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THEORETICAL CONSIDERATIONS ON CONSTITUTIONALISM AND CORRUPTION

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SUMMARY: I. *Preliminary Remarks*. II. *Corruption, Democracy, Rule of Law, Transparency and Human Development*. III. *Right to Good Governance*. IV. *Deconstitutionalize Versus Reconstitutionalize the State*. V. *Constitutional Design and the Fight Against Corruption*. VI. *Internationalize the Prosecution of Corruption*. VII. *Conclusion*.

I. PRELIMINARY REMARKS

This work, which I have had the privilege of coordinating together with my dear and admired colleague Antonio María Hernández, addresses the specific experiences of twelve countries, on three continents: Argentina, Brazil, Chile, Colombia, Spain, France, Guatemala, Italy, Mexico, Peru, Singapore, and Venezuela. In this essay reflections of a general nature are formulated, accompanied by some proposals to deal with the problem of corruption.

Corruption is the most widespread and oldest vice of power. For this reason, for Victoria Camps, it is also the easiest to fight as it is not an abstract problem and has its own names.[1] Experience shows that it is not so easy to achieve this, since corruption has a great osmotic capacity, so that it infiltrates the spheres of power charged with combating it and cleverly and effectively camouflages itself. Sometimes the corrupt themselves adopt a reiterated and convincing discourse against corruption, in such a way that they distract attention while they grow from power. Sometimes they go after

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1 Camps, Victoria, *Virtudes públicas*, Madrid, Espasa Calpe 1990, p. 195.

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the corrupt of the competition, for which they receive recognition and support while clearing the way for their own excesses.

The use of anti-corruption discourse, as a diversionary strategy to hide one's own corruption, is facilitated in closed political systems, outside the controls of an established democracy. There are also cases in which the purpose of combating corruption is genuine, but good faith alone is not enough to achieve success if a solid institutional apparatus, based on the principles of constitutionalism, is not available. For these reasons, in the following pages I am interested in underlining the relationship between constitutionalism and corruption.

II. Corruption, Democracy, Rule of Law, Transparency and Human Development

The expression of the English historian John Edward Acton is famous in the sense that "power tends to corrupt and absolute power corrupts absolutely". Acton penned this sententious statement in a letter to Archbishop Mandell Creighton in April 1887,[2] in which he analyzed the principle of papal infallibility adopted by Vatican Council I in 1870, during the papacy of Pius IX, which gave the ecclesiastical monarch absolute power. He later added that "great men [he was referring to the men of government] are almost always evil".

Acton never developed a theory from his assertion, but his deep knowledge of history, especially ecclesial history, was present in it. The force of his assertion consists in pointing out that corruption accompanies power, and that the degree of power achieved determines the level of corruption suffered. That power, on the other hand, is not only political. He did not make the distinction, nor does it have to be made when the possible behavior of those who have instruments to make their decisions prevail is characterized in general. What Acton indicated is that whatever the form of exercising power (military, ecclesiastical, economic, political, for example), there is a risk that it will be corrupted. Note that he said that power "tends" to corrupt because it is not an inescapable fatality. History also accounts for righteous rulers.

Acton lived in Victorian England. It was a long period of transition that allowed the consolidation of constitutional institutions. For centuries, the

[2] Acton, J. E., *Lectures on Modern History*, Londres, Collins, 1960, p. 13. For a current analysis referring to Mexico, see also Zaid, Gabriel, *El poder corrompe*, Mexico, Penguin Random House, 2019.

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election of members of Parliament had been affected by three major forms of corruption: direct vote buying, bribery through the provision of food and drink to voters, and the granting of sinecures to those who controlled a certain number of voters. Beginning in 1832, Parliament began to enact laws to reduce the effects of corruption, culminating in the Illegal and Corrupt Practices Act of 1863.[3] Acton's axiom thus had an empirical basis in the political and ecclesiastical tradition of his country. Reducing electoral corruption was a moral objective that could be achieved when complemented by the political objective of strengthening the British parliamentary system in the 20th century. At present, there are cases of corruption, but the institutional system offers effective responses that allow corruption to be contained at minimum levels. Episodes that gain notoriety are always subject to immediate correction.

