.

In fact, until the second half of the 20th century, most criminal justice systems contemplated the confiscation of the instruments or effects of crime, but they did not expressly regulate the confiscation of the profits derived.[2] Thus, for example, in England, lack of regulation of the confiscation of profits led to the impossibility of confiscation.[3]

In Spain, confiscation has been present in positive law, from its origin, as an accessory penalty, affecting the instruments and effects of crime but not the profits obtained illegally.[4] However, despite the absence of specific regulation, case law solved the problem by considering the proceeds as the effect of the crime and confiscating them as such.[5]

It is also probable that historical circumstances combined so that confiscation arose in the legal-criminal scene as a relevant instrument in the design of criminal policy. On the one hand, during the second post-war an increasing regulation of victim-less crimes, especially crimes whose object of protection are collective legal rights, revealed that the preventive effectiveness of civil reparation was null in these cases.[6] The hypothesis that the rise of economic theories of crime created conditions of possibility for considering the role of economic benefits as an incentive to commit crimes is also plausible. At the same time, the emergence of crime characterized by high levels of instrumental rationality, such as cases of economic crime and organized crime,[7] created the need for preventive instruments appropriate to their particularities. Likewise, criminological findings have shown that not only organized crime (the most extreme variant of crimes motivated by economic benefits), but also the majority of crimes, are committed with the intention of obtaining economic benefits,[8] which may be considered evidence that has laid the foundations for the generalization of the confiscation of the proceeds of crime as an instrument of criminal policy.

Thus, from the end of the 80s of the XX century, as a result of the adoption of international norms of great significance, several States began to review their regula-

2 See Stessens (2002), pp. 3 and 4.

3 English common law powers do not contemplate seizure of economic benefits of crime. Special statutory powers have been created in order to accompany a judicial decision with a confiscation order. See Alldridge (2001-2002) p. 283. In effect, to avoid the problems of criminal policy that the impossibility to seize profits from illegal activities created, English Parliament gave courts the power to seize profits from drug trafficking through the *Drug Trafficking Offences Act 1986*, later replaced by the *Drug Trafficking Act 1994*. Bowles, Faure & Garoupa (2000), pp. 544, 545.

4 Cerezo Domínguez (2004), p. 17.

5 Cerezo Domínguez (2004), p. 43.

6 Stessens (2002), p. 4. Also Bowles, Faure & Garoupa (2000), p. 543.

7 For that reason, it is said that criminal policy is currently oriented towards the investigation, seizure and confiscation of criminal assets. This is a fundamental concern in the legislative policy of the European Union and in the international context, as the Vienna Convention, the Convention on the Council of Europe and European Directives show; see Choclán Montalvo (2001), pp. 331, 332.

8 With regards to these criminological findings, see Kilchling (2001), pp. 264, 265.

tion on the subject.[9] This is how the international crime prevention strategy begins, which considers legislative harmonization as a key element in the confiscation of illicit proceeds and has had a profound and progressive impact on Spanish legislation on the matter.

II. THE DOCTRINAL CONTROVERSY REGARDING THE LEGAL NATURE AND JUSTIFICATION OF THE FORFEITURE OF ILLICIT PROCEEDS

The justification of the confiscation of the proceeds of crime, as well as its legal nature, are the subject of intense case law and doctrinal controversy that can merely be sketched here.

The legitimacy of the confiscation variant finds both a preventive and a retributive justice basis, with obvious discursive links to the justification of punishment. Thus, in the economic theory of crime, the possibility of obtaining profits necessarily represents the benefit side of the calculation that presupposes the decision to commit a crime, so the confiscation of the proceeds of crime, then, acts as a deterrent by reducing the expected benefits of criminal activity.[10] Also, the innocuous (sic) is seen in the background of the argument that money, if not confiscated, can result in the reinvestment of capital in illegal activities or in the capitalization and accumulation of economic and political power in criminal organizations.[11] Likewise, the German Constitutional Court in the Order of January 14, 2004, which is seen as an antecedent to Spanish legislation by virtue of references to the Statement of Reasons of the latest reform in Spain, has expressed that the confiscation of the proceeds of crime pursues the aim of stabilization of the norm as well as of the organization of the patrimony, with evident civil legal content in the second case but with clear reminiscences to general positive prevention in the first case.[12] However, the reparatory character through restitution and the confiscation of the proceeds of crime cannot be ignored (let's think of cases of corruption, when ill-gotten money returns to the public treasury, or in the financing of programs of detoxification of addicts with money confiscated from organizations linked to drug trafficking) as it allows for the association with deontological considerations of justice.

9 Stessens (2002), p. 5.

10 See Bowles, Faure & Garoupa (2000), pp. 539, 542.

11 See with regards to the function and inocousness of the confiscation of the profits of crime, Bermejo (2015), p. 218 and ff.

