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The Crime of "Prohibited Financing of Political Organizations"*

El delito de financiamiento prohibido de organizaciones políticas

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Abstract: This paper is an initial examination of the criminal offenses in Peru related to the corrupt financing of political parties, focusing on an analysis of the "simple" offense of "prohibited financing of political organizations" (Criminal Code of Peru, Art. 359-A), which was created under Law No. 30997 of August 5, 2019, and which punishes any individual who solicits, accepts, supplies or receives financial resources from prohibited sources to benefit a political organization. These regulations are not unique in comparative law; I begin the paper with a review of anti-corruption policies in Europe and Latin America in order to develop an overview of the legal aspects of the fight against corruption related to political parties' economic and financial operations. I follow up this review with a critical analysis of how the issue of political party financing is regulated in Peru's Constitution and in Law No. 28094 of November 1, 2003, the Law on Political Organizations. Based on the conceptual analysis of the regulations carried out in the preliminary sections I then seek to develop a more thorough understanding of the objective and subjective elements of the crime established in Article 359-A of the Criminal Code. The final section contains the main conclusions of the paper.

Keywords: political organizations, political corruption, prohibited financing of political parties, constitution

Resumen: Este artículo es una primera aproximación al estudio de las figuras delictivas relacionadas con la financiación corrupta de los partidos políticos en el Perú. A tal efecto, el texto se centra en el análisis de la modalidad básica del delito de financiamiento prohibido de organizaciones políticas (CP, art. 359-A), que fue creado en virtud de la Ley N° 30997, de 5 de agosto de 2019, y que castiga, en resumen, a quien solicita, acepta, entrega o recibe recursos económicos procedentes de fuentes prohibidas para beneficiar a una organización política. La incriminación de esta conducta no es un caso aislado en el derecho comparado, por lo que el trabajo comienza con una revisión de la política internacional anticorrupción para determinar el estado de la cuestión en la lucha contra el fenómeno de la corrupción en el funcionamiento económico y financiero de los partidos políticos. A continuación, se formulan algunas consideraciones críticas sobre el tratamiento que dispensan tanto

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la Constitución como la Ley N° 28094, Ley de Organizaciones Políticas, de 1 de noviembre de 2003, al problema del sostenimiento económico de los partidos políticos. Los temas anteriores proporcionan las bases conceptuales y normativas que permiten una mejor comprensión de los elementos del tipo objeto y del tipo subjetivo del delito tipificado en el artículo 359-A del Código Penal. Esta aportación termina con la exposición de las principales conclusiones a las que se ha ido arribando.

Palabras clave: Organizaciones políticas, corrupción política, financiación prohibida de partidos políticos, constitución

I. INTRODUCTION

On August 5, 2019, Law No. 30997 was published in *El Peruano*, Peru's government gazette. The law amended a new chapter—"Crimes Against Democratic Participation"—to Title XVII—"Crimes Against the Will of the People"—of Book II of the Criminal Code. The chapter established two new criminal offenses with associated regulations: "Prohibited Financing of Political Organizations" (Art. 359-A) and "Falsification of Information Related to Contributions, Income and Expenditure" by said organizations (Art. 359-B). The amendment included a provision detailing precisely which sources of financing were now "prohibited" (Art. 359-C).

In creating these offenses, the public authorities ostensibly broadened the focus of criminal policy in the fight against corruption, which was traditionally concerned with the categories of "public corruption" and "corruption in the private sector." Indeed, from a conceptual point of view, this was the first time a legal reform was specifically aimed at combatting "political corruption;" many experts in the field consider the illegal financing of political entities to be the quintessential example of this category of corruption (Malem, 2000, p. 31; Martínez, 2006, p. 207)[1].

1 See Villoria (2006, pp. 106-107) for further detail.

Law No. 30997 represented the first incursion of criminal law into an area it had previously neglected and which is key to any democratic political system: financial support for political parties. However, despite the specific criminal policy motivations behind the legislation, evaluating how effective these relatively recent regulations have been with regard to preventing the offenses they created is not a simple task, especially considering that, at the time of writing, no charges have yet been brought under the law in question.

However, this fact should not be an obstacle to an evaluation of the legislative rationality of the new regulations; as Queralt (2012) points out, the adequacy of an anti-corruption criminal policy depends not only on the effectiveness of the underlying procedural system and on enforcement of the penalties, but also on "the precise definition of criminal offenses and the establishment of appropriate penalties" (p. 20). In this paper I will analyze the latter two variables. However, due to space considerations, I will focus on the "simple" offense of "prohibited financing of political organizations."

Criminalization of these conducts is not unique to Peru, although a far greater proportion of the regulations around the world focus on corruption in the public and private spheres. This disparity can be explained by the fact that in general international legal instruments impose obligations related to criminalization of the latter two categories of corruption, while largely neglecting the financial affairs of political parties.

This situation has been remedied to a certain degree by regulations issued by Council of Europe (CoE) bodies—notably the Parliamentary Assembly, the Committee of Ministers and the European Commission for Democracy through Law (the Venice Commission)—which have developed a set of standards to guide states in the fight against corruption in political financing. These are the only EU-wide standards currently in place. For example, within the framework of the European Union's anti-corruption policy, the European Parliament and the CoE have approved rules to ensure transparency and oversight of the financing received by "political parties at the European level." However, as Núñez (2017) points out, no EU framework decision or directive makes any mention of Member States regulating the issue through legislation, making it seem that cases of illegal financing at the national level are "irrelevant or insignificant, or on the periphery of political corruption" (p. 736), which is obviously not the case. In Latin America, the Inter-American Democratic Charter (the IDC) states that the "strengthening of political parties is a priority for democracy," adding that special attention needs to be paid to "the problems associated with the high cost of election campaigns and the establishment of a balanced and transparent system for their financing of their activities" (Art. 5). However, this declaration

has not been built upon through further instruments and, moreover, no mechanisms exist through which to force IDC signatory states to follow through on these objectives, since the Charter does not include clauses which ensure effective compliance (Soria, 2015, p. 65).

In the following sections I will expand on this brief overview, first by reviewing the guidelines approved by the CoE regarding regulation of political party finances. I will specifically discuss the anti-corruption strategy developed by the CoE, which consists, broadly speaking, of rigorous oversight of the sources and amounts of contributions and of the accounts of political parties in order to ensure their democratic legitimacy. Secondly, I will present an analysis of comparative law in the area, including discussion of a number of laws in different countries which reflect their respective criminal policies and highlight their decisions to make illegal financing a standalone criminal offense. I will present my analyses in chronological order, beginning with Italy, the first country to criminalize this particular offense, followed by a discussion of the laws in Spain and then Chile. Finally, I will move on to the focal point of my study, briefly examining the evolution of the laws related to political financing in Peru before describing the conduct involved in the "simple" offense detailed in Article 359-A of the Criminal Code.

II. A BRIEF OVERVIEW OF THE COUNCIL OF EUROPE'S ANTI-CORRUPTION POLICY

As mentioned above, the anti-corruption treaties contain almost no guidelines related to combatting the illicit financing of political parties. A number of legal scholars have pointed out that the United Nations Convention against Corruption is the only instrument which touches on this issue, and even that merely provides that each State Party "shall consider taking appropriate legislative and administrative measures" to enhance transparency with regard to the financial affairs of political parties (Art. 7.3).

The CoE, in contrast, has issued a number of anti-corruption directives, which cover three areas: legal regulation of sources of financing, transparency and oversight measures related to political parties' financial activities and a system of penalties for illegal financing of political parties. These regulations began with Committee of Ministers Resolution (97)24 of November 6, 1997, which urged member states to incorporate the twenty guiding principles for the fight against corruption into their legislation; Principle 15 specifically called on elected representatives to "promote rules for the financing of political parties and election campaigns which deter corruption."

Another early step in this direction was taken by the Venice Commission (2001), which drew up guidelines related to the financing of political parties that resulted in the Parliamentary Assembly issuing Recommendation 1516(2001), on "the financing of political parties', on May 22, 2001. The preamble to the recommendation stated that the number of financing scandals linked to political parties demonstrated that the issue needed be addressed as a matter of urgency in order to avoid a loss of confidence in democratic systems. To this end, the Assembly recommended that the financing of political organizations should be governed by the following principles: a reasonable balance between public and private financing; fair criteria for the distribution of state contributions to parties; strict rules concerning private donations and election campaign expenses; complete transparency of accounts, and, finally, meaningful sanctions for those who violate the rules.

These principles were later included as general rules in Committee of Ministers Recommendation (2003)4 which outlined "common rules against corruption in the financing of political parties and election campaigns." This Recommendation constitutes the most complete version of the CoE's criminal policy guidelines; although member states are not obligated to follow them, doing so is considered an expression of a political commitment to the fight against "political corruption." For this reason, the Group of States against Corruption (GRECO), a CoE body, was assigned responsibility for confirming compliance with these rules: its mission is to ensure the implementation of anti-corruption agreements through a dynamic evaluation process and the application of mutual pressure among the states.

Within the framework of the Third Evaluation Round, devoted in part to "transparency of party financing" (Theme II), GRECO paid special attention to the regulation of particular issues—the financing of routine activities and of election campaigns, political parties' accounting processes, and oversight and penalty systems—in the legislation of the forty-seven CoE member states, plus Belarus and the United States of America.

However, GRECO's role with regard to the supervision of regulations related to sanctions was not to encourage states to create a standalone offense related to corrupt political financing. In fact, the aforementioned Recommendation (2003)4, the implementation of which was monitored by GRECO, only provided for the imposition of "effective, proportionate and dissuasive sanctions" (Rule 16) for illegal political financing. Compliance with this directive did not require the creation of an offense which would give rise to criminal liability. For this reason, between 2007 and 2013 GRECO's evaluation reports and recommendations for improvement were limited to addressing the effectiveness of domestic

regulations aimed at fighting political corruption. This notwithstanding, as Maroto (2015) points out, the work of GRECO constituted the first major international initiative to evaluate legislation governing political party financing as an anti-corruption mechanism (pp. 301-302).

III. COMPARATIVE LAW IN THE AREA

III.1. Background

Given the above observations, it can be argued that international anti-corruption policy was not the catalyst for the designation of illegal financing of political organizations as a criminal offense in various countries. In fact, the CoE states that decided to enact laws criminalizing such activity—such as Italy (1974), Germany (1994), France (1988) and Spain (2015), among others—have generally done so as a response to their own domestic political situation at the time; the true motivation behind their criminal policy was the reality of corruption and their society's perception of it (Berdugo, 2016, p. 24). This has likewise been the case in most of the countries in Latin America—Chile (2016) and Colombia (2017), for example—which have instigated similar criminal reforms over the past decade. In general, as pointed out in a joint report prepared by *Transparencia por Colombia et al.* (2020), the policies concerning oversight and sanctions being implemented in the region "are explained by the increasing number of cases of political corruption related to irregular campaign financing" (p. 7).

