

The continued crime

Abstract

This is to highlight the elements of current discussion based on the legal nature of the legal fiction of the continuous crime, which despite the fact that it does not find consecration in the legal system of many states, particularly in Chile, has undoubtedly interesting elements and characteristics to analyze, in order to better appreciate its influence on the application of justice.

Keywords: legal nature, justice, penalty, mitigating circumstances, statute of limitations

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Introduction

The present work aims to highlight the elements of current discussion on the continuing crime based on the legal nature of the legal fiction qualified in this way in some legislations, which despite the fact that it does not find consecration in the legal system of many states, Particularly from Chile, it undoubtedly has interesting elements and characteristics to analyze, considering that the way in which jurisprudence treats it, its influence will characterize how the application of justice is in such a case.

Doctrine and jurisprudence

Although the continued crime has ancient dates in the history of Law,¹ is followed by the current discussion based on the legal nature of the legal fiction that it is, which although it does not find enshrinement in the legal system of many states, in Chile it is not enshrined in positive law.² One of the best-known criminal acts today is the pyramid scam, spread thanks to the Internet. With the Internet, scams have spread steadily, making it very difficult to distinguish when the offer is real or a fraud. There are many examples of pyramid scams, here we will cite one that occurred in Spain. Afinsa Spanish company whose business was the buying and selling of stamps, but it became a massive pyramid scam. In effect, "investors were encouraged to invest large sums of money by promising high returns, but in reality the investments of the new investors were used to pay the old ones, thus creating a pyramid structure. In 2006, the scam was discovered and Afinsa was judicially intervened."³ In this study we will analyze the figure from the perspective of Chilean criminal law.

The Chilean Penal Code only regulates the real contest⁴ in its article 74 and the ideal and medial contest is regulated in article 75.⁵ In article 74, in its first paragraph, it states that "All the penalties corresponding to the various infractions will be imposed on anyone guilty of two or more crimes." It should be noted that the aforementioned article 75 rules that "The provision of the previous article is not applicable in the event that a single act constitutes two or more crimes, or when one of them is the necessary means to commit the other." For its part, article 351 of the Code of Criminal Procedure, according to jurisprudence, could consider the crime continued since

"the application of article 351 of the Code of Criminal Procedure is more favorable. The first paragraph of the aforementioned provision will be applied, as the court considers that these are infractions of the same type that can be considered as a single crime, by adding each of the amounts defrauded.⁶ It should be added, then, that the continued crime is a contribution of jurisprudence.

Due to the above, it is necessary to clarify that the continued crime is not a combined crime, on which both doctrine and jurisprudence agree.⁷ In effect, the Contest of crimes consists of the successive execution by the same actor of various criminal acts, whether of different or of the same nature, not yet sentenced. It cannot be confused with the so-called continuing crime, because although both materialize in a series of punishable acts apparently independent of each other, the continuing crime is a single crime that has different characteristics as has been well pointed out by both doctrine and

⁶TJOP of Antofagasta, in the ruling No. 138-2011.

⁷The Supreme Court has ruled in many cases that the continued crime is fully applicable in our legal system. See for example: Supreme Court. June 10, 2008. Role No. 3193-2008. "Against Gabriel Ernesto Maldonado López." 2008. p. 9.

Supreme Court. April 11, 2012. Role No. 10150-2011. "Against Roselda Janet Toledo Soto." 2012. p. 1-4.

Supreme Court. May 11, 2011. Role No. 2576-2011. "Against Sebastián Segundo Araya Soto and Sandra Marcela Yáñez Yáñez." 2011. p. 1-11.

Supreme Court. March 13, 2012. Role No. 9521-2011. "Against María Elisa Castro Bardales, Elizabeth Angélica Aravena Sanhueza, Paola Carolina Garrido Novoa." 2012. p. 1-5.

Supreme Court. February 14, 2011. Role No. 1737-2010. "Against Paulo Via Supreme Court l Munita." 2011. p. 1-3.

Supreme Court. May 16, 2012. Role No. 7777-2011. "Against Humberto Contreras Anguita and others." 2012. p. 1-2.

Supreme Court. April 19, 2012. Role No. 7266-2011. "Against Lorena Sánchez Álamos, Leopoldo Díaz Canales, Cristián Urtubia Fuentes, Jaime Silva Ortiz." judgment of ex officio invalidation. 2012. p. 1-6.

Supreme Court. January 20, 2012. Role No. 5790-2010. "Against Patricio Javier Juan José Kinzel Zurita." (cassation ruling). 2010. p. 13-14.

Supreme Court. December 27, 2012. Role No. 6831-2012. "Against Roberto Oetiker Luchsinger Roberto and others (Ezzio Aurelio Olivieri Díaz, Egon Arnoldo Hoffman Soto, Juan Cristóbal Costa Contreras, Reinaldo Leonel Torres Pizarro)." 2012. p. 1-2.

Supreme Court. December 3, 2012. Role No. 6514-2012. "Against Mauro Nasser Salazar and others." 2012. p. 1-6.

Supreme Court. June 30, 2011. Role No. 6991-2010. "Against Alfonso Morandé Court." 2011. p. 1-3.

Supreme Court. March 9, 2011. Role No. 3065-2010. "Against Osvaldo Repol Garrido." 2011.

¹Camargo Hernández Cesar. *The continued crime*. op.cit. 9 et seq.

²Besio Hernández Martín. Continuing crime in the Chilean penal system: criteria and trends. *Criminal Reasoning*. 2012;(2):117-147.

³<https://luisinsuameirasabogado.es/espana/estafas-piramidales-famosas-espana/>

⁴Novoa Monreal, Eduardo, Chilean Criminal Law Course. p. 271-274.

⁵Idem supra note.

jurisprudence.⁸ As an example, when a company executive carries out maneuvers every year for a long period of time to hide the true value of what must be paid to a worker as a bonus, each of which has the characteristics of a scam. Another example, in this case of the crime of pyramid scheme, in which the deception consists of showing how some investors earn a lot, while new investors are recruited who are paid nothing or little. However, here there is a single crime because the various and successive concealment maneuvers are nothing more than the various moments during which a single and unique criminal resolution, a single crime, is developed.

