SPANISH LAW AGAINST CORRUPTION

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> Corruption and democracy are to such an extent incompatible that, strictly speaking, one cannot speak of a corrupt democracy because if it is corrupt, it ceases to be a democracy.
>
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[1] *El desgobierno de lo público*, Barcelona, Ariel, 2007, p. 156.

I. The law against corruption

Although for methodological reasons it is not up to the constitutional jurist to enter the criminal law or sociologist business, at least for a merely illustrative purpose, it should be clarified (thinking of the potential non-Spanish reader) that, under the validity of the 1978 Constitution, history political and judicial power of Spain is walking (as can only happen in a state with an independent judiciary and freedom of the press) along the path of dozens of cases and convictions for corruption that have starred, and continue to star, the daily, journalistic and political chronicle.[2]

To understand the way in which the Spanish legal system has faced the "state of corruption"[3] hat has been able to afflict it, and for the purposes of a complete and systematic description and analysis of the legal regime of corruption in Spain, it is useful to attend, in application of the so-called authentic interpretation, to the justifying motivation incorporated into more than a hundred rules of infra-constitutional range that regulate this regulatory area. This is an exegetical approach from which interesting lessons can be drawn: firstly, the finding that explanatory memorandums and preambles rarely assume, in this area, etiological approaches to an issue

[2] Without exhaustive intention and by the name with which the cases are known: Roldán, Planasdemunt, Urralburu, FILESA, Lino (Castilla-La Mancha), Guerra (Andalucía), Astapa (Andalucía), Malaya (Andalucía), Baltar (Galicia), Alquería (Valencia), Naseiro (Galicia), Andraxt (Baleares), Mercasevilla (Andalucía), Banca Catalana (Cataluña), AVE, Palau (Cataluña), CAM (Valencia), Palma Arena (Baleares), Bankia (Madrid y Valencia), Invercaria (Andalucía), cursos de formación (Andalucía), Nóos, Bárcenas… If we are allowed to synthesize, for its explanatory usefulness, the list published in the last Annual Report of the Superior State Prosecutor's Office (2020), we will say that the Special Prosecutor's Office against Corruption and Organized Crime has intervened in matters so present in the media such as the following: for corruption, GÜRTELL, NAVANTIA, "familiares de quien fuera presidente de la Generalitat de Cataluña", Caso 3%, PÚNICA, ACUAMED, PLAZA S.A, Responsable infraestructuras Levante (ADIF), Querella del Ministerio Fiscal-Caso LEZO, Parques Eólicos, Fondos mineros, Caso Scardovi, Comisarios CNP - Operación TÁNDEM, Asunto de los ERE´S, Plan General de Ordenación Urbana de Alicante, CREEX y otros, G. P. Fórmula 1, Operación Poniente, Corrupción urbanística en La Axarquía, Asunto "Las Teresitas"…); y, por delincuencia económica, Forum Filatélico, AFINSA, IVA-Diligencias Previas 241/2006, INFINITY, SGAE, NUEVA RUMASA, Caja de Ahorros del Mediterráneo, BANKIA, Banco de Valencia, PESCANOVA, "HSBC, asunto FALCIANI", Bancaja Gran Coral, Vitaldent, Banco de Madrid, Iberdrola, Banco Popular, Real Federación Española de Fútbol, GOWEX, URBAS o ABENER. *Report of the State Attorney General's* Office for 2019, Madrid, 2020, *https://www.fiscal.es/memorias/memoria2020/FISCALIA_SITE/index.html.*

[3] Grondona, Mariano, *La corrupción,* Buenos Aires, Planeta, 1993, pp. 11 et seq. and pp. 57 et seq.

that is dissolving for the credibility of the Rule of Law, having repercussions on parliamentary fragmentation, and accentuating the political instability that we have suffered in Spain, at least since 2011. This view of the legislator towards the effects of evil, but not towards the causes that originate it, has repercussions on the articles of the norms, in which an accurate diagnosis of the problem is appreciated, and the prescription of certain active principles destined to alleviate the effects of it, but not a pertinent identification of the causes of the disease or a vaccine aimed at preventing it. An example is the reasoning contained in the Preamble to the Civil Convention on Corruption (number 174 of the Council of Europe) of November 4, 1999, ratified by Spain on December 1, 2009, when it states that corruption "constitutes a serious threat to the primacy of law, democracy and human rights, equity and social justice, which hinders economic development and endangers the proper and fair functioning of market economies".[4] In general, all agreements, laws, directives, and parliamentary initiatives in force in Spain coincide in testifying to the corrosive harmfulness of corruption on popular trust in institutions and on popular adherence to the founding pact of coexistence on which the Constitution rests; They also highlight its undesirable economic and political effects, but they do so superficially, that is, without sincere self-criticism or a desire to delve into its ultimate causes. These are directly related to marked shortcomings in constitutional culture and public ethics, which has repercussions on our political parties, on our political and administrative structures and, ultimately, on the guidelines and modes of behavior of our society.

Few official sources or authorities address the root of the problem. To give another example: according to the Statement of Motives of the bill to fight against fraud and corruption and protection of the complainant, processed in the Andalusian Parliament, it is "a systemic problem that affects the heart of democracy and that requires the adoption of effective public regeneration measures".[5]

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[4] As in the case of the Criminal Convention on Corruption (number 173 of the Council of Europe), this convention was ratified with an express and timely declaration on Gibraltar. Instrument of Ratification of the Civil Convention on Corruption (number 174 of the Council of Europe) made in Strasbourg on November 4, 1999, Spain, *BOE 78*, of March 31, 2010.

