

ARTÍCULO DE INVESTIGACIÓN

Prospects and challenges of penalties for economic crime in Cuba

Perspectivas y desafíos de las sanciones por delitos económicos en Cuba

Arnel Medina Cuenca 

arnel@lex.uh.cu

Universidad de La Habana, La Habana, Cuba

Mariano Rodríguez García 

marianorodriguez1@lex.uh.cu

Universidad de La Habana, La Habana, Cuba

ABSTRACT The present work is a study of the system of penalties imposed in cases of economic crime in Cuba. We use the legal-historical method to address the genesis of our study object and its variations over time. The legal-doctrinal method is also used, which entails reviewing the concepts and institutions involved in the procedures, together with their doctrinal, jurisprudential and practical aspects, in order to enter into the subject in greater depth and provide related information. These methods are used to discuss past and present research into economic crime, and the various theoretical and ideological approaches to an issue that is currently at the center of debate due to its serious consequences.

KEY WORDS Criminal Law; Economic crime; Corruption; punishment system; Cuba.

RESUMEN El presente trabajo valoró el sistema de sanciones a imponer frente al fenómeno de la delincuencia económica, tomando en cuenta el método histórico jurídico, para estudiar la génesis de nuestro objeto de estudio y sus variaciones a lo largo del tiempo. Asimismo, se utilizó el método jurídico-doc



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trinal, en tanto implica análisis de conceptos e instituciones involucradas en los procedimientos y en sus aristas doctrinales, jurisprudenciales y prácticas para la profundización y aporte de información. A través de estos métodos se ahondó en las investigaciones precedentes y actuales sobre la delincuencia económica y las diferentes posiciones teóricas e ideológicas sobre un problema, que se encuentra en la actualidad en el centro de los debates, por las serias consecuencias que acarrea.

PALABRAS CLAVES Derecho penal; Delincuencia económica; Corrupción; sistema de sanciones; Cuba.

1. Introduction

The application of the basic principles of Criminal Law for the adjustment of penalties, such as those of minimal intervention, proportionality, humanity of penalties, harmfulness, resocialization and others of significant relevance for the rational determination of penalties applicable to economic crimes, proves complex because of the characteristics of the persons found guilty of committing these offenses.

Muñoz Conde remarks that concern for economic crime goes back a long way; it became a topic of Criminology at the time Sutherland coined the expression "white collar crime" to describe offenses typically committed by powerful economic sectors¹. Since then, economic crime has held an important place in manuals and treatises on criminology and Criminal Law, albeit without very clear boundaries, limits or main defining elements.

Sutherland defined white-collar crime as a "crime committed by a person of high social status and respectability in the course of his occupation"². In this regard, Fernández Abad points out that this definition had immediate repercussions since, unlike most contemporary authors, Sutherland did not consider delinquency as exclusive to the lower classes; on the contrary, he argued that it is learned through differential contacts as a cross-sectional phenomenon that spreads across the entire social structure³.

Sutherland's arguments show that factors linked to policies of social exclusion of marginal sectors of the population have a significant impact on the rise in criminal activity and violence, without ruling out other factors. These views contrast with other explanations linking their origin to psychological and sociological phenomena that

1. CONDE (1995) p. 67.

2. SUTHERLAND (1969) p. 13.

3. ABAD (2000) p. 47.

underpin social relations⁴; these explanations were rightly refuted by Zaffaroni, who stressed "the lack of a project, that is, the existential frustration caused by an excluding society". Poverty causes as many crimes as wealth and there are certainly crimes of the rich and crimes of the poor, but the problem lies in the availability of projects⁵.

As the gap between rich and poor widens, so social conflict increases and people in the regions least favored by economic development find it harder to meet their needs; therefore, trying to exclude poverty from the causes of crime is just as serious and irrational as blaming it for all social ills.

As we enter the third decade of the twenty-first century, with the world economy considerably affected by COVID-19, common crime causes much less damage than public and private corruption, which is far more profitable than traditional criminal activity. Furthermore, globalization and the transnationalization of organized crime blur the distinction between these two types of crime.

For this reason, the objective of this study was to evaluate the penalties established for white-collar criminals with a view to considering possibilities of improving the response to this socio-legal phenomenon in Cuba.

The methodological tools used were the legal-historical method to study the genesis of our study object and its variations over time, and the legal-doctrinal method from the conception of the research to its outcome. The latter entails reviewing the concepts and institutions involved in the procedures, and their doctrinal, jurisprudential and practical aspects, in order to explore the subject more deeply and provide related information. Through this method, we delved into past and present research on economic crime and on the various theoretical and ideological approaches to an issue that is currently at the center of debate due to its serious consequences.

2. Intervention models to deal with economic crime

In this approach, it is necessary to establish the model of Criminal Law that covers economic criminals, understood as a conceptual representation based on certain theories, principles and purposes of operation⁶ as the criteria behind the justification and systematization of the scope of intervention in these social conflicts.

In this complex scenario, we essentially discuss two models of Criminal Law. On the one hand, maximum Criminal Law, also called Criminal Law of the enemy, marked by the weakness or absence of some of the traditional limits to state intervention; and on the other, minimal Criminal Law, which aims to maintain citizen rights within clear and verifiable limits in order to prevent arbitrary behaviors and errors

4. CUENCA (2018) pp. 2058-2059.

5. ZAFFARONI (2015) pp. 182-243.

6. ARMATE (2006) p. 62.6.b.

to the detriment of individuals. There are also hybrids of these two patterns of penal intervention, which attempt to integrate their characteristics as ways of confronting conducts deemed intolerable by society⁷.