The Unity and Concurrence of Crimes has also been extensively clarified by the doctrine.⁹ In fact, when dealing with the crime¹⁰ it is necessary to specify that this occurs when there are one or several actions, excluding the identification between action and movement and between action and result.¹¹ The doctrine considers that a single action in the legal sense can contain several bodily contents (for example, fraud, theft with invoice, etc.) or give rise to several results (exploding a bomb causing the death of several people).¹² Or when a subject carries out several punishable actions that result in the commission of as many infractions, we speak of real competition.¹³ To determine the concept of unity of action, following the example given by the authors cited here, it will be necessary to identify certain criteria, for example, in the case of an attack on a person who exercises authority.¹⁴ To clarify the concept, it is necessary to identify the final factor, that is, the will that governs and gives meaning to the plurality of isolated physical acts.¹⁵ (In murder, the will to kill unifies and gives meaning to a series of acts, such as buying and loading the gun, stalking the victim, aiming and shooting; or, in theft,

the will to appropriate the unique and gives meaning to the different acts of searching the pockets of a coat, in incest with rape, a typical example of a royal contest).¹⁶ In the case of the complaint, there is also the manifestation of the will that governs and gives meaning to the plurality of isolated physical acts such as threatening the victims, deceiving them with promises or taking advantage of their ignorance, setting up ideologically false collective contracts, registering actions and make them disappear, falsify balance sheets and modify profits, create waterfall-type companies to facilitate the execution of reported crimes and hide the commission of crimes, etc.

As Hernandez points out¹⁷ then, the normative factor must be kept in mind, that is, the structure of the type of crime in each particular case. In this way, although the final factor that governs a causal process is the same (defrauding someone), some of the particular acts carried out may, in isolation, have relevance for different types of crimes (for example: the imposition of a collective contract in a context of State terrorism, the creation of companies with an objective other than the declared one, modification of the terms of a contract, or, as in the case, making it believe that a value would be paid when in the end a much lower value would be paid, etc.).¹⁸ However, it can be concluded that, if there are isolated acts with a different final factor, the typical relevance can be considered only when they occur jointly or have a typical relevance depending on the regulation of the fact.¹⁹ In fact, in principle, in the case of a continuing crime, two consequences are observed: they do not prescribe and the lowest penalty can be applied, without prejudice to the aggravating factors that may arise, since there may be contexts that give a complementary nature to the crime, such as the fact that it has also been committed under a situation or context of crimes against humanity, genocide and serious human rights crimes.²⁰ However, as Professor Peláez concludes, the continued crime constitutes a unique and independent type of criminal offense, a form of ontological-normative realization of the same or similar type of crime, composed of various serial acts that are parts of that whole and of the progressive unfair that results.²¹

As a historical reference,²² it is necessary to point out that apart from remote precedents, this institution was developed by Italian authors of the 16th and 17th centuries²³ that they considered, as a single crime, a plurality of actions as long as they were presided over by the same design of their author. For their part, German criminal experts,

⁸Nova Monreal Eduardo. *Chilean Criminal Law Course*. Santiago, Ediar-Cono nSur. 1985. p. 285–290. The author exposes the different theories existing at the time.

⁹Maldonado Fuentes Francisco. Continuous crime and concurrent crimes. *Law Review (Valdivia)*. 2015;28(2):193–226., also on the nature and basis of the continued crime in Camargo Hernández Cesar. *El crime continuado*. Barcelona, Bosch Casa Editorial. 1957. p.31–43.

¹⁰Ideal Competition The confluence of two or more criminal infractions caused by a single action of the subject is known as ideal competition. A clear example of this is what happens when a reckless action is carried out: although the results are multiple, they all come from a single action that violates the citizen's duty. But there is also the ideal competition between intentional crimes; For example, if a subject resists police arrest causing injuries to the officer, even if the action carried out is a single one (to be clear, a fist blow), the infractions that arise from it are two: violating the legal right of health, talk about a crime of injuries; But since the passive subject of these injuries has the status of agent of authority, a second crime also appears: attack on authority, whose function consists precisely of protecting the principle of authority.

¹¹Maldonado Fuentes, Francisco, op.ct. note 24,

¹²Etcheberry OA. *The apparent competition of criminal laws*. Editorial Jurídica de Chile, Collection of seminars and institutes Vol. II, pp. 8 and ss.,

¹³Royal Competition. Consider, in the case of someone who, engaged in a fight, stabs several of his opponents; Apart from the fact that several actions (stabbing) are naturally observed, what is truly decisive is that each one of them injures a different object, such as the body of each person, which constitutes the material substrate of the legal good “health”, which allows conclude that the perpetrator of the act has violated as many times the criminal provision that prohibits causing injury to another. In other words: each of the opponents is, for the purposes of the type, an “other”, and their injury comes from an action directly directed against them, appearing in unison the objective and subjective elements that are required to give rise to a crime. intentional injury. See Nova Monreal, op.cit. 271.y Verdugo Marinkovic, Mario, Dictionary of Chilean Judicial Jurisprudence, (2000-2014), Santiago, Thomson Reuters. p. 81.

¹⁴Idem note 1 above. See also, Besio Hernández, Martín. *Continuing crime in the Chilean penal system: criteria*. Published in: Criminal Reasoning, n.2, op.cit. 2012.

¹⁵Camargo Hernández Cesar. *The continued crime*. Barcelona. Bosch Casa Editorial. 1957. p. 53–55.

¹⁶Muñoz Conde Francisco. *Criminal Law General Part*. 5th Edition. Barcelona. Editorial Tirant lo Blanch, Valencia. 2002. p.638. and Maldonado Mella Sergio Alberto. Contest of crimes and problems of determining the sentence in “massive” scams: lessons from the “la polar”, fermex” and “madoff” cases in the face of criminal dogmatics. memory to qualify for the academic degree of graduate in legal and social sciences. Santiago, U. de Chile, 2016. p. 14–16. Maldonado Fuentes Francisco. *Continuous crime and concurrent crimes*. Law Review (Valdivia). 2015;28(2):193–226.

¹⁷Hernández Basualto Héctor. Standardization of deception and level of protection of the victim in scam: what dogmatics says and does not say. *Chilean Law Review*. 2010;37(1):9–41.

¹⁸https://gredos.usal.es/jspui/bitstream/10366/108969/1/DDPG_Galvan_Gonzalez_F_ConcursoDeDelitos.pdf

¹⁹Camargo Hernández Cesar. *The continued crime*. Barcelona, Bosch Casa Editorial. 1957. P. 87.

²⁰Verdugo Marinkovic Mario. *Dictionary of Chilean Judicial Jurisprudence (2000-2014)*. Santiago, Thomson Reuters. 2015. p. 124–125.

²¹Peláez de las Heras Antonio. *El Delito Continuado*. Publications of the University of Salamanca. 1942. p. 11.

²²Nova Monreal. op.cit., p. 284–295.

²³Commonly, the authors who deal with continued crime understand that its origin is found in the post-glossators, receiving a decisive impulse in the 16th and 17th centuries by the Italian criminologists Clauro and Farinacio as a means of avoiding the imposition of the death penalty that it was established at the third theft. The conceptual application aims to humanize grief.

sharing with classical Italian theory, maintain that continued crime is a work of law in opposition to natural reality, moving away from its humanitarian foundations to give it a more utilitarian and opportunistic orientation. Spanish jurisprudence has been inclined to consider this criterion when it was appreciated that some of the circumstances of the criminal acts, such as the value of what was stolen or defrauded, or the dates of the different acts, could not be determined.²⁴ Hence, the doctrine includes from the Spanish jurisprudential work as necessary elements of the continued crime the requirement of a plurality of actions²⁵ characterized by unity of purpose,²⁶ the unit of legal injury or the injured legal asset,²⁷ the unit of active subject,²⁸ the unit of time²⁹ or unit of place,³⁰ all of which occurs in this case.

