Presumption of Innocence and Confiscation

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The purpose of this article is to analyze how it must be proved that the goods have an illicit origin and, thus, enable the extended confiscation to be agreed, after the transposition of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the seizure and confiscation of instrumentalities and the proceeds of crime in the European Union, which amended the regulation of confiscation in the Criminal Code, and its impact on the right of the accused to the presumption of innocence. And, on the other hand, the different treatment given to the proof of the illicit origin of the assets acquired by third parties, since the confiscation of these assets is a civil pronouncement.

Keywords: confiscation, confiscation from third parties, presumption of innocence, circumstantial evidence

INTRODUCTION

Confiscation is an effective tool against crime in general, and against organized crime in particular, because the confiscation of the instruments of crime is intended to prevent criminals from committing another crime with them and, on the other hand, because the confiscation of the proceeds of crime prevents convicted persons from benefiting from the proceeds of criminal activity by reinvesting the illicit profits obtained from their criminal activity into lawful assets. In the words of the Supreme Court, "both direct and indirect effects and profits from crime, as well as property, means or instruments with which it has been prepared or executed, may be confiscated. Whatever transformations they may have undergone, and including objects of any kind, of any nature (movable, immovable, fungible, non-fungible, etc.). In one case, it seems, in order to avoid the illicit enrichment of the criminally liable party and to favor the satisfaction of civil liability: a reparative purpose, therefore, of a certain punitive nature, in some cases where nothing needs to be repaired. In another, it seems, to avoid the possibility of new crimes with said objects: preventive purpose of consequence, therefore, here of an insuring nature, but also of a certain punitive nature, in some cases (if one accepts that the expression 'transformations that they may have undergone' also refers to the goods, means and instruments). Obviously, in neither case should we think exclusively of the material object of the crime (something on which the behavior of the active subject falls) nor in either case do we speak only of crimes of a patrimonial nature."[1]

The following pages will analyze some aspects of the regulation that the Criminal Code (hereinafter CC) makes of confiscation after the transposition of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014, on the seizure and confiscation of instrumentalities and the proceeds of crime in the European Union, by virtue of which, the Spanish legislator faced new changes in relation to the institution of confiscation[2], since the latter required the Member States to regulate: a) the possibility of proceeding with confiscation even if the accused cannot be tried due to illness or escape[3]; b) a new

regulation of extended confiscation[4]; and c) the possibility of confiscating the proceeds of crime or other property transferred to third parties[5]. Specifically, we will focus on the proof of the illicit origin of the property so that a court can agree to extended confiscation and, secondly, to confiscate the instruments or proceeds of crime that are in the possession of third parties.

NATURE OF THE CONFISCATION

In both simple and extended confiscation, confiscation is a criminal penalty imposed on the convicted person at sentencing as a result of the prior commission of a criminal act[6]. It must be preceded by criminal proceedings in which the fundamental rights and procedural guarantees enshrined in art. 24 SC are observed[7], in particular the right to the presumption of innocence, which must be safeguarded in the process of imposing any criminal penalty[8]. In this sense, the Constitutional Court (Const. C.) pointed out that the presumption of innocence also extends to confiscation because "it must be respected in the imposition of any sanctions, whether criminal or administrative (...) since the exercise of *ius puniendi* in its various manifestations is conditioned by art. 24.2 of the Constitution to the play of evidence and an adversarial procedure in which one's own positions can be defended (HCR 76/1990, June 24)"[9]. In this sense, HCR 41/2017 of 31 January recalls that "Confiscation is directly related to the penalties and to the sanctioning law, in any case, with the logical requirement of its personal nature and the obligatory criminal procedure for its imposition. Irrespective of this legal nature, which implies that such a measure must be requested by the Public Prosecutor's Office or the prosecuting parties, it follows that it must be raised and discussed at the hearing, and that the decision to do so must be reasoned". Therefore, in order to agree on confiscation, it will be necessary for there to be sufficient evidence to establish that the profits or property came from the crime[10]. In this regard, the Constitutional Court stated that confiscation "can only be decreed once it has been established that the effects and instruments to be confiscated are related from means to end or from cause to result to the commission of a crime (...) In other words, there must be evidence in the process that the amount in cash held by the convicted person for a crime against public health actually comes from the commission of that crime and not from other sources of income"[11]. On the other hand, the confiscation of property from third parties is not a criminal sanction but a declaration of deprivation of property ownership, which is why the action requesting confiscation is civil in nature and "the guarantees established for the exercise of *ius puniendi* do not apply (ECHR of 24 October 1986, Agosi v. United Kingdom)"[12].

EXTENDED CONFISCATION

Unlike simple confiscation, where the penalty is imposed on property directly or indirectly derived from the offence being prosecuted and for which the accused is convicted, in the extended version the object of the ancillary consequence extends to property or profits deriving from criminal activity prior to the offence being prosecuted, provided that the existence of such activity, which can be proven by circumstantial evidence, is established[13]. As indicated in HCR 740/2015 of 26 November, extended confiscation "is not based on full proof of the causal connection between criminal activity and enrichment, but on the judge's finding, on the basis of well-founded and objective evidence, that there has been another or other criminal activity, different from that for which the subject was convicted, from which the assets to be confiscated are derived"[14].

As is well known, confiscation is a criminal sanction that "is not linked to the ownership of the property by the criminally responsible party, but only to the demonstration of the illicit origin of the proceeds or profits or their use for criminal purposes"[15]. The effects of the offence, i.e. the direct product of the offence; the property, means or instruments with which it was prepared or executed; and the proceeds of the offence may be subject to the penalty. The High Court recalled in its Ruling No. 442/2013, of 23 May, that: "effects are understood, in a broader sense and in accordance with the spirit of the institution, as any object or good that is found, either directly or immediately, in the possession of the offender as a result of the infringement, even if it is the object of the typical action (drugs, weapons, money, etc.)"[16]. On the other hand, the instruments of crime have been defined in case law as the tools and means used in the execution of the

crime[17]. And finally, the proceeds of the crime can be confiscated, whatever changes they may have undergone[18]. It is thus a question of clearly establishing as a punitive consequence the loss of the economic benefit obtained directly or indirectly from the offence.

In Spain, the possibility of granting extended confiscation was expressly recognized in the Agreement of the non-jurisdictional Plenary of the Second Chamber of the High Court of 5 October 1998, which stated that "the confiscation of the profits derived from the crime of drug trafficking must be extended to the profits derived from operations prior to the specific operation discovered and prosecuted, provided that this origin is considered to be proven and the accusatory principle is respected in all cases". However, it was not until Organic Law 5/2010, which amended Organic Law 10/1995 of 23 November 1995 on the Criminal Code, that extended confiscation was introduced, thus transposing Council Framework Decision 2005/212/JHA of 24 February on the confiscation of products, instruments and goods related to the crime, establishing a legal presumption to prove the origin of the goods[19]. Thus, in art. 127. 1, II CC, it was established that:

> *"The Judge or Court shall extend the confiscation to the effects, property, instruments and proceeds of criminal activity committed within the framework of a criminal or terrorist organization or group, or of a terrorist offence. For these purposes, <u>the property</u> of each and every person convicted of offences committed within the framework of the criminal or terrorist organization or group or of a terrorist offence <u>whose value is disproportionate to the income legally obtained by each of those persons shall be deemed to derive from criminal activity</u>".*

Consequently, in accordance with this legal presumption, if the offender did not want to be dispossessed of the assets he had in his possession, which were not a direct or indirect consequence of the crime for which he had been convicted, he had to prove that they had a lawful origin, thus reversing the burden of proof against the accused.