[5] According to this Explanatory Memorandum, in "recent years, events of business, institutional and political fraud and corruption in the Autonomous Community of Andalusia have generated not only rejection by the citizens, but have also contributed to the discredit of our institutions. The clientelistic use that, on occasions, has been made of public funds has produced the perception that corruption enjoys a certain impunity or is not pursued with the zeal that it should". Bill for the fight against fraud and corruption in Andalusia and protection

With a greater proactive imprint, the Ombudsman stated not long ago, without further specification, "that the fight against corruption, conflicts of interest and favoritism requires profound changes in the way the Administration and society act. as a whole that allow dispelling any doubt about the correctness of the administrative action".[6] And it is that, as the distinguished administrator Alejandro Nieto warned years ago, corruption "appears, with greater or lesser severity, in each and every one of the areas of social life".[7]

We have, then, a state of opinion (of indignation or resignation, depending on the case) that, as we see in the quotes just reproduced, has ended up being internalized in official headquarters and in the academy, without resulting in the disappearance or attenuation of the opening of judicial proceedings for criminal cases related to corruption. According to the well-established premise, corruption appears to us as a fact, a scourge that must be reckoned with (in order to try to tackle it) as if it were something consubstantial with the power structures and with presence since time immemorial as a consequence of endogenous and exogenous causes that can be analyzed, but not corrected.[8]

To this state of affairs, somewhat defeatist, is added in Spain the finding that corruption is also shown to us as an opportunity, or an asset, available to be used and made profitable in terms of electoral contest. Except in the case of the UCD-PSOE alternation in 1982 (which took place in the context of a Spain convulsed by terrorism, the implosion of the ruling party and the 1981 coup d'état), the other replacements of political parties in the Government of the Nation have always tended to coincide with scandals motivated by cases of corruption. This was the case in the last stage of the PSOE before the first PP government in 1996 (GAL cases of dirty war against terrorism and scandal of the looting of funds carried out by the former General Director of the Civil Guard), and also in the succession PP —PSOE, in 2004 (the judicial cases of the PP in the Autonomous Communities of Madrid and Valencia), or in that of the PSOE— PP in 2011 (cases of corruption in Andalusia, which is the Autonomous Community that has

of the complainant. Principality of Asturias, *BOPA 514*, of February 15, 2021, *http://www.parlamentodeandalucia.es/webdinamica/portal-web-parlamento/pdf.do?tipodoc=bopa&id=152134*.

[6] Ombudsman, "Informe de gestión", *Informe anual 2020*, Madrid, 2021, Vol. l., p. 750. *https://www.defensordelpueblo.es/wp-content/uploads/2021/05/Informe_anual_2020-1.pdf*.

[7] Nieto García, Alejandro, *El desgobierno de lo público*, *cit.*, p. 157.

[8] See a broad list of the exogenous and endogenous causes of corruption, in Goig Martínez, Juan Manuel, "Transparencia y corrupción. La percepción social ante comportamientos corruptos", *UNE Law Journal*, No. 17, 2015, pp. 75 and 76.

traditionally contributed the most votes to the PSOE in the General Elections),[9] all of which has been consolidating a state of social alarm fueled by the bipartisanship crisis and the increase in political disaffection, in an environment of cross accusations, with court cases that have affected several Autonomous Communities and have ended up emphatically implicating and directly to the institution of the Head of State. Corruption accredited by court rulings is today part of our institutional reality and appears embedded in political processes: party financing, patronage, public contracting, urban planning... And always with a "thunderous" presence in the media, sometimes illuminated by a supposed regenerative purpose,[10] and others for purposes of pure political agitation, although the normal thing is that one thing is mixed with the other.

Sociological studies on the perception of corruption, which are regularly produced by official bodies or entities as prestigious as Transparency International (which produces the index of perception of corruption or IPC), confirm that the corruption forms part of the core of our collective problems, which leads to a deterioration of trust in institutions and, as a corollary, the inclusion of corruption in the political agenda and in electoral programs. In September 2020, the monthly report of the Center for Sociological Research (an autonomous body attached to the Ministry of the Presidency), indicated that corruption and fraud were listed as the fourth cause of concern for Spaniards (after the strike, the economic crisis and the coronavirus). And the report for the month of April 2021 maintained exactly the same pattern.

In short, it can be said that the damage and the supposed electoral returns that the political actors manage pro domo sua when they talk about corruption, have ended up causing a certain circle of less than virtuous ef-

[9] The percentage of votes of the Andalusian PSOE in the General Elections went from 51.7% (2008) to 36.5% (2011), with figures that had only been reached in 1979. The newspaper El País reported with the following headline this decline: *Andalusia leaves the PSOE after 34 years of fidelity*, El País, November 21, 2011, *https://elpais.com/politica/2011/11/20/actualidad/1321810005_739938.html*. It should also be noted that the motion of censure presented in the Congress of Deputies against the Government of Mariano Rajoy, in May 2018, whose victory determined the fall of the same and the investiture of Pedro Sánchez as President of the Government, had its immediate origin and directly in a Judgment of the National Court in which the criminal responsibility of the PP was established for the case of illegal accounting and financing known as the *Gürtel* case.

[10] Barrero Ortega, Abraham, "Regeneración democrática y el fantasma de la antipolítica" in Gómez Rivero, María del Carmen (dir.) and Barrero Ortega, Abraham (coord.), *Regeneración democrática y estrategias penales en la lucha contra la corrupción*, Valencia, Tirant lo Blanc, 2017, pp. 15-17.

fects: in the face of corruption, recurrent legislative reforms that are "sell" as the answer to the worst collective ills: political corruption, economic enrichment, tax fraud, privileged information... But by not finishing solving such reforms the underlying problems that give them their reason for being, they themselves become a factor that multiplies and aggravates the repertoire of problems: political detachment from the electorate, citizen movements that challenge the constitutional pact of coexistence ("they do not represent us", 15-M), crisis of the traditional party system, formation of new parties, increasing political polarization and, ultimately, parliamentary fragmentation, bloc politics, and government instability mental like the one that has been lived in Spain for five years.

That said, we must ask ourselves what, if any, is the answer offered by the Constitution and Constitutional Law to prevent the causes and neutralize the effects of corruption.