12 Cited in Roig Torres (2016), pp. 222 and 223. Likewise, Puppe points out, establishing a relationship between illicit economic gains and erosion in compliance with the rule, that "by means of transgression of the rule, the perpetrator obtains, or at least tries to obtain advantages, whether economic gains, the satisfaction of desires, or the liberation of aggression. If this remains constant, it erodes compliance with the norm on behalf of citizens originally compliant with the law, as they expect transgression of the norm to be, in the end, damaging to the transgressor. If they do not wish to be precisely martyrs of legality, they will then wonder if they are not being fools by complying with the rules and conceding the advantages of transgression to others." Puppe (2016), p. 114.

The preventive functions preached by this legal institute are those that seem to have given rise to the progressive interest in it by international organizations and national legislators. Likewise, whatever previous justification there may be, the fact that, as with the fine, confiscation of the proceeds of crime does not only have preventive or retributive effects related to the wrongful act, but, at the same time, is a source of income for the State, cannot be ignored.[13]

Its "legal nature" is also controversial, considering that it presents similarities with other variants of confiscation (such as confiscation of the instruments or effects of crime) and with the pecuniary penalty. We cannot ignore the fact that, even within the confiscation of the proceeds of crime, successive normative modifications have evidenced a mutation that begins with the original consideration as an accessory penalty, to variants that relate it with measures of civil or administrative nature[14] (as seen in the "expanded confiscation" of Spanish legislation and its European Union antecedent or in the various "extinction of domain" laws in Latin America).

On the other hand, in no case does the confiscation of illicit assets appear as a solitary axis in criminal policy, but rather it is accompanied by the regulation and progressive extension of the criminalization of money laundering and the crimes related to public and private corruption as well as the responsibility of the private sector in prevention (which is evidenced more radically in the area of money laundering and public corruption). Thus, reference is made to a *triple regulatory strategy* marked by the confiscation of the profits derived from the illegal activity, by the imposition of collaboration duties on private subjects and, last but not least, by the criminalization of behaviors identified as laundering assets, which are in a functional relationship with each other.[15]

1. The different variants of confiscation of the proceeds of crime

The confiscation of the proceeds of crime has been subject to progressive expansion which can be observed in international standards and, as will be seen, has also had repercussions on Spanish legislation.

The starting point of this expansion is the so-called *basic confiscation* (of a punitive nature or accessory nature to the penalty) up to the current "extended confiscation" (of a civil nature, according to the European legislator).

Basic confiscation includes the assets obtained directly from the crime. Thus, for example, the cash directly obtained by the illicit drug trafficker resulting from the sale of narcotics: the money collected from the illegal drug market is the direct benefit of the illicit activity and can be confiscated without further ado.

13 On certain occasions we may advert that the objective of affirming citizens' trust in the rule of law, may be realized at the expense of its own economic efficiency: in Argentina, law enforcement officers use high end vehicles seized from criminal organizations, with the slogan "vehicle recovered from narco-trafficking", even when its use on behalf of the state may not be rational from an economic view point due to high maintenance cost.

14 In this respect see Roldan (2016), pp. 49-83.

15 Bermejo (2015), p. 207 and ff.

However, regulation of forfeiture of profits does not only apply to assets obtained directly from criminal activity, but also extends to *substitutive confiscation*, that is, to assets that have subrogated the original ones,[16] thus occupying their place. Therefore, if it is impossible to find the money from the drug sale, but the property that has been purchased with said money may be found, this asset can also be confiscated as a substitute for money. This variant of confiscation is intended to prevent successive transfers of assets obtained as a result of criminal activity to frustrate the confiscation of profits. In fact, if only the original assets could be confiscated, the first transformation would prevent their confiscation in such a way that it would be rather simple to evade state intervention. The confiscation of substitute goods allows for the confiscation of any asset that is part of a chain connected to the original assets obtained from criminal activity. The only limit will be the third party who has purchased in good faith, in accordance with an adequate interpretation of article 127 number four of the Spanish Penal Code.[17] This limitation (acquisition in good faith), which aims to preserve the rights of third parties, supposes an important restriction to the confiscation of assets obtained from criminal activity or of those that have replaced them, but does not make confiscation impossible. If, for example, the offender sells real estate that is a proceed of crime to a third party in good faith, confiscation will then proceed regarding the money that has been collected as compensation from the third party: that is, the money substitutes the real estate, and as such is subject to confiscation.

The third variant of confiscation of the benefits of crime, the so-called *confiscation of equivalent value*, extends this institution to the "side" of the chain of acquisitions of goods with the benefits of crime, reaching assets of legal origin that are in the patrimony of the offender. In effect, *confiscation of equivalent value* is not limited to assets derived from criminal activity. Thus, it can be exercised against property owned by the convicted person that has been legally obtained and that has no connection with the crime for which it is being seized: confiscation is made for a certain amount of money.[18] The political/criminal need to regulate confiscation of equivalent value stems from the fact that the confiscation of goods (original or substitute) presents two problems from the point of view of effectiveness: on the one hand, if the offender has spent the goods, they may no longer be confiscated and, on the other, if the goods have been transferred to third parties in good faith, they cannot be confiscated either.[19] On the other hand, confiscation of equivalent value has a significant advantage since it is not impeded by the consumption, concealment, displacement or destruction of the goods of illegal origin (or their substitutes) since it proceeds against property of legal origin owned by the offender.[20] For this reason, confiscation of equivalent value has become a central part of the international strategy against money

16 Thus, the Spanish Penal Code, in article 127.1 refers to the seizure of profit "whichever transformation it may have experienced".

