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INSTRUMENTAL OFFENCE IN SPANISH CRIMINAL CODE: PROBLEMS OF LEGITIMACY?

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ABSTRACT

This paper presents a new category of criminal norms that are referred to as "instrumental crimes". It is a from of anticipation through which the Spanish legislator punishes the preparation of crime incriminating evidence or processes to commit a crime in order to prevent new forms of crime. However, this decision is illegitimate because it is incompatible with constitutional principles. In that sense, maintaining those criminal norms in the code will require interpretation that conforms to the basic principles of criminal law.

Key words: Anticipation, constitutional principles, preparation, instrumental crimes, interpretation.

1. PUNISHMENT OF PREPARATION

In most cases, the criminal code conceptualises an offence as the consummation of an act. However, at times preparation of crime is included in this definition depending on the relevance of the legal right and the circumstances that may threaten the object of protection. From the preparation phase[1]. In effect, when legislators normally describe crime, they often

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[1] Cfr. Santiago Mir Puig: Derecho penal. Parte general, 10.ª ed., Barcelona: Reppertor, 2015, 346.

do so referring to its consummate form[2]. This may lead to the presumption that legislators are not thinking of prohibiting the preparation of a criminal offence but rather that the set of rules, namely the code is intended to prevent actions that affect the essential legal interests of the law-society-entity not appreciated in the criminal preparation. With this in mind, although it is commonly understood that it is prohibited to kill, it is less clear to refer to the preparation of homicide or another type of crime. In those cases, doubt may arise regarding the certainty of punishability of crime preparatory acts. The precept contained in Art. 138 of the Penal Code describes a conduct carried out (homicide); it does not refer to acts of disposition that may subsequently cause the death of another[3]. If the Penal Code is reviewed, more precepts will be found to refer to an accomplished fact and not to the preparation of crime[4]. Therefore, it is plausible to state that the majority of precepts describe a perceptible, conflicting aggression. Therefore, the incrimination of the preparation in Spain is reserved for exceptionality[5].

Within the power available to the legislator to establish criminal offences as well as their respective sanctions, is the power to choose the mode of incrimination that deems most convenient, as well as the type of pen-

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[2] Cfr. Claus Roxin: Derecho Penal. Parte General, Tomo 1. Fundamentos: La estructura de la Teoría del Delito, 2.ª ed. (translators: Diego-Manuel. Luzón Peña/Miguel Díaz y García Conlledo/Javier de Vicente Remesal) Madrid: Civitas Ediciones, 1997, § 1, N. 22.

[3] Judgment of the Court of 25 April 2012 (case 2012 RJ 2012\11286 Jorge Barreiro), F.J. 7.

[4] The vast majority of crimes are of this nature; thus, carrying out sexual acts with children under sixteen years of age (Article 183), taking a movable property with others without permission of its owner (Article 234), causing damage to property of others (Article 263), provoking serious imprudence a crime of havoc (Article 347), counterfeit currency (Article 386). The examples of this category in the Penal Code would take pages and pages.

[5] Cfr. Claus Roxin, Derecho Penal. Parte General, Tomo 1, 2.ª ed., 1997, § 7, N. 14. The consummated crime is the point of reference for the legislator that only for special reasons decides, as a manifestation of its power, to incriminate preparatory actions that do not represent any injury in a phenomenal sense. In other words, it dispenses with the concept of unfairness as a valued fact from the perspective of "social damage". However, this power does not end with punishable preparatory acts but can go to other overtaking figures.

alty[6]. In the task of regulating human behaviour, the criminal norm is used and it may present various structures. In this sense, the legislator can describe actions that produce a result or opt for actions that do not require any external modification[7]. Pure omission, from which a rational contribution to the social system is expected, may serve as an example. It is known that the power to incriminate a conduct, elaborating criminal norms by means of various structures, does not find its limit when sanctioning the omission[8]. The legislator also draws precepts where it establishes a sanction for the non-observance of the objective duty of care of its citizens. And, in addition, the Penal Code is known to present other models of incrimination[9].