While the maximum model applies novel formulas to contemporary problems, it is usually characterized by the fact that it seeks to safeguard the purposes of the penal sanctioning power by abandoning positions otherwise considered the protective pillars of classical Criminal Law. This leads to anything from the proliferation of criminal types of abstract danger, that blur the foundations of state punishment policies, to acceptance of the advancement of this sanctioning power⁸.

In contrast, minimal Criminal Law aims to protect citizens' rights based on the social pact. Although it shows some conservative tendencies – which deny the possibility of protecting public interests and the use of the technique of danger, and seek a basic Criminal Law based on individual interests – it is characterized by addressing relevant interests and streamlining the approach to social conflict.

Both intervention systems face a common challenge: dealing with contexts marked by high technological development of the means of production, in which we observe the growth of a generic individual, beyond the citizen, linked to the dynamic progress of communications and transport along with security-reinforcing mechanisms designed to cover the entire complexity of contemporary criminality⁹. The implementation of these mechanisms is also hindered by the power structure, which creates the conditions for stronger prejudice and stereotyping in the delimitation of criminal punishment, and encourages violence with the excuse of countering it¹⁰.

The combination of these factors leads to a gradually growing use of the punitive system as a way of reinforcing social control. This explains the noticeable proliferation and diversification of *legal goods*¹¹ regulating conducts deemed harmful, through new legal mechanisms that have an impact on the environment, on labor rights and on economic activity, along with an aggressive information campaign that exalts their apparent benefits to citizen security.

7. FERRAJOLI (1995) pp. 91-116.

8. GUNTER (2003) pp. 19-56.

9. OCHOA (2004) pp. 1-3.

10. ZAFFARONI (2016) pp. 19-20.

11. “Legal goods” are relations or interests of special importance which deserve to be safeguarded by Law, in particular Penal Law, from behaviours which are most harmful to society.

This makes it possible to strengthen the relations of exploitation that underlie liberal societies and endorse the unequal distribution of the wealth created by human labor, as well as guaranteeing the protection of hegemonic class interests. These mechanisms bolster the processes of marginalization and related phenomena—poverty, crime and exclusion—and exempt the powerful from punishment for their illicit conduct and abuse of authority.

This debate is consistent with the rise – indeed the boom – in certain risks that contradict the idea of a classical liberal State¹², aggravated by the neo-liberal movement which champions an opportunistic reduction of state sovereignty and harsher repressive measures against social phenomena likely to threaten the status quo¹³.

The above is particularly obvious in the process of market deregulation, where few boundaries are set in terms of formal social control, usually considered the State's responsibility; and in the flexibilization of labor relations justified by the pursuit of greater efficiency in economic activity. This creates objective conditions for the criminalization of conducts bound to alter the status quo, and promotes mechanisms to cover up irregular behaviors within the economy.

In summary, the above patterns of anti-criminal intervention offer views both defensible and reprehensible in terms of conception and due contextualization, which explain support for a model of minimal Criminal Law based on its protective and rational approach to the legal guardianship of criminal interests, and on the defense of the *legal good* as an identifying formula that fixes the boundaries of intolerable conducts. Using the assumed model of criminal legal intervention, it is necessary to establish its proper scope, given the difficult realities of our times, when the State—in conjunction with private economic power—is changing its current strategies of excessive expansion of its power to criminalize conduct, unrestricted by the liberal ideal of the protection of Rights¹⁴.

This process is part of the modernization of Criminal Law around the new interests to be protected. That is why Gracia Martín defines two positions that have emerged in this regard: one against and one in favor of modernization¹⁵. In this connection, the permanence of liberal postulates and guarantees vis-à-vis collective interests is under discussion, as pointed out by Hefendehl¹⁶, questioning whether advances in punitive intervention should be allowed and whether liberal rights can be made more flexible.

12. JIMÉNEZ (2009) p. 160.

13. BECH (2008) pp. 19-34.

14. RIPOLLÉS (2005) p. 3; CUEVAS (2002) p. 4.

15. MARTÍN (2010) p. 33.

16. HEFENDEHL (2002) p. 2.

Among the currents that oppose modernization are the criteria of the Frankfurt School, which state that only individual goods should be protected. This school suggests a return to the limits of a classical, liberal Criminal Law, with sufficient guarantees for its defense and where the idea of the State as the guarantor of individual freedoms and free competition persists. With respect to the latter point, a position is taken because it is considered that it reduces the individual's performance to consider him – as a citizen – to be a competitor to the market, as explained by Borja Jiménez: "(...) to the individual, as much freedom as possible, and as much State as necessary"¹⁷.

This is represented as one of the victories of the social pact against arbitrary State action, particularly when using constructs such as the criminal *legal good*, which founded and limited punitive power. This is why Soto Navarro states that, in the new scenario, the individual is not in a position of dominion over new *legal goods*, especially collective ones, since the possibility of taking advantage of them is distributed among all¹⁸.

Within the positions that advocate modernization, there is debate on the relevance of the *legal good* as the material axis of criminal punishment. Some of these tendencies renounce its use, due to an apparent impossibility of precision, hence the use of other legitimizing foundations, where its functions are transferred, even within the theory of crime¹⁹.

These criteria have their origins in the rise of fascism in Europe, where the justifying and limiting functions of the criminal *legal good* were abandoned and the need arose for a theory oriented towards an ethics of results²⁰. Based on a substantial interpretation of crime, they acted independently of the criminal types and the limiting principles of Criminal Law that guided them in their application, justifying their aims through the pretension of avoiding behaviors harmful to the people²¹. It can be stated in brief that their purpose was to guarantee the status quo; which implied, in Schmidt's words, legitimizing the actions of National Socialist Law²².

