FORGERY

Lesson 24

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FORGERY

SUMMARY

1. COMMON ELEMENTS
2. LEGAL DEFINITIONS:
    1. *FORGERY COMMITTED BY AN AUTHORITY OR CIVIL SERVANT (ART. 390 & 391 CrimC).*
    2. *FORGERY OF PUBLIC, OFFICIAL AND COMMERCIAL DOCUMENTS DONE BY PRIVATE INDIVIDUALS (ART. 392.1 CrimC).*
    3. *TRADE AND USE OF FORGED IDENTITY DOCUMENTS (ART. 392.2 CrimC).*
    4. *USE OF FORGED PUBLIC, OFFICIAL AND COMMERCIAL DOCUMENTS IN A TRIAL OR TO THE DETRIMENT OF OTHERS (ART. 393 CrimC).*
    5. *FORGERY OF PRIVATE DOCUMENTS (ART. 395 CrimC).*
    6. *USE OF FORGED PRIVATE DOCUMENTS IN A TRIAL OR TO THE DETRIMENT OF OTHERS (ART. 396 CrimC).*
    7. *FORGERY OF PAYMENT CARDS, TRAVELLERS' CHEQUES OR OTHER NON-CASH PAYMENT INSTRUMENTS (Art. 399 bis CrimC).*
    8. *GENERAL PROVISIONS. MANUFACTURING OF COUNTERFEITING TOOLS AND OTHER RELATED CONDUCTS.*

FORGERY

1. COMMON ELEMENTS
   1. *DEFINITION OF DOCUMENT IN FORGERY AND DIFFERENCES BETWEEN PUBLIC, OFFICIAL, COMMERCIAL AND PRIVATE DOCUMENTS.*
      - **Document**: any material format in which manifestations of will, legal transactions, or any other situation with which it is intended to prove the reality of the legal act, with evidentiary effectiveness or legal relevance. Criminal concept of document (art. 26 CrimC).
      - **Public or official** documents: strict concept and broad concept (or by incorporation or destination).
      - **Commercial** documents: strict concept of commercial documents (those with special significance in legal/commercial traffic beyond their character as such, e.g. STS no. 232/2022, of 14 March, which rejects the commercial nature of an agency contract) and broad concept of those documents.
      - **Private** documents: residual concept, i.e., those not considered to be public or commercial documents.

FORGERY

1. COMMON ELEMENTS

2. LEGALLY PROTECTED INTEREST

- Trust in legal transactions, which determines several consequences:

1. It is a **danger offence to other legal assets**, by which it is intended to prevent the commission of harmful offences, especially those against property.

This should affect possible concurrences, which should be solved as concurrence of norms (8.3 CrimC, consumption) if the forgery is an element of the legal definition.

2. The legally protected interest establishes that the threshold of consummation for the offence is when **a forged document** enters **into legal traffic and is used in legal trade.**

FORGERY

1. COMMON ELEMENTS

3. MODALITIES OF FORGERY ACCORDING TO ART. 390 CrimC AND NOTION OF FORGERY

3.1. Falsifying modalities are found in Article 390 CrimC:

1st Altering any of the essential elements or requirements of a document.

2nd Simulating a document in whole or in part in such a way as to mislead as to its authenticity.

The Supreme Court introduced **an expansive interpretation of the concept of simulation** here that encompasses cases in which the documents are real but what is said in them has no real basis (absolute simulation).

3rd Assuming the involvement in an act of people who have not been involved, or attributing to those who have taken part in it statements or declarations that are different from those they would have made.

4th Failing to tell the truth in the narration of the facts.

3.2. Modalities of use of a false document: use of a forged document is considered to be the **use of a document that is considered false** or the **use of an authentic document by someone who is not legitimately authorised to use it** (art. 400 bis CrimC).

FORGERY

1. COMMON ELEMENTS

4. SUBJECTIVE ELEMENT IN FORGERY.

4.1. This is mainly an intentional offence: the only exception refers to cases of negligent forgery committed by an authority or civil servant, as defined in art. 391 CrimC.

4.2. All forgeries committed by private persons require intent.

4.3. Some legal definitions require a more specific definition of intent, i.e.:

- *“the intention to harm another individual”, art. 394, 395 y 396 CrimC*

FORGERY

1. COMMON ELEMENTS

5. PERPETRATORSHIP AND PARTICIPATION

5.1. **Perpetratorship**:

- The only requirement is hegemony or control over the act; it is not essential for the perpetrator to carry out the forgery directly.

- The individual who benefits from the forgery is punished as a perpetrator even if it is not proven that they are the direct perpetrator, or if it can be proven that the direct perpetrator of the forgery is someone else. In such cases they should be considered co-perpetrators.