17 Likewise, see the UN Convention (article 5.8). In Gilmore (1992).

18 Stessens (2002), p. 35.

19 Stessens (2002), p. 33.

20 See Kilchling (2001), p. 272. Cerezo Domínguez (2004), p. 45.

laundering, an assessment that is evident in the *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)* which promotes it.

Another relevant distinction is between *direct profits and indirect profits*. An extended concept of confiscation allows intervention in the case of indirect profits, that is, profits obtained by the person who invested or skillfully managed the original profits.[21] Thus, for example, if the person receiving a bribe has an economic adviser (for example, a broker) who knows how to invest in markets or sophisticated high risk financial instruments with a high rate of return and, after performing these operations, the State discovers that the money invested is of criminal origin, there is discussion regarding whether the infringer acquires property rights over the indirect profits, that is, over the profits obtained with the investment, even when forced to return the original capital. If we sustain that confiscation does not reach indirect profits, then the offender will have the right to keep such profit, which would otherwise be confiscated by the State. In my opinion, there are good reasons to confiscate indirect profits also: if the offender is allowed to appropriate the indirect benefits of crime, crime is encouraged for those who, because they have more resources (personal links, knowledge, etc.), are able to obtain greater benefits from capital obtained illegally. Imagine the multiple cases in which an individual has the opportunity to carry out a high-risk investment with the capital invested, but with great potential gains. In this type of case, if the offender can obtain property rights over the benefits obtained, incentives are created to commit crimes that provide economic benefits. I believe that this dissuasive argument and the absence of good reasons in favor of granting property rights to offenders over indirect profit, tilts the balance of arguments in favor of the legitimacy of the confiscation of indirect profits.

Another variant of confiscation, with a more contemporary regulation, is *extended confiscation*, which proceeds against assets that are presumed to be of criminal origin, but which are acquired prior to the criminal acts for which the offender is convicted. To this particular characteristic, which consists of extending it to assets acquired prior to the act for which he is convicted (which was already possible in cases of conviction for the crime of money laundering), we have to add the fact that in the European and Spanish system (the latter as a result of the transposition of the former) this variant of confiscation has been considered a civil institution, and therefore, evidentiary standards are more flexible, allowing the use of legal presumptions.

The last variant, which may reach any of the above, is *confiscation without conviction*. All the variants of confiscation mentioned in the previous paragraph have been presented as cases of action *in personam*, that is, in all cases there is a requirement that there be an accusation and criminal conviction of a person (physical or legal) subject to a penal type trial. However, there is a variant that substantially modifies the nature of the process that is carried out to seize assets of criminal origin. Such is the case of an action *in rem*, that is, a process whose sole purpose is to seize assets without there being a criminal conviction of those involved in the crime. These cases usually occur

21 Cerezo Domínguez (2004), p. 44. In the opposite sense, Aguado Correa (2000), pp. 95-96.

when the accused is at large, suffers from an illness that prevents prosecution, has been declared incapable or has died, or statute of limitations has extinguished criminal action, or for other reasons which vary according to each national legislation.

Undoubtedly, both the *extended confiscation and confiscation without conviction*, particularly when related to evidentiary standards of a civil nature (use of presumptions, reversal of the burden of proof), are related to one of the most relevant debates of recent times on the matter due to the practical consequences that derive from it, which consist of whether confiscation of the economic benefits of crime must be regulated as a criminal legal consequence (and, therefore, as a consequence of an action *in personam*) or if, on the contrary, it may be regulated as a real action (*in rem*) that operates exclusively with regards to the origin of the assets, independent of criminal action. Civil forfeiture and civil asset recovery procedures have had an important development in recent years, particularly in the area of recovery of assets from corruption of public officials.[22] Civil forfeiture has already been regulated in the United States, the United Kingdom, Colombia, Ireland, Italy, Australia, Slovenia and South Africa.[23] The case of Peru can be mentioned in Latin America,[24] as well as the current parliamentary debate taking place in Argentina on the topic.[25] In effect, if confiscation is regulated as a criminal consequence, it must be subject to the guarantee system that governs the criminal trial. On the other hand, if seizure of the proceeds of crime is regulated as an action *in rem*, it may be subject to the evidentiary standards and principles that govern administrative or civil procedures, with the consequent increase in effectiveness: the distribution of the burden of proof would be more favorable to the accusation than in its legal-criminal alternative, confiscation could be applied by an authority different from the courts of justice, it would proceed against legal persons regardless of their criminal responsibility, it would not depend on the presence of the accused at trial (as stated, it could be carried out even when it is impossible to convict the accused, either because he has died, has escaped or is protected by a regime of immunities), it would proceed against heirs, etc.[26]

22 Development of this institution in the international and compared arena is due, mainly, to the United Nations Convention on Corruption (2003).