As such, the criminalization of illegal party financing has come about, to a large extent, in response to a growing concern in society regarding major political parties' involvement in corrupt activities. A number of examples illustrate this point: in Italy the creation of these criminal offenses was inextricably linked to the "oil scandals" (Biondi, 2012, p. 145; Forzati, 1998, pp. 274-275; Spagnolo, 1990, p. 6), the *Penta* and *SQM* cases gave rise to legal reforms in Chile (Fuentes, 2018, pp. 118-119), and the same occurred in Spain with the *Gürtel* and *Bárcenas Papers* cases (Bocanegra, 2017, p. 856; Javato, 2017a, p. 2; Macías, 2016, p. 122; Núñez, 2017, p. 732).

This notwithstanding, clear differences exist with regard to the history of this issue in Europe and Latin American, and the experiences of different countries each have their own particular nuances; the above observation is simply intended to highlight the fact that legal and criminal policy debate has not always been the principal driver of change or the key factor behind the creation of these criminal offenses. There is nonetheless an unquestionable need for more detailed study of the underlying issues related to the illegal financing of political parties; political corruption is a highly complex phenomenon, and criminal law cannot target all of

the factors which contribute to the problem, especially given that legal systems in any democratic state which governs by rule of law should seek to respect the principles of specificity and subsidiarity.

As such, without ignoring the particular circumstances of each country, it is important to point out—as is often argued in the specialized literature in Spain—that corruption related to political parties' finances is a result of structural factors. I will summarize four here. Firstly, political parties require a steady flow of economic resources; they need to cover the costs of competing in regular election campaigns while their membership fees continue to fall against a backdrop of distrust and disillusionment among citizens regarding politics (Nieto, 2006, pp. 117-118). Secondly, political parties are suffering from a growing oligarchy and increased bureaucracy, meaning leaders are becoming more and more disconnected from the population in general and from their members in particular (Villoria, 2006, p. 206). This situation means the distance between parties and their traditional contributors is growing. The third factor is closely related to the first two: public administrations have undergone a sort of "politicization," as parties which are increasingly motivated "less by ideology and more by clientelism, with highly centralized and opaque bureaucratic structures" take over the state apparatus (Sánchez, 1997, pp. 195-197). This has resulted in an increased scope for arbitrariness which facilitates the use of public services as a bargaining chip in financing efforts (Ariño, 2009, p. 7). Finally, political corruption is also facilitated by party rules which do not adequately regulate the financing of routine activities or election campaigns, nor ensure transparency and oversight of party accounts and that sanctions are imposed on those involved in illegal financing (Ruiz-Rico, 2014, pp. 230-231).

This wide range of factors gives a rough idea of the magnitude of the problem of political corruption and can also be used to develop arguments on the effectiveness of criminal laws. However, a comparative law analysis of the preventive effects of specific laws intended to counter illegal financing is beyond the scope of this paper; for this reason, I will pursue a more modest goal in the following sections.

As stated above, I will focus on the legislation in three countries which are broadly representative in terms of experiences related to illegal financing in Europe and Latin America. I will begin with a discussion of the laws in Italy and Spain, and finish by examining the case of Chile, with the aim of pinpointing a number of aspects that will allow for a more complete analysis of the legislation in Peru. For the same reason, I will also highlight particular features of the criminal policies of these countries which are reflected in their laws.

III.2. Italy

In 1974, Italy became one of the first members of the CoE to criminalize illegal political financing. Several scandals had broken out in the years prior, and at the beginning of that particular year the so-called Enel case, in which all of the biggest political parties in the country were implicated, became public knowledge (Frosini, 2000, p. 415; Severino, 2000, p. 203). It emerged that the Italian Oil Union had been making systematic financial contributions in exchange for guarantees that the price of fuel would be maintained at a certain level. Due to the seriousness of the case, the urgent need for regulations on party financing could no longer be ignored (L'Erario, 2011, p. 291).

Law No. 195, on "financial contributions by the state to political parties," was passed on May 2, 1974. Article 7 of this law established two new offenses: "illegal public financing" and "illegal covert private financing." The first prohibited contributions to parties (including their political and organizational networks) and parliamentary groups from public administrative bodies or from public companies in which the state had a shareholding of 20% or more (Art. 7.1). The second offense prohibited donations (direct and indirect) from legal persons not included in the former category, unless they were officially approved by the company board, registered in the party accounts, and not prohibited by any other law (Arts. 7.2-7.3). Both making and receiving payments were made criminal offenses.

Although Law No. 195 was a "special" criminal law and as such was not part of the Criminal Code, most of its provisions concerned public authority financing (for routine activities and for election campaigns) of Italian political parties, which until then had depended exclusively on donations. Broadly speaking, the 1974 law sought to ensure the financial survival of political parties against the backdrop of declining membership numbers (Lanchester, 2000, p. 15) and also to promote more socially conscious ethics in the public sphere (Spagnolo, 1990, p. 17). However, as Forzati (1998) points out, the regulations were rarely enforced; this led to doubts regarding their effectiveness, and they began to be viewed as largely "symbolic" legislation. This situation changed as a result of investigations related to the *Mani Pulite* case (p. 59), which uncovered a widespread network of corruption that became known as *Tangentopoli*. The principal leaders of the *Partito Socialista Italiano* (the Italian Socialist Party) and *Democrazia Cristiana* (the Christian Democratic Party), among others, were found to have been engaging in corrupt activities including illicit financing (Severino, 2000, p. 202).

Of the two offenses mentioned above, only that of illegal financing by public bodies has been amended in the years since. First, in 1981, the offense was broadened to include illegal payments to particular political

officials, including members of the National and European Parliaments. Later, in 2012, donations from companies in which the state has a shareholding equal to or less than 20%, meaning a public body has control over the company, were prohibited; and, in 2019, contributions from social cooperatives and syndicates to political parties were also prohibited.

Although these reforms suggest that the offense of illegal political financing was steadily expanded, in reality, as Javato (2017b) notes, there have been more than a few

> attempts to decriminalize this activity, and to have these offenses instead regulated under administrative law with the corresponding sanctions; that such a (criminal policy) shift has been pursued reflects not only the desire of a particular sector of the Italian political class to ensure their own impunity, but also deficiencies in how the prohibited acts are defined (p. 7).

III.3. Spain

Illegal financing of political parties was declared a criminal offense under the 2015 criminal reforms in Spain. By then almost all Spanish political powers had at some point been involved, to a greater or lesser extent, in cases related to corrupt financing (De la Mata, 2016, pp. 1-3; León, 2018, pp. 4-7; Maroto, 2015, pp. 85-111; Núñez, 2017, pp. 735-736; Olaizola, 2014, p. 100). The legislation on political parties had thus far proven insufficient to prevent this; apart from being inefficient, its main purpose was to guarantee the survival of parties at the expense of the public treasury (Almagro, 2015, p. 15).

In light of this state of affairs, a number of bills seeking to criminalize the illegal financing of political parties were presented to the Congress of Deputies (Maroto, 2015, pp. 306-314). With some exceptions[2], the majority of legal scholars were in favor of these acts being made standalone crimes. To this end, a number of detailed *lex ferenda* proposals were developed to define categories of illegal financing—both public and private—of political parties (Maroto, 2015, pp. 320-323; Nieto, 2006, pp. 126-138). Other criminal policy proposals included the creation of a specific category of "aggravated" public corruption offenses, along with offenses related to the covering up of illegal financing (Olaizola, 2014, pp. 197-199 and 209-213).

However, these proposals were not the key factor behind the 2015 reform; as in Italy, the decisive impetus was the public outcry in the wake of a number of "political corruption" scandals which broke out in

2 See García Arán (2016, pp. 590-604), for example.

the midst of an economic crisis (De Miguel, 2015, p. 390; Hava, 2016, pp. 455-456).

There are at least five fundamental differences between the criminal regulations in Spain and those in Italy. The first is that in Spain the crimes of illegal financing were not created together with an *ex-novo* system of public financing. Spanish Organic Law No. 8/2007, of July 4, 2007, on political party financing (known as the LOFPP, from the Spanish acronym), states that parties may receive financing from both private and public sources, although in practice more comes from public subsidies (Ariño, 2009, pp. 36-49; Maroto *et al.*, 2013, pp. 25-27). This is due to the fact that the current party system, which emerged at the end of Franco's dictatorship, is heavily subsidized by the state in order to ensure the stability of democratic rule (Iglesias, 2016, pp. 88-89).

The second difference is that while Italy passed a special criminal law to regulate the offenses under discussion, Spain amended its Criminal Code with Organic Law No. 1/2015 of March 30. This decision by the legislature was applauded by legal scholars, although the specific location chosen within the text of the Criminal Code—immediately after the section devoted to "property crime and crimes that infringe upon the socioeconomic order"—was seen as evidence that no clear vision existed with regard to the precise legal right which was being protected (Abadías, 2021, p. 743). It was argued that, although these crimes do involve property and economic concerns, "these do not constitute the core element based on which the protected legal right can be identified" (Basso, 2021, p. 7); as the offenses relate more to the role played by political parties in a democracy governed by rule of law it would make more sense to characterize them as "crimes against the constitution" (Muñoz Conde, 2019, p. 509; Quintero, 2016, p. 530; Sierra, 2017, pp. 802-803). I personally agree with this last interpretation, since it is consistent with the idea that the specific wrongdoing involved in these acts means they belong under the category of "political corruption."

All acts of illegal financing involve a violation of the constitutional principles that guide political processes, which is why they qualify as corruption, and that they fall foul of regulations related to integrity is what marks them out as acts of "political corruption," regardless of whether the perpetrator is a private citizen or has the dual status of "politician" and "public official," and regardless of whether the financing constitutes an offense related to public corruption (Sandoval, 2014). However, more than a few authors consider that although these offenses involve a particular wrongdoing, how they are usually carried out and the fact that they contribute to the "politicization of the administration" is what qualifies them as public corruption offenses (Javato, 2017a, pp. 24-25; Nieto, 2019, p. 499). Still others argue that,

when it comes to evaluating its nature, political corruption is inherently a "public" offense (Benítez, 2021; Terradillos, 2017).

The third difference is that Italy's 1974 law established a wide range of offenses related to illegal public financing, as well as concealing illegal private financing from legal persons, whereas the amendment to Spain's Criminal Code was more limited in scope. While it did specifically establish the crimes of illegal private financing (Art. 304 bis) and of "belonging to or managing networks or organizations focused on unlawfully financing political parties" (Art. 304 ter), strictly speaking, only the former relates directly to corrupt party financing. The second is a standalone "enterprise crime," similar to others already prohibited by the Criminal Code (membership of illicit associations, and of criminal organizations and groups) before 2015, even though the specific objective involved is the illegal provision of funds to political powers (Macías, 2018, pp. 12-22; Pérez, 2018, pp. 154-180; Sáinz-Cantero, 2020, pp. 229-243).

As mentioned above, the offense detailed in Article 304 bis of Spain's Criminal Code covers cases of illegal financing from private sources (Santana, 2017). The prohibited conduct is that of "receiving" (although "delivering" is also punished) contributions for political organizations in violation of the provisions of the LOFPP, meaning that all donations prohibited under this law, including anonymous donations, donations towards specific projects, etc., are punished. However, most legal scholars agree that the criminal policy decision to limit the scope of the law to these specific acts has left significant gaps in the regulations. To begin with, Article 304 bis of the Criminal Code does not cover cases of illegal financing from public sources, nor does it cover illegal financing (public or private) of election campaigns (Núñez, 2017, p. 758; Puente, 2017, pp. 77-88). The same is true of "fraudulent accounting practices" by political parties, although the gap in this case only includes accounts related to routine activities; fraudulent election campaign accounting is covered in the legislation that regulates election processes (Bustos, 2021, pp. 168-169; Cano, 2021, pp. 173-179; Odriozola, 2018, p. 125).