Contemporary constitutionalism provides instruments to limit corruption, such as robust representative systems, and public freedoms that allow society to know and speak out against deviations of power. Constitutionalism also limits the patrimonialism of power, for which the public administration must be professional, governed by merit and act independently of partisan politics. According to Acton's thesis, if concentrated power is avoided, the risks of corruption are mitigated.

Corruption is not an isolated phenomenon. In an institutional system there may be areas that are more or less prone to corruption, but when it is ostensible in some area it means that it also affects others, even if they are less visible. Rampant corruption is often devastating because it contaminates the power structure; the historical constant demonstrates its disintegrating effects on political systems that fail to reduce it.

In systems where representative democracy is not consolidated, the fight against corruption tends to rely on persecutory procedures typical of closed political systems. Concentrated power makes it only answerable to the person on the top rung of the hierarchy, until reaching the apex of the structure, the president. In these cases, corruption comes to be seen as an act of disobedience. The schemes adopted in hermetic regimes, such as the Chinese, for example, apply the punitive pattern whereby power, to palliate the erosion of a regime without democratic support, selectively punishes behavioral deviations. This maintains internal discipline and seeks external approval.

[3] *Erskine May´s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, edited by Cocks, Barnett, Londres, Butterworth, 1971, p. 32.

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This model of internal controls is explainable while the democratic institutions that provided more dynamic instruments of horizontal and vertical control of power do not prosper. Sustaining only that kind of response is insufficient. Currently one of the most effective instruments to counteract corruption lies in the freedom of information. Media investigations, access to information and social networks have served to contain the corrupting scourge. However, this is not enough.

Throughout history, the informative task has been crucial in the fight to open spaces for rights and reduce territory to corruption. The dramatic stagings in the classical Greek world, the wandering of the minstrels in the Middle Ages or the pamphleteering intensity of the 19th century contributed to spreading the excesses of power. The greatest exposure is due to the conjunction of formal, printed and electronic media, with informal ones, which include social networks, influential due to their penetration but not powerful, due to being unstructured. However, regarding corruption, the paradox of its impunity is recorded when data was lacking; and now that the evidence is available, not much is being achieved either. What was previously assumed is now known, and even so it has not been enough to banish impunity. Recent experience shows that knowing about corruption, without consequences, multiplies its practice and encourages cynicism. Information has always been relevant, but by itself it is not enough to contain corruption if there is no institutional framework capable of reducing impunity to the lowest possible level.

When informative instruments in the hands of individuals and well-designed representative systems are combined, where congresses have adequate control instruments, the result translates into a better quality and more honest ruling class. Britain is one of the best built democracies and one of the most capable of minimizing corrupt practices. It was there that the most important contribution to democracy began to be built, since Greek and Roman antiquity: the representative system. English constitutionalism did not compress the representative function to the point of pigeonholing it only as a *legislative power*. On the contrary, it kept the representatives as the axis of the system of civil liberties and political responsibilities. In a masterful synthesis, Bagehot, one of the most brilliant minds in constitutionalism, identified five key functions of Parliament, in this order: elect the government, express the will of the people, teach the people the value of politics and respect, inform society what the public power does and, in the end, legislate.[4] A representa-

[4] Bagehot, Walter, *The English Constitution*, Oxford, Oxford university Press, 2001, pp. 100 et seg.

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tive system with this magnitude of functions becomes a pillar of institutionality. It is not the only thing that the system has built; They also have one of the strongest civil services in existence, but the basis is an active Parliament and a model of public liberties that brings the representative system and the information system into synergy.

Corruption discredits politics. Reducing corruption is rescuing the constitutional system. To be successful, it is essential to modify the exercise of power. It is not an ethical challenge that can be resolved only with acts of personal will or only with punitive measures. Experience proves that in addition to democratic convictions, solid institutions are required, including political responsibilities. Impunity is not due to the lack of rules to punish corruption; what tends to frustrate the fight against corruption is the organization of power in which verticalism prevails. If the underlying problems are avoided and the Gordian knot of political irresponsibility is not broken, the administrative and criminal procedures adopted will not significantly change the results.