23 See Hofmeyr (2008), pp. 91 and ff.

24 See the recent Legislative Decree number 1,373, of 2018, in use of the faculties delegated by Law number 30.823.

25 See, for example, https://www.lanacion.com.ar/2156046-postergan-el-debate-para-tratar-la-extincion-de-dominio (visited on september 21, 2018).

26 Jorge (2008), pp. 72, 73, 88, 89. The author explains that compatibility of such systems with fundamental human rights and the basic guarantees of the criminal process was examined on various opportunities, and from different angles, by the European Court of Human Rights. Interpretation of its decisions, according to this author, seems to indicate that there are certain characteristics and conditions under which these procedures *in rem* may be compatible with the fundamental guarantees of Criminal Law, (pp. 73-87). Also, on the usefulness of civil forfeiture in order to overcome the difficulties of criminal forfeiture, Daniel & Maton (2008), pp. 133-135.

IV. THE EVOLUTION OF THE SEIZURE OF THE PROCEEDS OF THE CRIMINAL OFFENSE IN INTERNATIONAL NORMS THAT INFLUENCED SPANISH LEGISLATION

The evolution of the confiscation of the proceeds of crime in international norms has been extraordinary. In effect, within a few years, seizure of the economic benefits of crime has transformed into one of the key instruments of criminal policy in the fight against crimes which produce economic benefits and money laundering.[27] The normative bodies of the United Nations, the European Union and the FATF have been very influential in Spanish legislation.

In fact, within the scope of the *United Nations (UN)*, three regulatory bodies provided a decisive impetus for this consolidation. In the first place, the *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)*, which established the confiscation of the proceeds from drug trafficking as a decisive part of criminal policy against the phenomenon, then the *United Nations Convention Against Transnational Organized Crime (2000),* which not only upheld the importance of this institution but extended it to a large number of various crimes linked to criminal organizations and, finally, the *United Nations Convention against Corruption (2003)* that turned the recovery of illicit assets (a broader enunciation that includes the restitution of assets) into a "fundamental principle" of the Convention.

Within the framework of the *European Union*, a succession of norms created since 1990 are influential in Spanish legislation. These are: the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990, 2005); Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property,* and *Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union.*

Also, the FATF *(Financial Action Group)* since its initial *40 Recommendations* pointed out the importance of confiscation of the proceeds of crime as a criminal political instrument in the international public agenda.

The evolution of confiscation of the proceeds of crime is evident in a historical analysis of international norms. Thus, the three UN conventions, namely the *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), the UN Convention against Transnational Organized Crime (2000)* and the *UN Convention against Corruption (2003)* provide for *basic confiscation*, *substitutive confiscation* and *confiscation of equivalent value*, in such a way that all three instruments contemplate the three variants of confiscation of proceeds of crime which express the minimum common consensus regarding the extension of this variant of confiscation.

It is in the most recent norms, namely, the *UN Convention against Transnational Organized Crime (2000)* and the *UN Convention against Corruption (2003)* that the *reversal of the burden of proof* regarding the legal origin of property is contemplated (articles

27 Blanco Cordero (2007), p. 123.

12.7 and 31.8 respectively) paving the way, therefore, for the consideration of the non-criminal nature of this variant of confiscation. Moreover, it should be noted that the most recent normative body, the *UN Convention against Corruption (2003),* is the one that provides for *confiscation without conviction* (Article 54.1.c) and entails the recovery of assets derived from corruption as a *fundamental principle of the Convention* (Article 51).

For its part, the FATF, in its 40 updated Recommendations includes *all these variants and refers to the three Conventions.*

European Union rules include confiscation that is *basic*, *substitutive, of equivalent value* and *without conviction*. We must clarify that confiscation includes both *direct and indirect profits* and, finally, *extended confiscation* as a measure of civil nature, in which case it is considered enough "that it is substantially more probable that the asset was obtained by criminal activity than by any other type of activity".

V. SPANISH LEGISLATION

A historical analysis of Spanish legislation regarding the confiscation of the proceeds of crime shows that this legal institute has gone through four distinct stages: 1) Before the Penal Code of 1995, 2) Regulation introduced into the 1995 Penal Code, 3) Amendments to the Penal Code introduced by the LO 15/2003 and the LO 5/2010 and, finally, 4) The recent Reform to the Penal Code introduced by the LO 1/2015.[28]

5.1 FIRST STAGE: BEFORE THE 1995 PENAL CODE

This period, which may be characterized as the primitive stage of confiscation of the proceeds of crime in Spain and begins previous to the first Criminal Codes, presented the peculiarity that confiscation seemed to be considered a penalty. Thus, we find the antecedents in the Penal Codes of 1822, 1848, 1870, 1928, 1932, 1944, 1950, 1973 and in the Law on Danger and Social Rehabilitation of 1970 (L 16/1970).

These norms lacked a general regulation of the confiscation of the proceeds of crime, although the confiscation of effects and instruments of crime was regulated *without mentioning the profits or economic benefits of crime*. The first specific reference, in this period, to the seizure of illicit proceeds appears in the Special Part, in article 136 of the *Penal Code of 1928*, which provides for the confiscation of *gifts or presents* received delivered in *bribery* type offenses.

