



ST. MARY'S
UNIVERSITY

St. Mary's Law Journal

Volume 51 | Number 1

Article 2

10-2019

Book Review

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Recommended Citation

Roberto Rosas, *Book Review*, 51 ST. MARY'S L.J. 101 (2019).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol51/iss1/2>

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BOOK REVIEW

ROBERTO ROSAS*

Lavado de Dinero y Defraudación Fiscal en el Derecho Positivo Mexicano
(*Money Laundering and Tax Fraud in the Mexican Legal System*)

by Julio Aspe

Editorial Porrúa, Mexico City, Mexico, 276 pages

Cloth ISBN 978-607-09-3329-5

Julio Aspe, a graduate with an LL.M. in American Legal Studies from St. Mary's University School of Law, is the author of this outstanding book. It explores, with diligent academic and practical rigor, a current topic that is widespread throughout the world. Money laundering wreaks havoc on countries' morals, economics, and governance due to the immense amount of capital that is handled because of its illicit nature and its relationship with tax fraud.

The author is a Mexican law graduate of the Escuela Libre de Derecho de la Ciudad de Mexico, who after receiving his LL.M. at St. Mary's University School of Law, earned an honorable mention in his Doctorate in Law (J.S.D.) from the National Institute of Criminal Science (Instituto Nacional de Ciencias Penales). Additionally, he earned a humanist education through his graduate studies in Europe.

Throughout his professional life, the author practiced constitutional, administrative, and tax law. He later specialized in criminal tax law and the litigious aspects of operations involving illicit resources, and assisted in the

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development of this body of law. Currently, Dr. Aspe works as an attorney with a joint practice in Mexico City, Mexico and San Diego, California.

The author wrote this book after questioning the relationship between Article 400 of Mexico's Federal Penal Code (criminalizing operations with illicit resources, commonly known as money laundering) and Article 108 of Mexico's Federal Tax Code (criminalizing tax fraud).

In Mexico, both provisions—money laundering and tax fraud—have developed to allow for the simultaneous prosecution of both crimes. Further, it is presumed that the commission of one of the crimes indicates the commission of the other. The line between both crimes is tenuous. Their prosecution can follow the circumstances of a criminal law of exception¹ that reflects the hypothesis of Günther Jakobs, entitled Criminal Law of the Enemy,² and even more so, the law of *anti-securitas*, as María Laura Böhm proposes it.³ The author uses María Laura Böhm's approach in an attempt to explain the dynamic between money laundering and tax fraud, and the extraordinary consequences that the prosecutor emphasizes in the prosecution and sentencing of these crimes.⁴

This book analyzes the relationship between money laundering and tax fraud not only from a dogmatic approach, but also from a historical, sociological, and criminological framework.

The legal issues that arise from money laundering and tax fraud have generated problems for law researchers since their inception. Roman philosopher Seneca's statement, *scelere velandum est scelus* (a crime must be concealed by another crime), gives the earliest approximation of a definition for the crime of money laundering—given that the activity implies creating an appearance of legality to criminal profits. Legal issues surrounding money laundering and tax fraud are still present in current times, considering the advancement of technology and the growing use of electronic means for financial transactions.

1. The law of exception is a movement that specifies that there are exceptions to the principal guarantees within criminal law—cases where principal guarantees do not apply. For example, the presumption of innocence. In criminal law, there is a presumption a criminal defendant is innocent until proven guilty. This presumption of innocence, however, is not absolute—it is limited in certain cases such as in acts of terrorism. This concept is regarded as the criminal law of exception.

2. JULIO ASPE, LAVADO DE DINERO Y DEFRAUDACIÓN FISCAL EN EL DERECHO POSITIVO MEXICANO [MONEY LAUNDERING AND TAX FRAUD IN THE MEXICAN LEGAL SYSTEM] 25–28, 263 (2019).

3. *Id.* at 38–48, 255–56, 260.