5.2. **Necessary cooperators and abettors:**

- As in all other cases of special offences (390 & 391 CrimC), extraneus (i.e., those who are not public officials) *should be considered only as necessary cooperators or instigators even if their role would make them co-perpetrators in a common offence (e.g., a person responsible for counterfeiting a document).*

FORGERY

1. COMMON ELEMENTS

6. MATERIAL WRONGDOING.

- *Gross and innocuous forgery are excluded from criminal liability as it is assumed that they do not damage the legally protected interest, i.e., they are unable to deceive anyone.*

Note, however, that forgery by scribbling someone's signature is usually punished.

- *Certain cases of consent are also excluded from punishment (e.g., when consent is given to sign a document on behalf of another person).*

FORGERY

1. COMMON ELEMENTS

7. OVERVIEW OF FORGERY

1. Forgery of documents (art. 390, 391, 392.1, 394.1 (telecommunication dispatches), 397-399 (certificates) 395, 399 bis.1 CrimC).

2. Use of forged documents (art. 392.2, 393, 394.2, 396, 399.2, 399 bis.3 CrimC).

3. Possession of forged credit or debit cards, travellers’ cheques or any other instruments for non-cash payments (art. 399bis.2 CrimC).

4. Preparatory acts that turn into offences (art. 400 CrimC).

5. Improper falsehoods (art. 401 CrimC): the use of authentic documents by an individual who is not entitled to use them is deemed equivalent to the use of forged documents of the same kind.

FORGERY

1. COMMON ELEMENTS

8. CONCURRENCE OF NORMS AND OFFENCES

6.1. Concurrence of norms **between different legal definitions of forgery** (speciality, Art. 8.1st CrimC, private vs. other documents; private individual vs. authority/civil servant, etc.) **and in cases of consumption** (Art. 8.3rd CrimC, fraud whose deception derives from a forgery) although, according to SC, **this is a means-to-end concurrence.**

6.2. Natural unity of action (v.gr. multiple forgery of documents related to the same fraud).

6.3. Concurrence of offences: continuous offence, ideal and means-to-end concurrence.

FORGERY

2. LEGAL DEFINITIONS

2.1. FORGERY COMMITTED BY AN AUTHORITY OR CIVIL SERVANT (ART. 390 & 391 CrimC)

2.1.1. **Conduct**: carrying out the forgery described in 390.1, as previously described.

2.1.2. **Active agent**: any authority or public official (art. 24 CrimC) who commits the offence **in the exercise of their functions**, which means that it should at least be related to those functions. This includes members of religious denominations if the document affects civil matters, especially personal status (e.g., being married).

2.1.3 **Object**: public or official documents, as a result of the public nature of the active agent.

2.1.4. **Mens rea**:

a) Art. 390 CrimC. Intention to counterfeit (forging a document intended for the legal trade).

b) Art. 391 CrimC. Forging a document by serious negligence (viz. a policeman who is tricked into changing the photo on a replacement ID card or a notary public who does not diligently check the identities of participants in a public deed).

2.1.5. **Penalties.**

a) Intentional offence: 3–6 years in prison, a fine of 6–24 months, and special disqualification of 2–6 years.

b) Negligent offence: a fine of 6-–2 months and a suspension from employment of office of 6 months–1 year.

2.1.6. **Attenuated legal definition** (Art. 398 CrimC): Any authority or public official issuing a certificate with little significance in the legal trade (less serious affect on the legally protected interest); this does not apply to Social Security or Public Treasury certificates. The penalty is 6 months–2 years in prison.

FORGERY

2. LEGAL DEFINITIONS

2.2. FORGERY OF PUBLIC, OFFICIAL AND COMMERCIAL DOCUMENTS DONE BY PRIVATE INDIVIDUALS (ART. 392.1 CrimC)

2.2.1. **Conduct**: carrying out the forgery established in art. 390.1.1st, 2nd (including cases of absolute simulation) and 3rd. This does not include the cases outlined in article 390.1.4th (not telling the truth in the narration of the facts).

2.2.2. **Active agent**: private individuals.

2.2.3 **Object**: commercial and public documents in accordance with the previous explanations.

2.2.4. **Mens rea**: intention to counterfeit (forging document intended for the legal trade).

2.2.5. **Attenuated legal definition** (Art. 399.1 CrimC): forging a certificate issued in Spain or in a third country. Penalty: 3–6 months.

FORGERY

2. LEGAL DEFINITIONS

2.3. TRADE AND USE OF FORGED IDENTITY DOCUMENTS (ART. 392.2 CrimC)

2.3.1. Material object: identity documents – i.e., any document used to verify the identity of a person (e.g., DNI, NIE, passports, driving licences, documents from other EU countries or documents from third countries) – used in Spain, regardless of where they were falsified.