This same logic of renunciation of the *legal good* is maintained by sociological interactionist criteria, which attempt to explain the criminalization process from the perspective of the reciprocal influences between society and individuals. Their postulates ignore aspects such as global social structures, which include the position of the individual in the community, the exercise of power and the integral development

17. JIMÉNEZ (2009) p. 151.

18. NAVARRO (2005) p. 903.

19. JIMÉNEZ (1997) p. 561.

20. MALARÉE (1992) pp. 68-69.

21. GRISPIGNI (2014) pp. 214-218.

22. RAFECAS (2010) p. 136.

of the community²³. The criticism aimed at these postulates is that, rather than new ideas, what they really seek is the re-legitimization of the spheres of power and their control mechanisms.

The pretensions of these positions lead to a greater control of the sources of dangers that threaten the system, which has crystallized in the simple protection of norms. In relation to this current, Berdugo Gómez de La Torre and Pérez Cepeda explain that: "The *legal good* is identified with the norm, that is, a legal formalism reduced to the power of the legislator in which what prevails is the protection of the State in the protection of its values"²⁴.

These ideas were taken up by Jakobs who, from a systemic functionalist perspective, denies dogmatic transcendence to the theory of the *legal good* and recognizes that it should be seen as the expectation of the functioning of social life²⁵.

These postulates of Jakobs diminish the relevance of the human being, insofar as they place the individual in the background, since, although they apparently encompass the individual person, they actually remove him from his postulates²⁶. As a radical perspective, it has its genesis in the sociological functionalism of Parsons and the science of law of Luhman²⁷, who share a vision of society as a system, made up of common elements (subsystems), from which they seek a rational explanation to all the problems of society.

This position is taken by admitting the modernization of Criminal Law and denying credit to the positions that pretend to return to a nuclear Criminal Law of individual goods, since it prevents the protection of new interests demanded by the society of globalization. Likewise, it supports the criterion of maintaining the *legal good* as the basis for anti-criminal intervention, contrary to the postulates that deny its relevance.

To achieve this adjustment in the complex globalized scenario and as a manifestation of modernization, the relevance of the use, as far as possible and under certain requirements, of the figures of abstract danger and blank criminal rules, among other techniques, must be recognized²⁸. These can be justified as long as the main assets they protect belong to specialized fields of knowledge: the harmfulness of the damaging behavior is appreciable and definable, and the conducts posing an intolerable risk to society are specified.

23. GIDDENS (2000) p. 711.

24. CEPEDA (2011) p. 41.

25. JAKOBS (2003) p. 43.

26. RAMÍREZ (1994) p. 111.

27. LUHMAN (2005) p. 21.

28. SÁNCHEZ (2015) pp. 150-152.

The premises by which criminal legal right must be guided will be constituted by the guidelines of an evaluative criminal policy and the postulates of the Constitution, as the axis of institutionality. The criminal policy must integrate formal and material guarantees that allow for the protection of both the interests directly threatened and the rights of offenders in the face of disproportionate state interventions. In the case of the Constitution, it must orient the content of criminal protection to its systemic guidelines and create alternative spaces for conflict resolution through mechanisms with less social impact than Criminal Law.

Therefore, minimal Criminal Law must be characterized by maintaining the *legal good* as a justification for intervention, which must adapt its postulates to assume new collective *legal goods* such as the Economy. Faced with the challenges of Globalization, its action will be conditioned by criminal policy and the Constitution, as premises that perfect the specification and delimitation of the criminal interests that require protection by Criminal Law; taking into account that there must always be other preferable mechanisms for use in this economic environment, in order to avoid the premature entry of Criminal Law and thus provide it with its true sense of *ultima ratio*.

3. Economic System and configuration of anti-criminal intervention

The links between Criminal Law and the economic system have their origin in the interventionist postulates of the State in the activity of production of goods and services, originated as a consequence of exceptional and contingent situations. According to Witker and Farjat, Economic Law was born after the First World War and as a consequence of the weak balance between capitalist concentration and the actual functioning of the State in economic activity²⁹.

This law, which emerged as a law of war and revolutions, was oriented, in socialist countries, to an equitable redistribution of income, with a focus on the socialization of the means of production. In liberal economy countries, in contrast, it was sought as a right to face the challenges of cyclical crises³⁰ and as a feasible way to compete with the social indicators of the Communist bloc³¹. This liberal movement sought to achieve a balance between private property and the disadvantaged sectors of society, through the corrective regulatory intervention of the state³².

29. WITKER (1999) p. XXVII; FARJAT (1976) pp. 7-9.

30. WELLS (2013) pp. 499-530.

31. STIGLITZ (1999) p. 352.

32. NORHAUS (2006) p. 41.

As part of its systematizing elements and from the social rule of law, Stiglitz explains how state intervention passes through the sieve of six important functions that cannot be delegated to the private sector: the promotion of education, technology, support to the financial sector, investment in infrastructure, prevention of environmental degradation and the creation and maintenance of a social safety net³³.

Given the failure of this branch of law to solve conflicts, and the increasingly irregular conduct of the Economy, it was necessary to deploy *ius puniendi*, according to Bajo Fernández, who pointed out that it became a form of State intervention, the most intense in terms of sanctioning power³⁴.

As to the role of Criminal Law in dealing with the economy, Tiedemann mentioned the need for a Criminal Law with its own characteristics, with well-defined *legal goods* that can be integrated into the conventional legal system. With respect to the particular features of *ius puniendi*, he explained that: "(...) *it presents characteristics related to questions of the General Part, and its postulates were endorsed in Italy and Spain, respectively, by Pedrazzi and Arroyo Zapatero*"³⁵.