The next rule included in the Spanish penal legislation on the matter, was introduced shortly before the Penal Code of 1995, through LO 1/1988, of March 24,

28 For an analysis of the evolution of the confiscation of the proceeds of crime in Spanish law, I have taken into consideration the following studies: Aguado Correa (2000); Bermejo (2015), p. 213 and ff.; Cerezo Domínguez (2004); De Porres Ortiz de Urbina (2016); Díaz Cabiale (2016); Roig Torres (2016), pp. 199-279, and Ruiz de Erenchum Arteche & Sanchez-Ostiz (2012), p. 204 and ff.

of reform of the Penal Code -EDL 1988 / 11313-, which set as the aim of criminal policy the attack of the economic consequences of drug trafficking more effectively when legislation was passed regarding the confiscation of the proceeds of crime, with regards to the crimes associated with illicit drug trafficking as a consequence of the *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)*. In this important legal reform, limited to the crime of drug trafficking, three mechanisms were established to deal with the economic benefits arising from criminal business: the terms of the forfeiture figure were extended, providing that goods of any nature may be forfeited, whether they were used in or came from criminal activity. To guarantee the effectiveness of this measure, judicial authority was empowered to apprehend the aforementioned assets at any moment, which was accompanied by the imposition of heavy fines and the creation of penalties for laundering money originating in drug trafficking.[29]

In conclusion, we may note that during this period there was no general regulation of the confiscation of the proceeds of crime under the General Part, with only a Special Part regulation for bribery and later for drug trafficking. At the same time, although there was no noticeable theorization regarding the legal nature of confiscation, it seems to have been considered either an accessory penalty or an accessory consequence to the penalties, always for intentional crimes. On the other hand, there is no doubt that the forfeiture of profits was treated as an *in personam* action and that it only seemed to apply to basic confiscation but not to the other variants (not even to substitutive confiscation or confiscation of equivalent value). There was no mention of the legal position of third-party acquirers of the assets of illicit origin nor was there reference to the eventual application of the principle of proportionality.

5.2 Second Stage: Regulation introduced in the 1995 Penal Code

The **Penal Code of 1995** expressly incorporates the confiscation of the benefits of crime in its General Part, as an "Accessory Consequence of Punishment", in its article 127. Thus, this primitive contemporary version of the confiscation of proceeds of crime, read: "Article 127. Any penalty that is imposed for an **intentional crime or fault** will entail the **loss** of the effects of crime and of the instruments with which it was executed, as well as the **proceeds of the crime**, whatever **transformations** they may have experimented. The ones and the others will be confiscated, unless they belong to **a third party in good faith not responsible for the crime, who has acquired them legally.** Those that are confiscated will be sold, if they are of lawful trade, and the product of the sale shall be used to cover the civil liabilities of the prisoner and, if they are not, they will be given the regulated destination, and in defect they will be rendered useless". Article 128 is also of interest as it expresses: "Article 128. When the aforementioned **effects and instruments** are lawful trade and their **value is not commensurate with the nature or seriousness of the criminal offense**, or civil liabilities have been fully satisfied, the Judge or Court **may** decree partial confiscation or **no confiscation** at all".

29 De Porres Ortiz de Urbina, E., "Novedades del decomiso introducidas por la Ley Orgánica 1/2015 y por la Ley 41/2015".

A careful reading of the wording of these statements allows us to distinguish, as central features, on the one hand, that regulation encompasses only two articles of one paragraph each, and on the other that both are located in the Book of "Accessory Consequences". In this way, the legislator gives the confiscation of the proceeds of crime the character of accessory consequence of the penalty, exclusively for intentional crimes. This is an *in personam* confiscation that includes both basic and substitutive confiscation, as it expressly covers "whatever transformations (the proceeds) may have experienced", but there is no regulation of confiscation of equivalent value or extended confiscation. Likewise, reference is made to the protection of third parties in good faith, without distinction between onerous purchases and gratuitous ones. Finally, its application is mandatory for judges, and the principle of proportionality does not apply to forfeiture of profits, since article 128 expressly mentions the confiscation of instruments and effects as those that may be limited in their application.

5.3 Third Stage: The Amendments to the Penal Code introduced by the LO 15/2003 and the LO 5/2010

During this stage, two successive reforms that are strongly influenced by the *Convention against Transnational Organized Crime (2000)* and the *UN Convention against Corruption (2003)* are reflected in the legislative text.

Thus, in the **Reform of the Penal Code governed by LO 15/2003**, *confiscation of equivalent value* is introduced (*at the time paragraph 2 of Article 127*): in effect, this new section of Article 127 of the Penal Code states that if by any circumstance, the forfeiture of the original or subrogated goods is not possible, confiscation will be granted for an equivalent value of other assets belonging to those responsible for the crime. Likewise, *confiscation without conviction* is introduced in cases of exemption from criminal liability (such as article 127.3): thus, it allows for basic confiscation, substitutive confiscation and confiscation of equivalent value in cases where a penalty cannot be imposed due to exemption from criminal liability or due to the extinction of criminal liability, with the duty to prove the unlawful patrimonial situation. This last reform was also accompanied by the inclusion in the Spanish Criminal Procedure Law of procedural regulations in order to carry out this confiscation in rem.30 This reform of 2003 includes *a specific regulation of forfeiture of profits in the articles referring to the crime of money laundering*: in effect, article 301.5 refers to the general regulation of forfeiture of profits affirming that "if the culprit (of the crime of money laundering) obtained profits, they will be confiscated according to the rules of article 127 of this Code".