When corruption reaches levels like those recorded in the third decade of the 21st century, it can only be overcome with radical institutional innovations. As long as power remains highly concentrated and there are no effective instruments of political control over all the organs of power, the fight against corruption will be fruitless, since repressive measures are only part of the solution, but by themselves they are insufficient.

The relationship between corruption and the institutional system can be appreciated empirically through the indicators that reflect the situation of different areas in the life of the State. To have an image of the most relevant factors, I chose the indicators related to democracy, rule of law, transparency, human development, and corruption, taking the data provided by institutions whose investigations are recognized for their technical solvency. I selected the data corresponding to the countries whose cases are examined in this volume. In table 1, I present those corresponding to each selected country and, to facilitate the analysis, in table 2, I identify the place occupied by these countries according to the figures that appear in the first. The results are these:

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TABLE 1
INSTITUTIONAL PERFORMANCE INDICATORS

Country	*Democracy*[5] *(rank out of 167 countries)*	*Rule of Law*[6] *(rank out of 128 countries)*	*Transparency*[7] *(rank out of 179 countries)*	*Human Development*[8] *(rank out of 193 contries)*	*Corruption*[9] *(score: the highest corruption is close to zero)*
Argentina	48	48	78	46	40
Brazil	49	67	94	84	35
Chile	17	26	25	43	67
Colombia	46	77	92	83	36
Spain	22	19	32	25	58
France	24	20	23	26	72
Guatemala	97	101	149	127	27
Italy	29	27	52	29	52
Mexico	72	104	124	74	28
Peru	57	80	94	78	36
Singapore	74	12	3	11	85
Venezuela	143	128	176	113	18

TABLE 2
RELATIVE POSITION OF EACH COUNTRY

Country	*Democracy*	*Rule of Law*	*Transparency*	*Human Development*	*Corruption*
Argentina	6	6	6	6	6
Brazil	7	7	8	10	9
Chile	1	4	3	5	3
Colombia	5	8	7	9	7
Spain	2	2	4	2	4

5 The Economist: Democracy Index 2020.
6 World Justice Project: Rule of Law Index 2020.
7 Transparencia Internacional: Índice de percepción 2020.
8 United Nations Organization: Human Development Index 2020.
9 World Bank: Corruption Perception Index 2018.

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Country	*Democracy*	*Rule of Law*	*Transparency*	*Human Development*	*Corruption*
France	3	3	2	3	2
Guatemala	11	10	11	11	11
Italy	4	5	5	4	5
Mexico	9	11	10	8	10
Peru	8	9	8	7	7
Singapore	10	1	1	1	1
Venezuela	12	12	12	12	12

In order to appreciate the importance of the places and the scores assigned to each country, the following is a list of factors considered in each of the groups mentioned:

TABLE 3
FACTORS OF EACH GROUP

Group	*Factors*
Democracy	Electoral processes and pluralism; government performance; political participation; political culture; civil liberties.
Rule of Law	Limits to government power; absence of corruption; open government; fundamental rights; order and security; compliance with standards; civil and criminal justice.
Transparency	Abuse of power; access to public information; private benefit in the performance of public functions.
Human Development	Life expectancy at birth; adult literacy rate; enrollment in primary, secondary and higher education; poverty index.
Corruption	Perception of bribery of government and judicial officials; embezzlement of public resources; political scandals; influence peddling; illegal financing of political parties and the media; nepotism; recruitment without competition.

To have a reference that facilitates contextualizing the previous information, the results are presented below, from the same sources, taking as a basis for comparison the five best and worst ranked countries in terms of democracy:

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TABLE 4
TOP RATED IN DEMOCRACY

Country	*Democracy (rank out of 167 countries)*	*Rule of Law*[10] *(rank out of 128 countries)*	*Corruption (score: least corruption is close to one hundred)*
Norway	1	2	84
Ireland	2	-	72
Sweden	3	4	85
New Zealand	4	7	88
Canada	5	9	77

TABLE 5
THE WORST RATED IN DEMOCRACY

Country	*Democracy*[11] *(rank out of 167 countries)*	*Rule of Law (rank out of 128 countries)*	*Corruption (score: highest corruption is close to zero)*
Chad	163	-	21
Syria	164	-	14
Central African Republic	165	-	26
Democratic Republic of Congo	166	126	18
North Korea	167	-	18

In general, it is possible to infer that there is an inverse relationship between democratic development and corruptive lag, since the greater the first, the less the second. Among the countries analyzed, this line only presents a significant interruption in the case of Singapore, whose position as a democratic state is very low (close to half of the table in the index consulted), while its performance in terms of the rule of law, transparency, human

[10] The consulted index does not include Chad, North Korea, Ireland, the Central African Republic or Syria.