These views originated in Germany during the Second World War and in the following years, when the country was overwhelmed with more than 40,000 criminal provisions against economic illegalities³⁶. Things improved only when this proliferation of regulations ceased in 1949 with the enactment of the Act for the Simplification of Economic Criminal Law; this separated Criminal Law from Administrative Law, and the protection of property was first assigned to the Economy and later became a socio-economic matter³⁷.

No common position has been agreed since then concerning the protection of economic activity, due to the existence of different approaches centered on the idea of Economic Order. This was one of the issues discussed at the 13th Congress of the International Association of Criminal Law, held in Cairo, Egypt, where three main conceptions based on comprehensive, exacting and strictly constitutionalist positions prevailed³⁸.

The broad conceptions, which understand that this order focuses on the regulation of the processes of production, distribution, exchange and consumption of goods and services, came into being under the influence of the exponential increase in economic crime and the development of neoliberal globalization. They fuel debate about

33. STIGLITZ (1999) p. 349.

34. FERNÁNDEZ (1973) pp. 95-96.

35. TIEDEMAN (1993) p. 1.

36. TIEDEMAN (2010) pp. 76-19.

37. WASSMER (2002) pp. 165-167.

38. RODRIGUEZ (2015) pp. 59-60.

the reductionist trend in the State's role and the reinforcement of its policing activity, which entails either a greater involvement of Criminal Law or quite the opposite: a hasty return to punitive Administrative Law³⁹.

This interpretation extends the boundaries of Economic Criminal Law and aims to give specific characteristics to this branch – in which traditional Criminal Law has proved to be ineffective in dealing with new phenomena such as economic crime. For this reason, it breaks with an extensive inclination towards the systematic approach of the criminal system and its underlying principles⁴⁰.

It has been criticized for its excessive scope, which could lead to the *legal good* Economic Order being considered as a second-class interest, behind that of individual property. It is also censured for equating the notion of Economy and the form of anti-criminal intervention without setting clear and verifiable limits that can be distinguished in the norms where it is enshrined as an interest worthy of legal protection.

On the other hand, strict positions understand Economic Order as an encompassing approach to State intervention in the economy, a view identified by Bajo Fernández, who describes this as an "(...) *interest of the State in the preservation of its productive capacity in order to fulfill its task and of the legal regulation of the economy, both as a whole and in its partial statutes, and understood as the interest of the individual in enjoying consumer goods and taking part in the development of an activity that fits in with his professional will to act and pursue profit*"⁴¹.

This strict approach has been the object of criticism for its restrictive postulates, for instance, from Bacigalupo, Righi and Muñoz Conde, who highlighted its limited scope for action and anti-criminal intervention. For this reason, they draw a research-supported parallel between the forms of intervention in the Economy. In this respect, its content will be made up of types of crime related to sectors directly regulated by the state power structure, such as those linked to tax, price-setting, monetary and anti-smuggling regulations, etc.

It is also criticised for not regulating conducts which the State has decided to no longer control for reasons of public policy, and which will be influenced by the type of intervention, direct or directive, chosen by the government. The latter will take into account indirect mechanisms of influence such as public enterprise, fiscal, monetary and other policies, whereas the former involves the engagement of the State as an economic subject that participates in and manages businesses as an administrative function with representation in the so-called public enterprises.

39. GONZÁLEZ (2015) pp. 138-139.

40. CERVINI (2008) p. 2.

41. FERNÁNDEZ (1973) p. 96.

The third position is an offshoot of the strict stances mentioned and relies on the Constitution, stating that Economic Order should be understood as a set of legal-criminal rules that protect the constitutional economic system. From the previous standpoints, this view is considered as a variant of the State system of intervention in the Economy, except that, barring the positive factor of its consistency with the Constitution, it remains the object of criticism for its poor vision of the field of economic activity, since it runs the risk of linking the goods to be protected with their express enunciation in the regulatory provisions.

There have been attempts to link the broad approaches with the liberal State model, marked by the predominance of private relations of production, apparently self-regulated by the market according to Smith's 'invisible hand'. In contrast, there have been clear attempts to associate these strict positions with socialist models of centralized regulation. We do not agree with this stance, because regardless of the differences between them, both economic systems allow room for regulatory intervention in the Economy and its interaction with the market, which should be interpreted as a form of relationship between producers and consumers that is subject to the mode of production but predetermined by neither⁴².

It is understood that the trend in centrally planned economies is to guarantee this structure and its economic operation with greater intervention in areas such as the pricing system, the distribution of goods, planning and other related fields⁴³. On the other hand, in liberal economies, the focus is on the protection of the mechanisms of free and fair competition, the credit and subsidy systems, the stock exchange and others that make it possible to sustain the areas where private production relations prevail⁴⁴.

In this discussion, we need to complement the knowledge provided by Economics to suggest the fields of production where the intervention of Criminal Law may be necessary. These should cover both the macroeconomic field, including a global study of the goods and services produced, the total income of the population, employment rates, productive resources, and price behavior; and the microeconomic situation, which focuses on examination of the conduct of individual economic agents such as consumers, companies, etc., and the decisions they make to reach their goals.

This explains the support for broad approaches to Economic Order supplemented with strict constitutional provisions, since they allow all areas of the Economy to be covered in both the public and the private sector through a systemic order, guided and limited by the Constitution itself, which sustains the essence of these modes of production.

42. RAVELO (2014) pp. 21-24.

43. VÁZQUEZ (2006) p. 102.

44. VÁZQUEZ (2006) p. 101.

Consequently, we endorse an eclectic approach to Economic Order as a criminal *legal good* that assumes the integration of the broad perspective supplemented with strict constitutional correctives. It will thus be seen as the process of production, distribution, exchange and consumption of goods and services, supported by the Constitution, bound to legitimize and limit the scope of anti-criminal intervention and to provide alternative responses for the resolution of conflicts, in accordance with the recognized systems of centrally planned economies or liberal market economies.