The Spanish legislature, when transposing the 2005 Framework Decision on confiscation, understood that it legitimated him to create a legal presumption, in fact in section VIII of the Explanatory Memorandum of the LO 5/2010 of 22 June on the reform of the Criminal Code, it was said that to facilitate extended confiscation for terrorist offences and those committed by criminal groups or organizations "a presumption of origin of criminal activity is established where the value of the assets is disproportionate to the legal income of each and every person convicted of offences committed within the criminal organization or group". But did the 2005 FD really establish a legal presumption? We will see that it did not.

Article 3.2 of the Framework Decision on confiscation did not establish any legal presumption when it provided that the judge could extend confiscation to property in the possession of a person convicted of a crime (counterfeiting, money laundering, human trafficking, corruption of minors and child pornography, or drug trafficking and terrorism) committed within a criminal organization when it was proved that the property was derived from a previous criminal activity or a criminal activity similar to that for which the offender had been convicted. In both cases the FD required that in order to grant such a sanction the court must "be fully satisfied", based on concrete facts, that the property sought to be confiscated was derived from criminal activity. Article 3(2)(c) of the FD, on the other hand, provided that extended confiscation should take place where the value of the property was found to be disproportionate to the lawful income of the convicted person and a national court, on the basis of concrete facts, was fully satisfied that the property in question was derived from the criminal activity of the convicted person. Indeed, it is in this article (3.2(c) FD) that the Spanish legislature found the basis for establishing the abovementioned legal presumption. However, a reading of this provision shows that it was not creating a legal presumption and, therefore, reversing the burden of proof but rather typifying as circumstantial evidence that the convicted offender had assets that were disproportionate to his legal income, a fact that could be taken into account by the judge when deciding whether the assets to be confiscated came from an offence, We believe that this was the most appropriate interpretation, since it expressly provided that the judge must be "fully convinced",

which meant that it was up to the prosecution to prove the unlawful origin of the property and that, in case of doubt, in application of the principle *in dubio pro reo*, confiscation should not be ordered[20].

In criminal proceedings, the presumption of innocence was a fundamental right that prevented the reversal of the burden of proof against the accused and therefore prevented the acceptance of legal presumptions to prove the illicit origin of property. However, as we have seen, the Spanish legislature opted to establish the reversal of the burden of proof by creating a legal presumption of guilt in order to decree extended confiscation in cases of organized crime and terrorism, by establishing that "*the property* of each and every person convicted of offences committed within the criminal or terrorist organization or group or for a terrorist offence *whose value is disproportionate to the income legally obtained by each of those persons shall be deemed to derive from criminal activity*". Legal presumptions are by definition incompatible with the presumption of innocence because a legal presumption, irrespective of what has actually happened, ties a legal situation to a fact and, when the legal situation is concurrent, places the accused with the burden of proving the contrary. We consider that one cannot pretend to overcome the difficulty of proving the illicit origin of the property by taking a step backwards, as our lawmakers did, by establishing legal presumptions in the criminal process.[21]

Directive 2014/42/EU on seizure and confiscation echoed the problems raised by the transposition of the 2005 FD[22] on confiscation and provided for a new regulation on extended confiscation. However, it is perplexing that in Recital 21, it is stated that: "*Extended confiscation should be possible where a court has ruled that the property in question is derived from criminal activity. This does not mean that the property in question must be proven to have been derived from criminal activities*". How can it not be necessary that for the confiscation of property it is not proven that the property to be confiscated has a criminal origin? Fortunately, the above-mentioned recital went on to warn that:

> "*Member States may stipulate that it is sufficient, for example, that the court considers, in view of the different probabilities, or may reasonably assume, that it is substantially more likely that the property in question has been obtained through criminal activities than through other activities. In this context, the court has to examine the specific circumstances of the case, including the available facts and evidence on which the extended confiscation decision may be based. The fact that the person's property is not proportionate to his lawful income may be one of the elements leading the court to decide that the property is derived from criminal activity. Member States may also set a certain period of time during which the property may be deemed to have been derived from criminal activity*".

It follows from the recital that the Directive was intended to allow States, when transposing it, to choose between the presumptions, legal or judicial, or the rule of the "*preponderance of evidence*", to determine whether the property to be confiscated is of unlawful origin. The rule of the "*preponderance of evidence*", relaxes the degree of conviction that the judge must reach, since, although he has a reasonable doubt about the origin of the goods, he will have to tilt the balance in favor of considering that they have an illicit origin.[23]

In line with the recital transcribed above, art. 5. 1 of Directive 2014/42/EU, the provision to be applied with regard to the list established in the second paragraph of the provision, states that:

> *"Member States shall take the necessary measures to enable them to confiscate, either wholly or in part, property belonging to a person convicted of a criminal offence which is liable, directly or indirectly, to give rise to an economic advantage, where a court has decided, having regard to the circumstances of the case, including the specific facts and evidence available, such as the fact that the value of the property is disproportionate to the lawful income of the convicted person, that the property in question is derived from criminal activities".*

A reading of this provision shows that the European legislature does not establish any legal presumption but leaves it up to the Member States to decide, when they regulate the concept of extended confiscation in their systems, whether they prefer to use the presumption technique or, on the contrary, the rule of preponderance so that the judge or court can consider it proven that the property comes from a previous criminal activity that has not been tried in the criminal proceedings in which the conviction is handed down. It also provides that, in order to reach his decision, the judge may take into consideration that "the value of the property to be confiscated is not proportional to the lawful income of the convicted person", that is, it is a requirement for the court to take into account, in order to agree on extended confiscation, that the convicted person has property whose value is disproportionate to his lawful income.

Having said that, let us see what is said about extended confiscation in the Explanatory Memorandum to Organic Law 1/2015 of 30 March, which amended the Criminal Code. Firstly, it is necessary to transcribe the following paragraph, contained in the Explanatory Memorandum:

> "*As opposed to direct confiscation and confiscation by substitution, extended confiscation is characterized precisely by the fact that the property or effects confiscated come from other illicit activities of the convicted subject, other than the facts for which he is convicted and which have not been fully tested. For that reason, extended confiscation is not based on full proof of the causal connection between the criminal activity and enrichment, but on the finding by the judge, on the basis of well-founded and objective evidence, that there has been another or other criminal activity, other than that for which the subject is convicted, from which the property to be confiscated is derived. See that the requirement for full proof would determine not the confiscation of the property or effects, but the conviction for those other criminal activities from which they reasonably derive*".

It is necessary to highlight the inadequate use of language, in the criminal process there is no *full* or *half proof*[24], but let's look at the paragraph transcribed. Firstly, the author of the Explanatory Memorandum states that "*extended confiscation is characterized precisely because the property or effects confiscated come from other unlawful activities of the convicted subject, other than the acts for which he is convicted and which have not been fully proven*", perhaps what the author meant, but does not express, is that when it is said that confiscation can be ordered for a previous activity, which means that it will not be necessary for the specific criminal operation to be identified, that it will be sufficient for the activity *to be linked to the seizable property in a generic way*[25], and furthermore, the HC has stated that the presumption of innocence of the accused will not be undermined when the existence of criminal activity[26] is proven by circumstantial evidence[27].

Secondly, the transcribed paragraph states that "*extended confiscation is not based on full proof of the causal connection between the criminal activity and enrichment, but on a finding by the judge, on the basis of well-founded and objective evidence, that one or more other criminal activities have taken place, other than those for which the subject is convicted, from which the property to be confiscated is derived*", that is to say, according to the legislature, in order to agree on extended confiscation it is sufficient that the existence of a previous activity be proven by the presumption technique, but it is unnecessary to prove the causal link between the previous criminal activity and the property to be confiscated. Following González-Cuéllar, we understand that "the proclamation of the irrelevance of the evidence for confiscation is not only an attack on the essential guarantee of the criminal process, it is also an unnecessary constitutional sacrifice for the achievement of the intended purpose, perfectly achievable through the application of the technique of proof of judicial presumptions, the proof of the factual element to be proven (in this case, the connection between the criminal activity and the property to be confiscated)... "[28].