The fourth difference is that while in Italy there are no specific regulations related to corporate criminal liability (León, 2019, pp. 68-69), the legislation in Spain does cover this topic; political parties themselves can be held liable for the crime of illegal private financing (Criminal Code, Art. 304 bis 5).

In both Italy and Spain illegal financing is punished as either a criminal or an administrative offense, depending on certain factors; the existence of these double punitive channels has, as pointed out above, fueled debate in Italy on whether the prohibited acts should no longer be dealt with in the realm of criminal law and instead treated solely as administrative

offenses (Castellón, 2021, pp. 890-895). In contrast, decriminalization has not been proposed in Spain, where the focus—the fifth and final fundamental difference—is on defining the boundaries between criminal and administrative offenses in this area.

Article 304 bis of Spain's Criminal Code is an example of what is referred to in legal systems in the Spanish-speaking world as a "blank" criminal law, meaning it is not self-contained, but rather makes reference to other laws, in this case the LOFPP and the specific administrative offenses provided for therein. However, the purpose of the cross-references in this Article is not simply to integrate the offenses detailed in the LOFPP: as the cross-references are made "en bloc," rather than supplementing Article 304 bis, the entire scope of the criminal offenses is taken to be that defined in the LOFPP (Javato, 2017a, pp. 26-27; Quintero, 2016, p. 530). This legislative technique is in breach of rulings concerning "blank" criminal laws issued by Spain's Constitutional Court, which have held that such laws must detail the "core elements" of the prohibited acts in order not to violate the principle of legality. Article 304 bis of the Criminal Code blurs the boundaries between criminal and administrative offenses; in certain cases, why the criminal offense is deemed to result in greater harm with respect to the administrative offense is not made clear (Basso, 2021, pp. 21-22; Corcoy & Gallego, 2015, p. 1052). The problem becomes even more conspicuous when considering the fact that the LOFPP describes other offenses which, "in evaluative terms, are of comparable or greater severity than those criminalized" in Article 304 bis of the Criminal Code (Terradillos, 2017, p. 21), but have nonetheless not been incorporated into the latter.

Finally, it is important to note that the criminal law principle of non-retroactivity meant that Article 304 bis of the Criminal Code, which entered into force in 2015, could not be used to prosecute the individuals implicated in the corruption scandals that prompted its creation. This is not to say that no individuals were found guilty of illegal financing of a political party by a court; the aforementioned *Gürtel Case* for example, concerned a corruption scheme linked to Spain's *Partido Popular* (the People's Party) and directed by the businessman Francisco Correa. Judicial proceedings began in 2009, but, given the complexity of the case, the process was divided into several separate *parts*, each covering a different period of time. In a number of the parts which concerned the Partido Popular, judges ruled that it was financed corruptly. In *Part I (1999 – 2005)*, for example, National Court Ruling 20/2018, of May 17, declared that the Partido Popular had a "B Fund," which consisted of "a financial and accounting structure implemented in parallel to the official one" and was in use between 1989 and 2008. Later, Supreme Court Ruling 507/2020, of October 14, confirmed the existence of this fund. Both rulings declared party officials guilty

of crimes related to public corruption, but the party could not be held criminally liable since the crimes were committed before 2012, the year the legislation allowing political parties to be held criminally liable as legal persons was passed. Nevertheless, the Partido Popular was declared civilly liable for profiting from illegal acts in both rulings.

III.4. Chile

From the 1980s onwards, when democratically elected governments began to replace military dictatorships in Latin America, it became clear that political parties should have a prominent place in the new political system (Ramos, 1998, p. 321). The expansion of democratic government was key to the gradual development of legislation on political parties and, as Valadés and Zovatto (2006) note, as a result "all Latin American countries have now constitutionalized political parties and created regulations to govern their operations" (p. XIX).

An example which reflects this emerging legal framework is the range of provisions regulating the relationship between money and politics. According to Casas and Zovatto (2011), developing such regulations has become a "critical task" for Latin American democracies owing to the experience of the last thirty years, during which the hazards inherent to deficient legislation on political financing have become more and more apparent. The authors go on to state that "the greatest danger for Latin America in this regard is that drug trafficking and organized crime syndicates will penetrate political organizations and provide campaign financing to assure their impunity." The cases of the campaigns of former presidents Paz Zamora in Bolivia, Samper in Colombia and Pérez Balladares in Panama are just some of the most noteworthy examples of this danger (p. 20).

Unfortunately, even though the issue is "critical," progress has been uneven. This is especially the case with regard to the sanctions imposed for illegal political financing. A comparative law study conducted in 2011 which examined the legislation in eighteen countries (Gutiérrez & Zovatto, 2011, p. 574) showed that national legislative processes do not follow the dictates of a regional anti-corruption policy.

However, during the second decade of this century a group of states undertook criminal reforms that resulted in the creation of specific offenses related to illegal financing of political parties. The case of Chile, which we will now examine, is broadly representative of this process.

I have chosen this country because it passed legislation making illegal financing a criminal offense shortly before Peru, and also because the advances in the Chilean legal system in this regard have been positive; where once it had no specific laws to combat illicit party financing,

the regulations now provide for both administrative sanctions and criminal charges.

The path to legal and constitutional recognition of parties in Chile was a long one, interrupted by the Pinochet dictatorship. Paradoxically, the current legislation governing the operations of political parties was conceived under that regime (García, 2006, pp. 306 and 328). The 1980 Constitution recognized the existence of political parties (Art. 19.15a), but the tenth transitory provision stated that, until such time as an organic constitutional law on parties was enacted, "party-political" activities were prohibited. This law, Law 18,603, was finally approved on April 4, 1987.

Law No. 18,603, the Organic Constitutional Law on Political Parties, implemented the first regulations related to their financing. However, this law only covered "ordinary financing" from "private" sources (membership fees, donations and endowments), and did not establish any control mechanisms or restrictions on permitted contributors. This meant that "election campaign financing" remained unregulated over the following years, during which time Chile lagged behind other countries in this respect (Fuentes, 2011, p. 135; Nogueiro, 2015, p. 573).

As was the case in Italy and Spain, the outbreak of a corruption scandal forced the Chilean legislature to finally take action on election campaign financing and on August 5, 2003, Organic Constitutional Law No. 19,884, on "transparency, limits and oversight of election spending," was enacted. Broadly speaking, this law established a financing system based on public subsidies—direct and indirect (free airtime on television)—and private contributions, and implemented caps on election spending. As was the case with Law No. 18,603, Law No. 19,884 did not prohibit donations from legal persons (with the exception of entities who were recipients of public subsidies and non-profit institutions); however, unlike the former law, Law No. 19,884 established a system of sanctions for non-compliance with its rules.

As can be seen, Fuentes (2011) was correct in arguing that the changes implemented in the first decade of the twenty-first century represented a significant advance (p. 179). This evolution has continued in recent years, as Laws No. 18,603 and 19,884 have undergone significant reforms which together have shaped a "robust and complex regulatory system" that seeks to "prevent money from having an undue influence in politics and level the playing field by ensuring all political powers operate under the same conditions" (Náquira & Salim-Hanna, 2021, pp. 812-813). I will limit my examination of these reforms to Law No. 20,900, of April 14, 2016, on "strengthening democracy and enhancing transparency," due to its particular relevance to this paper.

This law was enacted as part of a process aimed at tackling the grave political crisis triggered by the investigations into corruption in political campaigns (Torres, 2016, p. 25). It amended the following reforms, among others, to Law No. 18,603: a) public financing schemes were to be established to assist with the cost of activities, payment of debts, acquisition of real estate, studies intended to guide political programs and other work, etc.; and b) political parties were prohibited from receiving "contributions of any kind from legal persons."

Law No. 20,900 also made amendments to Law No. 19,884, two of which I will highlight here: a) legal persons, whether governed by public or private law, were prohibited from making contributions to election campaigns, with the exception of contributions "from political parties or the Treasury, as authorized by law;" and b) the illegal financing of political parties was made a criminal offense.

The principal features of these offenses can be summarized in the following five points: firstly, two categories of offenses were established under Law No. 19.884: one related specifically to the corrupt financing of political parties, and the other related to acts connected to this corruption.

For obvious reasons, only the first category is of interest to us. It includes the following criminal offenses: a) making or receiving contributions to candidates or political parties, as regulated by Laws No. 18,603 and 19,884, which exceed the permitted limit by 40%; b) making or receiving contributions from legal persons in violation of the provisions of Law No. 19,884; and c) soliciting or offering prohibited contributions (Decree with Force of Law No. 3, 2017, Art. 30).

Secondly, the aforementioned offenses encompass illegal financing of both routine activities and of election campaigns. Torres (2016) makes a similar point, mentioning that the description of the prohibited conduct includes "making or receiving contributions" to parties (for routine activities) and to "candidates" (for election campaigns) (p. 30). As such, although a number of legal scholars group these offenses together under the umbrella of "election crimes[3]," limiting our interpretation of the statutes to the sphere of elections is not correct (Náquira & Salim-Hanna, 2021, pp. 812-813).

Thirdly, the categories are based on acts which are prohibited and subject to administrative sanctions under Laws No. 18,603 and 19,884. In this sense the legislation is similar in some respects to the Articles in Spain's Criminal Code discussed above; however, in Chilean law the distinctions are more clearly drawn. For example, the fact that a specific objective

3 See (with some reservations) Maldonado (2018, p. 706).

requirement must be met in order for the offense to be punishable—in this case, that the contribution exceed the permitted amount by more than 40%—clearly demonstrates how the criminal offenses cause more harm than those which are subject to administrative sanctions alone.

Fourthly, the punishments stipulated in Law No. 19,884 for illegal political financing involve custodial sentences and proportional fines, applied cumulatively, which is in stark contrast to the light penalties stipulated in Spain's Criminal Code for this category of offense which have been the subject of so much criticism by legal scholars (Echarri, 2018, pp. 409-413; Odriozola, 2018, pp. 126-127).

The fifth and final point relates to the offense of making or receiving contributions from legal persons in violation of the provisions of Law No. 19,884. Two observations are relevant with regard to this offense. Firstly, the fact that the contributions from legal persons which are prohibited under Law No. 18,603 are not included is an inexplicable omission which has been rightly criticized by Náquira and Salim-Hanna (2021, p. 823). And secondly, only natural persons can be held criminally liable for this offense; legal persons are penalized only with the administrative sanctions stipulated in Law No. 19,884 (Torres, 2016, pp. 36-37). In short, the laws in Chile, in contrast to those of Spain, do not include any provisions which allow legal persons—and by extension, political parties—to be held criminally liable for this offense.

IV. THE LEGAL REGULATIONS ON POLITICAL FINANCING IN PERU

Unfortunately, any examination of corruption in Peruvian politics must include consideration of its long history in our country. The most reliable research on corruption in politics and government, beginning in the 1920s and right up to its 1990s peak during the governments of Alberto Fujimori (1990-1995 and 1996-2000), has found that Peru has "a long history of systematic and uncontained corruption" (Quiroz, 2013, p. 519).