[11] The consulted index does not include Somalia, considered in the other indices as the State with the highest level of corruption.

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development and combating corruption is very favourable. If tables 4 and 5 are examined, it will be seen that the data are consistent with the general trend pointed out in relation to table 1, so that the case of Singapore presents peculiarities that make it an exception within the dominant trend.

Singapore became independent from the Federation of Malaya in 1965. From this date and until 1990 it was governed by Lee Kuan Yew. His son, Lee Hsien Loong, has ruled since 2004. Between father and son, there was only one prime minister. According to Lee Sr., democracy was about holding regular elections. For a long period, the People's Action Party (PAP) acted as the only party.[12] To alleviate the effect of this hegemony, the Constitution provides for the presence in Parliament of up to nine deputies appointed by the President of the Republic and up to 12 additional deputies to the total number of those elected, corresponding to parties that are not part of the government (art. 39). Another sensitive aspect in terms of democratic principles consists of the flexibility that the Constitution itself assigns to fundamental rights, in particular freedom of expression and assembly, subject to the restrictions that the law determines based on order, security, and morality (arts. 9, 13 and 14). To this extent, the ruling party has a very wide margin to decree what it deems most convenient for the stability of the State.

This level of discretion means that the regulations and the functioning of political power receive a low rating from a democratic perspective. In contrast, and this is an exceptional case, the behavior of the authorities is in line with what is required, and the indicators of the rule of law, transparency, human development and corruption are among those that offer good results. In the remaining cases, both in the group of States referred to in this work and among those with the best or worst qualification in democratic matters, the trend is quite homogeneous and confirms that the greater the democracy, the lesser corruption and, vice versa, the less great democratic life are also the deficits in the other selected indices.

The most relevant problem is not to state a more or less obvious relationship, but to determine what can be done through constitutional designs to overcome the obstacles that prevent the development of democracy and the fight against corruption. The interrelation between excessive corruption and democratic scarcity causes a circuit to be produced according to which the democratic deficit accentuates the incidence of corruption, and the proliferation of corruption precipitates the fall of democracy. Machiavelli had

[12] Nam, Tae Yul, "Singapore´s One-Party System: its Relationship to Democracy and Political Stability", *Pacific Affairs*, Vancouver, Vol. 42, No. 4, 1969-70, pp. 465 et seq.

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warned of this phenomenon when he opposed the *vivere corroto* to the *political vivere*, meaning anomie with one and coexistence organized by the State with the second.[13]

Things seen like this, it would seem that there is no possible solution, while corruption suffocates democracy and prevents it from being invigorated to reduce it. Corruption would feed itself through a circular sequence of institutional deficits caused by the absence of democracy, rule of law and transparency, which would make it impossible to get out of the trap. It would be an assembly of adversities that would unleash social frustration, irritation, and skepticism, thus integrating an immutable scenario in which corruption would perpetuate itself.

A set of factors of this kind would be paralyzing and societies would be trapped, destined to consume huge amounts of energy and time without leaving the negative circuit. However, experience shows that all systems have been corrupted, and that many have been able to break the redundancy of corruption. To achieve this, at some point they had to break the inertia maintained by the circularity of corruption and systemic institutional deficits. It was already said above that coercive solutions alone are not enough when corruption captures multiple agents within the State and alters institutional life as a whole.

Corruption should not be underestimated, as long as it reproduces an effective organizational model. Considering it as an unstructured phenomenon is an error that limits the possibilities of combating it. Its presence is supported by public and private institutions and although it acts surreptitiously, it makes use of the organizational resources of the spaces where it is welcomed. In states with a weak combative capacity, corruption becomes autopoietic.[14] The concept implies that replication takes place without depending on the environment. When the State limits itself to combating the manifestations of corruption while leaving its systemic action subsisting, corrupt practices multiply as a result of impunity.