On the other hand, although it is clear that extended confiscation is criminal in nature, as it is a legal consequence of the crime (art. 127 bis 1 CC)[29], the Explanatory Memorandum denies the evidence and provides that:

"Extended confiscation is not a criminal sanction, but rather an institution through which the illicit economic situation resulting from the criminal activity is terminated. Its basis is therefore rather of a civil and property-based nature, close to that of such figures as unjust enrichment"[30].

How can a sanction, which is imposed as a legal consequence of the crime on the person convicted of it, have a "rather civil" nature? The author of the Explanatory Memorandum considers that the civil nature of the confiscation is drawn from the possibility that the proof of the illicit origin of the property can be achieved through the technique of presumptions "and even through procedures of a non-criminal nature". The question is, can't a fact be proven in criminal proceedings using the technique of presumptions (or circumstantial evidence)? What is meant by procedures of a non-criminal nature, the "trial rule based on the preponderance of the evidence", this is a trial rule that, for example, is used in the United States, when confiscation is agreed upon in criminal proceedings.

When the Public Prosecutor's Office chooses to resort to criminal proceedings so that property related to a particular crime can be confiscated, the confiscation is in the nature of a criminal penalty that is requested to be imposed on the accused in the event that he is found guilty. The procedure for granting it is subsequent to the defendant's conviction and the prosecutor has to convince the jury or the judge, as the case may be, by "*preponderance of evidence*", meaning that it is more likely that the property has an unlawful origin or was used to commit the crime, than that it has a lawful origin or was not used to commit the crime[31]. The object of the sanction, which can be confiscated, will be the standard for the offence for which the offender can be convicted, however, if the property related to the offence disappears, the offender may be sentenced to a fine of the value of the property or ordered to have other property confiscated to replace that related to the offence.[32]

The freedom left by the European legislature for States to decide how the origin of the assets should be established does not determine the nature of the confiscation. As González-Cuéllar points out: "As long as the Criminal Code is the normative text that regulates confiscation and as long as its application is attributed to the criminal courts, confiscation directed against the property of the subject who is accused of committing the punishable act will be a legal-criminal consequence of the crime, accessory or not to the penalty or security measure and despite the fact that a civil procedure is established for the prosecution of the public action through which it is implemented when it is applied outside the main process"[33].

Finally, the Explanatory Memorandum adds that;

"In order to facilitate the application of this figure, it was decided to include an open catalogue of circumstances that -among other possible circumstances- should be evaluated by judges and courts in order to decide on confiscation: the aforementioned disproportion between the assets of the person responsible for any of the crimes contained in the catalogue and his or her lawful means of subsistence; the intentional concealment of his or her assets through the use of natural or legal persons or entities without legal personality that have been introduced, or through recourse to tax havens; or their transfer through operations that make it difficult to locate or follow them, and that lack economic justification".

The legislature now considers that it is necessary to prove that the assets to be confiscated have an illicit origin, as could not be otherwise, and states that it can use the technique of judicial presumptions to reach its decision. For this reason, it adds that it is "*chosen to include an open catalogue of circumstances*", with which proof of the illicit origin of the assets can be established.

We now turn to how extended confiscation is regulated in the Criminal Code. Firstly, art. 127 bis of the CC, in its first paragraph, states that:

"The judge or court shall also order the confiscation of the property, effects and profits belonging to a person convicted of any of the following offences when it is determined, on

> *the basis of objective and substantiated evidence, that the property or effects are the result of criminal activity,* ***and their lawful origin is not proven"*** *(emphasis added).*

And it adds the precept in its third paragraph that:

> *For the purposes of paragraph 1 of this article, the following indications, inter alia, shall be assessed:*
> 1. *The disproportion between the value of the property and effects in question and the lawful income of the sentenced person.*
> 2. *The concealment of the ownership or any power of disposal over the goods or effects through the use of intervening natural or legal persons or entities without legal personality, or tax havens or territories of no taxation that hide or make difficult the determination of the real ownership of the goods.*
> 3. *The transfer of the goods or effects by means of operations that make it difficult or impossible to locate or use them and that lack a valid legal or economic justification.*

Thus, it can be seen that, in accordance with the first paragraph, confiscation may be agreed when the court considers, by means of the circumstantial vidence, that it is proven that the property to be confiscated comes from a previous criminal activity that is not the object of the process in which the confiscation is agreed, but is a proven criminal activity. To facilitate the work of the judge or court, the third section contains an open list of indications that the judge may take into consideration in forming his conviction, that is, it regulates the basic facts or indications that may be taken into account to consider proven the causal link between the criminal activity and the property to be confiscated.

Now, the first paragraph of Article 127a, *in fine*, stipulates *"and their lawful origin is not proven"*, which means that once the article establishes that on the basis of evidences the unlawful origin of the goods can be declared, it completely misintroduces the aforementioned phrase which expressly reverses the burden of proof, against the accused. Thus, according to the aforementioned article, it is up to the accused to prove that the property has a lawful origin, a provision that clashes head-on with the right to the presumption of innocence that governs Spanish criminal proceedings, a right that, as we pointed out above, also extends to confiscation. The phrase *"and its lawful origin is not proven"* is undoubtedly perplexing, since nothing can be said against the first part of the provision. The legislature, in line with the freedom offered by community legislation, opts for the use of the presumption technique to apply extended confiscation, in fact, it provides for a list of circumstances to be taken into account, but this phrase is contradictory to the right to the presumption of innocence[34], "which must be respected in the process of imposing any criminal penalty"[35].

Consequently, in accordance with the new regulation of extended confiscation, if the accused is convicted of any of the offences provided for in art. 127 bis 1 CC, confiscation of the property in his possession may be carried out when the accused has not convinced the judge that the property to be confiscated has a lawful origin and that it does not have a criminal origin (unless the criminal activity has become barred by the statute of limitations or has been the subject of an acquittal or an order of free acquittal, art. 127 bis 5 CC), since when the burden of proof is reversed, in case of doubt confiscation must also be carried out. A nonsense of precept that violates the right to the presumption of innocence. For this reason, we do not agree with the following statement: "Certainly, extended confiscation is based on the presumption, based on well-founded objective circumstances, some of which are listed in art. 127 bis 2, that the property or effects derive from criminal activity, since their lawful origin has not been proven and they are not fiscally justified, but such a presumption need not be contrary to the presumption of innocence, inasmuch as here the constitutional doctrine on circumstantial evidence, which is perfectly legitimate, governs as does direct evidence, in order to distort that presumption", and we do not share it because it is

true that circumstantial evidence does not violate the right to the presumption of innocence, but what does violate it is to demand that the accused be the one who must demonstrate in criminal proceedings that the origin of the goods is licit. Art. 127 bis 1 CC, would not violate the presumption of innocence, if the paragraph: "and its lawful origin is not proven" was removed, because as we will see, no one disputes that the illegal origin of the goods can be proven through judicial presumptions.

Consequently, in order for the aforementioned precept 127 bis 1 CC to respect the right to the presumption of innocence that governs criminal proceedings, it will have to be interpreted in the sense that the accused only has the burden of introducing doubt about the lawful origin of the property, so that if the judge or court is not convinced beyond a reasonable doubt, it will have to rule in favor of the accused, that is, not declaring the unlawful origin of the property that the prosecution intends to confiscate.

Surprisingly, however, the extended confiscation is not only provided for in the aforementioned art. 127 bis CC but is again regulated in arts. 127 quinquies and 127 sexies CC. The first question that arises is, why regulate twice the extended confiscation. Well, we agree with Hava García[36], when he states that this parallel regulation of confiscation can be "described optimistically as irregular, and realistically as absolutely ludicrous". Why? For the simple reason that arts. 127 quinquies and 127 sexies were provided for in the Second Final Provision of the *Preliminary Draft Organic Law amending the Criminal Procedure Act (LECrim) to speed up criminal justice, strengthen procedural guarantees and regulate technological research measures*, approved by the Council of Ministers on 5 December 2014, and were *automatically and thoughtlessly*[37] transferred to the processing of the reform of the Criminal Code. Leaving aside the fact that we share the opinion of those who maintain that the practical application of confiscation with this parallel regulation "will be difficult, if not impossible to reconcile"[38].