4. *Id.*

Money laundering and tax fraud not only have a historical or legal nexus, according to the author, they also intersect with the criminal policies of risk reduction and danger avoidance by criminalizing suspected conduct before it is proven. In these cases, criminal law departs from human rights guarantees and is substituted with the criminal law of exception.⁵ This is justified by balancing the potential risks and the need for security.

Therefore, the State imposes more obligations on its citizens regarding the flow of money and financial transactions. The State has extensive control over corporations and financial institutions that are obligated to report suspicious operations. The State tends to take cash out of circulation and electronically monitor the movements of the general public's capital and earnings. Thus, making it easier for the State to monitor and audit capital.

The State uses advanced technology to monitor the flow of capital through the banking system, allowing so-called financial intelligence (as well as tax audits) to detect and track certain acts. This technology can lead to penalizing perpetrators before establishing whether any crimes were actually committed by alleging money laundering and tax fraud.

In these cases, the classification of an administrative infraction or criminal offense assumes harm—and therefore, the presumption of innocence is relative—and an inquisitorial procedure is implemented. For these offenses, there is an a priori determination of the perpetrator's dangerousness and measures are taken against the perpetrator—in anticipation a conviction—who is then pre-prosecuted for the commission of one or more crimes.

Undoubtedly, adjudication through an exception to criminal law applies in these situations.⁶ The risk and dangers to the social order that money laundering and tax fraud present legitimizes the application of such criminal law exceptions. Under this viewpoint, money laundering and tax fraud jeopardizes the peace of mind of citizens, and therefore, imposing control measures and regulations to oversee financial assets—that could finance criminal activities or activities that evade taxes—is a logical consequence.

The author addresses the topics discussed above in the first chapter of the book, while including statistics relating to money laundering and tax fraud to highlight the difficulty in quantifying these crimes at a global level.⁷

In the second chapter, the author discusses relevant international law by analyzing the relationship between concealing profits originating from

5. *See supra* note 2.

6. *See supra* note 2.

7. *See generally id.* at 1–48.

illegality and tax crimes.⁸ Mr. Aspe's international analysis primarily focuses on the Vienna Convention of 1988,⁹ the 2000 Palermo Convention,¹⁰ and the Financial Action Task Force recommendations.¹¹ He also reviews the laws of various countries, including the laws of the United States, United Kingdom, Spain, Argentina, and Italy. These reviews will prove to be of great assistance to the global audience.

The author provides an outstanding comparison of U.S. legislation on money laundering—including the Currency and Foreign Transactions Reporting Act, also known as Bank Secrecy Act,¹² the Money Laundering Control Act,¹³ and the Annunzio-Wylie Anti-Money Laundering Act¹⁴—with tax fraud. He finds similarities between these regulations and their common-law counterparts, and further reveals their similarities with legislation from civil law countries. These comparisons provide for a richer understanding of the underlying dynamics between money laundering and tax fraud.

Chapter three discusses the criminal elements of money laundering and tax fraud, which are presented in a criminally dogmatic light.¹⁵ The chapter includes a chronological timeline of the development of both crimes in Mexico. The first legislation that considered tax fraud an actual crime was in 1887 (Ley del Timbre), which established the first form of money laundering as a tax crime. Money laundering was regarded as a special nameless crime in Article 115 of the Federal Tax Code from 1990 to 1996, but now is an autonomous and independent crime in Mexico through Article 400 of the Federal Penal Code.

Continuing his explanation, the author considers in chapter four the dynamic between money laundering and tax fraud—from the creation of wealth by these activities and whether the activity has a legal or illegal origin—to then determine what consequences the wealth may or may not

8. See generally *id.* at 49–100.

9. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 4, 1988, 1582 U.N.T.S. 95.

10. United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000 U.N.T.S. 209.

11. See ASPE, *supra* note 2, at 60–64 (acknowledging the forty published recommendations by the Financial Action Task Force).

12. 31 U.S.C. §§ 5311–5330 (2001).

13. 18 U.S.C. § 1956 (2016).