However, since the Fujimori period, the continuous election processes, the high cost of campaigns (centered principally on social media), and the increased competition between parties have led to a substantial overall increase in the cost of politics, while political party membership and financial contributions have progressively decreased over the same period (Tuesta, 2011, p. 445). Under closer examination, these factors are very similar to those which legal scholars in Spain have pointed to as structural causes of corruption in the financing of political parties.

Against this background, the need for financial resources has become an endemic issue for political parties—as is the case in other parts of

the world—and, due to deficient (or non-existent) self-regulation mechanisms (such as accepting responsibility and insisting on accountability) in political organizations, and also due to the control these exert with regard to public administration, corruption is unfortunately seen as an easy solution.

Given this history, it is remarkable that the public authorities began to address the issue of political financing only a short time ago. The first legal reference to the subject was in the 1993 Constitution, but no legislation specifically addressing financial support for political parties was passed until Law No. 28094 of November 1, 2003.

As was the case with the reforms implemented in Italy, Spain and Chile, the most significant amendments to Law No. 28094 have come about as a reaction to public outcry in the wake of corruption scandals. As is well known in these parts, the Odebrecht payment scheme triggered the biggest social and political crisis of this century in Peru. This scandal (among other less serious discoveries) was the impetus behind the Executive Branch's 2018 proposal, within the framework of a wide-ranging reform of the political system, of a set of constitutional reforms aimed at tackling corruption. These included overhauling the Judicial Branch governing body in terms of its composition and functions, reestablishing the bicameral system in the Legislative Branch, prohibiting the reelection of congressmen, and a final reform which is of most interest for our purposes: regulating the finances of the parties based on the principles of transparency and accountability.

Although the constitutional reforms—except for the return to bicameralism—were approved in a referendum in December 2018, the objectives of the "political reform" were yet to be fully achieved. For this reason, during the same year the Executive Branch had created the High Commission for Political Reform, which was given the task of drafting a set of legislative reforms designed to tackle corruption. The current regulations related to the financing of political parties are, to an extent, a result of the proposals of the High Commission, as a number of which were later added to the Criminal Code or, as mentioned above, introduced as amendments to Law No. 28094.

Over the rest of this section, I will elaborate on the principal issues with the legal system related to political financing in Peru, beginning with a discussion of the general guidelines contained in the Constitution and in Law No. 28094 prior to the constitutional reform mentioned above. I will go on to review one of the projects of the High Commission for Political Reform (hereinafter the HCPR), and, finally, I will briefly discuss the most recent reforms to the legislation governing political parties.

IV.1. The Constitution and the legislation governing political organizations

The opening paragraph of Article 35 of the 1993 Constitution declares that "citizens may exercise their rights individually or through political organizations such as parties, movements or alliances, in accordance with the Law." However, the second paragraph goes on to state that the ordinary legislature must ensure that political parties—notably not all "political organizations"—demonstrate "transparency regarding the sources of their financial resources and are granted free airtime on state-owned media in proportion to the last general election result". Aside from the issues with its wording, Article 35 can be seen to focus on "political organizations."

Despite this clarity, it took almost a decade for this provision to be enshrined in legislation; as mentioned above, Law No. 28094 was finally enacted only in 2003. Although the Constitution refers to "political organizations," the law—as its name suggested—covered only political parties, which thus became the pillars of the democratic political system. This remains the case to this day, despite the fact that in 2016 the law was renamed the "Law on Political Organizations" (hereinafter, the LPO).

The principal merit of the LPO was that it addressed, for the first time in the history of Peru, four central issues: a) The political party financing system (Art. 28): as well as provisions regulating the "direct public financing" of parties with representation in Congress (Art. 29) and "indirect public financing" based on free exposure on public and private media for any political force (Arts. 37-38), "private financing" was also regulated (Art. 30). b) Prohibited sources of financing: specifically, contributions from entities governed by public law, companies in which the state has a shareholding, "religious organizations of any denomination," and political parties and government agencies of other countries (Art. 31). Exceptions were made for donations towards education, training or research. c) Oversight of parties' economic and financial activity (Art. 34): the LPO left "internal" oversight in the hands of the parties themselves but entrusted "external" oversight to the Political Party Financing Supervisory Board under the auspices of the National Office of Election Processes. d) A system of administrative sanctions: Article 36 of the LPO dealt with three specific offenses, although only two are strictly related to illegal financing. The offense of receiving payments "from a prohibited source" concerns the handling of illicit funds, and that of omitting information from or altering "income and expenditure accounts" relates to concealment of the source or amount of such funds. Receiving "individual or anonymous contributions" in excess of the limits established in the LPO (Art. 36.c) also relates to party financing. The sanction established for these offenses was a proportional fine, the

size of which depended on the amount of the contribution received, omitted or altered.

However, the LPO suffered from serious shortcomings. Due to space considerations, I will not examine them all in detail; instead, I will present a brief summary of the four principal problems.

The first was that under the law, "direct public financing" could only be used to cover two categories of expenses: those related to education, training and research, and those related to routine operations. This differentiation, besides being overly rigid, seems to me artificial: the education and training of party operatives should, in my opinion, form a key part of the routine activities of political parties; however, at least in Peru, parties have never engaged in research, and are unlikely to begin to do so in the near future.

Regarding comparative law, under Chile's Law No. 18,603, on political parties, "ordinary public financing" may be used to prepare candidates for public office, to train activists and to carry out research to support political operations (Art. 40). This rule, in my opinion, suffers from the same flaws I mentioned in the previous paragraph in relation to the Peruvian law.

I believe that permitting public funds to be used to cover training and other similar expenses creates a risk that "training centers" for activists, or even higher education studies, could be used as a pretext to divert "public financing" from its legitimate objectives. Moreover, the LPO does not specify whether training and routine expenses include election campaigns.

The second shortcoming is that, in addition to neglecting to address "election campaign expenses," the law did not establish any rules relating to contributions—whether public or private—to election campaigns. The most worrying aspect of this omission was that specific campaign financing and expenses have always existed in practice without being subject to oversight. According to the Venice Commission (2001), a cap should be imposed on electoral campaign spending in order to ensure "equal opportunities for the different political forces" (§ B.8). Moreover, given that the ongoing need for money and loans from financial institutions is a result of the continuous election cycle, it is prudent, as CoE Recommendation (2003)4 states, to "establish limits on expenditure on election campaigns" (Rule 9).

The third shortcoming was that the "transparency" mandated in the constitution was not fully ensured. Amongst other reasons, that the LPO did not completely prohibit anonymous donations effectively gave permission for financial opacity, which facilitates corruption. Donors

can hide behind "anonymity" in their efforts to manipulate the will of a party and, if they are successful, voters are unaware of the procedures followed in taking certain decisions and the true reasons behind them; this violates the principle of openness, understood as the use of public reason in political administration (Malem, 2000, pp. 121-127).

There is an interesting comparative law observation to be made in this regard. Under Chilean election legislation contributors must be fully identified in all cases and the information made available to the public, although certain exceptions exist regarding public disclosure of the amount in the case of small donations (Law No. 19,884, Arts. 19 and 20).

The fourth shortcoming was that the list of conducts which constitute illegal financing did not include a number of acts which are subject to sanctions in other countries. The Spanish legislation on political parties, for example, stipulates that the cancellation of political party debts by financial institutions and the direct or indirect payment of party expenses by third parties is punishable with administrative sanctions.

As a result of the aforementioned shortcomings the LPO has so far been largely ineffective from the point of view of prevention. There have been four general elections—along with numerous other elections at different levels—in Peru between 2003 and 2021 and the unresolved issue of illicit financing has resurfaced each time. The case which best illustrates the most heinous manifestations of corruption in the Peruvian political arena has become known as the Odebrecht scandal, which was the name of the Brazilian construction company at its center. During the legal investigations carried out to date, in which the corporation's executives confessed to implementing a program of "effective collaboration agreements," it came to light that payments had been made in a systematic manner over a period of years to numerous political officials (including all of the presidents who governed between 2001 and 2018). The corporation's principal objective was to ensure it was awarded public works contracts. Despite the fact that the legality of these payments is still disputed, and the court cases are *sub judice*, the allegedly corrupt financing of the *Partido Nacionalista Peruano* (the Peruvian Nationalist Party) and *Peruanos por el Kambio* (Peruvians for Change), whose presidential candidates won the elections in 2011 and 2016 respectively, is particularly alarming. The main opposition party over the last decade, *Fuerza Popular* (Strength of the People), also allegedly received illegal funds to run both their election campaigns.

Faced with profound political and social instability in the wake of these dramatic disclosures, the public authorities decided to reform the LPO; its provisions on party financing had remained broadly the same since it

was first enacted. This was remedied with the passing of Law No. 30689 of November 30, 2017; however, an assessment of the changes brought about by this law shows that its success has been limited.

Under the new law, "direct public financing," which since 2003 could only be used for education, training and research and for routine operations, could henceforth be used to cover a maximum of 50% of the total expenditure in both categories. In my opinion, this rule limits the parties' autonomy with regard to their spending, and it is not easy to understand why the LPO now limited the permitted coverage to exactly half of the total spending, especially considering that the same reform allowed parties to "acquire property" for party committees to conduct their operations, an expense that would obviously increase routine expenses. Moreover, the new law again neglected the issue of "public financing of election campaigns."

Law No. 30689 also added to the list of prohibited sources of financing, which would now include contributions from: a) domestic for-profit or non-profit legal persons; b) foreign for-profit legal persons; c) foreign non-profit natural and legal persons (unless the contributions were exclusively used for training purposes); d) natural persons who have been "formally convicted of and sentenced for crimes [for a period of ten years after the sentence has been served], or who are under preventive detention for crimes against public administration, drug trafficking, illegal mining, illegal logging, people trafficking, money laundering or terrorism;" and e) "anonymous contributions of any kind." This last addition, in particular, was well-received. However, the 2017 legislation did not introduce any prohibitions with respect to financial institutions, meaning they could continue giving loans and cancelling debts without any legal restrictions which would prevent corrupt financing.

Without wishing to minimize the significance of the additional reforms, I would like to highlight the following three: the rules relating to the system of external oversight of party finances were expanded; the system of administrative sanctions was overhauled, with the number of violations increased from three to seventeen, each of which was classified as minor, serious or very serious; and, finally, although it was not expressly deemed an administrative violation, candidates (or third parties acting under their orders) were prohibited from giving or explicitly promising money or other economic considerations as part of election campaigns.

Around the time the aforementioned changes took effect the Constitution was amended. The background to this was notably tumultuous, and in August 2018 the Executive Branch sent four constitutional reform bills which sought to modify fundamental aspects of the political and judicial systems to the Congress of the Republic; the bills were approved and then ratified in a referendum in December of the same year.