The set of forms of exceptional criminality includes the so-called "instrumental offences". It is a tutelary technique that incriminates preparatory acts aiming to commit a criminal offence, which brings about relevant consequences[10]. It is a decision that creates legal norms with complex structures because the interpreter will be forced to go to areas

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[6] Cfr. Santiago Mir Puig: Derecho Penal. Parte General, 10.ª ed., Barcelona: Reppertor, 2015, 348.

[7] Cfr. Claus Roxin: Derecho Penal. Parte General, Tomo 1, 2.ª ed., 1997, § 11, N. 119. The legislator is known to be authorised to anticipate the intervention to phases before the consummation. It can be done by means of dependent figures, I think of "the attempt" or "punishable preparatory acts". But it can also present autonomous figures, for example, "abstract danger crimes" or "attempted crimes".

[8] Cfr. Judgment of the Court of 28 April (case 470/2006 de 28 abril. RJ 2006\233 Maza Martín) F.J. 1.

[9] Cfr. Claus Roxin: Derecho Penal. Parte General, Tomo 1, 2.ª ed., 1997, § 2, N. 1, 22.

[10] Preparation in terms of a criminal offence is a complex guardianship technique because it is fraught with contradictions. There are many doubts that arise when reviewing this figure since the questions begin with the concept of preparing in a penal legal sense, going through the determination of the unjust until the moment of determining the relevance of the legally relevant risk from the preparation. The chapters that follow will demonstrate how contradictions arise when drafting those rules and imposing the sanction foreseen in them. Preparation in terms of a criminal offence causes the incrimination to appear in various ways because the legislator is not limited to expressions such as "the one I will prepare" but in the largest number of cases, it turns to other governing verbs. For example, when sanctions tenure, possession, facilitation, manufacture... to commit a crime.

that in the largest number of cases are unknown[11]. For example, there are precepts that incriminate the preparation of crime from the possession of computer programs to obtain a fraud[12] (Article 248.2 b])[13]. They are instruments that are not usually used or dominated by anyone, so in some cases one might think about raising some of those types of crime to the rank of special crimes[14]. It is believed that at the moment of the application of the precepts, the interpreter will run into some contradictions in terms of the content and scope of the rules. There will also be contradictions with respect to other precepts, specifically, those provided for in the General Part of the Penal Code[15]. I put for example, the analysis of figures such as authorship, participation, and attempt, as well as voluntary withdrawal.

2. WHAT ARE INSTRUMENTAL OFFENCES?

Instrumental offences do not refer to an intermediate phase between the consummation of crime and the attempt to commit a criminal offence but before a period prior to the attempted crime that is planned[16]. The penological comparison made by the Spanish legislator in the case of instrumental offences is between the preparation phase and the consummation

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[11] Enrrique Peñaranda Ramos: "La reforma de los delitos de falsedades documentales". In: Julio Díaz-Maroto y Villajero, dir.: Estudios sobre las reformas del Código penal. (operadas por las LO 5/2010, de 22 de junio, y 3/2011, de 28 de enero), Cizur Menor (Navarra): Civitas, 2011, 576-578.

[12] Cfr. Judgment of the Court of 20 November 2001 (case 2002\805 Martínez Arrieta), F.J. 1.

[13] José Antonio Cruz de Pablo: Derecho Penal y nuevas tecnologías. Aspectos sustantivos, Madird: Difusión Juridica, 2006, 45-47; Francisco Muñoz Conde: Derecho Penal. Parte Especial, 20.ª ed., Valencia: Tirant Lo Blanch, 2015, 348-349.

[14] Mirentxu Corcoy Bidasolo: "Límites objetivos y subjetivos a la intervención panal en el control de riesgos". In Santiago Mir Puig/Mirentxu Corcoy Bidasolo, dirs.: Política criminal y reforma penal, Montevideo-Buenos Aires: B de F, 2007, 52.

[15] Francisco Muñoz Conde, Mercedes García Arán: Derecho Penal. Parte General, 9.ª ed., Valencia: Tirant Lo Blanch, 2015, 444-447.