14. Annunzio-Wylie Anti-Money Laundering Act of 1992, 106 Stat. 3672 (1992).

15. See generally ASPE, *supra* note 2, at 101–60.

have as an object subject to taxation.¹⁶ He also explores if the non-payment of taxes gives rise to money laundering given that legal commerce produces taxes. In addition, if at all, the profits of an illegal or criminal economy leads to money laundering, tax fraud, or both.

In this chapter, the author also explains the discussion generated by legal doctrine and considers whether tax fraud is an antecedent crime to money laundering.¹⁷ The author concludes it is not legally possible for tax fraud to be an antecedent to money laundering because it goes against the nature of tax burdens, which arise from legal activities subject to taxation. By classifying tax fraud as money laundering, we run the risk of committing *non bis in idem*.

In the fifth and last chapter, the author analyzes Mexican legislation, focusing on the third paragraph of Article 108 of the Federal Tax Code, which orders the simultaneous prosecution of tax fraud and money laundering.¹⁸ This legislation presumes tax fraud exists when operations are conducted with resources from illegal origins.

In this chapter, the author also analyzes the government agencies involved in the investigation and the prosecution of both crimes.¹⁹ The book highlights these agencies resources and competence, while discussing their level of compliance with the Constitution and the governing principles of human rights. Lastly, the author concludes that since the Mexican legislature denotes that both crimes can be prosecuted simultaneously and tax fraud is presumed committed when it involves resources from money laundering, there is a risk of punishing the same conduct twice, and the principle of the presumption of innocence and other fundamental human rights are threatened.

It is important to point out the number of references this work makes to diverse authors and law academics, the extensive and profound bibliography,²⁰ and to the preface by Ricardo Gluyas Millán.²¹ Ricardo Gluyas Millán earned a Bachelor's in Law and a Bachelor's in Economics from the Universidad Nacional Autónoma de México, as well as a Doctorate in Applied Economics from Facultad de Ciencias Económicas y Empresariales de la Universidad Autónoma in Barcelona, Spain. He is

16. *See generally id.* at 161–208.

17. *See generally id.*

18. *See generally id.* at 209–79.

19. *See generally id.*

20. *Id.* at 259–71.

21. *Id.* at VII–X.

considered one of the leading academics and researchers of topics in money laundering in Latin America. He has published in México, among other works: *Ganancia Ilícita: Prevención contra el lavado de dinero* (Illegal Profits: Prevention of Money Laundering), *Inteligencia Financiera* (Financial Intelligence), *Estudio Jurídico-Penal del Delito de Contrabando Equiparado de Dinero en México* (Criminal Law Study of the Crime of Smuggling Compared with that to Money in Mexico). His preface to *Lavado de Dinero y Defraudación Fiscal en el Derecho Positivo Mexicano* (Money Laundering and Tax Fraud in Current Mexican Law) enriches the book.

Worthy of note is the esteem Dr. Julio Aspe has for St. Mary's University. He mentions on the first page of his book that he is an LL.M. graduate in American Legal Studies from St. Mary's University School of Law and cites some of his professors throughout this book. He also cites St. Mary's University School of Law professors in his other published legal research in prestigious law journals of different countries.

St. Mary's University School of Law is very proud of the professional accomplishments of its graduates, especially when such works are developed within the framework of its Marianist tradition and its values. The Catholic Marianist University's mission can be identified fully in the author's work, and Julio Aspe honors St. Mary's University throughout his book. He highlights the respect of human rights and considers the human being in an integral way, demonstrating the Marianist views worthily being represented by the author.

Notably, even though the book focuses on Mexican legislation, it has immense value because of globalization and how extensive money laundering is around the world.

Congratulations Dr. Julio Aspe, and receive this beautiful reflection by Sor Juana Ines de la Cruz: Que el Señor os colme tanto de días como de bendiciones. (May the Lord fill you with both days and blessings.). This book will surely become a classic on the subject of money laundering and tax fraud.