Among the legal reforms laws which the public voted to implement in the referendum, the amendments to Article 35 regarding the financing of political organizations are most relevant to this paper. Under Law No. 30905, of October 1, 2019, four significant amendments were added to this Article: a) the legislature was required to ensure the transparency of "political organizations" in general—not just parties—with regard to the "sources of their financial resources", including "verification, monitoring, oversight, and sanctions". b) Such "organizations" were permitted to receive public and private financing, to be regulated "in accordance with the criteria of transparency and accountability." In addition, it was stipulated that public financing should promote the "participation and strengthening of political organizations, with respect for the principles of equality and proportionality." In turn, private financing was required to be channeled "through the financial system with appropriate exceptions, caps and restrictions." c) "Illegal financing," under the new Article 35 of the Constitution, would be subject to "the corresponding administrative, civil or criminal sanctions." d) 'Broadcasting election propaganda on radio and television' was authorized and would be facilitated through the provision of free airtime as part of the "indirect public financing" of political parties.

IV.2. The High Commission for Political Reform

As mentioned previously, shortly after the 2018 referendum the Executive Branch created the HCPR with the mission of proposing "comprehensive measures" to strengthen institutions, the democratic system and the constitutional rule of law. The High Commission's *Final Report* contained twelve proposals to reform and strengthen the democratic and legislative underpinnings of the Constitution, the Criminal Code, the Organic Law on Elections, etc. (Tuesta *et al.*, 2019). These proposals were presented to the Executive Branch for it to forward them to the Congress of the Republic for debate.

Now, in what in my opinion added substantial value above and beyond its initial brief, the HCPR also put together an analysis of the Peruvian political system. In essence, the *Final Report* (Tuesta *et al.*, 2019) emphasized that the party system of the 1980s, then in its infancy, was nonetheless more representative than the current system and its institutions were stronger. This was evidenced in the selection of candidates, which rose up from internal party structures; in how election campaigns were carried out, using mainly volunteers; and in the coordinated actions of representatives in the legislative chambers. In the mid-1990s, this party system collapsed and in its place another was built which was less representative overall, with more fragile institutions. Based on its analysis, the HCPR proposed a number of

guidelines for a criminal policy discussion on the structural causes of "political corruption" (pp. 22-62).

In relation to the specific problem of political financing, the HCPR proposed, among other recommendations, amending the LPO and the Criminal Code (Tuesta *et al.*, 2019, pp. 245-263). Due to space considerations, I will limit my examination to the current text of Article 359-A of the Criminal Code.

The HCPR proposed criminalizing the "illegal financing of political organizations," which was then a "special" offense, meaning only individuals who held particular positions could be charged with it, in this case those who were responsible for managing party finances, legal representatives of the party and campaign managers. The "simple" (as opposed to "aggravated") offense would consist of soliciting or receiving, by any means, directly or indirectly, "contributions, donations or any other type of financial support from illegal sources" (Tuesta et al., 2019). The punishments would include custodial sentences, a ban from working in a similar position in the future, and fines, and a more severe punishment would be imposed if the individual who committed the crime was a member of a criminal organization, or if the value of the illicit funds exceeded one hundred UIT[4]. The same punishment would be imposed on the candidate (as on those charged with the original offense) if they were aware of the source of the funds and used them for party activities, and on the person responsible for the organization's internal system of controls if they allowed the resources to be used for party activities in violation of their legal duties to verify the source of funds and implement control mechanisms.

The HCPR's proposals for reform included detailing the "prohibited sources of financing" which would be punished under criminal law: any public body or state-owned or controlled company; anonymous donors; contributions associated with certain criminal activities including crimes against public administration, drug trafficking, illegal mining, illegal logging, human trafficking, money laundering, terrorism and organized crime; legal persons—whether Peruvian or foreign—under criminal sanctions in Peru or abroad, or which have been sanctioned pursuant to Law No. 30424, of April 21, 2016, on the administrative liability of legal persons; and "persons with rights in rem or in personam—proven or presumed—of ownership over a property which is under injunction or which has been seized or impounded by the state."

4 *Translator's Note (TN):* The *Unidad Impositiva Tributaria* (Reference Tax Unit) is a reference unit whose value is determined annually by the Peruvian Ministry of Economy and is used to calculate applicable taxes, fines, etc.

The reforms to administrative and criminal law recommended by the HCPR were an attempt to deliver a wide-reaching response to corruption in political financing. This intention, however, was hampered by a number of problems related to legislative drafting. Here I will limit myself to pointing out a number of overlaps between the provisions of the administrative and criminal regulations recommended by the HCPR. For example, the Commission recommended that the LPO deem "receiving contributions from a prohibited source" a "very serious" offense, while the same conduct—but not "soliciting"—was also punishable as the crime of "illegal financing of political organizations". This overlap is even more evident considering the fact that the amendments to both the LPO and the Criminal Code state that bodies governed by public law, state-owned or -controlled companies, and anonymous donors are "prohibited sources."

The root of the problem was, in essence, that in order to clearly define the boundary between administrative law sanctions and criminal law, it is necessary to first determine the precise legal right being protected. The related offenses can then be defined specifically, in accordance with the harm principle and the principle of minimum intervention, ensuring that the criteria used to determine that the criminal offense involves greater harm than the administrative offense are made clear in all cases.

IV.3. Analysis of the most recent reforms

The Executive Branch approved the HCPR'S proposals and presented them—with some modifications—to the Congress of the Republic in April 2019, in the hope of advancing the objectives of the wide-ranging "political reform". The proposed amendments to the LPO and the Criminal Code were grouped into a single initiative, Bill No. 4189/2018-PE, but only the amendments to the latter made it through the legislative process.

This was because the Constitution and Regulations Commission and the Justice and Human Rights Commission concluded in a Joint Opinion, dated July 19, 2019, that a number of the proposed changes to the LPO were formal, while others, although substantive—for example, those related to the criteria for the use of "direct public financing", the limits on "private financing" and the system of sanctions—would affect articles which had been modified in 2017. Both Commissions thus recommended that the effects of the 2017 reform be evaluated before new amendments were added.

The LPO was finally reformed in 2020, by Law No. 31046, of September 26. The new law made a number of important changes, but these would unfortunately fail to lead to real progress. I believe that two points are particularly relevant in this regard: the first is that political

parties were now permitted to use "direct public financing" to finance activities "related to election campaigns, including conducting opinion polls, developing computer systems and digital instruments and mass data processing." As such it would seem that the legislation specifically authorized the use of public funds to cover "election expenses." However, the new law stipulated that these expenses must be related to "education, research or training activities." I will not repeat the observations I have already made regarding the differentiation between expenses related to routine activities and those related to education, training and research activities; it is worth noting, however, that from a conceptual point of view, "election expenses" do not fall into either category. In short, the legislature continued to be reluctant to regulate "election financing" as a standalone issue.

The second point concerns the new restrictions on "private financing" which were designed to reduce the risk of corrupt practices: the total permitted income from donations obtained through canvassing activities was reduced from 250 UIT to 100 UIT. Law No. 31046 was also stricter regarding compliance with the mandate in the constitution that "all financial contributions from private sources" be processed through the banking system: the maximum amount permitted to be processed outside this system was reduced from one UIT to 25% of a UIT. However, bank loans to political organizations, without limit, continued to be permitted under the category of "private financing." This criminal policy decision represents a serious risk to democracy with regard to transparency and equality among political forces, since banks could thus provide financial resources under very favorable conditions to political forces which defend their interests and, in turn, parties could take on debts knowing in advance that the bank can refrain from collecting on the loan or even forgive the debt.

In addition, it is important to note that the National Office of Election Processes has also issued regulations which affect the LPO; at the time of writing the Regulations on Financing and Supervision of Party Funds, detailed in Administrative Resolution No. 001669-2021-JN/ONPE, of November 30, 2021, remain in force.

Returning briefly to the legal initiatives presented by the Executive Branch to the Congress of the Republic in April of 2019, the proposed amendments to the Criminal Code were grouped together with eight other bills introduced by various sections of parliament which also sought to regulate the illegal financing of political parties as a standalone offense. This collection of proposals was eventually combined into a single bill which became Law No. 30997 on August 5, 2019. Over the remainder of this paper I will address the details of the "simple" (as opposed to "aggravated") criminal offense of "prohibited financing

of political organizations" established under this law, through an examination of Article 359-A of the Criminal Code.

V. THE CRIME OF "PROHIBITED FINANCING OF POLITICAL ORGANIZATIONS": AN ANALYSIS OF THE "SIMPLE" OFFENSE

The criminal offense of illegal financing of political organizations (Art. 359-A of the Criminal Code) heads Chapter II, "Crimes Against Democratic Participation," of Title XVII, "Crimes Against the Will of the People," of Book II of the Criminal Code. The "simple" offense is defined as follows:

> Whoever, directly or indirectly, solicits, accepts, makes or receives payments, donations, contributions or any other type of financial support from a legally prohibited source of financing, being aware of or with the responsibility to be aware of its origin, for the benefit of a political organization or electoral alliance which is registered or in the process of registration, shall be punished with a custodial sentence of not less than two and no more than five years and a fine of between sixty and one hundred and eighty day-fines, and disqualification pursuant to Article 36, paragraphs 1, 2, 3 and 4, of the Criminal Code.

In the following section I will describe the objective and subjective elements of the offense, as well as the legal consequences.

V.1. Objective elements

V.1.1. The legal right

As mentioned in the introduction of this paper, in a number of countries criminal laws governing the financial operations of political parties have been enacted as a direct result of scandals related to corruption in politics, among other factors. The public outcry in the wake of scandals has often been the catalyst for the creation of standalone offenses related to the illegal financing of political parties. This reinforced the symbolic role of criminal law in these countries, in that the reforms were clearly intended to reassure the public and restore trust. The importance of this objective does not mean that the criminal laws do not also play an instrumental role in protecting the interests of the public which are essential to social cohesion.

Moreover, with regard to the comparative law examples mentioned in previous sections, most legal scholars are of the opinion that offenses related to corrupt financing in politics protect legal rights which are wholly legitimate from a constitutional and democratic point of view (Javato, 2017a, p. 24). It follows, then, that that these laws obey the principle that a law must protect a specific legal right, in the sense that

the decision to criminalize a particular conduct can only be justified by precisely determining the related legal right which is worthy of and in need of protection.

An example from the Spanish criminal law literature comes from Nieto (2006), who argued that prior to the 2015 criminal justice reform in Spain, which added offenses relating to illegal financing to the Criminal Code, from a legal and criminal policy point of view corrupt financing in politics affects "standalone legal rights of the utmost importance for the functioning of the democratic system." Developing this idea, Nieto formulated a thesis that was widely accepted in Spain: the interests which deserve protection under criminal law are "transparency in financing, equal opportunities for all political forces and the internal democracy of political parties" (p. 123). The 2015 criminal reform, Nieto (2019) later affirmed, enshrined specific protections for these values in the Criminal Code, albeit within the framework of the "proper functioning of the party system as part of the democratic system" (pp. 498-499). This interpretation of the legal right is accepted by a significant number of legal scholars[5], as mentioned above.