4. Recommended penalties for economic crime

Based on the determination of the protected legal interest, it is possible to propose a response to crimes that affect these interests. In this respect, Terradillos Basoco rightly points out that even the harshest administrative penalties are nothing compared with the profits illegally obtained, or when the sanctioned enterprise can pass them on to the consumer through price rises. They cannot have any preventive value, especially in the context of transnational corporations in which the penal sums actually paid are much lower than those imposed⁴⁵.

The argument that the enterprise provides an instrumental framework for economic operation that it is advisable to shield from Criminal Law is also recurrent. Criminal Law should definitely prosecute crimes committed in the context of business activity, but be limited to common crimes, for which no particular strategies are required. Based on this *parti pris*, many call into question the convenience of resorting to Criminal Law to put an end to a phenomenon as complex, dynamic and structurally entrenched as white-collar crime. Trying to tackle these offenses with penal sanctions, they hold, would be tantamount to taking refuge, inadmissibly, in Criminal Law, a move certainly doomed to failure⁴⁶.

Zúñiga Rodríguez⁴⁷ states with reason that there are cultural factors in today's society that favor a much more benign understanding of white-collar crime than street-crime. In practical terms there is an atavistic vision of the dangers of violent street-crime against people's life and property, whereas citizens still fail to understand the social threat posed by crimes committed by the powerful sectors: political corruption, private corruption, corporate crime, financial crime, etc.

45. BASOCO (2015) pp. 19-20.

46. BASOCO (2009) p. 33.

47. RODRÍGUEZ (2012) p. 96.

We agree with Vervaele⁴⁸ that the most modern proposals have a special effect on this issue when it comes to re-discussing the question of the criminal liability of individuals. As an economic and social agent that plays a key role in post-industrial society, the business sector must have rights, but also duties, including criminal liability (and the legal protection linked to it).

In analyzing the role of Criminal Law and its effects through punishment, he points out that, in order to deal with economic crime, it cannot aim for transcendent objectives. Instead, and first, Criminal Law must restrict itself to considering, in strict observance of the principle of harmfulness, in what cases economic activity can lead to intolerable attacks on major *legal goods*; and second, to providing responses deemed consistent with the specific characteristics of the facts to be dealt with. Not knowing or omitting the reality at hand reveals preventive ineffectiveness⁴⁹.

Another aspect for consideration is the prevailing impunity of white-collar crimes. Zúñiga Rodríguez⁵⁰ holds that it is very common for these forms of criminality to be largely hidden and often spared from criminal prosecution. Besides, even if the offenders face charges, they are often acquitted or else given a sentence other than imprisonment. If we look at the economic crime figures that appear in the media and the types of crimes of the subjects that end up in prison, we can confirm that the reality of the matter is that the criminal proceedings for these crimes are quite selective. This criminal selectivity is particularly evident in white-collar crimes due to the various factors mentioned above: unclear illegal nature of some conducts, lack of awareness of the offenses, positive reinforcement within the group itself, and the tolerance displayed in their treatment by society and, consequently, by the law enforcement authorities.

Since the second half of the twentieth century, we have seen a growing debate on the pros and cons of the use of fines and their comparison with imprisonment, especially in cases of light sentences. The crisis facing prison sentences, as stated above, has called into question the rationale and purpose of imprisonment to serve its supposedly most positive aim: resocialization.

In the opinion of Fernández Abad, the relationship between white-collar crime and prison is complex and unusual. On the one hand, its characteristics make its perception and control difficult, and on the other, there are extremely strong barriers obstructing the imprisonment of the perpetrators, who form a very small minority. From an empirical viewpoint, this extreme is easily verifiable. In 2017, Spanish prisons held only 104 inmates convicted of corruption-related crimes, that is, 0.17% of the country's overall prison population⁵¹.

48. VERVAELE (2006) p. 35.

49. BASOCO (2012) p. 22.

50. RODRÍGUEZ (2012) p. 53.

51. ABAD (2000) p. 2.

For Tiedemann⁵², sanctions may be limited, in law or in practice, to a restricted number of penalties or measures, or else there may be a varied range of sanctions stipulated in special laws or developed by other means. The first identifiable solution would be to resort exclusively to fines and prison sentences, to be either served or suspended for a term of up to two years. This is the system applied by the German Penal Code of 1975.

The other solution, diametrically opposed to the previous one, is that upheld by the United States. This option establishes, at least in certain areas such as antitrust legislation, that the penalty should be rather light but without the possibility of a conditional suspension. In addition, the law imposes fines and other accessory sanctions, for example, the temporary prohibition of advertising⁵³.

A study conducted by Tiedemann, based on interviews with businesspeople and entrepreneurs, proves that imprisonment without the possibility of parole had a preventive effect. In other words, according to all the interviewees, a fine hardly has any intimidating effect in cases of violations of antitrust laws, something also confirmed by parallel studies conducted by the academic Mark Green in New York. A similar conclusion can be deduced from interviews with more than two thousand people by the Centro Nazionale in Milan, who agreed that prison had an intimidating effect on middle- or upper-class offenders⁵⁴.

As is the rule in matters of white-collar crime, it is advisable to warn both corrupting and corrupted individuals that they are very likely to get prison sentences⁵⁵, the legal configuration of which would facilitate their effective enforcement. They would not necessarily involve serving time in prison in all cases, but there should be a credible chance that the court will rule in favor of imprisonment in individual cases, since this will weigh in the offender's calculations⁵⁶.