II. Corruption and constitutional law: conceptual framework

Whether for historical reasons or by express decision of the constituent, the word corruption has an unequal place in the Constitutions: from the 20 references of the Constitution of Mexico[11] to the omission in the vast majority of constitutional texts: United States, Germany, Italy, France, Portugal, Austria, Argentina… The common thing in comparative Constitutional Law is to silence the word "corruption".[12] Of course, such is the case of the Spanish Constitution of 1978; and if we look at the jurisprudence of the Constitutional Court, we find that since 1981, only 35 sentences refer to the word corruption, and most of the time as a mere invocation or indirect reference,

[11] Mexico exemplifies the constitutionalization of corruption through the constitutional reforms approved between 1999 and 2019 in matters of judicial organization and criminal procedure (articles 19, 22, 73, 79, 102...). Other comparative references on this matter, almost always with a merely nominal character, can be found in article 14 of the Brazilian Constitution of 1988, the Preamble of the Cuban Constitution of 2019, or article 108.8 of the Bolivian Constitution of 2009: "Bolivian men and women have the duty: To denounce and combat all acts of corruption". Also referenced in articles 123 and 231. Likewise, article 36 of the Moroccan Constitution of 2011 "creates a national Instance of probity, prevention and fight against corruption".

[12] Vergottini, Giuseppe de, "Una *road map* contro la corruzione (An Anti-Corruption Road Map)", *Percorsi Costituzionali*, Milan, No. 1 / 2, 2012, pp. 19 and 20, *http://magna-carta.it/pubblicazioni/corruzione-contro-costituzione/*.

without delving into the concept or the devastating implications that corruption has on the essential contents of constitutionalism.[13]

The absence of formal references to corruption does not mean, obviously, that it is a trivial problem or lacks constitutional relevance. Taking into account the legal, jurisprudential and doctrinal justifications invoked, we can conclude that the heterogeneous, incomplete and fragmented regulation on corruption and pressure and interest groups in Spain is constitutionally based on the principles of the Rule of Law (control of authority, responsibility , rule of law, legal certainty, separation of powers and the democratic State, anchored, at least, in articles 23, 77, 103 and 106 of the 1978 Constitution: the right to political participation, the right to petition before the Chambers, objectivity and control of decision-making by public administrations...). All this, as we say, although corruption and its pernicious social and political effects make it difficult to fulfill the most basic constitutional functions: acceptability of the founding pact of coexistence, integration, governmental stability and legal security.

A look at the hundred or so regulations applicable in Spain to the phenomenon of corruption makes it possible to verify that, at least in this regard, the "regulation" is nothing more than an aspiration or a name. There is a lack of a uniform definition of corruption beyond the narrow and unavoidable scope of its criminal classification, the administrative sanctioning regime or the control entrusted to parliamentary bodies or offices or commissioned by Parliament. Corruption is not mentioned in the wave of most recent reforms of the Statutes of Autonomy (2006-2019); nor is anything said about it in the General Administrative Law (Law 39/2015, of October 1, on the Common Administrative Procedure of Public Administrations), a provision that was already elaborated in a context of social alarm caused by the multiple scandals of corruption. Regulatory fragmentation and legal loopholes hinder and intensely condition state activity in the fight against corruption. On the other hand, and unlike what is common in the European sphere, the lack of regulation of pressure groups, interests or lobbying is striking.

Meaning number 4 of the Dictionary of the Royal Spanish Academy defines corruption as follows: "In organizations, especially in public, consistent practice of the use of the functions and means of those for the benefit,

[13] See for all, on corrupt practices, the recent STC 180/2020, of December 14, BOE No. 22 of January 26, 2021, FF.JJ. 5 to 9, and with reference to the field of public procurement, STC 68/2021, of March 18, BOE No. 97, of April 23, 2021, F.J. 8.

economic or otherwise, of their managers".[14] According to this definition, and without the need, therefore, of criminal classification or administrative anti-juridicality, spurious economic benefit would suffice for there to be corruption.

If we refer to the action that causes it, according to the RAE, to corrupt means to alter and disrupt the form of something; to spoil, deprave, damage or putrefy something; bribe someone with gifts or otherwise; pervert someone; cause something to deteriorate (customs...). In addition, for the RAE there would be no qualitative or quantitative difference with "corruption" insofar as corruption is a word synonymous with corruption and is defined as "bad custom or abuse, especially those introduced against the law", without excluding actions not legally provided for.

More specifically, the Pan-Hispanic Dictionary of Legal Spanish defines corruption only in the criminal sphere and with an unlawful nature: "behavior consisting of bribery, offer or promise to another person who holds public office, or to private persons, in order to obtain advantages or benefits contrary to the law or that are of a fraudulent nature".[15] If this behavior "contrary to the law" occurs in the scope of the functions that the active subject performs in the Public Administration, the RAE adjectives corruption as "public corruption".[16] In developing this political characterization of corruption, and following his well-known thesis on the organization of misgovernment, Alejandro Nieto starts from the premise that "corruption accompanies Power like the shadow to the body" to then highlight that "within the State official and harmonic described in the Constitution (...) there is another semi-clandestine State where public life really takes place",[17] concluding that "corruption as misgovernment"[18] it is a note that necessarily accompanies the political system (systemic corruption or "democratic corruption".[19]

However, Alejandro Nieto himself explains that corruption and patrimonialization must be differentiated, although one and the other may co-

[14] Spanish Royal Academy, *Diccionario de la lengua española*, "Corrupción", *https://dle.rae.es/corrupci%C3%B3n*.

[15] Spanish Royal Academy, *Diccionario panhispánico del español jurídico*, "Corrupción", *https://dpej.rae.es/lema/corrupci%C3%B3n*.

[16] *Ibidem*, "Corrupción política", *https://dpej.rae.es/lema/corrupci%C3%B3n-p%C3%BAblica*.

[17] Nieto García, Alejandro, *El desgobierno de lo público, cit.*, pp. 154 and 155.

[18] *Ibidem*, pp. 153 and 154.