Another group of authors, however—without substantially departing from the above interpretation in my opinion—argue that the legal right which is violated by corrupt financing is the obligation of political parties to carry out the duties required of them under the Constitution. I believe that there is no fundamental difference between these two arguments because, if there is a state interest in ensuring the "political party system" adheres to the principles of democracy, the legitimacy of this value in itself is inseparable from the duties of political organizations. Regarding this second interpretation, Sáinz-Cantero (2021) argues that the legal right protected by the Spanish Criminal Code is:

> that political parties carry out their constitutional duties as normal (ensuring political pluralism, representing and expressing the will of the people, and encouraging political participation), seeking to ensure freedom and equality among them as provided for in Article 6 of the Constitution (p. 209).

This interpretation is currently the majority position (Javato, 2017a, p. 24; Macías, 2016, p. 131; Maroto, 2015, p. 299; Olaizola, 2015, p. 341; Rebollo, 2018, pp. 89-90). Recently, however, a number of scholars have pointed out that both of the above interpretations consider only the legal basis of the offense and not the formal purpose of the law, which is to ensure "equality of opportunities (between political organizations) in terms of financing" (Bustos, 2021, pp. 160-161). Thus, the offense

5 See, for example, Corcoy and Gallego (2015, pp. 1051-1052), Núñez (2017, pp. 754-755), Odriozola (2018, p. 112) and Puente (2017, p. 59).

consists of creating "unfair competition" between political parties, "since the economic advantage illicitly obtained by the political organization involved puts it in a better competitive position with respect to other parties" (León, 2018, pp. 10-11).

Once the fundamental legal right involved has been identified, the need for it be protected with criminal laws is justified by Spanish scholars with two additional arguments, which have been ably summarized by Pérez (2018): that administrative sanctions would not be enough to effectively prevent the conducts involved, and that attempting to punish them by charging the perpetrators with other offenses results in extremely complex judicial processes (p. 2). Regarding the latter in particular, Quintero (2015) has pointed out that the "bilateral structure of bribery is too narrow to encompass cases in which the money is received by the party as opposed to a particular party official." Moreover, a payment "may not necessarily be made in return for the performance of a specific act, but simply to maintain an ongoing relationship involving close friendship and favorable treatment" (p. 509).

Returning to the situation in Peru, it is interesting to note that during the procedure which resulted in the proposed reforms being enshrined in Article 359-A of the Criminal Code, the government authorities used the same arguments as justification, as will be seen below.

Repeating the rationale outlined in the HCPR's *Final Report* (Tuesta *et al.*, 2019, p. 275), Draft Bill No. 4189/2018-PE, sent by the Executive Power to the Congress of the Republic in April 2019 and which would make the illegal financing of political organizations a criminal offense, included Nieto's interpretation almost verbatim. The "Statement of Reasons" included with the bill declared that the new criminal offenses would fall under the category of "Crimes Against the Will of the People," as "the legal right requiring protection is the proper functioning of the party system," which ultimately impacts upon the "democratic system."

Furthermore, the Joint Opinion of the Constitution and Regulations Commission and the Justice and Human Rights Commission, of July 2019, which approved the modifications to the text of the abovementioned bill—the version which was eventually amended to Peru's Criminal Code—cited the opinions of Nieto and those who interpret the legal right as "that political parties carry out their constitutional obligations as normal." Based on this and other considerations, the Joint Opinion concluded that the criminal offense of "illegal financing of political organizations" would protect "the principle of transparency with regard to the management of financial resources, political pluralism, the principle and right of equality and the proper functioning of the party system, ensuring that the will of the people shall not be distorted."

Peruvian scholars have developed arguments which are similar to those put forward by their Spanish counterparts. Prior to the 2019 reforms, authors such as Castillo (2017), among others, had argued for the introduction of criminal laws to govern party financing and illegal use of political party funds. And given that, in accordance with the harm principle (Criminal Code, Preliminary Title, Art. IV), criminal punishment can only be imposed when a legal right protected by law is violated, Castillo argued that the interests being protected were equal conditions for electoral competition, transparency in political affairs and electoral competition, and the duties to represent and express the will of the people and channel politics appropriately, among others (pp. 335-341). In addition, after the reforms were implemented, Caro (2019) proposed a more restrictive interpretation of the protected legal right: that of "free competition between parties, such that the goal is not to gain power at any price, but through lawful means."

In my opinion, the correct interpretation of the legal right protected by Article 359-A of the Criminal Code is "that political parties carry out their constitutional obligations as normal." In arriving at my point of view I have taken into account the following considerations.

Firstly, political organizations play a leading role in our democratic system; according to Article 35 of the Constitution, they are a channel for the collective exercise of citizens' rights; that is, they are the quintessential instrument of political participation and a vehicle for "the representation and expression of the will of the people." These functions are also detailed in Article 1 of the LPO. Likewise, political parties play a role in shaping democratic institutions, since they exert significant influence on the country's most important political and administrative institutions, including appointing the heads of these institutions and regulating their functions.

Secondly, the value inherent to the parties' functions makes their financing a matter of vital importance for the country, since without sufficient financing they cannot carry out their routine activities, let alone participate in election processes. However, money in politics is not purely instrumental; much to the contrary, as Ariño (2009) argues, the financing of political activities is "one of the factors which shape a country's model of democracy," since the "system which governs how the necessary funds to meet the costs of political action are obtained […] is as important as the election system or how the state is organized." In fact, the "reciprocal relations between parties and candidates, and between parties and civil society, depend to a large extent on how the financing of each is coordinated" (p. 4).

Thirdly, as Ariño's (2009) arguments effectively illustrate, the objective of imposing requirements of legitimacy and democratic limits on the

raising of funds seeks primarily to ensure that the activities of political organizations facilitate the free participation of citizens; that parties embrace political pluralism and do not serve only the interests of powerful groups; and that they represent the will of the people without the interference of spurious interests. Regarding the latter, as pointed out by the Venice Commission (2001), "regulation of the financing of political parties is essential to guarantee their independence from the undue influence of sources of finance and the opportunity to compete on equal terms" (§ C.54). From this perspective, as mentioned above, the legal right being protected can be defined as the "the normal functioning of political parties with regard to their constitutional obligations." This encompasses particular interests which must be protected in order to guarantee the legal right, such as those discussed by Spanish scholars as outlined above.

However, there are three caveats to this interpretation in the case of the Peruvian legislation: one is that the State's interest in ensuring "transparency regarding the sources" of political financing (Constitution of Peru, 1993, Art. 35) is inadequately protected. Article 359-A of the Criminal Code criminalizes financing from "sources prohibited under the law," which are detailed in Article 359-C. Considering that these do not include all anonymous donations, it is almost contradictory to claim they constitute a "minimally adequate" protection of the interest of transparency regarding the financial operations of political organizations. In addition, the criminal legislation's tolerance of the opacity inherent to anonymous donations—Article 359-C of the Criminal Code only prohibits "anonymous monetary contributions of more than two tax units"—contradicts the total prohibition of such contributions in the LPO.

There is no easy explanation for this disparity. Since 2017, The LPO has stipulated that "political organizations may not receive anonymous contributions of any kind" (Art. 31); however, neither the HCPR proposal nor Bill N° 4189/2018-PE included such a rule, and the Joint Opinion of the Constitution and Regulations Commission and the Justice and Human Rights Commission did not recommend a total ban either. A possible explanation can be deduced from the Joint Opinion; since the bill submitted by the Executive Branch included three of the five "sources" then prohibited under the LPO, and did not differentiate "by establishing limits or making some other" distinction between the criminal offenses and those which were punishable only with administrative sanctions, the Joint Opinion concluded that, in the case of anonymous donations, it was "necessary to establish a limit in order to differentiate" between the two. The reasoning is weak: the limit stipulated in Article 359-C of the Criminal Code does not communicate how the criminal offense involves greater harm than the administrative offense;

the harm results from the opacity, and as such is the same regardless of the amount. The issue of the "normative collision" contained in the bill could have been resolved in Parliament by prohibiting all anonymous contributions under the criminal law, leaving the LPO to regulate less serious cases.

The protection of transparency under criminal law raises more questions than can be answered here; the issue represents a general principle which should guide the fight against corruption, thus highlighting the cross-cutting and instrumental nature of the issue. The same point has recently been made by Italian scholars. As mentioned in the previous section, in 1974 "illegal private financing" was made a criminal offense in Italy; concealed donations from legal persons (i.e., without the official approval of the corporate authority responsible for oversight and not recorded in the corporate accounts). In early studies on the subject such donations were interpreted as contravening the principle of transparency with regard to parties' financial operations (Spagnolo, 1990, pp. 32-38). However, this limited interpretation has since been criticized based on arguments related to the instrumental nature of transparency; that in the case of concealed illegal private financing, the legal protection of transparency is aimed at ensuring democratic participation in politics (Manna, 1999, p. 147) and that citizens have all the information they need to make rational decisions (Forzati, 1998, p. 96).

The second caveat is that the criminal offense established in Article 359-A of the Criminal Code can also be perpetrated using public funds. Italian scholars have pointed out that illegal public financing impacts negatively on political pluralism, since if one political organization receives more state funds than others, the existing diversity is not properly represented (Manna, 1999, p. 144). Another objective, according to Forzati (1998), is to ensure the impartiality of the public administration and the integrity of its assets (p. 253). The latter is also affected in the case that of financing obtained through criminal offenses related to "public corruption."

However, Article 359-C of the Criminal Code does not explicitly state that funds obtained through the commission of crimes against public administration constitute a "prohibited source;" it prohibits contributions from public bodies or those in which the state has a holding—"any entity governed by public law or company owned by the State or in which the State has a holding"—and contributions from "natural persons who have been formally convicted of and sentenced for crimes, or who are under preventive detention for crimes against public administration."

There have been innumerable cases in Peru of political organizations receiving contributions in exchange for the award of public works

contracts, through the diversion of public subsidies and even from the decapitalization of public or private companies controlled by members of a political party (Valeije, 2008, p. 36). As mentioned in the previous section, such offenses have led a number of Spanish scholars (Cugat, 2015, p. 240; Sáinz-Cantero, 2021, p. 874) to argue that these acts should be treated as criminal offenses for criminal policy reasons associated with the risk posed to the proper functioning of public administration bodies. Amongst Peruvian scholars, Caro (2019) has argued that criminalizing these offenses preemptively safeguards the integrity of public administration bodies, since "public posts are not for sale or subject to free market forces."

Although I agree with the above views in the main, it is important to note that crimes against public administration and illegal financing of political parties constitute separate acts which do not always occur together (Puente, 2017, p. 67). Indeed, "crimes against public administration" do not include instances in which a contribution is not made in exchange for special administrative treatment, or when this is impossible to prove (Maroto, 2015, pp. 224-225). According to this view, "public corruption" is not a useful conceptual category when it comes to analyzing corruption related to the financing of political parties (Rebollo, 2018, p. 89). Strictly speaking, the wrongdoing involved in illegal financing belongs conceptually in the arena of "political corruption;" according to Villoria (2006), this encompasses "actions aimed at acquiring and maintaining political power by illegitimate means." This author adds that what makes it possible to differentiate conducts which respect the "legitimacy of politics" from those which constitute "political corruption" is the violation of a "normative frame of reference," which in this case consists of a system of "public ethics" which all persons and entities must be required to uphold, including public officials, public authorities and private individuals (pp. 102-107).