The Chilean Penal Code only regulates the royal contest,³¹ in article 74, and the ideal and medial competition, in article 75. The first states in its first paragraph that "All the penalties corresponding to the various infractions will be imposed on those guilty of two or more crimes." The second named article prescribes that "The provision of the previous article is not applicable in the event that a single act constitutes two or more crimes, or when one of them is the necessary means to commit the other. In these cases, only the greater penalty assigned to the most serious crime will be imposed." In this regulatory context and keeping in mind the provisions of article 351 of the CPP, we will proceed to study the continued crime in relation to the facts mentioned in the complaint.

Doctrinary aspects

The national doctrine,³² widely included in the jurisprudence of the Most Excellent Supreme Court of Justice, and widely cited in this article, has also been developed by authors such as Eduardo Novoa Monreal, Enrique Cury, Alfredo Etcheverry, José Luis Guzmán Dalbora, Sergio Politoff, Jean Pierre Matus, María Cecilia Ramírez, Francisco Maldonado, Héctor Hernández Basualto, Jaime Couso, among others, whom we quote in various passages in this article and in the bibliography.

The right to justice in criminal matters refers not only to lawbreakers, but to all those involved, whether victims or perpetrators. Some crimes committed by agents of the State, such as war crimes or crimes against humanity, are considered by international law, jurisprudence and doctrine as imprescriptible. Contrari sensu, many violations of law, which have affected fundamental values of society, such as life or liberty, but committed by individuals, their authors can benefit from the prescription of some national legislation, as long as they are not considered agents of the State. It is necessary to find a balance between the rights of the victims, social values or social ethics and the rights of the perpetrators when the intentional action continues over time.³³ This leads to reflecting on the retribution or

punishment for the criminal act in a manner proportionate to the case and its circumstances of all kinds, which allows it to be resolved in justice and not in impunity, which has led to the determination of the existence of institutes such as "continued crime."

Characteristics of the continued crime

The doctrine defines that the Continuing Crime is that act considered as a single crime,³⁴ punishable with a penalty greater than that of the common crime,³⁵ but constituted of a series of criminal actions, which are similar in the type of fact or the way of carrying out, and because each of them constitutes different crimes, the penalty that would have to be applied, if this institute is not resorted to, would be sum of all the crimes actually committed, so that, in the case of theft, for example, "when the thefts, although carried out at different times, have been carried out with a unitary purpose" we are faced with a continuous crime.³⁶

Legal homogeneity, unity of criminal purpose and plurality of actions are the three defining features with which scientific doctrine constructs the concept of continued crime and which has been collected by national jurisprudence,³⁷ giving rise to three doctrinal conceptions: subjective theory, underlining the unity of criminal design or result that the author wants; and mixed theories, which combine all the elements, paying attention fundamentally to the criminal dynamics to verify if there were various isolated actions in time or if there are sufficient elements and connection to speak of a common clamp that justifies their unitary treatment.

In this regard, the Supreme Court has ruled: "3.- That the figure of continued crime, although not enshrined in Chilean positive law, is accepted by both doctrine and jurisprudence (The Supreme Court accepts it for the first time). Once in 1966, according to Alfredo Echeverry: Criminal Law in Jurisprudence, Volume II, pages 78, 80, 82,84 and 85). Historically born from crimes against heritage values, the notion of continued crime has expanded its sphere of application, when, as Arroyos De Las Heras states, "the current trend is to provide continuing crime with an ever-increasing scope.", as well as in crimes against honor, statutory rape, dishonest abuse, theft of things with force, falsehoods, etc. "4.- That the figure of the continued crime can only be applied insofar as it benefits the criminal as it occurs in the species, due to the lack of legal norms that enshrine it, based on the legal unity of the criminal act as a result of a creation of law customary (Maurach (1962) page 429; Mezger (1985) page 339; Cury (1998) II page 266, all cited by Marco Antonio Mercado Gómez, Bankruptcy Problems and Continued Crime in Crimes that Protect Sexual Freedom, Edit. Lexis Nexis, 2003 page 35). "5th.- That the elements of the continued crime are the plurality of actions, the unity of the violated legal norm, the passage of a certain period of time between the execution of each action, added to the subjective element, the unity of intent or design criminal, what some call joint intent, or continuity between the various resolutions, these fully coincide with the conduct displayed by the accused Sandra Marcela Yañez Yañez, in relation to the crime of sexual abuse investigated in the proceedings.

Finally, in another ruling, the same Court stated the following:" Fifth: That the concept of continued crime constitutes in our legal system a creation of customary law that, for an important part of the

²⁴Supreme Court of Spain, 3-23-66, in relation to the crime of fraud "inexcusably requires the indeterminacy of the facts."

²⁵TS 1-28-08 -EDJ 2008/31057-, 1-3-14 -EDJ 2014/3181-, 6-20-30, 1-19-40, 10-11-47, 11-7-55.

²⁶TS 6-6-34, 6-4-36, 11-22-47.

²⁷TS 2-19-40, 11-22-47, 3-3-50.

²⁸The TS of 5-23-41 and 1-29-49 insist on the unity of the taxpayer in the fraud and that of 5-30-36 in relation to the crime of misappropriation.

²⁹However, it is admitted even when the acts have been perpetrated at various times in TS 28-10-11 -EDJ 2011/270501-, 9-4-31 and 24-2-47.

³⁰TS 27-9-1913 regarding sexual abuse deviates from this requirement of unity of place.

³¹Verdugo Marinkovic Mario. *Dictionary of Chilean Judicial Jurisprudence (2000-2014)*. Santiago, Thomson Reuters. 2015. p. 81.

³²Novoa Monreal, op.cit., p. 285-290.

³³Couso Salas Jaime. "The bankruptcy regime in Chilean law. Doctrinal and jurisprudential treatment." In Couso Salas Jaime, Hernández Basualto Héctor

(directors): *Annotated Penal Code: First Book (arts. 1 to 105) Doctrine and Jurisprudence*. Santiago: Editorial Legal Publishing. 2011.

³⁴Camargo Hernández Cesar. *The continued crime*. Barcelona, Bosch Casa Editorial. 1957.

³⁵Novoa Monreal, op.cit. 296.

³⁶Novoa Monreal, op.cit s., p. 294-296.