Just as it is known that where there is society, there is law, it is also known that where there is power, there is corruption. The legal system is effective in dealing with corruption as long as power is designed in such a way that not all its organs are infiltrated by corruption at the same time and with the

[13] Maquiavelo, Nicolás, *Discorsi sopra la prima deca di Tito Livio*, in *Opere*, Turín, Einaudi-Gallimard, 1997, Vol. I, pp. 309 et seq.

[14] The concept of *autopoiesis*, taken by Luhman from the research of Humberto Maturana and Francisco Varela on the cell's ability to reproduce itself, operates in the internal sphere of systems. See Luhmann, Niklas, *Sistemas sociales*. *Lineamientos para una Teoría General*, Mexico, Universidad Iberoamericana-Alianza Editorial, 1991, pp. 56 et seq.

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same intensity; on the other hand, it is ineffective despite the fact that some of its organs remain free from corruption, but lack the instruments to identify and correct those who have given in. For this reason, the mere separation of powers is insufficient to guarantee good results, since its design can favor the concentration of faculties in some of them, with which the other organs of power are left at a disadvantage. The asymmetries between the organs of power play as potential factors for corruption and expose the strongest organs to the pathologies of corruption. Where power does not control power, power succumbs to corruption that reaches an exorbitant dimension, known as *grand corruption*, whose irradiation is also projected towards the spheres of economic and social power.

If the horizontal and vertical controls of power are poorly designed, they will not be able to provide effective responses to corruption, and it will be impossible to break the circuit that sustains and feeds it. It is necessary to get out of this circularity and the institutional experience shows that this is only possible if the exercise of power is reformed, so that first the controlled exercise of power is established so that the controlled power can in turn subdue corruption.

Corruption-free states first had controlled systems and then they functioned honestly; the opposite has never been recorded in the history of public institutions. Even in cases such as that of Singapore, despite their restrictions on public liberties, they have designed an organization and operation scheme that does not lead to the monopolization of political power by a single body, and even less so by a grassroots personal body plebiscite. The Code of Conduct for Ministers, adopted in 1954, was based on British practice and is complemented by a "well-trained, efficient and honest" civil service as mitigating factors for the rigid concentration of political power. It is foreseeable that this republic will evolve towards a full democracy since it has no obstacles that hinder it. This was the process in other systems, like English, for example.

Institutional history shows the presence of corruption in all stages of the life of the State, and shows how it began to decrease after the emergence of the constitutional State, giving rise to the transition from the Modern Age to the Contemporary Age. The ancient, estate and absolute States passed in the midst of corruption. The suppression, or at least the attenuation of corruption, was possible thanks to the introduction of a new institutional dynamic that was expressed in modern constitutionalism and later in contemporary democratic constitutionalism.

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There is no possibility of error when resorting to the laboratory of the institutions, where it is verified that the solutions exist and work. For this, the forms of concentration and patrimonial exercise of power have to be overcome, which is not easy because the appetite for complete power prevents adopting designs of balance and control.

There is also another obstacle. Solutions to corruption based on democratic institutional designs take time to produce results, and the fight against corruption has become a profitable political refrain on electoral agendas. Denouncing the corrupt and offering to eliminate them usually generates votes. The electoral constraints and the offers of hypothetical results in the short term allow access to power. If, once achieved, they do not have the vision, integrity and consistency to redesign it, the circuit that favors the permanence of corruption inevitably deepens. This solution is effective but has the electoral drawback that it does not offer sudden results; the effects of state reform are always progressive, and this is difficult to explain to an impatient electorate. In general, political leaders do not take the risks of proposing long-term solutions.

Democratic constitutionalism offers an extensive list of institutions suitable for taming corruption, but the decision to adopt them and give the time frame required for them to come into force, mature and achieve their goals concerns politics. These institutions are, in essence, a system of intra-organizational political controls (accountable collegiate governments, robust career civil service), of inter-organizational political controls (parliamentary controls, parliamentary minority rights, courts of accounts, functional federalism or regionalism) and of social controls (instruments for access to justice, prohibition of arbitrariness, right to truth, horizontal defense of human rights, free media). The remedy for corruption lies in the institutions, not in volunteerism which, instead, operates as a temporary distraction for society and leaves the inertia of grand corruption intact.