Referring to Colombia and Spain, Terradillos Basoco and Castro Cuenca believe that the imposition of mere pecuniary fines or penalties entailing restriction of liberties other than freedom of movement has limited preventive effectiveness. The former are easily evadable or compensable⁵⁷, whereas the latter are hardly intimidating. Therefore, endorsing the punitive provisions of the Spanish Criminal Code—quite different from those of Articles 413 and subsequent of the Colombian Criminal Code, which pointedly reserve special disqualification penalties for crimes of corruption

52. TIEDEMANN (1985) pp. 157-167.

53. PIZARRO (2017) p. 26.

54. PIZARRO (2017) p. 28.

55. LEAL (2013) p. 18.

56. BASOCO (2019) p. 21.

57. BASOCO (2016) p. 492.

without enrichment and rule out imprisonment—is as good as relinquishing in advance any general preventive effect. The threat to the criminal comes to nothing when it is limited to disqualifying corrupt, politically stigmatized officials who, in fact, will no longer be able to hold public office, at least for as long as [we confide that] popular decisions to elect political authorities are based on rational criteria⁵⁸.

For Terradillos Basoco, special prevention is also set aside. As a penalty, disqualification has an impact only in the public sphere (CPE, art. 42) and fails to prevent the relocation of the convicted person in fields of activity with a public scope, as evidenced by the omnipresent mechanism of the "revolving doors", by virtue of which a person disqualified for an administrative position gains access to a different but no less public job, or assumes functions in a private enterprise that keep them in close contact with the areas whose laws they broke⁵⁹.

Quintero Olivares holds that, unlike common criminals, those who commit white-collar crimes are not marginalized persons but rather members of the dominant sectors of society. Therefore, the sanctions that they are likely to receive would not fulfill the same political-criminal objectives as the punishment imposed on conventional offenders. Reacting to both with the same criteria would be illogical and inconsistent, since society assumes very different attitudes towards these two types of offender⁶⁰.

For Vicente Martínez⁶¹, as long as the problem exists and there is no proof to the contrary, all the general categories and principles of Criminal Law should be used to solve the problems of Economic Criminal Law, bearing in mind that the established penalties must be in line with the need to fight conducts which are now more frequent and dangerous, and that criminal sanctions are necessary. However, as pointed out by Viladas Jene⁶², they are not sufficient unless they are combined with other measures of social and legislative policy.

Pursuant to the above, Economic Criminal Law is based on the same system of legal consequences as ordinary Criminal Law, which means that economic crimes are punished mainly with prison sentences and fines. This is why doctrinal theorisation questions the adequacy of these two traditional penalties to meet the goals of criminal punishment in white-collar crime-related cases, and wonders what type of sanctions could be a deterrent to potential perpetrators; whether traditional sanctions suffice or whether it would be necessary to invent new ones⁶³.

58. CUENCA (2018) p. 280.

59. BASOCO (2019) pp. 21-22.

60. OLIVARES (1980) p. 213.

61. MARTÍNEZ (1999) p. 219.

62. VILADAS (1983) p. 1102.

63. MARTÍNEZ (1999) p. 223.

The idea of using imprisonment to tackle white-collar crime is related to the issues of reeducation, resocialization or social reintegration of prison inmates, which was an alternative to classic Criminal Law but entered a period of crisis in the late 1920s⁶⁴.

As Hassemer has pointed out, from the terminological viewpoint, it should be noted that the term "resocialization" has understandably fallen into disrepute in the theories of socialization, which have drawn attention to the fact these processes have been either unavailable to most prison inmates or an outright failure⁶⁵.

We agree with Vicente Martínez⁶⁶ that, if resocialization is a myth or a utopian concept and there is no consensus on its content, there is no explanation as to why resocialization is used precisely as a justification for not imposing imprisonment on perpetrators of economic crimes. Muñoz Conde also considers resocialization to be a myth, describing it as a deceptive and unattainable mirage⁶⁷.

The imposition of fines for economic crimes, especially those most damaging to society—and in general least damaging to the perpetrators—has so many disadvantages that it is safe to say that imprisonment, with mainly short sentences, is more recommendable for these crimes, except in cases of hardly harmful offences in which Criminal Law, again, should not intervene.

Goite Pierre⁶⁸ puts forward other ways of coping with corruption and organized crime without resorting to Criminal Law, starting from the fact that some criminalized conducts, derived mainly from so-called organized crime, yield great profits and help criminal organizations amass substantial fortunes. Until very recently, the State had no legal instrument to deal transparently with confiscated goods. Given this situation, and in order to stipulate legislation that contributes to the compensation or reparation of the victims of these illegal activities, among other goals, the State decided to implement figures such as Asset Forfeiture proceedings and consolidate its normative character as a legal instrument without detriment to the constitutional guarantees of judicial security, legality and due process. This tool is also useful to fight crime by reducing the offenders' chances of achieving such power that they can continue to break the law with impunity.

64. MARTÍNEZ (1999) p. 225.

65. HASSEMER (1984) p. 352.

66. MARTÍNEZ (1999) p. 225.

67. CONDE (1985) p. 128.

68. PIERRE (2014) p. 121.

This step coincides with the growing movement to address economic crime, perpetrators of which also swell their coffers with huge sums of money. German legal-criminal authors have repeatedly stressed the need to look at alternatives to Criminal Law for purposes of crime prevention in business organizations in light of the exclusive—and ineffective—use of Criminal Law in this area⁶⁹.

