

Let us imagine a situation in which an individual gets caught while carrying over 300 thousand dollars across the border without declaring it. According to the criminal statute, the harsh punishment of automatic forfeiture of the whole amount carried is to be applied in such situations. The reason behind such a severe penalty is the assumption that the vast majority of people smuggling bulk cash of substantial value are involved in a money laundering scheme. However, in this case the illegal origin of the cash carried has not been proven and the individual claims the whole situation is merely due to an ordinary oversight. Taking that into account, isn't the full forfeiture of 300 thousand dollars an unfairly severe punishment for a minor administrative offence?

This question has been faced by the US Supreme Court in case of *Bajakaijan*. In their ruling, the majority decided that under such circumstances the sanction of full forfeiture, as disproportionately harsh, is unconstitutional. The opinion of majority has met with a dissent in which it was argued that money laundering is a crime both lucrative and hard to prove. Therefore, the intention of the legislator was to apply harsh sanctions to cash smugglers *precisely in those situations, in which the illegal origin of the cash smuggled has not been proven*. We interpret the tension present in this verdict as a symptom of the conflict between consequentialist (economic) and retributivist approaches to the problem of proxy criminalization.

In the law and economics literature, the notion of a **proxy crime** refers to crimes such as possession of illegal drugs over the statutory limit or acceptance of illegal gratuities by civil servants. A common feature of these crimes is that they prohibit conduct which is **not significantly socially harmful in itself** but the legislator assumes that it is "**suspicious**", i.e. it is in a significant correlation with some other "underlying crime" (here, respectively, drug trafficking and bribery). In law and economics literature it is argued that proxy criminalization is justified when proving the underlying crime "beyond a reasonable doubt" may be hard but convicting individuals engaging in the suspicious behaviour is still socially desirable.

However, as the opinion of majority in *Bajakaijan* shows, proxy criminalization may be found objectionable, mainly because of prevalent **retributivist moral intuitions**, which prohibit the **intentional punishment of innocents**. After all, proxy criminalization seems to inevitably lead to punishing "innocents" (i.e. individuals who have committed the proxy crime without committing the underlying crime) which is unacceptable from the retributivist perspective.

The main objective of this project is to answer the question of whether there are cases of proxy criminalization which may be justified from both, seemingly conflicting, points of view. Our working hypothesis is that such a case is possible if proxy criminalization dynamically leads to such situation (separating equilibrium) in which all "innocents" refrain from engaging in the suspicious behaviour.

However, first let us notice that proxy crimes, although very common, are still scarcely described in legal theory. Therefore, we will start our research with creating a precise definition of proxy criminalization, introducing a typology of proxy crimes, and finding the most common examples of them across different legal systems. Then we will carry out a philosophical analysis of whether and how proxy criminalization may be justified from consequentialist (economic) and retributivist points of view. Finally, using the methodology of game theory, we will identify factors that may facilitate/hinder the emergence of the postulated separating equilibrium.

Our project has both a theoretical value, because of the need to fill out an important gap in the criminal law theory, as well as a prescriptive dimension, since it will possibly result in recommendations relevant from the perspective of contemporary debates on the overcriminalization of many spheres of life.