In terms of civil service, an international cooperation effort is possible to take advantage of the experience of the better consolidated systems. The inverse relationship between civil service and corruption has been demonstrated; but the implantation of the civil service generates an important resistance because it affects the patrimonial exercise of power. As long as corruption and patrimonialism continue running along parallel paths, the anti-corruption discourse is no more than a simulation. A solid and powerful civil service supposes the exercise of power in a different way from that practiced by systems with a high concentration of powers. The implementation, development and consolidation of civil services take a long time, so it is not a decision that translates into high political profitability for whoever

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assumes it. In addition, there are severe difficulties in establishing the civil service in conditions of great corruption.

The experiences are very sobering. For example, the Danish civil service began in the 17th century, being used as an instrument to strengthen the monarchy against the nobility. In 1821, a law was passed according to which a law degree was required to be part of the civil service;[15] in England, the abolition of sinecures and the professionalization of public administration also began in the 17th century, and by 1840 a system outside political traffic was already in operation; in France, one requirement of the Revolution was to remove the administration from favoritism, although it took a long time to achieve this; In the United States, the Pendleton Act of 1883 founded a professional, efficient and autonomous civil service of politics.[16] The indicators of success in the fight against corruption show the favorable impact of this type of measure.

In general, successful transitions to democracy or post-colonial independence have been facilitated by the presence of solvent administrative structures, unrelated to electoral processes and subtracted from the patrimonial system.

III. Right to Good Governance

It could be assumed that speaking of a right to good governance is a rhetorical formula. I don't see it that way. The idea of good governance is associated with the legal, responsible, and effective functioning of the governing bodies. The subject comes from very far in time and all the generations of each state space have had their own perspective.

If one of the objectives of constitutionalism is to ensure a range of freedoms, among the purposes of a good governance is that these freedoms have meaning for those who enjoy them. Constitutionalism solves the basic problems of the relationship between the governed and the governors, and of the governed among themselves. In the horizon of the contemporary

[15] Mungiu-Pippidi, Alina, *The quest for good governance. How societies develop control of corruption*, Cambridge, Cambridge University Press, 2015, p. 71.

[16] In the United States, the president appoints about 4,000 people to administrative positions, of which 1,200 require senatorial confirmation. Joseph Biden was sworn in on January 20, 2021; two months later the Senate had only ratified 29 presidential appointments. In that period the president issued 37 executive orders. *The Washington Post* published a report on March 29 and noted that the president was governing with the professional support of the civil service, *https://www.washingtonpost.com/politics/interactive/2020/biden-appointee-tracker/*.

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State, the discussion no longer concerns the list of rights that were the initial flag of constitutionalism; now it is possible to advance to other levels in the development of those rights.

Freedoms make sense when their exercise depends on a system according to which each person has an increasingly wide range of options in conditions of equality, security and regularity, and has the guarantees to assert them. To the extent that the organs of power hinder the guarantees that the legal system establishes, a situation of disadvantage arises for the governed, since their freedoms are restricted by factors outside their democratic control.

Freedoms also make sense insofar as people can exercise them to achieve the ends that the legal system establishes as lawful. Any transgression by third parties, including the holders of organs of power, who without right restrict, limit or condition the exercise of freedoms as a result of complicity, ineptitude, leniency, violence or for any other reason, makes freedoms lose. sense because its exercise becomes risky, difficult, impossible or unproductive.

In addition to enjoying freedoms that make sense, another way of looking at good governance is to identify its opposite: bad government is one that breaks the law by omission or commission, and one that, while abiding by the law, acts in a deficient or insufficient manner, causing thereby a governance deficit. Governance and legality are the axis of good governance, and the governed have the right that the organs of power always act in accordance with the law and for the purposes of the constitutional State. Governance has to do with the multiple issues related to the constitutional State, such as the legitimacy of the institutions and their owners, the legality in the performance of their functions by public officials; relations between the organs of power; the instruments of political and jurisdictional control; the representative and party system, and public opinion, for example.