[19] On the systemic analysis of corruption, see Nieto García, Alejandro, *Corrupción en la España democrática*, Barcelona, Ariel, 1997, pp. 13-15 and 45 et seq.; Nieto García, Alejandro, *El desgobierno de lo público*, *cit.*, pp. 158 and 168.

incide. In his words, victory in the political struggle leads to the distribution of the spoils and the occupation of public office, a process that sometimes does not stop (...) and by virtue of which "the incumbent knows that he can obtain from public office greater profitability if you take advantage of the privileges of power to practice corruption". We could go further and specify that it is not that the patrimonialization of power, at least in the Weberian sense of the term and in its various forms, may coincide with corruption but, usually, it is the ignorance and/or contempt of everything that the Rule of Law means that delimits the natural context of corruption.[20] Moved by historical inertia or misunderstood corporatism, civil servants and public officials believe that the job, the physical space and the skills that accompany it, are their own domain from which, consequently, profits and advantages can be obtained, weave clienteles or impose easements, even if they are formally legal, instead of a field of public service subordinated to the general interest. And many times without all this going hand in hand with an awareness, even superficial, of the corrupt nature of the conduct.

It is in this context of "patrimonialization" of the public, sometimes perceived and stoically consented by the citizen, in which the subjective elements of the legal theory on corruption are incardinated: mainly the corrupt (those who allow themselves or have allowed themselves to be bribed, pervert or vitiate)[21] and the corruptor (the person who corrupts).[22] Both one and the other subject pervert a legal situation that is constitutionally conceived to objectively "serve" the general interests, fully subject to the Law (article 1031. CE) and excluding any particular benefit: economic profit, preference in the enjoyment of rights, favored treatment in public services or in administrative contracting, access to a job, civil servant promotion... As a consequence of poor constitutional education and a lack of ethical awareness, corrupt and corrupting individuals ignore or appear to ignore that public employees are servants and not owners of the legal situations generated by the exercise of public powers. A wide range of subjects with diverse responsibilities coexist in its environment, some of which —the so-called "day laborers of corruption"—[23] they are the most exposed in the eyes of society, even though they are not usually the ones who obtain the

[20] On neopatrimonial regimes, see Trocello, Gloria, "Regímenes neopatrimonialistas. Apuntes acerca de los modos de ejercicio de la dominación política en América Latina", *Revista de Estudios Fronterizos del Estrecho de Gibraltar*, No. 1, 2014, pp. 1-3 and pp.12 and 13.

[21] Spanish Royal Academy, *Diccionario de la lengua española*, "Corrupto", *https://dle.rae.es/corrupto.*

[22] *Ibidem*, "Corruptor", *https://dle.rae.es/corruptor.*

[23] Nieto García, Alejandro, *El desgobierno de lo público*, *cit.*, pp. 165.

most benefit. By "patrimonializing" the position or job ("Making something become part of the material or immaterial assets that are considered as their own")[24] and forget that the official, labor or administrative legal relationship is constitutionally configured as a public service relationship (article 103.1: "The Public Administration objectively serves the general interests...)", and not to use it (dominate or condition others for their own benefit or that of a third party), the foundations of the building of corruption are already laid. Corruption, says Nieto again, is "the natural complement to the patrimonialization of the State apparatus".[25]

Depending on the degree of commitment of society with the ideal of transparency, the need arises to provide protection to those who oversee revealing corrupt actions. From this perspective, the figure of the whistleblower is the object of increasing attention by the legislator, sharing prominence with independent authorities and newly created regulatory bodies designed to stand up to systemic corruption. In the case of whistleblowers, European Union Law has an ad hoc protection system: the Directive (EU) 2019/1937.[26] Illuminated by the search for an important objective of general interest for the Union and for the Member States, it is read in Recital 84 of the Directive, it is necessary to provide effective protection of the reserve regarding the identity of the complainants, with the in order to protect the rights and freedoms of others and, in particular, those of the complainants themselves. To this end, the Member States of the European Union may restrict the exercise of certain data protection rights of the affected persons to the extent and for as long as necessary in order to frustrate attempts to curb complaints or hinder its development by attempting to ascertain the identity of the whistleblower. The Directive obliges the Member States to guarantee the existence of an adequate register with regard to all reports of infringements, so that they can be consulted, and that the information collected in them can eventually be used as evidence. Whistleblowers must also be protected against any form of retaliation, whether direct or indirect, that is taken, encouraged or tolerated by their employer or by clients or recipients of services and by people who work for or on behalf of them, including, for example, co-workers and managers of the same organization or

[24] Spanish Royal Academy, *Diccionario de la lengua española*, "Patrimonializar", *https://dle.rae.es/patrimonializar.*

[25] Nieto García, Alejandro, *El desgobierno de lo público*, *cit.*, pp. 155.

[26] Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the protection of persons who report violations of Union Law, *https://www.boe.es/doue/2019/305/L00017-00056.pdf*.

other organizations with which the complainant is in contact in the context of their work activities.[27]

III. The legal regime of corruption: a regulatory feast that does not address the causes

At the international normative level, corruption is governed by the United Nations Convention against corruption, of October 31, 2003, ratified by Spain through an Instrument of June 9, 2006, whose article 6 establishes that each State "in accordance with the fundamental principles of its legal system, it will guarantee the existence of a body or bodies in charge of preventing corruption" endowed with independence so that they can effectively carry out their functions and equipped with "the material resources and personnel specialized as necessary. All this for the purpose of achieve a "substantial reduction in corruption and bribery", which is one of the Sustainable Development Goals 2030 (SDG), in September 25, 2015.

Within the scope of the Council of Europe, article 2 (Definition of corruption) of the aforementioned Civil Agreement on Corruption of November 4, 1999, states that, for its purposes, corruption shall be understood as

> the act of requesting, offering, granting or accepting, directly or indirectly, a bribe or any other undue advantage or the promise of an undue advantage, which affects the normal exercise of a function or the behavior required of the beneficiary of the bribe, of the undue advantage or of the promise of an undue advantage.

The preamble of the Criminal Convention on Corruption number 173 of the Council of Europe, of January 27, 1999 (ratified by Spain by Instrument of January 26, 2010.[28]

As regards the state and regional spheres, the Official State Gazette Agency publishes and updates the so-called "Code for the Fight against Fraud and Corruption", which far exceeds a hundred regulations (the majority are laws) and the thousand pages in which the baroque and clustered Spanish legal regime on this matter is unraveled, both in its substantive

[27] Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the protection of persons who report violations of Union Law, *cit.*, Recitals 84-90.