[16] Bernardo Feijoo Sánchez: Retribución y prevención general. Un estudio sobre la teoría de la pena y las funciones del Derecho penal, Montevideo, Buenos Aires: BdF, 2007, 141, 149, 573, 577.

phase and not between the tentative phase and execution[17]. In reviewing the definition that the legislator offers for those norms, instrumental offences do not correspond to any of the following criminal manifestations: attempt or consummation of crime. By mandate of the legislator, instrumental offences are understood to be the preparation of certain offences, by means of certain instruments, is equivalent for punitive purposes to the formal consummation. It is not necessarily any prejudice to the protected legal right but the disposition of some materials or necessary processes to be able to injure it. In that sense, for the legislator, the preparation of the offence to the legal right is the basis to ground the unfair[18]. In effect, instrumental offences are considered to correspond to a specific modality of consummated crime in which the legislator views that the act of preparing a crime must be regarded as a consummation[19]. It is a political decision; however, the instrumental offence has few things in common with the crime. For example, its location in the Special Part of the Penal Code, which gives it a certain autonomy since it is not necessary to resort to a rule of the General Part as occurs with other figures of anticipation to be able to regulate its application.

Instrumental offences share certain qualities with figures of dependent anticipation, for example: punishable preparatory acts. Thus, on the one hand, ways or means of preparation for specific crimes are incriminated and not for any crime that can be committed through instruments; On the other hand, the conduct is punished -in a disproportionate manner- without the offense being prepared. However, despite those similarities, instrumental offences cannot be sustained to correspond structurally with punishable preparatory acts as a form of criminal anticipation[20]. In fact,

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[17] Cfr. Ignacio Flores Prada: Criminlidad Inormática: Aspectos sustantivos y procesales: Tirant Lo Blanch, 2012, 250.

[18] Cfr. Alfonso Serrano Gómez, Alfonso Serrano Maíllo: Curso de Derecho Penal. Parte Especial, 4.ª ed., Madird: Dykinson 2017, 659.

[19] Cfr. Noelia Solari Merlo, en Oscar Morales García (dir.): Código Penal con Jurisprudencia, Madrid: Aranzadi, 2013, 892.

[20] Cfr. José Cerezo Mir: Derecho Penal. Parte General, 2008, Montevideo, Buenos Aires, BdF, 900-906; Soledad Barber Burusco: Los actos preparatorios del delito, Granada: Comares, 2004, 99-155; Juan Carlos Campo Moreno: Los actos preparatorios punibles, Valencia: Tirant lo Blanch, 2000, 31.

it is indisputable that instrumental offences do not sanction the execution phase of the respective offences but acts of preparation. In that order, someone commits an instrumental offence whenever their conduct (possession, possession, facilitation, manufacture of instruments), corresponds to a criminal function regardless of whether the respective crime ends. The phenomenon of instrumentality as a crime must be assimilated as a solid base on which the necessary conditions for attacking a legal good are sustained. Five instrumental offences that are contained in the Spanish Penal Code will be displayed (Articles 248.2 b, 270.6, 371.1, 400 and 570.2)[21].

In the crime of manufacturing, introduction, possession or provision of computer programs specifically intended for the commission of fraud[22] (Article 248.2 b), the instrumental nature is appreciated since the actions incriminated by the legislator are intended to avoid accomplishment of a specific criminal work, that is, defrauding another through the use of tools[23]. For that reason, when incriminating the possession or manufacture of the program the content of unlawfulness is assumed to consist of the anticipation of the injustice of the final crime.

The crime of possession, manufacture, import or circulation of any means designed to check out computer programs or literary works (Article 270.6)[24] also has an instrumental structure since both the device or program - prohibited by the legislator - allows for the commission of a specific crime, or, in other words, facilitates the execution of a specific crime. In that direction, the subject can prepare with the device the consummation of the final crime by the same or by third parties[25].

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[21] Alberto Alonso Rimo: «¿Impunidad general de los actos preparatorios? La expansión de los delitos de preparación», InDret 2017/4, 3-45.

[22] Cfr. Judgment of the Court of 20 November 2001 (case 2002\805 Martínez Arrieta), F.J. 1.

[23] Ignacio Flores Prada: Criminlidad Inormática: Aspectos sustantivos y procesales: Valencia: Tirant Lo Blanch, 2012, 212-214.