In the regulation of the extended confiscation carried out in art. 127 sexies CC, it is established that:

> *"For the purposes of the preceding article (art. 127 quinquies), the following presumptions shall apply:*
>
> 1. *All property acquired by the sentenced person within the period of time beginning six years before the date of commencement of criminal proceedings shall be presumed to have been derived from his criminal activity.*
>   *For this purpose, property is deemed to have been acquired at the earliest date on which it is known that the defendant has disposed of it.*
>   *All expenses incurred by the offender during the period referred to in the first paragraph of the previous number shall be presumed to have been paid from the proceeds of his criminal activity.*
>   *All goods referred to in number 1 shall be presumed to have been acquired free of charge".*

It is noted that although the provision seems to contain legal presumptions that reverse the burden of proof against the accused, in reality they are not because the legislature provides in the last paragraph that "The judge or court may agree that the above presumptions shall not be applied in relation to certain goods, effects or profits, when, in the specific circumstances of the case, they prove to be incorrect or disproportionate", that is, it exempts the judge or court from applying the above presumptions when "the inference made *a priori* by the rule in general by means of the presumption does not correspond to the result of a correct and proportionate judicial assessment of the circumstance, in accordance with reason"[39].

DECLARATION OF THE CRIMINAL ORIGIN OF ASSETS: CIRCUMSTANTIAL EVIDENCE

In its Ruling No. 483/2007 of 4 June 2007, the HC expressly stated that in order to prove the unlawful origin of the goods "the principles set out in HCR 174/1985 of 17 December 1985, HCR 175/1985 of 17 December 1985 and HCR 229/1988 of 1 December 1988 are applicable, according to which the right to the presumption of innocence does not preclude a judicial conviction in criminal proceedings from being formed on the basis of circumstantial evidence[40].

At present, it is not disputed that circumstantial evidence or evidence of judicial presumptions is capable of rebutting the presumption of innocence[41]. In order to prevent the use of circumstantial evidence, as a tool for proving the illicit origin of assets[42], from infringing the principle of the presumption of innocence, it will be necessary to demand the same requirements as those generally demanded when evidence of judicial presumptions is used to prove the existence of an act constituting an offence, thus preventing the illicit origin of goods from being based on mere suspicion, conjecture or supposition. In accordance with the case law of the Const. C. and the HC, the requirements are: a) concurrence of several circumstances or only one of particular significance; b) the circumstances must be proven; c) there must be a precise and direct link between the circumstances and the alleged act; d) there must be no evidence against them; e) there must be no alternative explanation to the circumstances; f) the reasons for the decision; and g) the circumstances must be included in the proceedings.[43]

The property may thus be deemed to have an illicit origin when:

a) Concurrence of plurality of evidence or one of special significance: it will depend on the circumstances of the specific case[44]. An indicative circumstance that may be considered general is where the holder of the seizable property has assets that do not correspond to his legal income. But this is not the only indication; it can be understood as indications, among others, that the property to be confiscated has been acquired during the period of time in which there were reasonable suspicions that the subject was engaged in criminal activity; that there is no income that justifies the lawful acquisition of the property or confiscationable earnings[45] because it is not proven that the accused has developed a lawful work activity or business[46]; the ascertainment of movable and immovable acquisitions without any income; deposits in irregular bank accounts in amount and without periodicity or large amounts of cash in bags in the domicile of the accused without legal income[47].

In fact, the legislature has included in its articles 127 bis.2 CC and 127 quinquies CC, an open catalogue of indications to be taken into account so that the judge can consider the illicit origin of the goods to be accredited: *"1.º The disproportion between the value of the goods and effects in question and the income of the sentenced person of lawful origin. 2.º The concealment of the ownership or any power of disposal over the property or effects through the use of intervening natural or legal persons or entities without legal personality, or tax havens or territories of no taxation that conceal or make difficult the determination of the true ownership of the property. 3.º The transfer of the goods or effects by means of operations that make their location or destination difficult or impossible and that lack a valid legal or economic justification"*.

b) The circumstantial evidence must be proven: the basic facts must be established and not mere suspicion, assumption or conjecture.

c) Existence of a precise link between the evidence and the alleged act (illicit origin)[48]: this will be given when the judge, by means of an inductive trial in accordance with the maxims of experience and the rules of logic, reaches the conviction that the confiscated property comes from the crime being prosecuted or from previous criminal activity.[49]

d) Absence of evidence against the accused: of particular relevance to this requirement is the value to be attached to the accused's failure to provide evidence on the lawful origin of the property or to his silence when he decides to exercise his right not to testify. If the accused does not offer any counter-indication or evidence to prove that the property was derived from a lawful activity or simply remains silent when asked about it, it cannot be considered as an indication of guilt but simply leaves unscathed[50] the circumstantial evidence that the property to be confiscated is of unlawful origin.[51]

e) No alternative explanation: if the defendant can provide a rational explanation that the existence of the liable property is a consequence of lawful acts, confiscation cannot be authorized. The problem arises when the defendant gives an implausible explanation as to the

provenance of the property. On this question the HC maintains that "if the accused who lacks the burden of proof enters a definite fact in the proceedings and that fact is shown to be false, its mere negative result cannot be represented as irrelevant or inconsequential, since the judicial conviction of the guilt of the accused will undoubtedly be corroborated by important facts"[52]. It should be made clear that what happens when faced with an implausible explanation is not that the accused corroborates that the origin of the property is illicit, but that he has not managed to create in the court a state of "reasonable doubt"[53] that would prevent it from not proceeding with the confiscation of the property.

f) Grounds for the decision: it will be necessary for the Legal Grounds of the ruling to make explicit what evidence leads the court to determine the unlawful origin of the assets[54] and the logical reasoning which, on the basis of the proven circumstantial evidence, has led it to infer that the assets are the result of criminal activity. The HC states in its ruling 728/2018 of 30 January that "if it is not clearly determined in the sentence -that the profits obtained by the accused are the result of their criminal activity- an indispensable requirement for the application of articles 127 is missing (…), the express affirmation that the money taken was profit from the sale of drugs (HCR 1528/2002, of 20 September), in any case, the origin of the crime and not that it belonged to a third party must be stated as conditions for authorizing confiscation (HCR 235/2001, of 20 February)"[55]. With respect to the third party, HCR 183/2017 of 23 March reminds us that "the granting of a power of attorney does not imply proof of ownership. And the exclusion of a property from confiscation requires proof that it belongs to a third party, understanding as such one who does not incur criminal responsibility for the crime that motivates it. Such circumstance must be proven by the person alleging such ownership. As required by article 127 of the Criminal Code and not by the Court. Confiscation does not require proof that the property belongs to the person who uses it as an instrument of the offence. Such functionality constitutes the rule. It is the belonging to a third party that exempts its application. Therefore, in order to exclude it, evidence to that effect is required"

If the accusation through the circumstantial evidence proves that the confiscated goods have an illicit origin, they must be confiscated unless the interested party, in the words of the HC "enervated that evidence of presumptions, presenting in its discharge evidence of the legitimacy of its acquisition or possession"[56]. However, the burden is not exactly to prove, but at least to create a situation of uncertainty[57], in the face of which the principle *in dubio pro reo* will apply and it will not be possible to order the confiscation of the assets.