2.3.2. Trafficking in false identity documents (Art. 392.2, first indent)

- ***Conduct***: *carrying out legal transactions with fraudulently forged documents without having been involved in the forgery.*
- ***Penalty***: *the same as for the perpetrators of the forgery.*

2.3.3. Use of false identity documents (art. 392.2, second indent)

- ***Conduct***: *knowingly using false identity documents*
- ***Penalty***: *6 months–1 year in prison and a fine of 3–6 months.*

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2. LEGAL DEFINITIONS

2.4. USE OF FORGED PUBLIC, OFFICIAL AND COMMERCIAL DOCUMENTS IN A TRIAL OR TO THE DETRIMENT OF OTHERS (ART. 393 CrimC)

2.4.1. **Object**: forgery mentioned in the previous provisions.

Does it imply that there are different types of forgery depending on whether it was committed by an authority or civil servant or by a private individual?

Even though it is the letter of the law, it makes no sense: there is no legal justification for imposing a higher penalty for the use of a forged document by an authority or public official.

2.4.2. **Conduct**: knowingly using a forged document, either

a) *<u>by means of its presentation in court</u>: this involves presenting the forged document in any jurisdiction and phase of the procedure and could concur with bankruptcy forgery (art. 261 CrimC, speciality of the latter, art. 8.1 CrimC) and procedural fraud (art. 248 and 250.1.7º CrimC, speciality and, in any case, alternativity, art. 8.1 and 4 CrimC).*

b) *<u>using the forged document to the detriment of a third party</u>: harming a third party in any of their legitimate interests, not exclusively of a financial nature. This will be understood to be co-penalised – consumption, art. 8.3 CrimC – in cases where it is the means for carrying out deception in basic fraud or the offence outlined in art. 250.1.3rd CrimC (procedural fraud).*

2.4.3. **Penalty:** one or two degrees lower than that which is awarded for forgers. Forgers are not punished separately for using the forged documents.

2.4.4. **Attenuated legal definition** (Art. 399.2 CrimC): knowingly using a false certificate created in Spain or in a third country, or trafficking in it. Penalty: 3–6 months in prison.

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2. LEGAL DEFINITIONS

2.5. FORGERY OF PRIVATE DOCUMENTS (ART. 395 CrimC)

2.5.1. **Object:** private documents as previously defined

2.5.2. **Conduct:**

a) The first three conducts outlined in Art. 390 CrimC.

b) Specific intent to harm another, not necessarily financially.

2.4.3. **Penalty:** 6 months–2 years in prison.

2.6. USE OF FORGED PRIVATE DOCUMENTS IN A TRIAL OR TO THE DETRIMENT OF OTHERS (ART. 396 CrimC)

- the same conduct as in art. 393 CrimC, but this time with private documents.

- Penalty: one degree lower than for forgers. Forgers are not punished separately for using the forged documents

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2. LEGAL DEFINITIONS

2.7. FORGERY OF PAYMENT CARDS, TRAVELLERS' CHEQUES OR OTHER INSTRUMENTS FOR NON-CASH PAYMENTS (Art. 399 bis CrimC)

2.7.1. **Material Object:** credit and debit cards or traveller's cheques or any other instruments for non-cash payments (including cryptocurrencies) defined in Art. 399 ter CrimC.

2.7.2. **Conduct:**

a) Altering, copying, reproducing or counterfeiting the above documents. The penalty incurred is 4 to 8 years' imprisonment, the upper half of which affects persons in general or is committed within a criminal organisation. A legal person can be punished for this offence.

b) Possessing the above documents for distribution or trafficking purposes. The penalty is the same as for counterfeiters.

c) Using a forged document to the detriment of another while knowing it to be false. The penalty incurred is 2 to 5 years' imprisonment.

d) Possessing or obtaining a forged document for oneself or a third party for fraudulent use or knowing it to be false. The penalty incurred is 1–2 years imprisonment (preparatory act turned into legal definition).

FORGERY

2. LEGAL DEFINITIONS

2.8. GENERAL PROVISIONS. MANUFACTURING OF COUNTERFEITING TOOLS AND OTHER RELATED CONDUCTS (Art. 400 CrimC)

- Special offence that turns preparatory acts into an offence: unjustified infringement of the principle of proportionality and the principle of the act.

12.1. **Conduct**: making, receiving, procuring or possessing counterfeiting tools.

12.2. **Material object**: tools, materials, implements, instruments, substances, data and software, apparatus, security features, or other means specifically intended for the commission of the offences described in the previous chapters.

Need for a restrictive interpretation based on the requirement that these items must be specifically intended for counterfeiting: items whose use is not expressly designed for committing forgery should not be included.

12.3. **Subjective element**: intentional offence; requires knowledge of the nature of these objects and their specific purpose.

12.4. **Penalty**: the same as for counterfeiting in the specific case (counterfeiting currency, documents, cards, cheques, and certificates).