For this reason, the design of constitutional institutions must include the assessment that society makes of them and of the results they offer in terms of the balance between the organs of power, the provision of satisfiers for collective needs, legal and political actions. to maintain social cohesion, measures to achieve and ensure justice, equity in social relations and protection of the environment, and the probity with which public officials, at all levels, act. Corruption, therefore, is a factor that alters the good governance to which society is entitled.

Good governance is obliged to rationalize the exercise of power. When those who govern, due to ineptitude, do not resolve the conflicts that affect social coexistence, or exacerbate them of their own free will, they may not

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affect punishable acts according to the legal system, but they violate the right of the governed to enjoy good governance.

Good governance implies giving the governed the certainty that the organs of power act in a timely and effective manner to prevent and solve the problems that affect each individual and the group. Opportunity concerns the proper use of time in government functions, and effectiveness implies using the State's resources in a legal, satisfactory, and reasonable manner. It is satisfactory when the resources applied to attend to collective demands correspond to the magnitude of the need attended to, and it is reasonable when it achieves the best expected results with the least possible social sacrifice. Human, financial, material, organizational and political resources must be managed in an expert, responsible, serious, and honest manner.

Good governance is obliged to anticipate problems, adopting measures in advance to mitigate them, and to prevent their causes, avoiding potential problems. Foresight and preventive actions correspond to the good governance to which every member of a constitutional State is entitled. Foresight is the anticipated knowledge of potential risks and the options to circumvent or reduce them; prevention consists of adopting early actions, such as strengthening institutions and relations between the governed and the governors.

Every government is faced with the dilemma of choosing between decisions that entail greater or lesser social costs. To identify the least onerous decision, it is convenient to apply a transactional formula derived from the Pareto optimum. Before, I have used it in terms of the design of institutions suitable for guaranteeing democratic governance, and I have pointed out that *there is a reasonable constitutional situation when, in order to define the structure and functioning of the institutions, the criterion is adopted that one situation is better than another, if none of the institutions is disproportionately affected and at least some of them improve, provided that the political cost that this effort represents is offset by greater collective welfare, by the best guarantee of the rights of the governed, by a more symmetrical relationship between the organs of power or by a more responsible and better controlled exercise of power*.

As for good governance, it is possible to adapt the constitutional optimum to understand it as *one whose activity is in accordance with the principles and rules of the constitutional State, and is carried out continuously, efficiently, honestly, professionally, reasonably, responsibly and systematically, to guarantee the exercise of the freedoms and other rights that the law grants to the governed, maximizing the results that translate into collective well-being and minimizing the financial, material and social costs of its functioning and operation*.

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Good governance maximizes coexistence and minimizes disorder through *a process of decisions adopted by legitimate authorities, in a legal, reasonable, and effective manner, to guarantee people the exercise of their environmental, civil, cultural, economic, political and social rights, in an environment of freedom and political stability, and to meet the needs of the population through regular, sufficient and timely benefits and services.*

Corruption is situated at the antipodes of good governance and therefore affects the governability of the State, the freedoms and the well-being of the governed. In all likelihood, interest in this subject has accompanied the State since its inception. The dialogue between Protagoras and Socrates is an eloquent example of how ingrained the concern about corruption was in the public consciousness of the ancients. The sophist of Abdera referred that the society had had two founding moments. Based on a fable, he explained that in a first attempt Prometheus gave man the secret of the arts and fire, but he did not grant him the knowledge of politics, reserved for Zeus. As the first men lived apart and therefore exposed to the fury of the beasts, they decided to unite and found cities, but since they lacked political virtues, their coexistence was impossible and they had to return to their previous condition, of isolation. Zeus warned that if men failed in their associative attempt they ran the risk of extinction and so he sent Hermes to endow them with respect and justice so that, with those virtues, they would associate again.[17] This original contractual theory, which contains the contrasting elements that centuries later would be supported by Hobbes and Rousseau respectively, is also a formidable metaphor for power: in the absence of good governance, based on a free, responsible and fair order, what happens in already in antiquity it was known as *stasis*, the fracture of coexistence.[18]

Ambrosio Lorenzetti's admirable mural in Siena is one of the best possible representations of the image of good governance. In the fourteenth century, when he painted it, the idea of good governance was associated with the individual virtues of the ruler, which corresponded to wisdom and prudence, from which justice resulted and from this in turn peace, harmony, and wellness. García Pelayo observed that the iconological interpretation of this beautiful work denotes a process of secularization of power in progress since the late Middle Ages, since the central images of the allegory of good

[17] Platón, *Protágoras*, p. 322.