[28] Instrument of Ratification of the Criminal Convention on Corruption (Convention No. 173 of the Council of Europe) of January 27, 1999, BOE 182, of July 28, 2010.

aspects and in its organizational and institutional aspects.[29] From this last perspective, the units of the Judiciary and the Prosecutor's Office (Special Prosecutor's Office against Corruption and Organized Crime) Stand-out, together with organizations with competence in the matter, such as the Advisory Council for the Prevention and Fight against Fraud the financial interests of the European Union.

The legislator codifies the main regulatory areas on corruption in the following Sections: a) guarantees; b) responsibilities and intelligence; c) asset recovery against fraud and corruption. The guarantees can be institutional and procedural. In the case of institutional guarantees, a distinction is made between "collaborating bodies for the prevention of fraud and corruption" and "agencies and services for the prevention of fraud and corruption", differentiating in the latter case the state structures (General Subsidies Law, Advisory Council for the Prevention and Fight against Fraud, Ministry of Finance) and the regional structures.

Regarding the collaborating agencies for the prevention of fraud and corruption, the profuse and scattered regulations on corruption are made up of the following regulations: General Tax Law, General Regulations for actions and procedures for tax management and inspection, National Fraud Investigation Office, Organizing Law of the Labor and Social Security Inspection System, Special Coordination Unit for the Fight against Transnational Labor Fraud, Law for the fight against irregular employment and Social Security fraud, Special Unit for Collaboration and Support for Courts and Courts, Law creating the Commission National Markets and Competition Law, Law for the Defense of Competition, regulations on the creation of the personal data file "Register of interest groups", Law on the Securities Market, Law for the prevention and blocking of terrorist financing, Law and Regulation for the prevention of money laundering and the financing of terrorism, the Centralized Body for the Prevention of money laundering of the Association of Registrars and the Centralized Body for the Prevention of money laundering in the General Council of Notaries.

On the other hand, in the case of procedural guarantees, jurisdictional procedures are distinguished, which are regulated in the Criminal Code, the Law regulating the Contentious-Administrative Jurisdiction and the Organic Law of the Judicial Power; and the so-called "auxiliary procedures for the prevention of fraud and corruption" regulated in the Law of the Common Administrative Procedure of the Public Administrations, the General

[29] Code of Fight Against Fraud and Corruption, BOE, *https://www.boe.es/biblioteca_juridica/codigos/codigo.php?id=322&nota=1&tab=2*.

Inspections of Services of the Ministerial Departments, the General Law of Subsidies, the Law of Contracts of the Public Sector , the Organic Law on the Protection of Personal Data and the guarantee of digital rights, the Law amending tax and budget regulations and the Law on Business Secrets, the Organic Law on Security Forces and Bodies, the Foral Law on the Navarre Police , the Consolidated Text of the Police Law of the Basque Country, the Police Law of the Generalitat-Mossos d'Esquadra, the Police Law of Galicia and the Law of the General Corps of the Canarian Police.

As for the responsibilities, their classification allows us to differentiate between those that are of an administrative nature, of an accounting nature and of a criminal nature on fraud and corruption. Regarding administrative responsibilities, these are those specifically regulated against fraud and corruption: the Law on the Legal Regime of the Public Sector, the Law on Transparency, Access to Public Information and Good Governance, the General Budgetary Law (partial), the European Union Law (responsibility for non-compliance with European Union Law), General Law on Subsidies, General Tax Law, General Regulations for actions and procedures for tax management and inspection, and the Law on Public Sector Contracts.

In everything related to accounting responsibilities against fraud and corruption, the legal regime is found in the following regulations: Organic Law of the Court of Accounts, Law on the Operation of the Court of Accounts, General Budgetary Law, regulations on administrative files of responsibility accountant, Law of the Audiencia de Cuentas de Canarias, Law of the Council of Accounts of Galicia, Law of the Audit Office of Catalonia, Law of the Basque Court of Public Accounts, Law of the Audit Office of the Principality of Asturias, Foral Law of Chamber of Accounts of Navarra, Law of the Chamber of Accounts of Aragon, Law regulating the Council of Accounts of Castilla y León, Law of the Chamber of Accounts of the Community of Madrid, Law of Audit Office of the Valencian Community, Law of Chamber of Accounts of Andalusia and Law of the Audit Office of the Balearic Islands.

And thirdly, the criminal responsibilities against fraud and corruption are included in the Organic Law of the Penal Code, the Organic Law for the Repression of Smuggling, the Organic Law of the General Electoral Regime, the Law that regulates the Statute Organic Law of the Public Prosecutor's Office, the Law on mutual recognition of criminal decisions in the European Union, the Law regulating joint criminal investigation teams in the European Union, the Complementary Organic Law Law regulating joint criminal investigation teams and the Law on the Statute of the crime

victim. Of the criminal regime on corruption, reformed by LO 1/2015, of March 30, just at a time of great social concern about corruption and quantifiable citizen detachment towards traditional political parties, the criminal type of corruption established in the article 286 ter 1, precept that sanctions those who "by offering, promising or granting any undue benefit or advantage, pecuniary or of another kind", in actual or attempted degree ("corrupt or attempt to corrupt"), by themselves or "by interposed person" to contemplate the usual use of figureheads. Along with the corruptor, the corrupt is "an authority or public official who acts for their benefit or a third party, or responds to their requests in this regard", contemplating both action and abstention ("act or refrain from acting in relation to the exercise of public functions to obtain or retain a contract, business or any other competitive advantage in the performance of international economic activities)".

The sanctions are prison sentences, a fine, a ban on contracting with the public sector, as well as the loss of the possibility of obtaining subsidies or public aid and the right to enjoy tax and Social Security benefits or incentives, and to intervene temporarily in commercial transactions of public importance for a period of seven to twelve years.

Regarding the qualification, according to article 286 quater, the facts will be considered, in any case, of special gravity when: a) the benefit or advantage has a particularly high value, b) the action of the perpetrator is not merely occasional, c) in the case of acts committed within a criminal organization or group, or d) the object of the business deals with humanitarian goods or services or any other essential, also being considered especially serious when: a) they have the purpose of influencing the development of games of chance or betting; or b) are committed in an official sports competition at the state level qualified as professional or in an international sports competition.