However, with the regulation of extended confiscation provided for in the Criminal Code, when the circumstances set out in the Criminal Code are proven, it will be presumed that the property has an unlawful origin, and it will be up to the accused to prove the contrary, and in case of doubt, this will play against the accused. We share the words of Choclán Montalvo when he stated that "it is not possible to establish in this field (confiscation) reversals of the rules of evidence (…)", because, he added, "dirty money cannot be confused with money of illicit origin, and criminal intervention -aside from possible fiscal responsibility in the first case- only proceeds by means of confiscation, when it is a matter of property that constitutes the economic benefit of a crime, not from any other source, even if it cannot be identified"[58]

EVIDENCE OF CRIMINAL ORIGIN IN THIRD-PARTY CONFISCATION

Art. 127 quarter CC establishes that it will proceed to the confiscation of goods, effects and profits that have been transferred to third parties, or of an equivalent value to them, when:

a) *In the case of effects and profits, where they have been acquired in the knowledge that they derive from unlawful activity or where a diligent person would have had reason to suspect, in the circumstances of the case, of their unlawful origin.*
b) *In the case of other property, where it was acquired with the knowledge that it was thereby made more difficult to confiscate or where a diligent person would have had reason to suspect, in the circumstances of the case, that it was thereby made more difficult to confiscate".*

Given that the confiscation of third parties is a civil pronouncement[59] consisting in the deprivation of the patrimonial title that is held over the confiscationable assets, the action that will be exercised to proceed to the seizure of the assets will be of a civil nature and, consequently, during the process in which the origin of the confiscation is decided, the guarantees established for the exercise of the *ius puniendi* will not apply[60].

When the confiscation of goods is carried out in a civil proceeding[61], the proof of the illicit origin of the assets receives a different treatment from the one given in the criminal proceeding in terms of legal presumptions, rules of valuation and distribution of the burden of proof, which makes it easier to prove that an asset has a criminal origin, since the burden of proof allows the judge, when he is not able to overcome his state of uncertainty, to consider it proven that the property has an illicit origin because in civil proceedings, doubt plays against the party who is encumbered with the burden of proving a certain fact in accordance with the rules of distribution of the burden of proof, while in criminal proceedings, by virtue of the right to the presumption of innocence, doubt always deploys its effects in favor of the accused, requiring that when the judge does not reach certainty about a fact that harms them, it be considered unproven.

It is therefore not contrary to Law that the Criminal Code provides in the second paragraph of art. 127 quarter that:

> "*It shall be presumed, in the absence of evidence to the contrary, that the third party knew or had reason to suspect that the property was derived from an unlawful activity or was transferred to avoid confiscation, when the property or effects were transferred to him free of charge or at a price below the actual market price*".

The legislature has therefore chosen, in accordance with the freedom left to it by art. 6 of Directive 2014/42/EU, which provided that: *"Member States shall take the necessary measures to enable the confiscation of proceeds of crime or other property the value of which corresponds to proceeds that have been directly or indirectly transferred to third parties by a suspected or accused person, or acquired by third parties from a suspected or accused person, at least where those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of specific facts and circumstances, including the fact that the transfer or acquisition was effected free of charge or for an amount significantly below the market value*", to establish legal presumptions for the judge or court to reach its conclusion on whether the third party had or should have had knowledge that the *inter vivos* transfer of the assets had been made with knowledge of their illicit origin or with knowledge that the purpose of the transfer was to avoid the confiscation of the assets from the defendant in the main criminal proceedings, presumptions that admit evidence to the contrary, being therefore a *iuris tantum* legal presumption[62].

Consequently, when criminal proceedings are instituted against a third party for confiscation, it is presumed that the third party concerned was aware or should have been aware that the property they have acquired is of unlawful origin or that it has been transferred to them to evade confiscation, *when it was transferred to them free of charge or at a price below the actual market price*. Therefore, once the prosecution proves that there has been a transfer free of charge or for a price lower than the market price, it will be up to the third party to convince the judge of their lack of knowledge and suspicion that the property had an illicit origin or was transferred to them by the accused to avoid confiscation[63]. Should the

judge remain doubtful, that is, unable to reach certainty, he will tip the scales against the third party, and proceed to agree on the confiscation of the property.

ENDNOTES

1. HCR 553/2019 of 12 November.
2. The transposition of the aforementioned Directive also involved amendments to the Criminal Procedure Act, which were carried out with the approval of Act 41/2015 of 5 October, amending the Criminal Procedure Act to speed up criminal justice and strengthen procedural guarantees (Official State Gazette (OSG) of 6 October).
3. Art. 4 of Directive 2014/42/EU of the European Parliament and of the Council.
4. See art. 5 of Directive 2014/42/EU of the European Parliament and of the Council.
5. Art. 6 of Directive 2014/42/EU of the European Parliament and of the Council
6. In this sense, STS 877/2014 of 22 December stated: "In effect, as we said in HCR 969/2013 of 18.12, HCR 600/2012 of 12.7, HCR 11/2011 of 1.2, and HCR 16/2009 of 27.1, the Criminal Code 1995 considers confiscation to be an "accessory consequence" outside of both penalties and security measures. Its nature is, according to the most authoritative doctrine, that of a third class of criminal sanctions, thus following our Criminal Code the line initiated by the Germanic criminal laws (Swiss or German CC.) of establishing a third genre of sanctions under the denomination of "legal consequences or accessory consequences". In the same sense, HCR 299/2019 of 7 June, which adds that "It is not a question of *ex delicto* civil liability; on the contrary, the confiscation is directly related to the penalties and to the sanctioning law, in any case, with the logical requirement of its personal nature and the obligatory criminal procedural channel for its imposition (HCR 450/07, of 30 May). Nature that, after the reform of 2015, despite the extent of the cases and procedures for confiscation, has not changed substantially".
7. CHOCLÁN MONTALVO, J.A., *El patrimonio criminal. Comiso y pérdida de la ganancia*. (The criminal heritage. Confiscation and loss of profit.), Ed. Dykinson, Madrid 2001, p. 28. HCR 553/2014 of 24 June declares that: "This Chamber (Cfr. HCR 23-5-2013, nº 442/2013) has pointed out that the confiscation is directly related to the penalties and to the sanctioning law, in any case, with the logical requirement of its personal nature and the obligatory criminal procedure for its imposition. Independently of this legal nature, which implies that such a measure has to be requested by the Public Prosecutor's Office or by the accusing parties (HCR 30.5.97, HCR 17.3.2003), from which it can be deduced that it has to be presented and debated in the oral trial (HCR 6.3.2001), and that the resolution that agrees to it has to be motivated (...) and it is important to bear in mind that the application of confiscation in criminal proceedings is not linked to the property belonging to the person criminally responsible, arts. 127 and 374 CC, instead the only requirement is to demonstrate the illicit origin of the product or profits or its use for criminal purposes, so that in principle, even if a person has been acquitted or the property belongs to a third party, it could be agreed to confiscate the property, thereby distorting the presumption of good faith in the arts. 433 and 434 of the Civil Code and proving that it was an apparent or limited third party to cover up its illicit origin".
8. GONZÁLEZ-CUÉLLAR SERRANO, N. en MARCHENA GÓMEZ/ GONZÁLEZ-CUÉLLAR SERRANO, *La reforma de la Ley de Enjuiciamiento Criminal en 2015* (The reform of the Criminal Procedure Act in 2015), Ed. Ediciones Jurídicas Castillo de Luna, Madrid 2015, p, 442.
9. In the same vein, Constitutional Code Ruling 169/1998 of 21 July. The High Court pointed out in Ruling No. 1528/2002, of 20 September, that "Certainly, confiscation, although not included in the catalogue of penalties contained in Article 33 of the Criminal Code, constitutes a penalty subject to the principles of guilt, proportionality, relevance and legality".
10. See HCR 388/2006, of 10 March, in which the confiscation of an amount of money was left without effect, stating that "The accused has denied, from the first procedural moment until the trial, that the money occupied came from the sale of drugs; and, in its legal grounds, the Audience, in dealing with the event immediately preceding the occupation of drugs and money, speaks of an alleged transaction. It cannot be concluded that

there is sufficient evidence to prove the origin of the banknotes in question, and consequently, that the presumption of innocence has been distorted in this respect".