³⁷Novoa Monreal, op.cit, Verdugo Marinkovi, op. Cit. See also bibliography.

doctrine, involves the recognition of a natural unity of action. This disputed figure is a creation of the Italian practitioners (Baldo, Bartolo, Farinaccio) its origins lie in a purpose of benignity. The law in force at the time threatened the death penalty for anyone who committed three or more thefts. Even for a magistrate like Farinaccio, who was not known for his benevolence, this disposition had to lead to aberrant results. In order to avoid them, the pilots formulated the rule that there are not three thefts, but one, when the thefts, although carried out at different times, have been carried out with a unitary purpose. To date, our Code does not contemplate a rule related to the subject, despite which our jurisprudence gives the institution a relatively widespread application. In this way, we speak of a continuous crime in the hypothesis that there are several actions carried out at different times, each of which, individually considered, contains the requirements of a type of crime of the same species, however, which is assumed to treat them as a whole and punish them as a single punishable act, by virtue of the special relationship between them. The question then arises of elucidating what will be and what nature will be the link to which the efficiency of unifying the different actions is attributed. The response and opinions on this matter are divided, and the theories can be mentioned, among others: subjective or traditional, subjective of purpose, objective, Italian subjective conception and negative conception. However, all the contributions, which without a doubt offer us the aforementioned currents of thought to clarify the concept of continued crime, we can affirm that this figure appears, therefore, as a problem of typical injustice. And, thus we can say, that it consists of a plurality of actions, each of which satisfies all the characteristics of a legal type, but which must be evaluated jointly, because they constitute the violation, necessarily divided, of the same norm of duty. . The question of the nexus, which until now has usually been raised on the psychic level of the action or on the formal level of the type, is transferred to the material sphere of illegality. In turn, the positive criteria on which the continuation link has been intended to be erected are replaced by a negative starting point: the violation of the norm is only when, according to the author's representation, it was not possible to consummate it except in "fractional."

This ruling raises several theoretical aspects developed by the doctrine on continued crime,³⁸ such as unity of purpose, unity of action, unity of punishable act and type, which we can consider as requirements of this.³⁹ Although the continued crime appears in the doctrine consulted as a procedural issue that appears to try to prevent the prescription of the oldest acts by linking them with the most recent ones and also favor the offender with a lesser sentence than that which would correspond to him for the commission of the different criminal infractions, its definition in Chile is, as has been said, more jurisprudential than positive law, since in order to understand the crime committed as a result of a series of facts, actions or omissions, it is necessary to observe it as a whole. , from a unitary perspective, as the repeated jurisprudence of the Supreme Court of Justice has established in numerous rulings cited in this article, and precisely that should be the purpose of criminal prosecution.

Requirements for the continued crime in the case

In order to consider a continuing crime to exist, the following requirements must be met, which this informant believes can be seen in the reported facts:

- I. Plurality of differentiated facts not subject to separate prosecution by the Courts.

³⁸See also Supra note, especially the work of Novoa Monreal.

³⁹See in this regard Costiñeira Maria T. *The continued crime*. Bosch, Barcelona. 1977. p. 23, 29, 43, 84, 116, 166. Also Camargo Hernandez Cesar. *The continued crime*. Bosch, Barcelona. 1951. p. 87-96.

- II. Concurrence of a unitary fraud that reveals a unity of resolution and purpose that supports and unites the plurality of commission actions, so that these lose their substantiality to appear as a partial and fragmented execution in a single and unique programming of the actions themselves.
- III. Carrying out the various actions in close space-time coordinates, an indicator of their lack of autonomy.
- IV. Active subject unit. Obviously, no further explanation is required.
- V. Homogeneity in the "modus operandi" due to the identical or similar use of similar methods, instruments or performance techniques.

Scam as a continued crime

It is necessary to clarify how a scam can persist over time to be considered a continuing crime and not have prescribed.

1.- *Previous concepts*.- In Chile, the doctrine has developed various concepts of scam, thus, Professor Etcheberry points out that "scams would be those frauds in which the deception has consisted of a ruse or mise en scène, some of which have been expressly described and punished by law"; For his part, Yubero defines it as "deceptive behavior (or deception) that, determining an error in one or more people, induces them to carry out an act of disposition that translates into a lucrative consequence for the agent;"⁴⁰ while Bullemore and Mackinnon⁴¹ They define it as "that fraud in which the deception has consisted of a scheme expressly described and punishable by law"; and Labatut briefly conceptualizes it, pointing out that it is "the injury to another's assets through deception or artifice suitable for deception and profit."⁴²

Regarding the governing verb, Bullemore and Mackinnon⁴³ define "defraud" as synonymous with "damage property". The doctrine has abundantly developed this theory. Thus, for example, Juan Bustos,⁴⁴ the Chilean criminal lawyer, explains that the staging, although it is not a "theatrical montage", can be more than a simple lie or a mere evaluative error, but that the author must create a ruse, machination or simulation; and in Argentina, Romero explains that "only frauds confirmed by external manifestations, by machinations, schemes, stratagems, etc. are sanctioned, that is, by a true staging that makes the fallacious more credible." Then it must be a plot whose objective is to appropriate what belongs to others.

When analyzing the continued crime, it was explained that it sought to punish the perpetrator of repeated crimes in a more lenient manner, although certain requirements had to be met for it to be applied. Regarding massive scams, Mayer and Fernandes⁴⁵ consider that "if there are several deceptions committed in the context of a collective fraud, a case of continued crime can be seen - which, as we know, does not have legal recognition, but it does have doctrinal and jurisprudential recognition - and consider the reiteration of typical deceptions constituting fraud as a single crime."

⁴⁰Yubero Canepa Julio A. *Deception in the Crime of Fraud*. Editorial Jurídica Cruz del Sur. Santiago. 2010. p. 7-10.

⁴¹Bullemore G Vivian, Mackinnon John RW. *Criminal law course*. Libromar publishing, and R. Edition: 4th. Increased and Updated Edition Format: 4 Volumes. 2005. p. 1583.

⁴²Labatut. *Criminal Law*. Volume II 6th edition, Editorial Jurídica de Chile. 1977.

⁴³Idem, note 50 above.

⁴⁴Bustos Juan cited in Mayer Lux Laura, Godinho Inês Fernandes. Fraud as an economic crime. *Law Review (Valparaíso)*. 2013;(41):183-209.

⁴⁵Mayer Lux Laura, Godinho Inês Fernandes. Fraud as an economic crime. *Law Magazine (Valparaíso)*. Op.cited. 2013.