Proper implementation of the Asset Forfeiture regulation can be a very useful tool for the State to hit criminal structures where it hurts most: in their economic resources. Since it is a novel action with no immediate precedent in the regulatory context of our Latin American countries, there has been much speculation about whether it is valid, legitimate or even applicable.

5. Penalties established in the Cuban Penal Code for white-collar criminals

Mejías Rodríguez remarks that the changes that are occurring in the entire structure of the Cuban economic model—marked by increasing private or personal activities which necessarily lead to more registration, intervention, diligence and control of the State's economic, financial and material resources—require that economic subjects and agents have priority and, at the same time, an adequate response from the legal-criminal system⁷⁰.

For Terradillos Basoco, who has studied Cuban criminal legislation in depth in recent years, fighting economic crime is not about making room for either indiscriminate criminalization of irregular business conducts—which would be both illegitimate *and* dysfunctional—or inhibition in the face of behaviors deemed detrimental to essential legal interests. It is necessary to strike a balance and achieve technical adequacy between too much and too little punishment and between turning to and running from Criminal Law, since both options are incompatible with a functional preventive strategy⁷¹.

While Cuba's current Criminal Law contains provisions to this effect, a certain obsolescence is observed, at least if it is measured against such a new, complex and dynamic phenomenon as economic crime. The Cuban model is certainly not deserving of criticism concerning punitive expansionism, but neither does it "meet the demands of Economic Criminal Law as currently stated"⁷².

69. PIERRE (2014) p. 121.

70. RODRÍGUEZ (2012) p. 12.

71. BASOCO (2015) p. 20.

72. BASOCO (2015) p. 20.

In the Cuban Penal Code, the importance of the protected goods cannot be made to tally with the sentencing scale. A legislative review of these scales would be aimed at breaking with the legacy of the nineteenth century, when the country established extremely harsh criminal sentences, and *legal goods* that are no longer relevant or have been replaced over the years. Suffice it to mention, for example, that crimes related to the forgery of notarized documents are punished more severely than those against a person's life or physical integrity, and even those against the environment, despite the fact that the value and importance of these goods for society are highly recognized nowadays⁷³.

In view of the above, and taking Criminal Law into account, it is safe to say that the severity of penalties for economic crimes, as expected, becomes manifest only in cases of malicious crimes, especially in some not precisely considered as crimes against the economy.

Recent research into crime prevention strategies in Cuba has stressed that legal policymakers should rate Criminal Law as the last resort in the fight against crime, as well as the need for urgent procedural reforms and out-of-court solutions for social conflicts of this nature.

The results of these investigations make intriguing suggestions intended to underpin the development of a Cuban criminal policy with well-defined crime-fighting tools and a clear distinction between the treatment of petty criminals and that of the most socially dangerous offenders. Since citizens can play an active role in solving the former, the tools of the criminal system can be reserved for the latter.

There are regulations about white-collar crime that make it possible to decriminalize and give administrative treatment to some related offenses. We agree with Mejías Rodríguez that a penalty – as a legal consequence of a crime of this kind – can be easily enforced in accordance with the criminal or penal policy in force at the time, and must be designed to achieve a solution outside the criminal system of conflicts that occur in the field of economic relations⁷⁴.

The cited authors consider that it is possible to relieve the congestion of the Cuban court system through methods and institutions capable of designing more effective and less costly solutions to the social conflicts created by criminal behavior; and respond to crime in a harmonized manner to resolve those conflicts, implementing a consistent criminal policy based on research⁷⁵.

73. RODRÍGUEZ (2013) p. 118.

74. RODRÍGUEZ (2013) p. 118.

75. AN OTHERS (2018) p. 11.

One of the elements provided by research underscores that a decriminalization process and adequate application of the principle of opportunity, among other measures, would not only reduce the caseload of our People's Municipal Courts by 67% (taking into account the characteristics of the crimes and offenders currently prosecuted) but also save us \$112,104,342 Cuban pesos in every five-year period. In terms of the current costs of the People's Supreme Court, this amount would cover its needs for two years of work, or else could be invested in the People's Provincial Courts in charge of trying the most serious crimes, which demand \$58,999,512 pesos every five years.

As to the matter in hand, Mejías Rodríguez believes, rightly, that the contradictions between Economic Criminal Law and administrative sanctioning law are hardly ever addressed in our discussions. Interlocked as they are, the so-called parallel figures – the principle of minimal intervention or *ultima ratio*, and the suppositions regarding the *non bis in idem* principle – encourage a search for the most effective discretionary responses enshrined in substantive legislations; because sometimes a misdemeanor, otherwise treatable through administrative channels, is seen and classified as a criminal figure and sent straight to Criminal Law for a judicial response. This incoherence has fall-out on other general tenets of Criminal Law, such as the principles of legality, certainty and legal security⁷⁶.

The first problem concerning white-collar crimes in Cuban Criminal Law is to define which crimes can be rated as such, something to be considered in the draft of the new Penal Code under development and in accordance with the provisions of the new Constitution of 2019, to avoid as far as possible their current dispersal across four titles of the Code.

The declared objective of socioeconomic change in Cuba, which boasts clear and consistent postulates, is to achieve a more efficient and stable economy as an essential requirement for progress toward sustainable development. However, these postulates do not form part of a program containing – in addition to strategic economic policies – the scope and general challenges of inevitable future changes. The development of economic crime is a particular challenge, given its permanent relevance and significance to the State and society⁷⁷.