11. See HCR 123/1995, of 18 July.
12. GONZÁLEZ-CUÉLLAR SERRANO, adds that "the conduct of the third party which makes up the *de facto* assumption of the confiscation may, in addition to the assumption of application of the measure of seizure of the property, constitute an offence committed by the same third party (art. 127 quarter CC): the assumption under a) may be included in an offence of receiving and laundering money; and under b) may be included in an offence of frustration of execution".
13. See, for all, HCR 600/2012 of 12 July. In this sense, HCR 575/2013 of 28 June states that "with respect to the proof of the illicit origin of the confiscated assets, we have specified in STS 16/2009, 27 January that it cannot be claimed that it is in the same terms as the fact discovered and worthy of conviction, but on the contrary, that evidence must necessarily be of a different nature and deal generically with the activity carried out by the convicted person (or owner of the confiscated property) prior to his arrest or the criminal operation detected. Evidence that may consist of police investigations into the fact that the accused had been engaged for some time in the activity for which he was finally convicted, that the property whose confiscation is sought was acquired during the period in which the convicted person was engaged, in terms of rational suspicion, in the criminal activity in question, that the property to be confiscated was not financed in a lawful and accredited manner, or, in other words, that there were no assets, sales, businesses or economic activities capable of justifying the increase in property, etc. Once this information has been proven and compared, the unlawful origin of the property found in the possession of the convicted person may be deemed to have been proven, even though it does not derive from the operation discovered and for which he was convicted, and may therefore be confiscated as criminal proceeds".
14. Similarly, HCR 512/2017, of 5 July, states that "With regard to proof of this origin, it cannot be claimed that it is in the same terms as the fact discovered and worthy of conviction, but on the contrary, this proof must necessarily be of a different nature and relate generically to the activity carried out by the convicted person (or owner of the confiscated property) prior to his arrest or the criminal operation detected. Indicative evidence that may consist of police investigations into the fact that the accused had been engaged for some time in the activity for which he was finally convicted, that the property whose confiscation is being sought was acquired during the period in which the convicted person was engaged, in terms of rational suspicion, in the criminal activity in question, that the property to be confiscated was not financed in a lawful and accredited manner, or, in other words, that there were no assets, sales, businesses or economic activities capable of justifying the increase in property, etc. Once this information has been proven and compared, the unlawful origin of the property found in the possession of the convicted person may be deemed to have been proven, even though it does not derive from the operation discovered and for which he was convicted, and may therefore be confiscated as criminal proceeds".
15. HCR 746/2014 of 13 November states that: "In HCR 157/14 of March 5, it is recalled that the purpose of confiscation is to annul any advantage obtained by the crime and that its application in the criminal process is not linked to the property belonging to the criminal responsible, but only to the demonstration of the illicit origin of the product or earnings or its use for criminal purposes, so that in principle, even if a person has been acquitted or the property belongs to a third party, it could be agreed to confiscate the money involved, thereby overturning the presumption of good faith in arts. 433 and 434 of the Civil Code and proving that it was an apparent or limited third party to cover up its illicit origin". In the same sense, HC 41/2017 of 31 January.
16. In that resolution, it is added that: "Perhaps to avoid the problems that doctrinally generated the consideration of drugs as an effect of the crime, since the narcotic substance was more properly the object of the crime, already art. 344 bis e) of the CC of 1973, in the wording given by OL 8/92 and art. 374 CC of 1995, included the reference to toxic drugs, narcotics or psychotropic substances as the express object of the confiscation".
17. The HC states in its ruling No. 32/2009 of 7 January that the basis for the confiscation of the property, means or instruments with which the offence has been prepared or executed "is different from that of the effects

arising from the offence, since it is a question of removing those that are particularly suitable for the commission of the offence, and therefore its interpretation must be restrictive. What is really relevant is that it is a question of property whose destination is preordained for the commission of the unlawful act, without prejudice obviously to the fact that in any case it has the capacity to cover civil and criminal liabilities and therefore its retention will be justified".

18. HCR 512/2017 of 5 July states that these are gains "whatever transformations they may have undergone. It is thus a matter of clearly establishing as a punitive consequence the loss of the economic benefit obtained directly or indirectly from the crime".

19. On the admissibility of legal presumptions in criminal proceedings, see GASCON INCHAUSTI, F., *El decomiso transfronterizo de bienes* (Cross-border asset confiscation), Ed. Colex, Madrid. 2007, pp. 93-99.

20. See our work, *La prueba del origen ilícito de los bienes y el decomiso ampliado* (Proof of illicit origin of property and extended confiscation), in González-Cuéllar Serrano (Director), "Problemas actuales de la Justicia Penal", Ed. Colex, Madrid 2013, pp. 365-382.

21. In the same sense, CHOCLÁN MONTALVO, J.A., *El patrimonio criminal…* (The criminal wealth…), cit., p. 35, affirmed in 2001, that "the presumption of illegality would not be legitimate as a presupposition of the confiscation measure, since the confiscation has an evident sanctioning nature, but this does not affect the possibilities that the criminal Judge has to declare the illicit origin of the goods by way of inference based on a logical-deductive reasoning", that is, by way of circumstantial evidence.

22. Specifically, Recital (19) states that "Criminal groups engage in a wide range of criminal activities. In order to deal effectively with the activities of organized crime, there may be situations where it is appropriate, following a conviction, to confiscate not only property associated with a particular offence, but also additional property determined by the court to be the proceeds of other offences." This measure is called «extended confiscation». Framework Decision 2005/212/JHA provided for three different sets of minimum requirements that Member States could choose from for the purpose of applying extended confiscation. As a result, during the process of transposition of that Framework Decision, Member States have chosen different options which have led to divergent concepts of extended confiscation in national legal systems. This divergence constitutes an obstacle to cross-border cooperation in confiscation cases. It is therefore necessary to further harmonize the provisions on extended confiscation by setting a single minimum standard.

23. See our work, *La prueba del origen ilícito de los bienes y el decomiso ampliado* (Proof of illicit origin of property and extended confiscation), in González-Cuéllar Serrano (Director), "Problemas actuales de la Justicia Penal", Ed. Colex, Madrid, 2013 (ISBN: 978-84-8432-369-1), pp. 377-381.

24. As GONZÁLEZ-CUÉLLAR SERRANO points out, N., op. cit., p. 495, "language is old-fashioned. There is no such thing as full or half proof in criminal proceedings, a distinction typical of inquisitorial law in which a system of appraisal of evidence was in place in which, in case of doubt, torture was used as an instrument to obtain a confession, considered '*regina probatorum*".

25. In this sense, HCR 877/2014, of 22 December, states that "the assets of the offender will no longer be immune from confiscation once he has been convicted of an operation that has frustrated his economic expectations, since confiscation may be ordered against assets possessed prior to the act for which he was convicted, provided that the two aforementioned conditions are met: the origin of the assets from drug trafficking (or any other crime) is deemed to be proven, and the accusatory principle is respected.

With regard to the first circumstance, i.e. the illicit origin, it must be borne in mind that this illicit origin can be accredited by means of indirect or circumstantial evidence, and that the demonstration of the criminal origin -which is essential for the order of confiscation- does not require the identification of the specific criminal operations, it being sufficient for this purpose that the criminal activity is sufficiently proven in a generic way. This is how this Chamber has understood the crime of laundering with respect to the preceding or determining crime (HCR. 10.11.2000, HCR. 28.7.2001, HCR. 5.2.2003, 10.2.2003, HCR. 14.4.2003, HCR. 29.11.2003, HCR. 19.1.2005 and HCR. 20.9.2005)".