In this regard, the jurisprudence of first-class judges has repeatedly ruled in favor of the application of article 351 of the Criminal Procedure Code, but looking at the situation as a real competition and not as a continuing crime. In this sense, the Oral Criminal Trial Court (TJOP) of Antofagasta, in the ruling No. 138-2011, has estimated that the continued crime is inadmissible, because “the continuity of a crime is determined by the action permanent, without interruption or solution of continuity, of the punishable act, an element that, as is clearly noted, does not occur in the present case, in which we are in the presence of various property dispositions based on the error that generated the deception, after a first and others later, in each case, since it is not plausibly credible to maintain that the defendants have planned in a precise and stipulated manner to carry out certain behaviors during a certain period of time through which they seized different sums of money, since there is no the criterion of unity required by the doctrine, not being possible to consider all of these behaviors as a single, major crime as the defense has claimed.”

In the same sense, the 2nd TJOP of Santiago, in the ruling No. 167-2010, also denied the defense’s request to consider repeated scams as a continuing crime, considering that this “supposes a unitary or joint fraud, which must have covered in advance the total result that will be obtained through the plurality of actions. In this way, the TJOP of Antofagasta. RUCN° 0910008393-8, Judgment of August 3, 2011, considering fifteenth, the “subject must propose from the beginning the total result that he will achieve through various punishable acts that will be provided to him fractionally.”

However, jurisprudence has also recognized the existence of the continuing crime, for example, in the ruling handed down by the TJOP of Rancagua on August 10, 2007, Role No. 151-2007, in which it was considered that for the configuration of the continued crime, a unity of legal action is required that allows the different actions to be linked, adding that “such a relationship occurred, in this case, when a criminal unit was established, since a set of successive illicit behaviors carried out by the accused were demonstrated, in different times but within the same period, against the same taxpayer and who injured the same legal right and infringed the same criminal offense, with the same *modus operandi*.”

Also in the ruling of the TJOP of La Serena Rol No. 41-2006, regarding the calculation of the penalty, the judges have estimated that the extent of the harm caused must be taken into account, following a criterion similar to that established in article 74.2 of the Code Spanish criminal. Thus, the 4th TJOP of Santiago considered it in the ruling No. 25-2008 issued on May 15, 2008, considering that “the application of article 351 of the Criminal Procedure Code is more favorable. The first paragraph of the aforementioned provision will be applied, as the court considers that these are infractions of the same type that can be considered as a single crime, by adding each of the amounts defrauded.

In short, although there are two interpretations regarding fraud as a continuing crime or not, in this article we discuss the hypothesis that does consider it, as we will see below, as a continuing crime, which is the one most accepted by the Excm. Supreme Court,⁴⁶ which concludes the existence of the continued crime, which is precisely what would occur in the case against possible actions such as pyramid schemes or fraud in public limited companies.

For the continued crime, it is necessary to determine the material commission of several punishable acts - due to their nature - as a single crime. If it is considered possible, it is referred to as a “continued

crime.” Jurisprudence has accepted it and for its verification the following requirements are required:⁴⁷

- I. Procedures to defraud used by the authors themselves.
- II. Violation of the same legal right; and,
- III. Be inspired by the same criminal purpose (fulfilling the so-called “triple identity”, that is, [a] active subject, [b] violated norm, [c] criminal intention).

Well, if eventually in massive crimes, such as pyramid schemes, it is possible to consider the victim as one, if clearly from the victims’ story and the evidence provided they would demonstrate without a doubt that in the fraud and misappropriation, promoted by the authors, completely meet the stated requirements.

Requirements in the continued crime

Can, then, a scam be classified as a continuing crime?

Yes, when a scam is reported, consisting of a plurality of actions, a typical characteristic of the continued crime. In effect, following a consolidated jurisprudential doctrine of the Courts in Chile and also followed by the Spanish Courts, the following requirements are understood as the backbone of the continued crime:⁴⁸

- I. Plurality of facts that can be distinguished from each other that are prosecuted in the same process.
- II. A single fraud that implies a single intention and therefore unity of resolution and purpose in the double modality of a plot prepared in advance that is executed fractionally - joint fraud -, or that arises whenever the proper opportunity arises to carry it out carried out -continued fraud-, both legally provided for in the expressions “preconceived plan or taking advantage of the same opportunity.”
- III. Unity of the violated criminal precept, or at least that they are similar precepts, which externalizes a unity or similarity of the legal good attacked.
- IV. Homogeneity in the “*modus operandi*”.
- V. Identity of the offending subject. Therefore, as the first requirement of the continuing crime, the existence of a plurality of actions or omissions that, individually contemplated, can constitute independent infractions, crimes or misdemeanors, is essential.⁴⁹ The complaint must detail the plurality of actions that constitute the crime of fraud as a continuing crime.
- VI. Identity between the time elapsed and the fact.

A doctrinal sector cited in Spanish jurisprudence resorts to the natural conception of life to affirm that we will be faced with a single action when a series of events of unitary meaning occur according to the social point of view, it being transcendent for these purposes that they are linked by a single purpose and present a space-time connection, whereas several actions are appreciated when the purpose is manifested in separate temporal moments.⁵⁰ It is understood that there is a criminal unit of almost successive nature that takes

⁴⁷Balmaceda Hoyos Gustavo. The crime of fraud in Chilean jurisprudence. *Law Magazine*. 2011;24(1):64.

⁴⁸TS 23-4-13, number 407/2013, Pte. Julián Sánchez Melgar -EDJ 2013/89561.

⁴⁹In that same sense, the jurisprudence of the Excm. Supreme Court of Chile, cited among others in Verdugo Marinkovic, Mario, *op.cit.* p. 166.

⁵⁰TS 23-5-03, number 760/2003, Pte. Miguel Colmenero Menéndez de Lúcar -EDJ 2003/30214-; TS 23-4-13 number 407/2013, Pte. Julián Sánchez Melgar -EDJ 2013/89561. 2003.

⁴⁶See errors in the bibliography of this article.

shape in a single injury to the protected legal good, depending on the purpose pursued by the author, so that “in the same way that we cannot decompose several insulting phrases uttered at moments close or immediate in several crimes against honor, nor can the various successive blows inflicted in an attack be divided into several crimes of injury, thus we must combine the various sexual assaults produced in an uninterrupted period of time into a single responsibility.”⁵¹

Hence it is necessary to analyze whether the criminal act is a unit of fact or natural unit of action.

In effect, this current evolved into what the doctrine calls “unity of fact” or “natural unity of action”, which occurs when in a short period of time, successively, the same typical action guided by a purpose is reiterated only.⁵² The repetition of different body movements, as long as their repetition is carried out in a close temporal manner, are considered as a natural unit, making no sense to break them down into different criminal acts.⁵³ They are “separable actions, but of the same type, repeated in a short space of time so that the criminal injury only experiences a quantitative progression within the same unitary injustice and responds to the same motivation.”⁵⁴ Therefore, to affirm the existence of “unity of action”, it is necessary that all acts be linked spatially and temporally - objective element -, that there is a single act of will aimed at carrying out the entire criminal dynamic - subjective element, and, from a normative perspective, that identification occurs in the criminal typology.⁵⁵

In this way, the concept of natural unity of action has been applied on numerous occasions in crimes of rape, rejecting criminal continuity, in cases of iteration.⁵⁶ Immediate of carnal access between the same people, under the same situation of intimidation or violence, carried out within the same situation and consequence of the same fraud.⁵⁷ Similarly, in crimes of falsification, continuity is excluded when the facts are carried out repeatedly and practically in the same way, in a unit of act and with the same false purpose, so that the performance of several false manipulations at a time or determined uninterrupted criminal phase would constitute a single crime,⁵⁸ maintaining continuity if they have been carried out on different dates and places.