A few years later the **Reform of the Penal Code** was introduced, by **LO 5/2010**. This reform incorporates *extended confiscation* (as article 127.1.ii) of assets derived from terrorist offenses or those committed within a criminal or terrorist organization or group. The Judge must extend confiscation to proceeds derived from criminal activities committed within a criminal organization, including the assets of

30 Díaz Cabiale (2016), pp. 52 and ff.

all convicted persons whose value is disproportionate to legal income. Likewise, it introduces as a power of the Judge, the *seizure of profits in imprudent crimes* (*Article 127.2)* punishable by imprisonment for more than a year.

This reform did not change the number of articles of the General Part referring to confiscation, since regulation remained in only two articles (articles 127 and 128 in the Book of "Accessory Consequences") but subsections were added to article 127. These modifications led to a part of the doctrine referring to the legal nature of confiscation of proceeds of crime as a *tertium genus* criminal penalty (along with penalties and other measures).[31] Thus, variants of confiscation in personam were added to basic confiscation, substitutive confiscation, confiscation of equivalent value and extended confiscation. But the seizure of the proceeds of crime was incorporated as an action in rem in cases of exemption and extinction of criminal liability. Regarding third parties in good faith they are mentioned but their scope is not defined. The confiscation of the proceeds of crime is mandatory for judges except in the case of confiscation of the benefits of imprudent crimes, in which case it is optional. Here, too, the principle of proportionality applies to instruments and effects, but does not extend to the confiscation of profits.

5.4 Fourth Stage: The recent Amendment to the Penal Code introduced by LO 1/2015.

The last stage takes place with the **Reform carried out by LO 1/2015** (Organic Law 1/2015, of March 30, which modifies the Organic Law 10/1995, of November 23, of the Penal Code) by means of which article 127 was expanded to 127 number 8, and article 128 of the Penal Code was maintained. Since then, and under the influence of the European Directive 2014/42 /EU referred to above, the importance that the regulation of confiscation of the benefits of crime in the Spanish Penal Code has acquired may be noted in the fact that this reform undertakes a new and extensive technical regulation of confiscation, with the aim of systematizing and developing it in general for all crimes, introducing modifications that aim to provide legal instruments that are more effective in the recovery of assets derived from crime, and their management. To this end, the Statement of Motives expresses that new features are incorporated in three issues, confiscation without conviction, expanded confiscation and confiscation of third party property, in articles 127 to 127 number 8.

Thus, confiscation[32] is foreseen in the Spanish Penal Code, in accordance with the reform by LO 1/2015, in articles 127 to 127 number 8 as an accessory consequence of the offense (Title VI - of accessory Consequences- of Book I), that is, it depends on the existence of an unlawful act, regardless of whether it has been effectively punished.

31 In this sense, Ruiz de Erenchum Arteche & Sánchez-Ostiz (2012), pp. 204 and ff.

32 «Decomiso» is the term used by the Penal Code according to the reform made by LO 1/2015, leaving behind the term «comiso», according to modification number 260 which states: «Substitution of terms in the Penal Code. All references contained in LO 10/1995, of November 23, of the Penal Code, to the term "comiso" are hereby substituted by the term "decomiso".

The Criminal Code regulates, in the recent article 127, the confiscation of the proceeds of the crime, the instruments of the crime and the effects that come from it, both in the case of commission of intentional crime and reckless crime (in particular, see article 127, paragraphs 1 and 2, regarding basic and substitutive confiscation). Also, article 127, in section 3 (where it was transferred to after its original inclusion in subsection 2 in 2003), regulates confiscation of equivalent value. In effect, the Criminal Code in article 127.3 says that, if it is not possible to confiscate the effects, instruments or profits, "the confiscation of other assets will be agreed upon, up to an amount that corresponds to their economic value, and to the gains that would have been obtained from them. The same procedure will be applied when the confiscation of certain goods, effects or gains is agreed upon, but its value is inferior to that which they had at the time of acquisition ". Also article 127 number seven incorporates confiscation of equivalent value.

The following articles, recently incorporated, ranging from article 127 bis to 127 number eight, regulate various aspects of confiscation. According to the Statement of Motives (point VIII), the new rules affect, in particular, three issues: extended confiscation, confiscation without conviction and confiscation of third-party property.