[24] Cfr. Judgment of the Court of 27 October 2015 (case 2015\4803 Martínez Arrita) F.J. 1-2.

[25] Ferando Miró Llinares: La protección penal de la propiedad intelectual en la sociedad de la información, Madrid: Dykinson, 2003, 427-433.

In the crime of preparatory acts for the trafficking of precursors (Article 371.1)[26], its instrumental nature is highlighted because when the legislator incriminates the possession, manufacture, transportation of certain substances or objects, it does so to avoid the preparation of another crime[27]. The unlawfulness of this rule represents the anticipation of the unfairness of a final crime and not a simple custody of instruments.

In the crime of fabrication or possession of materials or instruments to commit crimes of falsehood (Article 400)[28], the phenomenon of instrumentality as a crime is also highlighted[29]. The legislator sanctions the preparation of another crime but the subsequent conduct, that is, falsification, could be carried out by the same preparer (for example, the manufacturer of the instrument) or by other subjects (for example, the new holder of the materials[30]). In this line, the unlawfulness of the preparation contains to a certain degree an anticipation of the injustice of the final crime[31].

In the crime of passive indoctrination or self-indoctrination (Article 570.2)[32], a completely new provision in the legal system, its appearance in the penal code has been detected to obey the will of the legislator to counteract terrorism[33]. The instrumental nature of this crime is not only manifested by material objects considered dangerous by the legislator but by behaviour aimed at committing another crime. In this way, in the phe-

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[26] Cfr. Judgment of the Court of 27 September (case 2012\9830 Berdugo y Gómez de la Torre) F.J. 2-3.

[27] Francisco Muñoz Conde: Derecho Penal. Parte Especial, 20. ª ed., Valencia: Tirant Lo Blanch, 2015, 561-562.

[28] Cfr. Judgment of the Court of 28 de april 2016 (case 474 Giménez García), F.J. 2.

[29] Ignacio Flores Prada: Criminlidad Inormática: Aspectos sustantivos y procesales: Valencia: Tirant Lo Blanch, 2012, 160-234.

[30] Cfr. Judgment of the Court of 30 September 2011 (case 2222 Sánchez Melgar), F.J.6.

[31] Franciso Muñoz Conde/Mercedes García Arán, Derecho Penal. Parte General, 9.ª ed., Valencia: Tirant Lo Blanch, 2015, 505.

[32] Cfr. Judgment of the Court of 29 Juini 2015 (case 2015\3889 Ferrer García) F.J. 1-3.

[33] María Nieves Sanz Mulas: Política criminal, 2.ª ed., Salamanca: Ratio Legis, 2017, 277-278; Franisco Muñoz Conde: Derecho Penal. Parte Especial, 20.ª ed., Valencia: Tirant Lo Blanch, 2015, 767.

nomenon of instrumentality as a crime, the instruments that facilitate the performance of a "task" are not only things (that is, devices, machines, devices, programs, plates, etc.), but that is also behaviour or knowledge[34]. The fundamental thing to establish its instrumental nature is then based on the purpose to which the behaviour is ordered.

Reviewing the precepts has recognised the Penal Code to govern a category within the set of preparedness of crime, that is an instrumental offence. Precepts are characterised by a similar structure since they punish preparatory acts to carry out specific crimes, incriminating, among other actions, the possession, manufacture or facilitation of materials, instruments, objects with a specific criminal goal. However, the legislator also incriminates the acquisition of knowledge or processes aimed at a criminal purpose. As it has been mentioned, with these crimes the commission of another crime is prepared (the final crime)[35], either by the same subject, by another or by other subjects[36].

3. INCOMPATIBILITY WITH BASIC PRINCIPLES OF CRIMINAL LAW

In the first part of this investigation it has been demonstrated that instrumental offences are presented in various ways because it is not an advancement of punishment to prevent infractions that can be committed through the computer system or to avoid behaviour that seek to overthrow the government, for example. This phenomenon also reaches other spaces such as the production, manufacture, facilitation, possession or possession of devices or devices to commit a crime of documentary falsi-

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[34] Juan Carlos Campo Moreno: Comentarios a la reforma del Código penal en materia de terrorismo: La L.O. 2/2015, Valencia: Tirant Lo Blanch, 2015, 72; Boldoba Pasamar: "Consecuencias sancionadoras de la radicalización terrorista de los menores de edad y su adecuación al perfil de jóvenes infractores". In Alonso Rimo/Cuerda Arnau/Fernández Hernández (dirs.), Terrorismo, sistema penal y derechos fundamentales, Valencia: Tirant Lo Blanch, 2018, 696-701.