⁵¹TS 4-12-00, number 1855/2000, Pte. José Antonio Martín Pallín -EDJ 2000/44230. 2000.

⁵²Idem, supra note.

⁵³17.- Among many others, TS 15-2-97, number 175/1997, Pte. Enrique Bacigalupo -EDJ 1997/653-; TS 19-6-99, number 991/1999, Pte. José Antonio Marañón -EDJ 1999/18440-; TS 29-7-02, number 867/2002, Pte. José Antonio Martín Pallín -EDJ 2002/28164-; TS 7-4-06, number 413/2006, Pte. Miguel Colmenero -EDJ 2006/53063.

⁵⁴TS 11-20-95, number 1150/1995, Pte. Joaquín Delgado -EDJ 1995/6173.

⁵⁵TS 7-10-14, number 627/2014, Pte. Juan Ramón Berdugo y Gómez de la Torre -EDJ 2014/172612.

⁵⁶Iteration is a word that has its origin in the Latin term *iteratio*. It is a word that describes the act and consequence of iterating, a verb that is used as a synonym for reiterate or repeat (understood as developing an action again or saying again what has already been said).

⁵⁷TS 28-9-96, number 659/1996, Pte. José Augusto de Vega Ruiz -EDJ 1996/6483-; TS 21-5-01, number 859/2001, Pte. Roberto García-Calvo -EDJ 2001/13876-; TS 23-6-05, number 820/2005. Pte. Juan Ramón Berdugo -EDJ 2005/113570. 1996.

⁵⁸TS 7-5-99, number 705/1999, Pte. Joaquín Delgado -EDJ 1999/8166-, in relation to a police officer who on the same occasion put seven different airport entry stamps on seven passports; TS 7-4-06, number 413/2006, Pte. Miguel Colmenero -EDJ 2006/53063-, in relation to two bills of exchange without stating that their falsification took place on different dates; TS 4-6-12, number 486/2012, Pte. Alberto G. Jorge Barreiro -EDJ 2012/124692-, in relation to four official documents that were prepared to be presented to a Provincial Traffic Headquarters to avoid the execution of a fine, it is reasonable to assume that they were made at a single moment.

Typical unit of the action or legal unit

Here we will try to clarify some doctrinal interpretative difficulties regarding the concept of unity. For another doctrinal sector, it is necessary to go to the characteristics of the criminal type at stake, thus following a legal criterion to appreciate the unity as supported by jurisprudence. This normative concept of the typical action substantially addresses the infringed precept and the protected legal good, so that the action is consummated when the agent acts, and with such action, the result provided for by the norm is caused, whatever the natural facts may be, single or plural, that occur in the real world.⁵⁹

Both doctrines coexist in comparative jurisprudence, and although sometimes they can be considered complementary, in such a way that starting from the natural concept of action, normative complements are used, in others, when it comes to determining the legal scope of a unit or plurality of actions, the result is completely different.⁶⁰ Therefore, to justify the normative doctrine, it is said that a single natural action, such as a shot, carried out by someone who knows the deadly power of the weapon he uses and that is capable of passing through two people at the same time as they meet one another together with the other, and which produces the death of both, is a single natural action, but, however, with application of the normative concept of action, it becomes two typical actions, two homicides or murders, in real competition.⁶¹ On the contrary, several false documents prepared in the same space-time context would force the facts to be subsumed in a continuous crime in accordance with the normative criterion, while for the natural doctrine of action, as we have seen, it would be a single crime.⁶²

If we remember that the continuous crime, understands that “...it is possible to appreciate the commission of a single crime (a single punishable typical act) in a reiteration of independent factual facts or events, even if in each of them, separately, could be subject to a typical individual classification and therefore, autonomously penalized under the rule of real competition of crimes.”, in that case, the perception that the fact of fraud and misappropriation, even when they are crimes in themselves Likewise, it can be determined that there was an objective of the accused to achieve the realization of their criminal purposes.

The natural reality, where a mere plurality of actions is not perceived, but a single great action, which is determined by the unity of fraud. Respect for its unity, with the teleological orientation that distinguishes it - prevents the imposition of various penalties on the guilty -, as well as the safeguarding of the *res judicata* and the *ne bis in idem* material, prevent the autonomous prosecution of such partial situations, “even when such acts may be subject to a different assessment from a legal point of view.”⁶³ This is a generalized opinion in the doctrine and jurisprudence in comparative law, as happens in Spain⁶⁴ and that, as can be seen from the cited ruling of Minister Ana Gloria Chevesich, indicated and from the widely shared doctrine of the jurists Novoa Monreal and Cury Urzúa, cited. Now regarding

⁵⁹TS 9-5-06, number 566/2006 -EDJ 2006/83847- and TS 26-4-13, number 398/2013, Pte. Julián Sánchez Melgar -EDJ 2013/78337-; TS 16-4-09, number 365/2009, Pte. José Ramón Soriano -EDJ 2009/56270-; TS 9-7-14, number 560/2014, Pte. Juan Ramón Berdugo y Gómez de la Torre -EDJ 2014/122360.

⁶⁰http://www.elderecho.com/tribuna/penal/delito_continuado_11_765430003.html

⁶¹TS 30-9-14, number 604/2014,

⁶²Idem note 36 above.

⁶³Maurach Gössel, Zipf H. *Criminal law*. General part. 2 vols. Translated by Enrique Aimone Gibson and Jorge Bofill Genzsch. Astrea, Buenos Aires, t. II. 1995. p. 547.

⁶⁴see Antón Oneca, op. cit., pp. 214-215. DPP-Procedural Doctrine.indd 156 11-30-2012 16:24:42).

the crime committed over time, this constitutes a unit in which the same actor and the same victim are present in the commission of the same crime of fraud constituted by various criminal actions, as in the species, whose initial purpose was to defraud, the appropriation and concealment of assets, and the malicious use of commercial legislation and corporations, without prejudice to estimating that there was also tax fraud of enormous proportions, of all of which there is, according to the complaint, antecedents in records and that will be proven at trial. Well, precisely the same actor and the same victim are present in the commission of the crimes reported in the complaint.