The third and final—though no less important—caveat is the following: the justification of the democratic legitimacy of the legal right is based on Article 35 of the Constitution; however, since the 2019 reform, this Article also stipulates that "illegal financing shall be punished with the corresponding administrative, civil or criminal sanction." So how should this provision be interpreted? Does it mean criminalization of illegal financing in politics is mandated by the constitution? The Joint Opinion of the Constitution and Regulations Commission and the Justice and Human Rights Commission, which approved the current text of Article 359-A of the Criminal Code, answered this question in the affirmative. Specifically, the Commissions concluded that "criminal liability for illegal financing of political organizations" was required by the constitution; however, when the Joint Opinion was issued a "precise definition of the criminal offense" was still pending.

In my opinion, it is reasonable to conclude that the inclusion of the above clause in the Constitution was intended, in the context of the "political reform" pursued by the Executive Branch between 2018 and 2019, to put an end to the perception of widespread impunity with regard to the illegal financing of political parties, rather than to address the current state of affairs. From this point of view, Article 35 of the Constitution was intended to express the commitment of the Peruvian State to ensuring that this particularly serious form of corruption would be met with "civil, administrative or criminal" charges. It follows from this interpretation that criminal legislation on this matter is required. Thus, what Huerta (2012) has pointed out in relation to Article 8 of the Constitution also applies here:

> […] the phrase in the Constitution mandating an obligation to tackle and punish illicit drug trafficking must not be read as having no significant impact on the legal system, since this would imply acknowledging that the Constitution may contain normative provisions without legal relevance (p. 186).

This clause thus raises two fundamental issues. First, it is unclear whether it is intended to be purely symbolic; in this sense, it evokes the well-known strategies of "zero tolerance" and "no quarter given" in the fight against certain crimes which in some cases have resulted in penal populism and irrational legislation which has had little to no preventive success.

Secondly, the Constitution does not seem to be the appropriate instrument for such a clause; it is not compatible—according to a majority of legal scholars—with the principle that constitutional provisions should be open in nature, and it could be used to convincingly support arguments that legal considerations related to specificity and subsidiarity should be excluded from the debate on the criminalization of illegal financing.

In conclusion, interpreting the protected legal right as "the normal functioning of political parties with regard to their constitutional obligations" supports the decision to locate Article 359-A of the Criminal Code at the beginning of the second chapter—"Crimes Against Democratic Participation"—of Title XVII, which concerns "Crimes Against the Will of the People." Although the location of a criminal offense within a body of regulations is not decisive when it comes to identifying the legal right protected, I believe that the location of Article 359-A within the Criminal Code does not contradict my analysis here.

V.1.2. Offenders

In a previous section, I pointed out that the HCPR's *Final Report* (Tuesta et al., 2019) proposed criminalizing the "illegal financing of

political organizations," and that the "simple" offense should include two conducts—"soliciting" and "receiving"—related to "donations or any other type of financial support from illegal sources of financing." I also clarified that this would be a "special" offense, meaning only individuals who hold particular positions can be charged with it. To give more detail, the individuals who could be charged with his offense, that is, the only potential offenders, were individuals – specifically treasurers, campaign managers, legal representatives, and *de facto* or *de jure* administrators of a party's finances – who were authorized to make decisions of varying consequence regarding the financial operations of a political organization.

The Executive Branch included these conducts in the bill sent to the Congress of the Republic, but made two changes to the objective elements. It added two acts—"accepting" and "extorting a promise" of a contribution—and it eliminated the "special" requirement that only those individuals who hold particular positions could be charged with the offense. As such, Bill No. 4189/2018-PE described a criminal offense which would encompass acts involving "passive participation in illegal financing" ("soliciting", "receiving" or "accepting" contributions) and "active participation in illegal financing" ("making payments"), which any person could be charged with.

However, when it approved the creation of the offense under Law No. 30997 the legislature not only eliminated the act of "extorting a promise" of an illegal donation, but also, as I will discuss below, replaced the expression "source of illegal financing" with "legally prohibited source of financing" in its definition of the "material object"[6] of the crime.

Base on this brief outline we can begin to determine precisely which individuals may be charged with "passive participation in prohibited financing of political parties." "Soliciting," "receiving" and "accepting" contributions from a "legally prohibited source" only constitute a violation of the legal right if the individual is capable of ensuring the prohibited funds reach the political party. For this to occur it is necessary that the offender have some kind of connection with the party. In my opinion this is why the HCPR recommended the "special" condition that only individuals who hold particular positions could be charged with the "simple" offense, while still allowing for the creation of "aggravated" offenses, e.g., when a treasurer, campaign manager or legal representative of a political organization makes use of funds in the knowledge that they came from a proscribed source of financing.

6 T.N.: The legal systems of many countries in the Spanish-speaking use the term "material object" (*objeto material*) to refer to the person or thing which the offending conduct is carried out upon or directly affects, in this case the financial contribution.

Although neither the bill drafted by the Government nor the final text of Article 359-A of the Criminal Code stipulated that only individuals who hold particular positions could be charged, it is nonetheless clear that, according to the harm principle, only individuals whose roles —*de jure* or *de facto*—require links to a political organization can engage in conducts involving "passive participation in illegal financing;" only this interpretation allows us to reasonably hold that they can "solicit," "accept" or "receive" prohibited financial contributions on behalf of an organization. A similar interpretative criterion is employed by the majority of Spanish scholars when interpreting the offense of "passive participation in private illegal financing" (Art. 304 bis 1 of Spain's Criminal Code), which includes "receiving" illegal donations without the requirement that the offender hold a particular position (Hava, 2016, p. 459; Odriozola, 2018, p. 118; Pérez, 2018, p. 114).

It is important to note that Article 359-A of the Criminal Code stipulates that the offending conducts include both directly and "indirectly" soliciting, accepting or receiving prohibited contributions. This mention of "indirect" conducts opens the door to charges being brought against those who facilitate corrupt financing. The majority of Spanish scholars accept this interpretation, which allows for the possibility of "intermediaries" being charged; those who receive prohibited donations destined for a political party (Macías, 2016, p. 136; Puente, 2017, p. 94). As Corcoy and Gallego (2015) point out, this means is not necessary that the offender have any formal connection to the party which benefits from the act (pp. 1053).

With regard to "active participation in illegal financing," there is also no requirement that an individual hold a particular position in order to be charged, and both "direct" and "indirect" (in this case, through an intermediary) "delivery" of the prohibited contribution are punishable. All of this suggests that the legislature did not intend to impose restrictions regarding the donors which can be charged with a criminal offense. However, Article 359-A of the Criminal Code does not mention the provisions concerning the administrative liability of legal persons contained in Law No. 30424 of April 21, 2016, whose Article 2 includes "legal persons such as entities governed by private law as well as unregistered associations, foundations, committees and companies, entities with independent assets, and state and semi-state companies." The regulations proposed by the HCPR and in Bill N° 4189/2018-PE, however, did seek to reform the aforementioned Law No. 30424 so that the same provisions would apply to criminal offenses related to the "illegal financing of political organizations."

The criminal policy decision to refrain from allowing legal persons, associations, foundations and other entities to be charged with this

crime is deserving of severe criticism, since it significantly limits the effectiveness of the rule in terms of prevention, thus calling into question the commitment of the Peruvian State to the fight against "political corruption." However, it is important to separate this issue from the question of whether political parties should be held criminally liable for certain offenses; we are not concerned with whether or not they are subject to the regulations of Law No. 30424, but whether "active participation in prohibited financing" is punishable under this law.

Finally, it is important to note that candidates, treasurers, campaign managers and *de facto* or *de jure* administrators of a party's finances cannot be charged with the "simple" offense of either "passive" or "active" participation in illegal financing. If such individuals engage in these activities they are charged with the "aggravated" offense detailed in the second paragraph of Article 359-A of the Criminal Code.

V.1.3. The prohibited conducts

The "simple" offense of prohibited financing of political organizations applies both to those who "solicit," "accept" or "receive" contributions from "legally prohibited sources" and those who make such donations, i.e., those who "deliver" them. The legislation in Peru, in common with that in Spain (Javato, 2017a, p. 29; Quintero, 2016, p. 531; Puente, 2017, p. 74), focuses on a number of offenses related to "public corruption" (Montoya, 2015) and "private corruption" (Caro, 2021).

However, while the Spanish Criminal Code employs the technique of "blank" criminal laws (laws which make express and "en bloc" reference to non-criminal regulations, with all the legal issues this entails) to define the contributions deemed illicit in the "crime of illegal private financing," the Peruvian Criminal Code contains an implicit internal reference, including an expression—"legally prohibited source of financing"—which is explained in other regulations, without expressly referring to any particular criminal law provision (Doval, 1999, p. 90). Article 359-C of the Criminal Code specifically defines this expression.

A first issue with the description of the prohibited conducts is that the specific moment when the offense is deemed to take place is unclear, since the "governing verbs" employed refer to intrinsically different situations. As regards "soliciting," "accepting" and "receiving" illicit contributions, the offense of "passive participation in illegal financing" can be deemed to have taken place as soon as this conduct is engaged in. Even so, considering the wide-ranging nature of the protected legal right—"that political parties carry out their constitutional obligations as normal"—and the fact that any individual can be charged with

this offense, for the purpose of assessing the "material unlawfulness"[7] a restrictive interpretation is most appropriate, as pointed out in the previous section. A number of Chilean scholars interpret the crime of illegal financing of political parties in a similar manner (Náquira & Salim-Hanna, 2021, p. 820).

As for the "delivery" of prohibited contributions, according to Nieto (2019), the offense is deemed to have taken place "the moment the contributed amount falls under the control of the political party" (p. 501).

The definition of the criminal offense does not include, for example, conducts such as "extorting a promise" of illegal financing from a donor (which was included in Bill No. 4189/2018-PE) or "offering" an illegal contribution. Nevertheless, these behaviors are a necessary component of the preparation phase of this criminal offense and, given that endeavoring to commit an intentional crime is punishable under Peruvian law (Villavicencio, 2006, p. 421)—unlike other legal systems—such conduct could be punished as an unsuccessful attempt to commit a crime.

The second issue worth highlighting is the following: while the second paragraph of Article 359-A of the Criminal Code does mention "candidates" and "campaign managers," the description of the "simple" offense does not contain—notwithstanding some error or omission on my part—any reference that suggests that the conducts detailed can be punished whether or not they are perpetrated during an election campaign (national, regional or local). This is not the case in the Chilean law on illegal financing; it is stipulated that only conducts involving contributions to "candidates or parties" which are prohibited under the Law of Political Parties or the Election Law are punishable.

As I mentioned previously, the Peruvian legislature has historically been reluctant to establish regulations relating specifically to election financing and expenditure, which has given rise to a regulatory vacuum which makes oversight of the financial activity of political organizations extremely difficult. This problem affects the interpretation of the criminal offense under discussion, as corrupt campaign financing is a problem that deserves specific attention. As such, the LPO should regulate the "financing—public and private—of election campaigns," establishing limits and detailing the "prohibited sources." On the basis of these regulations, and with due regard for the principles of specificity

7 T.N.: In the jurisprudence of many countries in the Spanish-speaking world the term "material unlawfulness" (*antijuricidad material*) refers to the specific social harm caused by an act with respect to the legal right protected by the criminal law.

and subsidiarity, the offenses to be punishable under criminal law could be delineated.