With regard to corruption in the field of legal-private relations, the crimes of corruption in business should be mentioned (reform of LO 1/2015, of March 30) of article 286 bis, according to which, The director, administrator, employee or collaborator of a commercial company or a company who, by himself or through an intermediary, receives, requests or accepts an unjustified benefit or advantage of any nature, or offer or promise of obtain it, for himself or for a third party, as consideration to unduly favor another in the acquisition or sale of merchandise, or in the contracting of services or in commercial relations, will be punished with a prison sentence of six months to four years, special disqualification from the exercise of industry or commerce for time from one to six years and a fine of up to three times the value of the benefit or advantage. According to section 2 of this

precept, the same penalties shall be applied to anyone who, by himself or through an intermediary, promises, offers or grants to directors, administrators, employees or collaborators of a commercial company or a company, a benefit or advantage not justified, of any nature, for them or for third parties, as consideration for unduly favoring him or a third party over others in the acquisition or sale of merchandise, contracting of services or in commercial relations.[30]

Finally, the legal regime on intelligence and recovery of assets against fraud and corruption is projected in the following regulatory areas: Law that regulates the status of the national member of Spain in Eurojust, Law of Criminal Procedure, Office of Recovery and Management of Assets, Basic organic structure of the Ministry of Justice, scope of action of the Asset Recovery and Management Office, basic organic structure of the Ministry of the Interior, basic organic structure of the Ministry of Health (partial), basic organic structure of the ministerial departments, Regulations for the control of drug precursors, Regulations for the Surveillance Commission for Terrorist Financing Activities, Ministerial Commission for Digital Administration of the Ministry of the Interior, Ministerial Commission for Digital Administration of the Ministry of Justice, Support Unit for the Special Prosecutor for Repression of Economic Crimes and Commission National to combat the manipulation of sports competitions.

IV. For when is the regulation of pressure and interest groups?

Evoking the eloquent Ciceronian question *Quousque tandem abutere patientia nostra*, one might ask: When will the regulation of pressure and interest groups arrive?

[30] Regarding specific corruption in sports, article 286 bis. 4 of the Penal Code punishes the directors, administrators, employees, or collaborators of a sports entity, whatever its legal form, as well as athletes, referees or judges, with respect to those behaviors that have the purpose of predetermining or altering deliberately and fraudulently the result of a test, meeting or sporting competition of special economic or sporting relevance. For these purposes, it will be considered a sports competition of special economic relevance, one in which the majority of the participants in it receive any type of remuneration, compensation or economic income for their participation in the activity; and sports competition of special sports relevance, which is qualified in the annual sports calendar approved by the corresponding sports federation as an official competition of the highest category of the modality, specialty, or discipline in question. LO 10/1995, of November 23, of the Penal Code, *BOE 281*, of November 24, 1995.

The Proposal to Reform the Regulations of the Congress of Deputies of May 7, 2021, aimed at incorporating a new Title XIV for the regulation of interest groups,[31] points out that "the regulation of the activity of influence of interest groups within the General Courts is a pending issue of the Spanish parliamentarism". With more than seven decades behind the United States of America[32] and almost the same period of delay with respect to several European States, Spain has not had legislation on interest groups and lobbies until in 2016 the National Commission of Markets and Competition (CNMC) created a registry of Interest Groups[33] of a partial and voluntary nature that welcomes almost 600 entities (2021), almost none, by the way, belonging to the IBEX 35.[34]

Gone are the failed debates, approaches and initiatives of the last four decades: from the process of drafting article 77 of the Constitution (exercising the right to petition before the Chambers) to the parliamentary processing of the aforementioned Law 19/2013, of December 9, Transparency, Access to public information and Good governance, whose final text did not regulate pressure groups, going through several other bills that did not prosper. The aforementioned Proposal for the Reform of the Regulations of the Congress of May 7, 2021, has the purpose of incorporating a new Title (which would be the XIV) on the regulation of interest groups, with a public Registry and accessible through the website of the Congress of Deputies for the registration of interest groups and their representatives "who wish to carry out their influence activity within the Congress of Deputies".

If this recent Proposal prospers, organizations and individuals, regardless of their form or legal status, platforms, networks or other forms of collective activity without legal personality that carry out "influence activity" will be considered "interest groups". To this end, two interrelated concepts are introduced: a) "influence activity", defined as "all communication,

[31] Proposal for the Reform of the Regulations of the Congress of May 7, 2021, to incorporate a new Title XIV for the regulation of interest groups, *Boletín Oficial de las Cortes Generales* (BOCG), Series B, No. 165-1, of May 7, 2021, *https://www.congreso.es/public_oficiales/L14/CONG/BOCG/B/BOCG-14-B-165-1.PDF.*

[32] In 1946, the *Federal Regulation Lobbying Act* of 1946 was approved in the United States of America, which was followed by the *Lobbying Disclosure Act* of 1995 and the *Honest Leadership and Open Government Act* of 2007.

[33] *https://rgi.cnmc.es/.*

[34] Business associations, companies, offices and consultancies, NGOs, academic and think-tank groups, professional associations, or foundations, among others, have been registered in this registry, which assume a code of ethics in their relations with CNMC officials that prohibits trafficking with the information obtained or making gifts or invitations to officials.

direct or indirect, with members or public employees of the Congress of Deputies or Parliamentary Groups, which intends to influence in the preparation, processing or approval of projects and legislative proposals or of other parliamentary initiatives";[35] y b) Legislative Footprint and Legislative Footprint Report, with "public, universal and free" access, which according to article 214 of the aforementioned Proposal for the reform of the Regulations, would be prepared by the services of the Chamber in the processing of each legislative initiative and where the proposals received from the interest groups or their representatives, "delivering the documents related to them, and that have been used for the preparation or amendment of legislative initiatives", as well as their modifications. In addition, according to this regulation proposal, when registering an initiative, deputies and parliamentary groups must communicate "if it originates from an interest group". The legislative footprint report would also collect all the votes produced during the process, indicating the direction of vote of each of the members of the Chamber who had participated. This regulatory regime would be completed with a sanctioning regime for deputies and parliamentary groups, leaving unanswered many questions raised by private and public agents, national and international, that influence the decision-making procedures of our public Administrations.