26. In its Ruling No. 483/2007 of 4 June 2007, the HC stated that in order to prove the criminal origin of the property "the principles set out in Constitutional Court Ruling (Const. C. R.) 174/1985 of 17 December 1985, Const. C. R. 175/1985 of 17 December 1985 and Const. C. R. 229/1988 of 1 December 1988 are applicable,

according to which the right to the presumption of innocence does not preclude a judicial conviction in criminal proceedings from being formed on the basis of circumstantial evidence. In other words, the offence from which the property originated can be proved by indicia, and there is no need for a court judgement to have established this in a particular previous proceeding".

27. As HCR 877/2014, of 22 December points out: "As regards proof of such origin, it cannot be claimed that it is in the same terms as the fact discovered and worthy of conviction, but on the contrary, such proof must necessarily be of a different nature and relate in a generic way to the activity carried out by the convicted person (or owner of the seized property) prior to his arrest or the criminal operation detected.

Circumstantial evidence that may consist of police investigations into the fact that the accused had been engaged for some time in the activity for which he was finally convicted, that the property whose confiscation is being sought was acquired during the period in which the convicted person was engaged, in terms of rational suspicion, in the criminal activity in question, that the property to be confiscated was not financed in a lawful and accredited manner, or, in other words, that there were no assets, sales, businesses or economic activities capable of justifying the increase in property, etc. Once this information has been proven and compared, the unlawful origin of the property found in the possession of the convicted person may be deemed to have been proven, even though it does not derive from the operation discovered and for which he was convicted, and may therefore be confiscated as criminal proceeds".

28. GONZÁLEZ-CUÉLLAR SERRANO, N., op. cit., p. 496.

29. Following MONTALVO, J.A., *El patrimonio criminal*… (The criminal wealth), cit., p. 27, "it follows that seizure and confiscation are, according to the case-law of the ECHR, undoubtedly punitive in nature when they are imposed as a consequence of the commission of a punishable act, following a criminal charge and in proceedings of a criminal nature".

30. Section VIII of the Explanatory Memorandum of OL 1/2015, amending the Criminal Code.

31. To protect third parties there is a procedure called "ancillary proceeding", which is initiated once the criminal proceedings have been completed. Under this procedure, if a third party can prove that he was the owner at the time of the offence or that he subsequently acquired it in good faith, the confiscation will be declared null and void.

32. CASELLA, S.D., Asset forfeiture law in the United States, Ed. JurisNet, LLC New York, 2007, in chapter one makes an overview of the regulation of forfeiture in the United States, pp. 12-14.

33. GONZÁLEZ-CUÉLLAR SERRANO, N., op. cit., p. 469.

34. On the contrary, GIMENO SENDRA in his appearance in the Justice Commission held on May 13, 2015, in relation to the Bill of modification of the Lecrim, Diario de Sesiones del Congreso de los Diputados, no. 810, p. 20, pointed out when referring to the process of autonomous confiscation "they have just approved a new regulation and perfectly constitutional, even that of unjust enrichment, that of the signs of wealth. We are not dealing with a criminal type of unjust enrichment; we are dealing with signs of wealth that make a civic precautionary measure possible. Therefore, the presumption of innocence is not at stake here, and it seems to me that the articles are perfectly constitutional and very necessary in the fight against drug trafficking and corruption".

In the same sense, ASENCIO MELLADO, J.M., *El delito de enriquecimiento ilícito* (The crime of illicit enrichment), in El Notario del Siglo XXI, No. 32, July-August 2010, in relation to the previous regulation of extended confiscation, which can be found at http://www.elnotario.com, stated that "the accused could prove the legality of his income, which would not imply any inversion of the burden of proof, but rather the exercise of the right to defense.

35. GONZÁLEZ-CUÉLLAR SERRANO, N., op. cit., p. 442, who adds on p. 468, that the criminal nature of confiscation is undeniable "when it is imposed on the person to whom the offence is attributed and before whom a reproachful judgment is issued".

36. HAVA GARCÍA, E, "*La nueva regulación del comiso* (The new regulation of confiscation)", in "Comentario a la reforma penal" (Dir. Gonzalo Quintero Olivares), Ed. Aranzadi, Pamplona 2015, p. 214. On pp. 215 and 216, he explains the ups and downs of extended confiscation during the parliamentary process, which resulted in two different extended confiscation regimes, which can lead to "numerous application problems, if not

insurmountable contradictions". On the other hand, see the comment made by VIDALES RODRIGUEZ C., "*Consecuencias accesorias: decomiso*… (Ancillary consequences: confiscation…)", cit., p. 406- 409, who points out that, although there is a certain similarity between 127 bis and arts. 127 quinquies and sexies, there are also important differences.

37. HAVA GARCÍA, E, "La nueva regulación… (The new regulation…)", cit., p. 214.

38. HAVA GARCÍA, E, "La nueva regulación del comiso (The new regulation of confiscation)", in "Comentario a la reforma penal" (Dir. Gonzalo Quintero Olivares", Ed. Aranzadi, Pamplona 2015, p. 214.

39. GONZÁLEZ-CUÉLLAR SERRANO, N., op. cit., p. 506, adds that "such provisions are not, therefore, authentic legal presumptions, but simple normatively exposed presumptions, mere intellectual guides proposed by the norm to lead to judicial reasoning in accordance with reason, the judge is not bound as expressly warned."

40. See HCR 198/2009, of 28 September, in which the appellant for amparo stated that his right to the presumption of innocence had been violated in relation to the confiscation, since he stated that it had not been proven that the assets came from the criminal activity for which he had been convicted and in which the Const. C. stated that "as the Public Prosecutor's Office rightly points out in its brief of allegations, with express invocation of the synthesis that in HCR 186/2005, of 4 July, F. 5, is made of the constitutional doctrine on the conditions which must be met by evidence in order to be able to undermine the fundamental right to the presumption of innocence, the applicant's arguments for amparo are inconsistent in that regard, since the inference made in the contested judgment satisfies those conditions, an assessment which is not invalidated by the arguments put forward by the applicant". It concludes that "in particular, that inference cannot be disregarded by invoking the work carried out in a company which, as the Public Prosecutor's Office has pointed out, did not even exist at the time the property in Carrer Arquitectura in Hospitalet de Llobregat was purchased, or by referring to financial assistance without any evidence, despite the unquestionable ease of proof available to the then accused and now appellant. Consequently, we must reject this second plea of the appeal for protection, as there is no violation of the fundamental right to the presumption of innocence (art. 24.2 SC) in the confiscation of the property agreed by the controversial ruling".

41. The HC stated in Ruling 33/2005, of 19 January: "there are two sources of empirical knowledge of past events: direct evidence and indirect evidence, on an equal footing and therefore, circumstantial evidence is not more insecure than direct evidence, nor is it subsidiary". It recently recalled in HCR 146/2014, of 22 September that "it is necessary to recall the constitutional jurisprudence applicable to the case that was already set forth in the aforementioned HCR 133/2014, FJ 8, which indicated that this Court, in HCR 126/2011, of 18 July, recalling what was established in HCR 109/2009 of 11 May, FJ 3, states "that 'as we have been holding since HCR 174/1985, of 17 December, in the absence of direct evidence of guilt, even circumstantial evidence may support a conviction, without undermining the right to the presumption of innocence, provided that the following requirements are met: 1) the basic fact or facts (or circumstances) must be fully established; 2) the facts constituting the offence must be deduced precisely from these fully established basic facts; 3) in order to check the reasonableness of the inference, it is necessary, first of all, for the judicial body to express the facts that are established, or circumstances, and above all to explain the reasoning or logical link between the basic facts and the consequential facts; 4) and, finally, that this reasoning be based on the rules of human judgment or on the rules of common experience' or, in the words of HCR 169/1989, of October 16 (FJ 2), 'on a reasonable understanding of the reality normally lived and appreciated in accordance with collective criteria in force' (HCR 220/1998, of November 16, FJ 4; HCR 124/2001, of June 4, FJ 12; HCR 300/2005, of November 21, FJ 3; HCR 111/2008, of September 22, FJ 3)" In the same sense, HCR 495/2015 of June 29.