With regards to *extended confiscation*, regulated in art. 127 bis and 127 number 5, the Explanatory Memorandum states that "in the face of direct confiscation and substitutive confiscation, extended confiscation is characterized precisely because the property or effects seized come from other illegal activities of the convicted subject, different from the facts for which they are convicted, which have not been the object of complete evidence. For this reason, extended confiscation is not based on full evidence of the causal connection between criminal activity and enrichment, but rather on the verification by the judge, on the basis of well-founded and objective evidence, that there have been other criminal activities, other than those for which the subject is convicted, from which the assets to be confiscated derive" adding that "extended confiscation is not criminal punishment, but rather an institution through which the unlawful patrimonial situation to which the criminal activity has given rise, is ended. Its foundation has, therefore, rather a civil and patrimonial nature, close to that of figures such as unfair enrichment. The fact that European Union regulations expressly refer to the power of courts to decide on extended confiscation on the basis of assumptions, especially the disproportion between the lawful income of the subject and the available assets, and even through procedures of a non-criminal nature, confirms the previous interpretation". Although extended confiscation had already been introduced in the Penal Code in 2010 for the crimes of terrorism and those committed by criminal groups or organizations, it is now extended to other cases in which it is common for a sustained criminal activity to take place over time, from which important economic benefits can be derived (laundering and reception, human trafficking, prostitution, exploitation and abuse of minors, counterfeiting of currency, punishable insolvencies, crimes against public finances and social security, corruption in the private sector, computer crimes, bribery, embezzlement or patrimonial crimes in cases of criminal continuity or multiple re-incidence).

Likewise, and according to the Statement of Motivation. "with the purpose of facilitating application, an open catalog of indications that, among other possible ones, should be valued by judges and courts to decide on confiscation, is introduced: disproportion between the patrimony of the person responsible for any of the crimes contained in the catalog, and their legal means of life, the intentional concealment of their assets through the use of natural or legal persons or entities without legal personality, or through recourse to tax havens; or transfer through operations that hinder their location or follow-up, operations which lack economic justification". Thus, according to the legislator "these rules would not prosecute the convicted person for an illicit act, which would be typical of penal punishment, but to achieve the purpose of putting assets in order and correct an unlawful patrimonial situation derived from unjust enrichment of criminal origin; and extended confiscation does not presuppose or entail a declaration of guilt of criminal activity, as confiscation does not presuppose such a declaration of guilt nor is it a penalty. Regulation provides, therefore, that if the convicted person is later to be found guilty of similar criminal acts committed beforehand, the judge or court should assess the scope of prior confiscation when deciding on confiscation in the new proceedings." Even article 127 number six introduces presumptions regarding the criminal origin of the assets, which will, without a doubt, give rise to important controversies.

Confiscation without judicial sentence (conviction) was already regulated, before the reform of LO 1/2015, in section 4 of article 127, although the criminal legislator, in the current article 127 number three, considered it was "opportune to use the reform to introduce some technical improvements in its regulation and introduce the necessary procedural rules to make its application possible", as expressed in the Statement of Motives (Point VIII). Likewise, the Statement of Motives points out that "traditionally the confiscation of proceeds of crime has been linked to the existence of a prior (criminal) conviction for the crime committed. From this starting point, it had been asserted that confiscation without conviction is necessarily contrary to the right to be presumed innocent, as it authorizes the confiscation of the proceeds of a crime that has not been proven and for which no conviction has been imposed. However, such an interpretation is the result of an analysis of confiscation under traditional regulation, which ignores that, as stated by the European Court of Human Rights, confiscation without conviction does not have a properly criminal nature, as it is not based on the imposition of a penalty adjusted to responsibility for the deed, but is more comparable to the restitution of unjust enrichment than to a fine imposed under criminal law given that confiscation is limited to the actual (illicit) enrichment of the beneficiary due to the commission of a crime, which does not show that this is a punitive regime (Decision 696/2005, *Dassa Foundation vs. Liechtenstein*).

With regards to the *confiscation of third-party property*, regulated in article 127 number four, the Statement of Motives points out "on many occasions, the goods and effects of criminal activities are transferred by their perpetrators to third parties. Regulation of the confiscation of goods held by third parties was already provided for in our legislation, although the reform introduces some technical improvements aimed at increasing the efficiency and legal security in the application of these rules." Thus, the reform undertakes a regulation in article 127 number four which is

much more detailed in order to determine if a third party acquiring the assets must be considered to be in good or bad faith, which was regulated before briefly in article 127 number four, proving the bad faith of the third party on the basis of knowledge of the illicit origin of the goods or their acquisition under circumstances that recall the concepts of eventual misconduct or imprudence with respect to the knowledge of said origin.

Article 127 number eight incorporates procedural rules regarding measures that may be taken during the first steps of the process, the possibility of the anticipated or provisional use of the goods and effects intervened, as well as rules regarding their destination, either for reparation of the victims or for their adjudication to the State.

Likewise, to improve management of the assets intervened, regulation contained in the Law of Criminal Procedure is revised, and an Office of Asset Recovery and Management is created which will be charged with carrying out the necessary actions to manage, in the most economically efficient manner, the conservation, realization or use of the assets intervened.