[35] Cfr. Judgment of the Court of 16 January (case RJ 2018\78 Llanera Conde) F.J. 2-3.

[36] Ramón García Albero, in: Gonzalo Quintero Olivares, dir.: Comentarios al Código Penal Español, Tomo 2, 7.ª ed., Cizur Menor (Navarra): Aranzadi, 2016, 1910.

fication (Article 400)[37]. Surprisingly, this phenomenon also incriminates acts of psychic influence to avoid the commission of public disorder (Article 557)[38]. In addition, there are high preparedness of acts to the category of crime by indirect approach with the victim to protect the economic interests of consumers, as it happens in the crime of false allegations in the market[39] (Article 282)[40]. There are, therefore, few legal assets that are protected with this figure of anticipation.

Those rules seek to intensify the protection of various legal rights that are threatened. At the time it has been confirmed, albeit succinctly, that this legislative technique generates several hermeneutical problems and disjunctives. However, the editor of those precepts continues to resort to this instrument, so that the scope of prohibition continues to increase. In this sense, arguments are necessary to justify the appearance of those precepts in the Penal Code. In other words, although including better prevention tools in a complex society to counteract threatening actions, it remains the attitude of the legislator, not that any legislative provision is valid. For this reason, it is worth knowing if the creator of those norms sufficiently justifies the incrimination of those precepts.

While those criminal norms protect both individual and collective legal rights, it is also true that the legislator is especially interested in economic patrimony and other lesser legal assets. In the authors' view, this legal right is important but does not deserve the status of a privileged legal right to typify preparatory acts with a view to protecting economic interests since that legal good does not depend on the configuration of other legal rights.

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[37] Cfr. Judgment of the Court of 28 Juni 2017 (case 2017\3174 Jorge Alberto Gumersindo) F.J. 1.

[38] Cfr. Criminal Court of Pamplona of 27 October 2014 (case 314\2014 Alemán Ezcaray) F.J. 1.

[39] Cfr. José Antonio Cruz de Pablo, in: José Antonio Cruz de Pablo, coord.: Comentarios al Código penal, Vol. 1, Madrid, Difusión Jurdídica, 2008, 1028-1029; Antonio Doval País, Enrique Anarte Borrallo, in: Javier Boix Reig, dir.: Derecho Penal. Parte Especial, Vol. 3, Madrid, Iustel, 2012, 483-493; Carlos Martínez-Buján Pérez: Derecho penal económico, Valencia: Tirant lo Blanch, 2002, 80-90.

[40] Cfr. Judgment of the Court of 25 Juni 2007 (case 2007\7294 García Pérez) F.J. 1-2.

The prediction of those norms in the Penal Code did not occur in a single reform but the legislator, gradually, has been introducing new instrumental offences in numerous titles of the Special Part of the Penal Code. Although it cannot be said that any reform of the code has brought new instrumental offences, it is verifiable that they have been foreseen in several of them. It is plausible to state that those norms are not compatible with the limiting principles of punitive power since this type of intervention goes beyond the traditional or classical model of criminal law[41]. Indeed, criminal law can be understood as a measure or an instrument of social control[42]. In this sense, criminal policy is concerned with studying effective means to fight crime[43]. Thus, the legislator groups or selects the behaviour that it intends to avoid; only those who are able to affect the legal order. But to meet this objective the content described in the standard must be understandable to citizens. However, this does not happen with several precepts that have been analysed in this section[44].