42. See HCR 219/2006 and HCR 220/2006, of 3 July, which discusses how, on the basis of a variety of circumstances, it is possible to conclude that the origin of the property is illicit because it has been established that the confiscated property was owned by the appellant and was acquired with the proceeds of the sale of narcotic drugs.

[43] Requirements established as of HCR 174/1985, December 17, reiterated in its jurisprudence on the subject, among others, in HCR 137/2007, June 4. With regard to the jurisprudence of the HC, see for all, No. 169/2011, of 18 March. V. GONZÁLEZ-CUÉLLAR SERRANO, N., *La prueba de los delitos contra el medio ambiente* (Evidence of environmental crimes), in González-Cuéllar Serrano, N. (Dir.), "Investigación y Prueba en el Proceso Penal", Ed. Colex, Madrid 2006, p. 272.

[44] See HCR 429/2004, of 2 April, in which, in response to the appellant's argument that: "the unlawful origin of the vehicles has not been proven, since the lack of work demonstrated in the Social Security report does not prove it, since the dates of purchase, prices and current situation of the vehicles remain in the dark", the Court concludes that the contested judgment "explains and justifies, through various pieces of circumstantial evidence, the unlawful origin of the assets. To this end, the Court used the following evidence: a) the testimony of the police officers, who observed the exclusive enjoyment of these goods by the appellant; b) the declaration of the formal owners, who incur in multiple contradictions to explain the ownership they held, without enjoying the vehicle; c) the social security report, which justifies the fact that the accused has not carried out any activity since 1991, a fact verified in recent times by the police themselves; d) The insurance policy found at his home, in which he was listed as the owner of one of the vehicles, precisely the one that Victor formally had in his name, which made it clear that the explanations given by the latter were not true; e) the untraceability of a formal third party owner. With all these inferences, the Court could reasonably conclude that the five vehicles (two of them Mercedes and one Porsche) had been purchased with the money obtained from the illicit drug proceeds. With all this evidence, it is appropriate to order the confiscation of the goods, even if they do not originate from the criminal acts that were judged, but from the same criminal activity previously developed".

[45] See HCR 1574/2005, 15 December 2005, which states that "in general it will be sufficient to establish that the accused has no other means of subsistence or illicit income that could explain the origin of the money or that there is evidence of trafficking operations from which the possession of the amount in question is naturally derived".

[46] See HCR 450/2007, of 30 May.

[47] HCR 9/2005, of 10 January. VEGAS TORRES, J., *Presunción de inocencia y prueba en el proceso penal* (Presumption of innocence and evidence in criminal proceedings), Ed. La Ley, Madrid, 1993, p. 150, states that "when it is said that criminal evidence must be plural, it is only stated that, normally, a single piece of evidence is not enough for the presumed fact to be considered fixed, according to the rules of experience and reason".

[48] The HC states in its ruling 602/2007 of 4 July that the link "consists in ensuring that the basic facts or circumstantial evidence do not permit other, equally epistemologically valid, contrary inferences".

[49] See HCR 450/2007, of 30 May.

[50] GONZALEZ-CUÉLLAR SERRANO, N., *La prueba de*... (Evidence of…), cit., p. 275

[51] The SC expresses the value of the defendant's silence in its ruling 1736/2000, of 15 November, that "while a reasonable explanation by the defendant -who chooses not to exercise his right to silence- may in its case diminish the demonstrative effectiveness of the existing evidence by diminishing the logical rigor of the less beneficial alternative deduction, the absence of any explanation leaves intact the logical rigor of that deduction in its case, but it does not replace the reasonableness of what the evidence itself does not allow to deduce, so that the question of whether or not the defendant has given an explanation must be assessed in the context of what is considered logical but not in the context of the repertoire of objective data and material evidence available".

[52] HCR of 9 June 1999 and HCR 17 November 2000, among others.

[53] On the standard of *reasonable doubt*, see MORANO A. A., *A reexamination of the development of the reasonable doubt rule*, 55 B.U.L.Rev. 508, 1975, pp. 507 a 529.

[54] HCR 9/2005, of 10 January.

55. HCR 483/2007, of 4 June, stated that it is “indispensable for the confiscation to be granted that it be proven that its origin is illicit or in relation to the crime and that the Court expressly states this in the resolution that agrees to it”.

56. For all, HCR 16/2009, of 27 January.

57. Regarding the burden of proof, see GIMENO BEVIÁ, J. “Recuperación de activos y proceso penal: algunas cuestiones relevantes (Asset recovery and criminal proceedings: some relevant issues)” in *Cuaderno Electrónico de Estudios Jurídicos* nº 2, 2014, pp. 186 ff.

58. CHOCLÁN MONTALVO, J.A, *El patrimonio criminal*… (The criminal wealth…), cit…, p.34.

59. As noted by NIEVA FENOLL, J., *El procedimiento de decomiso autónomo. En especial, sus problemas probatorios* (The autonomous confiscation procedure. In particular, its evidentiary problems), Diario La Ley, No. 8601, Sección Doctrina, September 9, 2015, Ref. D-322, Ed. LA LEY, “the confiscation for the third party is not a sanction, but a simple nullity of the legal transaction through which he acquired the goods, because he had a cause unacceptable to the law. Hence, with respect to the third party, the presumption of innocence does not apply, even if they are indeed innocent, as recalled in the case law of the European Court of Human Rights (STEDH Geerings v. Netherlands, 1 March 2007), with respect to the declaration of the existence of the offence, because in that case a defendant is already being affected, and not that third party. This also seems to be confirmed by art. 127 ter 2. CC”.

60. GONZÁLEZ-CUÉLLAR SERRANO, N., op. cit., pp. 446 et seq., who adds that “the conduct of the third party which forms the factual basis for confiscation may, in addition to the assumptions for the application of the measure of seizure of the property, constitute an offence committed by the third party: the assumption in a) may be included in the offence of receiving and laundering of money; and the assumption in b) may be subsumed in an offence of frustration of execution”, and makes an exhaustive analysis of the factual assumptions which may arise when criminal proceedings are brought where the conduct of the third party is also criminal.

61. See on the procedure, GONZÁLEZ-CUÉLLAR SERRANO, N., op. cit., pp. 444 and ss./ GIMENO BEVÍÁ, J., "Análisis crítico de la reforma de Lecrim 2015 (Critical analysis of the Lecrim 2015 reform)", in *Revista Derecho y Proceso Penal Aranzadi* nº40, October-December 2015, pp. 209 et seq.; GIMENO SENDRA, V., *Manual de Derecho Procesal*, Ed. Ediciones Jurídicas Castillo de Luna, Madrid 2015, p. 516.

62. In “*iuris tantum* legal presumptions, the law dispenses with or facilitates the burden of proof for the beneficiary of the investment and simultaneously, in relation to the alleged event, reverses it for the damaged party. The beneficiary of the presumption retains the burden of proof, but not the presumed fact, rather the legal situation or the different fact. Once the burden of proof of the different fact has been satisfied, the party damaged by the presumption has the burden of proving that the presumed fact has not occurred in order to avoid the fixing of the sentence”, GONZÁLEZ-CUÉLLAR SERRANO, N., op. cit., p. 463.

63. GONZÁLEZ-CUÉLLAR SERRANO, N., op. cit., p. 464, states that “such a limitation on the effectiveness of confiscation, which is entirely reasonable for onerous acquisitions -although the appropriateness of the price at market value can be discussed-, is open to criticism for acquisitions made free of charge. For it is contrary to the principle that prohibits unjust enrichment based on donations of goods from illicit acts, which constitute the basis of arts. 643 CC and 122 CC”.