As in the case of corruption, we are facing an incomplete and fragmented legal regime, still pending a systematic and integrated regulatory configuration in the legal system at the service of the protection of the general interest, particularly in the decision-making procedures of the Public Administrations.[36] A regulation, in short, that lacks planning and has too many voluntaristic and fragmented approaches that offer an impression of provisionality and, ultimately, of inefficiency.

V. Corruption and multilevel government: European Union, autonomous communities and local entities

If we take as a reference the type of multilevel government that characterizes the constitutional structure of the State in Spain, we can affirm that corrup-

[35] Proposal for the Reform of the Regulations of the Congress of May 7, 2021, to incorporate a new Title XIV for the regulation of interest groups, *cit.*, articles 209 and 210.

[36] On the necessary complete, systematic, and multidisciplinary approach to corruption, see Gimeno Sendra, José Vicente, "Corrupción y propuestas de reforma", *La Ley*, No. 7990, December 26, 2012, pp. 1 and 2.

tion has not only affected the central level of the State but also its European levels (mainly in the area of structural funds, fraud of large-scale cross-border VAT...), regional (with very famous cases and sustained over time in various Autonomous Communities) and local (urban planning schemes, especially notable). In short, all levels of power are involved in this legal fight against corruption.

At the international level, the Group of States against Corruption (GRECO) supervises compliance with the aforementioned Civil and Criminal Agreements on Corruption[37] (supported organically by the International Organization for Police Criminal-Interpol, Europol and other regional bodies). At the European level, and in development of article 325 of the Treaty on the Functioning of the European Union (hereinafter, TFEU), which imposes on the Union and the Member States the obligation to combat fraud and any illegal activities that harm financial interests of the European Union, the aforementioned Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the protection of persons who report violations of Union Law, known as the Whitleblowers Directive, is expressly refers to the need to "prevent and detect fraud and corruption in public procurement in the context of the execution of the Union budget" and has become a regulatory instrument with great potential for harmonizing state and regional law and , then, to articulate the coordination, control and administrative, criminal and accounting investigations.[38] This directive is added to a complex system of sectoral regulations whose monitoring and control corresponds mainly to the European Public Prosecutor's Office,[39] as well as the European Anti-Fraud Office (OLAF); in both cases with powers to investigate fraud in the execution of the General Budget of the European Union, corruption and serious misconduct in the European institutions. It also has a voice in the preparation of the anti-fraud policy for the European Commission, and has powers to investigate, with full organizational and functional independence, complex corruption activities of an eminently supranational nature.

[37] The IBEX is made up of the 35 most liquid companies listed on the Spanish Stock Exchange Interconnection System. Technical Guide to the United Nations Convention against Corruption. New York. 2010, *https://www.unodc.org/documents/mexicoandcentralamerica/publications/Corrupcion/Guia_tecnica_corrupcion.pdf*.

[38] Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the protection of people who report violations of Union Law, recital 6.

[39] Regulation (EU) 2017/1939 of the Council of October 12, 2017 establishing enhanced cooperation for the creation of the European Public Prosecutor's Office, *https://www.boe.es/doue/2017/283/L00001-00071.pdf.*

To this end, specific programs and actions have been designed, such as the so-called Hercules programs, aimed at preventing and combating fraud, corruption and other illegal actions that affect the financial interests of the European Union.

For its part, the state regulatory level, already referred to above, has an organic structure present in the three powers of the State, significantly in the Judicial Power, where in addition to the jurisdictional bodies of the criminal and contentious-administrative orders, they act independently and impartiality of the anti-corruption Prosecutor's Offices at state and regional level (Special Prosecutor's Office against Corruption and Organized Crime), reporting hierarchically to the State Attorney General's Office. In the specific field of control of the Governments and Public Administrations, in parliamentary headquarters or bodies commissioned by Parliament, the Legislative and Non-legislative Permanent Commissions (control) stand out, as well as the Investigation Commissions, the Ombudsman, the Commission for the audit of democratic quality, the fight against corruption and the institutional and legal reforms of the Congress of Deputies; and the office of Conflict of Interests of the General Courts. The external and internal controls —in addition to the jurisdictional-accounting control of the Court of Auditors, the General State Comptroller and the General Service Inspections— are completed by the network of independent public bodies (Transparency and Good Governance Council, National Commissions: competence, stock market, coordination of the judicial police, gambling...) and specialized bodies already mentioned. De lege ferenda, both in doctrinal and parliamentary terms, the creation of a National Authority to Fight Corruption at the state level, independent of the Public Administrations and their public sector and attached to the Congress of Deputies, is defended, which would act in a supplementary in those Autonomous Communities that lacked an equivalent body.

At the regional and local level, corruption has deserved special parliamentary and doctrinal attention, which is pending an adequate general regulatory order regarding a problem that cannot be attacked from isolated compartments. And not only because the Statutes of Autonomy are silent on corruption, but because, despite the profuse and diverse ordinary legislation approved on this matter, corruption has permeated the administrative structures through the usual forms of patronage and damage to the public treasury. Public, always to the great discredit of the institutions. Indeed, for four decades, some Autonomous Communities have mimetically repro-

duced the political and administrative structures of the State,[40] but at the same time they have distinguished themselves by their constant link to corruption scandals (Catalonia, Madrid, Andalusia, Valencia...), which are at the origin of a citizen perception, justified to a greater or lesser extent, in which corruption goes the hand of electoral clientelism and the perpetuation in power of the traditional parties. This autonomous dimension of corruption has shown that partisan use (sometimes in collusion with journalistic companies) can be used both to regenerate public life and also to destroy the political adversary; and, in the long term, to try to achieve both objectives simultaneously. As Alejandro Nieto points out (again) with his usual irony, many times "if you have good lawyers or the judge falls asleep on the summary (not an uncommon case), the statute of limitations arrives and nothing has happened here"; or it also happens in other cases, that the judicial acquittal of the innocent "is worth nothing", due to the irreparable damage of a moral, political and economic nature caused by the "bench sentence" of the defendants in a situation of preventive detention.[41]