One factor to consider is the compatibility of the figure of continued crime with the principle of legality. To do so, foreign jurisprudence will be taken into account, particularly Spanish jurisprudence, which, before its incorporation into positive law, resolved the case; In fact, the Constitutional Court of Spain had the opportunity to rule on the compatibility of the figure of continued crime with the principle of legality, a principle that had been elevated to the category of fundamental right in the EC art.25.1, stating that “The principle of legality entails the need for a prior law that typifies certain behaviors and establishes penalties with which they must be sanctioned” but that “Neither the criminal nor the penal guarantee can be understood (...) in a mechanical way that nullifies the freedom of the Judge to decide when, for the purposes of determining the applicable penalty, different acts, criminally classified, must be considered as members of a single act, subsumable within the same type in which each of those could be included, but from which results a damage whose magnitude entitles him to a penalty of the same kind but a different extension (lesser or greater) than that which would correspond to the author if the different acts that the Judge has integrated, for criminal purposes, into a single one were punished separately. » .

The reserve of law or legal domain is the set of matters that the Constitution exclusively delivers to the scope of powers of the legislator, excluding from its scope the intervention of other powers of the state.⁶⁵

A continued crime of collective fraud

The crime of fraud, in general terms, maintains its classic line through contemporary doctrine,⁶⁶ represented by works such as those of professors Alfredo Etcheberry and Mario Garrido Montt. In this sense, it continues to be conceptualized as a sufficient deception that produces an error in a victim, causing them to make a harmful asset disposition. As Professor Etcheberry points out, when it comes to failing the behaviors presented to his knowledge, and in this case it is not a mere lie, but a series of acts designed to deceive the workers by telling them that they would be owners of the company.

⁶⁵On the Principle of legality see: <https://www.derechoconstitucional.es/2012/02/la-reserva-de-ley.html>

https://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-00122003000100025

http://derecho.udp.cl/wp-content/uploads/2016/08/22_Cazor_Guiloff.pdf

The main ideas of this section can also be found in: Cazor, Kamel, The jurisprudence of the Constitutional Court and the search for guiding criteria in the configuration of regulatory powers in Chile, in *Collective Book of Constitutional Studies* (Librotecnia), 2010, pp. 289-301. See also:

http://derecho.udp.cl/wp-content/uploads/2016/08/22_Cazor_Guiloff.pdf; Zúñiga, Francisco, Actions of inapplicability and unconstitutionality. *Doctrine and jurisprudence of the Constitutional Court on procedural issues*. AbeledoPerrot-LegalPublishing. 2010. Aldunate, Eduardo, *Fundamental Rights*, (Legal Publishing) 2008, p. 185., Zapata, Patricio, “Constitutional Justice”, *Editorial Jurídica de Chile*. 2008,

⁶⁶Verdugo Marinkovic Mario. *Dictionary of Chilean Judicial Jurisprudence*, (2000-2014). Santiago, Thomson Reuters. 2015. p. 186–188.

Linking directly to the above, the victim has resurfaced in these respects, just as it has done in criminal procedural studies. Hand in hand with victimology, a science that emerged in the 1940s, combined with criminological studies, the victim takes an important place in the imputation of typical behaviors. The birth of the theory of victim dogmatics, which places in the conduct of the passive subject a decisive element for the eventual reproach, has highlighted an important precedent for the study of the crime of fraud, since the new commercial and civil relations are given in a clear communicative context, so the victims would, in some cases, have some responsibility for the crime they have suffered.

This doctrinal variant has been the subject of numerous criticisms, mainly for transferring responsibility for the crime to the person who suffered it. However, its contribution cannot be denied, mainly in the criminal type that we study, hand in hand with the introduction of certain duties that all citizens should protect, such as truthfulness in traffic, issues that must be analyzed when judging the behavior presented. A ruling from 2011, issued by the Illustrious Court of Appeals of Punta Arenas, includes this variant. Regarding the elements of property disposition and damage, a sector of the doctrine, represented by the renowned jurist Mr. Héctor Hernández Basualto, prefers the union of both elements, since it understands the consummation of the crime at the moment in which the dispositive act is carried out.

By way of example, this would have consequences in the well-known figure of procedural fraud, in which the judge is deceived so that he rules in a declarative sense in favor of the active subject, making a credit due from the victim that he has not consented to, understanding the consummatory moment with the execution of the sentence. This has not been followed by the studied jurisprudence, which sees the moment of harm as an independent act, actually caused, following the classic doctrine already defined by Professor Gustavo Labatut, the moment of consummation of the crime. Finally, the study of damage and from there of heritage, as a protected legal asset, and the various theories that are presented in its regard circumscribes the topic under study. Starting from the legal conception, as a manifestation of the subjective rights that were studied in the 19th century, passing through the economic theories where the emphasis is already placed on the victim, to the latest ones, of an economic-legal type, or mixed, which They put a stop to the excesses of the previous ones, the theme continues to be intertwined.⁶⁷

Jurisprudence shows a preference for the latter, as does more contemporary doctrine. However, these have been regulatory shortcuts that have been perfecting the study, providing it with new elements, capable of satisfying the demands that social and economic relations present in the contemporary world and that require a solution from Criminal Law and its figure of fraud by deception. The element of damage in property crimes.⁶⁸

Chilean jurisprudence on fraud has been consistent with our normative identity, not only reflected in our constitution on domain protections, but also in criminal provisions; however, we could say that it has been “too much.”⁶⁹ Within the concept of deception and for the determination of its sufficiency, we agree with the majority

⁶⁷Ars boni et aequi (Year 10, N° 2). p. 123–161.

⁶⁸Jurisprudence cited by Luzón Cánovas María, *supra* note, TS 11-10-99, number 1404/1999, Pte. Joaquín Delgado García -EDJ 1999/28326- and TS 1-10-02, number 1615/2002, Pte. Diego Antonio Ramos Gancedo -EDJ 2002/42724-, apply the rule of the CP art.74.2 -EDL 1995/16398- to two continuous crimes of embezzlement.

⁶⁹Verdugo Marinkovic Mario. *Dictionary of Chilean Judicial Jurisprudence*, (2000-2014). Santiago, Thomson Reuters. 2015. p. 166–167.

jurisprudence that the basic figure of fraud should be found in art. 468 CP. To consider fraud as a continuing crime, it is necessary to specify when the victim realizes that she has been deceived, the moment that will determine the temporary start of the crime. In this case the moments are different because some did not know until now that they should receive 3.8 shares for each share and others found out at the moment of leaving the company, while others knew that they were victims of the crime when claiming to the company said shares, which refuses to deliver them. However, what the victims have in common is that they did not act individually, but as members of a union, so that the materialization of the crime occurs when the last worker has seen or not satisfied his rights.