Finally, it is also important to highlight that "receiving contributions from a legally prohibited source" is defined as a criminal offense in Article 359-A of the Criminal Code and as a very serious offense in Article 36.c.5 of the LPO. As will be seen below, the regulatory overlap does not solely relate to the "governing verbs" employed in these particular articles, it is also in evidence in Article 359-C of the Criminal Code and Article 31 of the LPO, both of which deal with "legally prohibited sources of financing."

V.1.4. The "material object"

Unlike the criminal legislation in Italy and Spain, in Peru the *nomen juris* of the criminal offense does not refer to the "illicit" or "illegal financing of political parties," but to "financing" through contributions from "legally prohibited sources." As such, the "material object" of the crime does not include all economic contributions which may be obtained illegally, nor does it include money or property obtained through acts which, although they may technically be permitted under the law, are nonetheless "illicit" because—providing certain conditions are met—they violate certain principles and constitute abuse of process, abuse of the law, or abuse of power (Atienza & Ruiz, 2000, pp. 16-31).

The Peruvian legislature avoided the use of the expression "illegal financing" in Articles 359-A and 359-C of the Criminal Code. The explanation for this can be inferred from the "Statement of Reasons" attached to Bill No. 4189/2018-PE, to which I have referred numerous times. According to this document, the proposed Article 359-C of the Criminal Code was intended to distinguish between "prohibited financing" of political parties and "money laundering." Although not expressly stated, it was necessary to differentiate these criminal offenses as a number of the most recent scandals related to corrupt financing were being investigated as cases of money laundering.

According to Caro (2019), the Justice Department has focused on money laundering in its investigations of these scandals—despite the fact that the standard of proof for this crime is extremely demanding—since the acts involved were carried out prior to the creation of the crime of "prohibited financing" of political parties. The problem with this, the author adds, is that those indicted for receiving money for election campaigns have argued that the criminalization of "prohibited financing" represents "undeniable proof that their acts were not criminal: the new criminal offense has only existed since August 2019." Likewise, "in the worst-case scenario" defendants argue "that the new law [which created the crime of prohibited financing] should be applied because the penalties are considerably lower than those for money laundering."

Caro concludes that, although the two are clearly different crimes, the debate remains open because of a similarity between the two: money laundering refers to "assets obtained from 'illicit sources'" and requires that the perpetrator be aware of or presume the source; while prohibited financing "refers to 'legally prohibited sources of financing' and requires that the offender be aware of, or have the responsibility to be aware of, the source."

In my opinion, corrupt party financing and money laundering frequently go hand in hand. As Maroto (2015) points out

> evading compliance with the restrictions imposed by election campaign regulations, as is the case with concealing the proceeds of other crimes [related to illicit financing], generally involves putting in place mechanisms to conceal the source and destination of donations, as well as the amounts, the intermediaries involved, etc. (p. 294).

This overlap explains why, prior to the 2019 reform in Peru—as was the case in Spain prior to its 2015 criminal reform—the crime of money laundering could be perfected as part of a strategy to illegally finance a party, and campaign contributions could launder dirty money. The problem is that, as the majority of Spanish legal scholars argue, money laundering (as is the case with other criminal offenses such as bribery and influence peddling, among others) does not encompass all of the wrongdoing involved in corrupt party financing (León, 2018, p. 7). This reading can be easily applied to the *sub judice* cases mentioned above. In short, the argument that money laundering linked to illegal financing could not constitute money laundering before 2019 is unsubstantiated.

Moreover, a potential retroactive application *pro reo* of Article 359-A of the Criminal Code to the *sub judice* cases of money laundering would require something that the 2019 reform of the Criminal Code did not represent: a succession of laws which have changed over time in line with new evaluations. Making the "prohibited financing" of political parties a standalone offense does not have any impact on the need, usefulness, or merit of criminal punishment for money laundering. However, if acts such as those discussed above have been committed since the 2019 reform came into force, then the link between crimes related to the "prohibited financing" of parties and money laundering would be clearer.

An additional problem with regard to the legislation governing political parties is that Article 31 of the LPO details the "prohibited sources of financing" and Article 359-C of the Criminal Code does the same; indeed, the latter includes a word for word reproduction of a part of the former. This overlap raises the question of what criteria should be used

to guide the decision as to which "sources" should be included in the Criminal Code.

This decision regarding the "sources" must be justified by clearly identifying the legal right being protected by the criminal law, among other criminal policy considerations. It must be "necessary" in order to protect the legal right that said sources be prohibited under criminal law. Two examples can be used to illustrate this point: first, the prohibitions related to financing from public sources (rather than "direct or indirect public financing") under criminal law is based on the principle of state neutrality in relation to the democratic system; and the prohibition of "private financing" from legal entities (national or foreign, profit or non-profit) is based on the principle that political parties must be independent from financial lobbying groups, as well as the principle of equal opportunities in political competition, which would be compromised by an influx of private donations to particular political forces. And second, criminal law is the most "appropriate" instrument of control, given the capacity these offenses have to impede political parties from "carrying out their constitutional obligations as normal." The same arguments can be made, as I have done in previous sections, regarding contributions from "anonymous sources." As Callejón (2021) states, "permitting anonymous sources of financing results in a higher likelihood of corruption going unpunished" (p. 869). The cancellation of bank debts and refraining from collecting on loans should also be outlawed. Making a loan to a party while knowing in advance that it will not be repaid or making a loan without intending to collect on it, according to García (2017), is close to "the most basic notion of corruption."

By using a more reasoned specification of the sources of financing to be prohibited under criminal law the implicit reference in Article 359-A of the Criminal Code to Article 359-C of the Criminal Code would express the decision that such offenses are deemed to cause greater harm than those classed as administrative violations. Moreover, I believe that the list of "prohibited sources" in the LPO is not necessary, since it has less effect in terms of prevention than might be believed: it seems that the role of Article 31 of the LPO is merely to integrate the administrative offenses of its own Article 36.c.5. Based on this argument, the administrative sanctions stipulated by the LPO could be limited to behaviors—for example, non-compliance with caps on contributions, violating the duties of transparency and accountability, etc.—which, since they are deemed to cause less harm, should not be punished under the Criminal Code. In any case, this issue deserves a deeper and more detailed analysis than that undertaken by the legislature.

This notwithstanding, there is no justification for the parallel regulations in Article 31 of the LPO and Article 359-C of the Criminal Code, especially considering that it is difficult to find a reason which satisfactorily explains the overlap. The criminal law proposal prepared by the HCPR suffered from the same issue, as did Bill No. 4189/2018-PE.

V.2. *Mens rea*

Under Article 359-A of the Criminal Code only intentional conduct is punishable. The offense of "soliciting," "accepting" or "receiving" contributions, as well as that of "delivering," require that the offender "be aware of, or have the responsibility to be aware of, the source." It is reasonable to assume that the offender must also be aware that the contribution will be received by a party. These acts are not punishable if the individual did not have knowledge of the criminal nature of their conduct.

V.3. Penalties

The "simple" offense is punished with a custodial sentence of not less than two and no more than five years and a fine of between sixty and one hundred and eighty day-fines, and disqualification pursuant to Article 36, paragraphs 1, 2, 3 and 4 of the Criminal Code. There are two problems with these penalties.

The first relates to the preventive effect of these penalties. The minimum custodial sentence is insufficient to have the deterrent effect recommended by the Group of States against Corruption with regard to corrupt political financing. Nor is it reasonable for the sentence range for this crime to be lower than that for the crimes of bribery or influence peddling, for example. Moreover, given that a person convicted of illegal financing may be convicted of those offenses in parallel, the total final sentence would also be lower.

Taking into account the seriousness of the offense, the upper limit on the fine to be imposed is also unsatisfactory. In addition, the amount of the fine, which is calculated based on the financial circumstances of the offender (Art. 43 of the Criminal Code), may be lower than the administrative fine stipulated for a violation of Article 36.c.5 LPO, which is pegged to the tax unit.

The second problem I wish to highlight relates to the possibility of imposing penalties on the political parties which benefit from this crime. Without wishing to minimize other equally complex aspects of this problem, it is important to keep in mind that broadening the legislation regarding the administrative liability of legal persons to cover political parties would give rise to a conflict between the legitimate interest of the

State in preventing and punishing crime within political parties and the exercise of the right of political participation—in a broad sense—by the members and supporters of that political organization. In the worst-case-scenario, this conflict could result in the dissolution of a political party (Faraldo, 2018; Sandoval, 2018).

VI. CONCLUSIONS

The criminal policy decision to make "prohibited financing of political organizations" a criminal offense is justified first of all by the vital importance of the protected legal right—"that political parties carry out their constitutional obligations as normal"—which in turn encompasses other values and interests of the State such as transparency regarding the financial operations of political organizations, the free representation and expression of the will of the people, political pluralism, equal conditions for political competition, and the independent functioning of political parties, all of which are fundamental to our political and democratic system.

Criminal punishment for this offense became necessary due to the ineffectiveness of the LPO in terms of prevention, the absence of self-regulatory mechanisms in political parties, and the lack of an institutionally enforced system of political accountability. The backdrop of corruption scandals played a key role in the development of criminal policy in this area, and the somewhat problematic fact that Article 35 of the Constitution mandates that illegal financing be made a criminal offense was an additional contributing factor.

Prior to 2019 individuals who engaged in corruption related to political party financing were charged with offenses related to "public corruption," money laundering and tax fraud, among others. These offenses, however, do not come close to encompassing all of the wrongdoing involved in obtaining financial resources for political parties through corruption.

With regard to comparative law, although many countries have made the illegal financing of political parties a criminal offense, the regulations in Peru have a number of strengths in comparison with other legal systems. For example, financing with public funds other than those authorized by the LPO and falsifying information related to contributions, income or expenditure are criminal offenses in Peru but not in Spain; this shortcoming in the Spanish Criminal Code has been criticized by numerous legal scholars that country[8].

However, despite the strong justification for the creation of the criminal offense and the fact that a number of aspects of the legislation in Peru

8 Recent examples can be found in Bustos (2021, pp. 161-174) and Cano (2021, pp. 195-198).

merit a positive evaluation, any prognosis regarding its effectiveness in terms of prevention must take into account a number of shortcomings. Of those I discussed in the previous section one of the most concerning is that the categorization of the different offenses as criminal—those in Articles 359-A and 359-C of the Criminal Code—or administrative—those defined in the LPO—does not seem to correspond to the degree of harm involved. These regulatory overlaps affect the "governing verbs" used to describe the offenses and also the regulations detailing the "prohibited sources of financing," which define the "material object" of the offending conducts. This lack of rationality in the legislation has resulted in significant inconsistencies in the proscribed penalties.

Although the 2019 criminal reform represents an important step towards the goal of eliminating the regulatory gaps in which "political corruption" thrives, it cannot be said that it marked a decisive change in the system of administrative oversight or in political parties' employment of self-regulatory mechanisms. In conclusion, it is still important to recognize, as the HCPR warned, that low levels of representativeness, widespread fragmentation, poor organization and minimal cohesion within parties make Peru's political system especially vulnerable to corruption (Tuesta et al., 2019, pp. 23 and 32). Criminal laws alone will not remedy this state of affairs.

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