The most representative regulations of this regional and local level of the legal regime on corruption are the following: Catalonia (Law of the Cybersecurity Agency of Catalonia, Law of the Anti-Fraud Office of Catalonia, Law of foreign action and relations with the European Union, Law on the Audit Office), Valencian Community (Law on the Agency for the Prevention and Fight against Fraud and Corruption, Law on the Audit Office, Law on the General Inspection of Services and Law regulating the activity of the interest groups of the Valencian Community, which has had a referential character), Balearic Islands (Law creating the Office for the Prevention and Fight against Corruption in the Balearic Islands), Navarra Foral Community (Legal Law creating the Office of Good Practices and Anticorruption of Navarra), Aragón (Law of Public Integrity and Ethics), Principality of Asturias (Law of the General Inspection of Services, Law of Transparency, Good Governance and Interest Groups), Extremadura (Law of public contracting Socially Responsible Government of Extremadura), Castilla y León (Law that regulates the actions on information provided to the Autonomous Administration and Law of the Civil Service of Castilla y León), Canar ias (Law of the Audiencia de Cuentas de Canarias), Galicia

[40] See Fernández Alles, José Joaquín, "La progresiva equiparación al Estado como modelo autonómico: el caso de Andalucía", *Teoría y Realidad Constitucional*, No. 24, 2009, pp. 323-355.

[41] Nieto García, Alejandro, *El desgobierno de lo público*, *cit.*, p. 160.

(Law of the Council of Accounts) and Madrid (Law of the Chamber of Accounts of the Community of Madrid.

In the field of regional and local governments and public administrations, the functions attributed to parliamentary bodies (commissions) or commissioned by Parliament (autonomous Ombudsmen, transparency agencies...), the jurisdictional-accounting control of the Chambers of Autonomous accounts, the general interventions of the corresponding Autonomous Communities and the General Service Inspections. In addition, there are Anti-Corruption Offices (Andalusia) and registers of interest groups (Aragon, Asturias, Catalonia, the Valencian Community and Madrid). Within this regional and local level, it is also worth mentioning that in Andalusia the draft Law on the fight against fraud and corruption and protection of the complainant is currently being processed, whose article 2 addresses the difficult challenge of defining the corruption of the broadest way and with pretensions to cover all the possible assumptions.[42]

To finish drawing the picture, it should also be mentioned that, in the field of civil society, we have seen the emergence of associations whose main objective is the fight against corruption, such as the Alliance Against Corruption association, which is being especially active in monitoring situations of corruption linked to calls for public employment.

VI. Conclusive reflections

The same thing happens with corruption that happens with many other areas of social reality: they are easy to perceive, but difficult to be covered by

[42] Article 2 of the Draft Law on the fight against fraud and corruption in Andalusia and protection of the complainant defines corruption as abuse of power to obtain illegitimate gains or benefits, for oneself or for third parties, through the illegal use or destination or irregular of funds or public assets; the violation of the principles of equality, merit, publicity, capacity and suitability in the provision of jobs in the Andalusian public sector, including instrumental entities of the Administration of the Andalusian Government; Any other irregular use, for himself or for third parties, derived from conduct that entails a conflict of interest or the use, for private benefit, of information derived from the functions attributed to the people included in the following subjective scope: to people who provide services in the Andalusian public sector; people who provide services in the institutions and bodies provided for in Title IV of the Statute of Autonomy and in those other public entities that are considered Institutional Administration of the Junta de Andalucía; people who provide services in the entities that are part of the local Administration of the Autonomous Community of Andalusia and public bodies and entities of public or private law linked or dependent on them; and people who present services in Andalusian public universities and public bodies and entities of public or private law linked or dependent on them.

means of a precise definition that could serve as a guide for normative activity aimed at combating it. There is as much corruption in the civil servant who deducts substantial time from his workday to allocate it to the social activity of "shared coffee" (or making domestic purchases), as in the provost or treasurer of the political force who demands a commission in exchange for guaranteeing the award of a public work. Each sector of public activity, that of a civil servant nature, and that of a representative political nature, has its problems and its patterns of conduct, not always compatible with the ideal of an advanced and efficient democracy. With unsurpassable clarity, Madison already warned in number 51 of the Federalist that "if men were angels, the State would not be necessary (and) if angels governed men, no control of the State, neither external nor internal, would be necessary" With enlightened thought we learned that there was nothing to look forward to in matters of angelic rulership; and with constitutionalism, that it was necessary to raise certain barriers to the exercise of power and establish certain modes of exercising it available to generate by themselves virtuous government practices. The roadmap of constitutionalism is minimal and with a far-reaching projection that, obviously, is not enough to deal with contemporary social complexity and with the tendency to behavior far removed from Madisonian observations. But the underlying idea, in its simple bluntness, is still valid: where there is power there must be control (controls) and a system, one might add, that enables and encourages the demand for responsibilities, instead of diluting them and hindering attempts to demand them. Each era of democracy, that fragile and elusive ideal, has its crisis built in and the one that afflicts us today, under the stalk of populism, is closely connected to a perception of the management of the public that appears to us as essentially corrupt and accompanied by the message without nuances of "all equal". It is true that, as a counterpoint, during the last two decades we have witnessed, in the Ibero-American and European political space, a rise in the objective of transparency and good government as ways to deal with corruption.[43] But the fact that high rates of transparency and high rates of corruption sometimes concur simultaneously in the same political sphere casts a shadow over the picture.

What the review of the Spanish experience that we have summarized here shows is that the profusion of institutional norms and mechanisms

[43] See Pérez Tremps, Pablo and Revenga, Miguel (coords.), *Transparencia, Acceso a Información pública y Lucha contra la Corrupción. Tres experiencias a examen: Brasil, Italia y España,* Valencia, Tirant lo Blanch, 2021.

aimed at combating corruption, more than an indication of a healthy and vigorous system, seems to be the manifestation of a response that sounds circumstantial and inefficient. Faced with this, claiming the Machiavellian return to principles may perhaps sound like a melancholy confirmation of the failure of an endeavor, but let us conclude by presenting it rather as a cry of hope.