Within the framework provided by the legislator to decide what behaviour should be elevated to the category of crime and opt for one or another legislative technique, is highlighted, as we know, the legal authority to set the penalty deemed appropriate according to criteria of legality. In this way, the normal thing is the one depending on the greater or less seriousness of the fact, as it determines, in the same way, as it is to be expected, the seriousness of the penal sanction. However, the sentence chosen by the legislator in this technique of instrumental offences is incommensurate with the criminal action. In effect, those precepts set a penalty for a stage prior to the beginning of the execution of the offence even for a pre-trial phase. The barrier of criminal protection is advanced punishing preparatory acts aimed at injuring a legal right, in other words, incriminating acts

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[41] Claus Roxin: Política criminal y sistema del derecho penal, 2.ª ed., traslator: Francisco Muñoz Conde, Buenos Aires: Hammurabi, 2002, 87-88; Giovanni Fiandaca, Enzo Musco: Diritto Penale. Parte Generale, 4.ª ed., Bolonia: Zanichelli, 2001, 5-31.

[42] From another opinion, Yesid Reyes Alvarado: Imputación objetiva, 3.ª ed., Bogotá: Temis, 2005, 61-62.

[43] From another opinion, Diego-Manuel Luzón Peña: Lecciones de Derecho penal. Parte general, 2.ª ed., Valencia: Tirant lo Blanch 2012, 36.

[44] Franciso Muñoz Conde: Derecho Penal. Parte Especial, 20.ª ed., Valencia: Tirant lo Blanch 2015, 768.

that are too far from producing an injury, resorting to sanctions, in some cases, equal to those provided for the types of result[45].

It is understood that the basic principles of criminal law provide for, among other aspects, certain limits that the legislator must follow when describing the behaviour that are to prohibit since the criminal law is the most violent instrument that the State has[46]. In that sense, the principles that set limits to the punitive power of the State, namely, legality, subsidiarity, proportionality, injury, guilt and presumption of innocence, are not compatible with instrumental offences. In consequence, those precepts must be interpreted with criteria that limit their application, otherwise, they should be expelled from the Penal Code[47].

4. FINAL REMARKS

The Spanish legislator, when punishing acts of preparation, makes criminal policy, as it fights crime but we cannot affirm yet that all the incriminated conducts with this technique are intolerable to deserve such advancement.

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[45] The following has been found. Art. 400 establishes the same sentence indicated for the authors of a crime of falsehood that the subject prepares, obviously, the penalty will depend on the illicit that corresponds to the plan of the author, for example, the penalty will also be six months up to two years if one prepares falsification of a private document to harm another (see Article 395). In the same way it happens with Art. 248.2 b) because it provides a prison sentence of six months up to three years for those who prepare a computer fraud. In a similar sense, the assumption of Art. 270.6 imposes a penalty very close to that provided for the type of result since for the preparation corresponds to a penalty of imprisonment of six to three years in prison; while for the result it is from six to four years (see Article 270). Something similar can be seen in the precept contained in Art. 183 ter, since it is a crime that establishes a custodial sentence of one to three years for anyone who contacts a minor on the Internet and proposes a meeting. While for the result crime, sexual abuse, a prison sentence of two to six years is imposed (see Article 183).

[46] Cfr. Claus Roxin: Política criminal y sistema del derecho penal, 2.ª ed., traslator: Franciso Muñoz Conde, Buenos Aires: Hammurabi, 2002, 39-42.

[47] Miguel Bajo Fernández: Los delitos de estafa en el Código Penal, Madrid: Editorial Universitaria Ramón Areces, 2004, 173.

It has been shown that by means of those criminal rules, an attempt is made to protect a diverse group of legal rights. In this way, the technique cannot be seen as an instrument for a group of privileged legal rights but it can be used with great flexibility. In other words, in the case of instrumental offences, intervention can be anticipated to protect a variety of legal rights.

The increasing number/volume of those criminal norms represent a response to the social demand for greater legal protection agains almost everything that is dangerous. In this sense, Spanish legislators as well as those from other European countries use this legislative technique. Those precepts are foreseen to reach similar objectives both in Spain and in other countries. And some legislative reforms that have foreseen instrumental offences come about because of compliance with international commitments.

The phenomenon of criminal preparation represented in instrumental offences must face the criticism that has been indicated. In that sense, the criminal norms, that have been analysed, must conform to the principles of presumption of innocence, minimal intervention, proportionality, culpability, injury and legality. Otherwise, an integral function with those norms cannot be confirmed.

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