Further necessary updates regarding economic crimes and others against property rights have to do with the mechanism established in Article 342.2 of the Penal Code, Act No. 62 of 1987. To wit, the Governing Council of the People's Supreme Court is the body responsible for interpreting and determining, in each case, the scope or

76. RODRÍGUEZ (2012) p. 12.

77. RODRÍGUEZ (2014) p. 155.

amount relating to the terms "considerable, limited and reduced value" laid down in the Penal Code with the intention of defining such concepts. For instance, in crimes of misappropriation, the last Instruction still in force, enacted in 2001, understands as "assets of considerable value" those valued at more than two thousand pesos and more than ten thousand in the case of crimes of embezzlement. These two examples show that these figures do not represent a considerable value in Cuba as we enter the third decade of the twenty-first century.

A brief overview of the sentencing scales for offenses that could be classified as white-collar crimes in the Cuban Penal Code reveals that they are scattered across different titles. Furthermore, even if the established punishments are not as harsh as those established for other crimes, they are not in keeping with the desired model of harmony and coherence in accordance with the principles of a Criminal Law that protects and respects the limiting principles of *ius puniendi*.

6. By way of conclusion

"Resocialization" builds on a simplistic notion that links crime and social exclusion, and its purpose is associated with the achievement of effective social inclusion. In this regard, white-collar criminals, who are not subject to these views, would not need resocialization. Far from being appealing, this limitation of the term is perfectly understandable if we consider the historical evolution of the concept as well as the selective nature of penal policies and the capitalist culture in which they develop. This does not mean that these offenders should be spared imprisonment, taking into account the discouraging impacts of a prison sentence – which, together with the public disclosure of the conviction, is the penalty that economic criminals fear the most.

White-collar crime generates other but no less important costs in addition to economic ones, such as the political and social costs of the political-criminal strategies designed to fight these offenses. More specifically, there is a risk that an expansionist criminal policy could pave the way for classifications or penalties that come into unacceptable conflict with the key principles of a democratic criminal justice system.

The challenge lies in assessing the exact importance of the *legal goods* affected by economic crime and learning more about how they are targeted. Avoiding any complicit inhibition or exacerbated punishment goals—both unconstitutional—the idea is to design political-criminal strategies based on our inherited wealth of dogmatic knowledge, but aimed instead at the fight against the new realities.

Corruption undermines the principles of good administration, equity and social justice and also distorts competition, hinders economic development and endangers society's democratic institutions and ethical foundations. As a crime, it is no longer specific to high-ranking government officials, since it pervades all administrative levels in general as well as the private sector in terms of conducts somehow related to abuse of power for personal gain.

In criminological terms, corruption manifests itself in two broad forms. On one hand, we have “petty corruption”—typical of officials with less decision-making power and, therefore, less public influence; some of these individuals accept benefits (bribes) to make the administrative machinery “work”. On the other hand, we have something that is much more harmful to a society’s economic balance, namely large-scale corruption, very clearly defined in the doctrine and widely observable, but much less investigated and rarely detected at the judicial level. This activity involves high-level public officials with decision-making power over extremely valuable businesses and who accept extraordinary amounts in monetary bribes. As a rule, it is big companies or economic groups, multinationals or even other States (in specific departments) that seek to benefit from this practice.

All the disciplines involved – criminology, dogmatics, legislation and jurisprudence – must keep striving to understand this type of crime, the features of which differ from those traditionally established in Criminal Law for offenses committed by socially excluded sectors: violent crimes, crimes against life and property, and so on. As Sutherland points out, it is a matter of committing to the search for a theory of crime at once clarifying and capable of contributing to the prevention of powerful white-collar criminals.

Public and private corruption is at the root of much of the violence seen in our societies; it contaminates the economy and fosters corruption, which also tampers with governance. On a legislative and criminological level, preventing – or at least reducing the impact of – the process of concealing or disguising the illicit origin of assets, or of helping a person involved in these unlawful acts to escape justice, can be an effective contribution to the aspiration to develop an inclusive society and a competitive economy.

Sobre los autores

Dr. Arnel Medina Cuenc es Profesor Titular y Consultante de Derecho Penal. Licenciado en Derecho por la Universidad de Oriente. Especialista de Postgrado en Derecho Penal por la Universidad de La Habana. Máster en Derecho Público por la Universidad de Valencia, España. Doctor en Ciencias Jurídicas por la Universidad de La Habana. Presenta una amplia experiencia profesional con más de 43 años de labor, donde ocupó responsabilidades como Decano de la Facultad de Derecho de la Universidad de Oriente, Presidente del Tribunal Provincial de Santiago de Cuba, Cuba, Presidente de la Unión Nacional de Juristas de Cuba y vicedecano de la Facultad de Derecho de la Universidad de La Habana. Ponente en eventos nacionales e internacionales. Ha publicado más de cien artículos, en revistas indexadas nacionales e internacionales. Imparte en el pregrado la asignatura Derecho Penal General. En el Postgrado imparte materias vinculadas con el Derecho Penal y Procesal Penal. Desarrolla investigaciones vinculadas con las penas y su adecuación y el tráfico y la trata de personas, entre otros temas.

Dr. Mariano Rodríguez García. Profesor Titular de Derecho Penal. Licenciado en Derecho por la Universidad de la Habana (2008). Especialista de Postgrado en Derecho Penal (2011). Director del Departamento de Ciencias Penales y Criminológicas de la Facultad de Derecho de la Universidad de La Habana, con una experiencia docente de 15 años. Es Juez Profesional Suplente del Tribunal Provincial Popular de La Habana, con una experiencia de 7 años en el ejercicio profesional. Ponente en eventos nacionales e internacionales. Ha publicado en revistas indexadas nacionales e internacionales. Imparte en el pregrado la asignatura Derecho Procesal Penal y Criminología. En el Postgrado imparte materias vinculadas con el Derecho Penal y Procesal Penal Económico. Desarrolla investigaciones vinculadas con el Derecho penal económico y la Criminología.

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