In this regard, Balmaceda tells us the following: “The key here lies in being able to determine the material commission of several punishable acts - due to their nature - as a single crime. If it is considered possible, we speak of a “continued crime.”⁷⁰ In the opposite case, we would find ourselves face to face with several crimes - in a material and legal sense - that is, facing “repeated crimes.”⁷¹ The normative border between one figure and another is not easy to determine.”⁷²

As has been pointed out, the continued crime has no positive basis but when accepting it, jurisprudence has demanded the following requirements:

- I. “Procedures to defraud used by the authors themselves;
- II. Violation of the same legal right and,
- III. Be inspired by the same criminal purpose (fulfilling the so-called “triple identity”, that is, [a] active subject, [b] violated norm, [c] criminal intention).”

Meanwhile, jurisprudence has defined fraud as follows: (a) fraud is fraud by deception (GJ No. 159 CS 1993 p. 115); (b) “...without a doubt that the accused attempted to deceive a third party, that is, he carried out a suitable simulant activity, a lie inserted in an external deceptive display, a ruse, machination or *mise en scène*, tending to produce an error or a false representation of reality in the victim, by virtue of which he disposes of his assets (which supposes an act of will by which the affected person causes a decrease in his assets or the assets of a third party) with which which was intended to cause harm or damage or impairment to the assets of the affected person” (STOP of Santiago [2°] 05/16/2008, RIT 48-08. Similar, STOP of Punta Arenas 02/26/2007, RIT 1720- 06); (c) “...fraud, is the one who causes another to adopt, for profit, a property provision that is detrimental to himself or to third parties through a display of deceptive means tending to cause the victim to make an error about the appropriateness of your decision” (STOP of Punta Arenas 04/23/2008, RIT 14-08); (d) “...is a damage caused by deception to the patrimony, with the intention of enrichment [...] the illegitimate appropriation of other people’s patrimonial values, gratuitously and by means of deception [...] is the harmful asset disposition made due to an error, which has been achieved through schemes aimed at obtaining an undue benefit [...] is the deceptive conduct that a certain error in one or more people induces them to carry out an act of disposition that translates in a lucrative consequence for the agent” (STOP de Santiago [3rd] 06/18/2007, RIT 112-07).

⁷⁰Balmaceda Hoyos Gustavo. The crime of fraud in Chilean jurisprudence. *Law Review (Valdivia)*. 2011;24(1).

⁷¹Balmaceda Hoyos Gustavo. The crime of fraud in Chilean jurisprudence. *Law Review (Valdivia)*. 2011;24(1):108–109.

⁷²Balmaceda Hoyos Gustavo. The crime of fraud in Chilean jurisprudence. *Law Review (Valdivia)*. 2011;24(1):59–85.

Balmaceda concludes that jurisprudence has also tried to define deception, stating that it consists of (a) “...the lack of truth in what is said, done, believed, thought or thought, leading one to believe what is not true,” using words, reasoning or apparent or feigned works. It is the use of deception that is called *mise en scène*. This deception must be suitable, effective, sufficient, sufficient or adequate for the error to occur in the victim, taking into account their individual circumstances” (STOP of Punta Arenas 04/23/2008, RIT 14-08); (b) In another interesting ruling it has been stated that “...the typical defrauding or deceptive action is nothing other than acts, facts, machinations, tricks, devices, which unequivocally reflect the agent’s will to directly and necessarily induce error to the victim, who as a result, makes a disposition, which causes financial damage” (STOP de Talca 03/10/2009, RIT 105-08); (c) “Deception [...] is, in short, failing to tell the truth when expressing something or executing it, to present reality with an aspect different from that which it really has or possesses. Deception may consist, then, in a machination aimed at pretending the existence of a thing that is not real or making it appear with characteristics or qualities that it does not have (simulation), or hiding those that it actually possesses (dissimulation)” (STOP de Santiago [3°] 02/22/2008, RIT 02-08).

Continued crime of fraudulent administration as part of the scam

When the criminal act is carried out in the context of a company, due to decisions made by it, behind the backs of its shareholders, they actually constitute fraudulent or unfair administration.⁷³ Let’s review comparative jurisprudence. The continued crime has also been the work of jurisprudence in Spain in coincidence with Chilean doctrine. The Penal Code of Spain states in article 451: “In cases of repeated thefts from the same person, or different people in a house, commercial establishment, shopping center, fairground or place, the court will classify the illegal act and make the regulation of the penalty based on the total amount of the stolen objects, and will impose it on the offender at its highest level. This rule is without prejudice to the provisions of article 447.”

There is agreement in Chilean doctrine that this figure regulates a repetition of crimes and not a continued crime, stating that “it is not a continued crime treated with severity, but rather a material competition, treated with benignity, probably because the legislator considers the “close connection between the actions, which makes them resemble a continuing crime.” The Spanish criminal procedure code contemplates the possibility of applying a single penalty in the event of repetition of crimes of the same type, but with the fundamental requirement that at least two crimes independent of each other be proven.

Time as the key to crime

The preceding analysis allows us to conclude that fraud can be constituted as a single crime, as does the natural doctrine of action.⁷⁴ However, theoretically the scam could have the character of a continuing crime precisely because it materialized over time, keeping in mind that its objective is to keep the assets of a group of victims by those accused.¹⁻³²

Conclusion

The continued crime constitutes an interesting legal fiction, (which like all fiction helps to understand and materialize doctrinal ideas)

⁷³Ynciso Estrada Catherine. *Problems of application of the crime of misappropriation in Chilean Law*. Cases of Unfair Administration, Santiago. UAH. May 2012.

⁷⁴Idem note 36 above.

which is not exempt from struggle by both national and comparative legislation, and to which we must point out, foreign legislation. They are advanced in giving explicit recognition to this figure, a situation that does not occur in Chile. Few matters in criminal law are surrounded by an interesting and rich discussion such as continuing crime, which to this day does not find a common criterion for its determination, which leaves the legislator and courts in constant expectation regarding its constant doctrinal and jurisprudential evolution, a situation that this article attempts to collect briefly but concisely in order to give a general overview aided by bibliography of prominent authors in criminal law. It is interesting to know the diversity of criteria used by doctrine and our courts when examining the origin of this figure when determining a penalty for a crime with plurality of conduct, a situation of great difficulty if we propose that precisely the continued crime comes to respond in part to the lack of connection that comes with acting in repeated crimes of the same nature, but carried out over a period of time that is not always easy to prove and that calls both those involved in the criminal process and the legislator to nourish themselves of the different assessments to determine a crime of these characteristics, which obviously does not favor legal certainty. Finally, although the continued crime favors the criminal offender by reducing the eventual sentence, it is also a way to overcome the absurdity of criminal prescription, an issue that is debatable since the latter allows impunity and therefore punishes the victim of the crime.

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Conflicts of interest

The author declares there is no conflict of interest.

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