In conclusion, we may note that the new regulation of confiscation in the Spanish Criminal Code deepens the policy of recovering assets of criminal origin not only with the aim of greater efficiency of criminal confiscation but, at the same time, by means of regulation of legal instruments that lie between criminal law and civil law.

VI. EXTENDED CONFISCATION AND PRINCIPLES OF CRIMINAL LAW

Extended confiscation has precedents in both Spanish and German case law, as well as in that of the European Court of Human Rights, which, surely, has given the legislator support in the face of questions related to its confrontation with the principles of Criminal Law.

In Spain, the Supreme Court had already opened the possibility of confiscation of assets acquired prior to the event for which a subject is convicted, a legal basis for extended confiscation, even before it was expressly legislated. Such was the decision of the *Non-Jurisdictional Plenary of October 5, 1998*, regarding confiscation of the economic benefits of drug trafficking, which has been followed in numerous subsequent resolutions of the Supreme Court itself, namely the SSTS of April 1, 1999 (RJ 1999, 2254), April 5, 1999 (RJ 1999, 2767), November 15, 2000 (RJ 2000, 10640), July 15, 2003 (RJ 2003, 5386) and January 10, 2005 (RJ 2005, 1612).[33] Thus, one of these resolutions (RJ 2003, 5386) points out that "(…) confiscation is also possible when the assets have been acquired in a time prior to the act of drug trafficking that is prosecuted, provided that the means used for their acquisition have their origin in previous drug trafficking activities, as also happens in the present case according to the facts from which we must necessarily begin. This question was expressly decided by the Non-Jurisdictional Plenary of the Second Chamber of the Supreme Court of

33 See Iñigo Corroza & Ruiz de Erenchun Arteche (2007), pp. 227-228.

10/05/98 in which it was agreed upon that the confiscation of profits referred to in article 374 of the Criminal Code should be extended to the proceeds of operations prior to the specific operation discovered and prosecuted, provided that provenance has been proven and the accusatory principle is respected in any such case". Likewise, also in Spain, the Constitutional Court, Chamber 1ª, S 3-7-06, nº 220/06, (Pte: Delgado Barrio, Francisco Javier) -EDJ 2006/105175- has also pointed out that confiscation is essentially economic in nature and that in its determination, the principle of presumption of innocence does not apply, which only applies in cases of conviction. The problems that may arise must be from the perspective of the right to a fair trial and the right to effective judicial protection.[34]

Also in Germany, both the Constitutional Court and the Supreme Court have declared that the confiscation of illicit proceeds (*Verfall*) is not a security measure or a penalty because it is not linked to culpability, but rather a *sui generis* measure consisting of requisitioning property gains obtained illegally for a preventive purpose, as a crime should not benefit its author or participant or third parties protected by them. Likewise, the German Constitutional Court in the Order of January 14, 2014 declared extended confiscation in accordance with the Fundamental Law as it is not a criminal penalty, qualifying it as a "measure" different from a security measure, argument that has been partially reproduced by the Spanish legislator in the Explanatory Memorandum of the Organic Law 1/2015 to justify legislative reform.[35]

But also the European Court of Human Rights (since the judgment *Phillips v. United Kingdom*, related to the Drug Trafficking Act of 1994) has considered that in certain matters such as confiscation, it is possible to establish rules that shift the burden of proof, without implying a violation of the principle of presumption of innocence. In order to set such a principle the court establishes what it understands by penal norm and affirms that the criteria for its delimitation are the qualification of domestic law, the seriousness of the penalty that it imposes and the nature of the procedure in which it is declared.[36]

VII. CONCLUSIONS

In light of the successive legislative reforms as well as the doctrinal and jurisprudential controversies in Spain, we may claim that history has taken the confiscation of the proceeds of crime from the storage room of legal policy and turned it into a striking institute, with an impressive reformist dynamics, which has led from its traditional consideration as an accessory penalty or accessory consequence of the current penalty to an institution between criminal law and civil law.

Thus, in a few years it has reached the status of a legal statement that includes several articles of the Criminal Code and that points out that in cases of extended

34 De Porres Ortiz de Urbina (2016).

35 Roig Torres (2016), pp. 216, 224.

36 De Porres Ortiz de Urbina (2016).

confiscation and confiscation without conviction, the principles of guilt or innocence do not apply, as it is a measure of a civil rather than a criminal nature, although it is accepted that the procedural principle of contradiction and the fundamental right to effective judicial protection are applicable in order to ensure the participation of those affected in the confiscation process. For its part, there is consensus that the principle of proportionality does not apply in the matter of forfeiture of profits, but only in relation to instruments and effect. However, there does exist a rule in the European Directive of 2014, as well as in German legislation, which is very just in my opinion, that allows for mitigating the effects of confiscation of the proceeds of crime for humanitarian reasons (rule of excessive rigor) that is not contained in Spanish legislation.

This extraordinary evolution, which is also a sign of the expansion of criminal law and contemporary criminal policy, has exposed the difficulties that the legal and scientific subsystem face in the face of inputs from the political system, which is committed to complying with international organizations and the European Union for permanent legislative harmonization aimed at addressing the demands of criminality motivated by economic advantages which is increasingly complex.

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