[18] A revision of the classic concept from the contemporary perspective can be seen in Agamben, Giorgio, *Stasis*, Turin, Bollati Boringhieri, 2015.

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governance correspond to a young woman and an old man, while only the image of the bad government embraces the Augustinian idea of diabolical power.[19]

The effects of good governance were also projected on the civil world, not on the religious one. The images reveal a class order harmonized by distributive and commutative justice, while the bad government focuses on the hegemony derived from pride, from which tyranny, social fracture, violence, and corruption emerge.[20] García Pelayo's conclusion is that, then as now, good governance has only been conceivable from the perspective of its social and economic efficacy.

Good governance is complemented by good administration, of which there is a scheme in the Charter of Fundamental Rights of the European Union. Article 41 provides that everyone has the right to have their affairs dealt with impartially and equitably, and within a reasonable time. It adds that this right includes being heard before a decision that affects it; access his file; receive compensation for the damages caused and use their language in administrative procedures. In addition, administrations are obliged to justify their decisions.[21]

Good governance includes good administration. One and the other complement each other and form the core of an essential right to successfully deal with corruption. The possibilities of having such a government and administration are linked to adequate institutional designs. Good governance is an inescapable condition for the positivity of human rights. In this sense, there is a very extensive empirical analysis on the negative impact of corruption in terms of the exercise of these rights. Landman and Schudel have shown, with indisputable statistical evidence, that in countries where corruption prevails, human rights are in a precarious condition.[22]

[19] García Pelayo, Manuel, "El buen y el mal gobierno", *Del mito y de la razón en el pensamiento político*, Madrid, Revista de Occidente, 1968, pp. 319 et seq.

[20] Meoni, Maria Luisa, *Utopia and reality in Ambrogio Lorenzetti´s Good Government*, Florence, IFI, 2005, pp. 22 et seq.

[21] The doctrinal development of the right to good administration can be seen in Matilla, Andry, "Good administration as a legal notion and the Ibero-American Charter of Rights and Duties of the Citizen in relation to Public Administration", in *Revista Iberoamericana de Gobierno Local*, Granada, Centro Iberoamericano de Gobernabilidad, Administración y Políticas Públicas Locales, No. 16, June 2020.

[22] Landman, Todd, and Schudel, Carl Jan Willem, "Corruption and human rights: empirical relationship and policy advice", International Council on Human Rights, 2007, *https://www.researchgate.net/publication/238790101.*

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IV. Deconstitutionalize Versus Reconstitutionalize the State

In 1910 Jellinek concluded his famous theory of the State. It had immediate resonance. In 1911 it was translated into French and in 1914 Fernando de los Ríos translated it into Spanish. There he alluded to the *normative force of facts*[23] to underline the relationship between the organs of the State and society and between the different social factors. Decades later (1959), in an inaugural lecture that also became famous, Konrad Hesse developed a novel theory, whose genesis is in the thought of Lassalle and Jellinek: *The normative force of the Constitution*.[24]

For the purposes of this study, Hesse's basic arguments help to decipher the relationship between constitutionalism and the phenomenon of corruption that, in some systems, seems irreducible. Hesse assumes the theses sustained by Lassalle regarding the so-called factors of power. He follows Lassalle in enunciating the factors he identified: the monarchy, the aristocracy, the big and small bourgeoisies, the bankers and, in a kind of annotation and "within certain limits", he added "the collective conscience and the general culture from the country".[25] Among these components it includes, understandably, military power. As a last factor Hesse printed a bias by calling it "spiritual power". There is an element that Lassalle did not identify because it was not a relevant fact of his time: the political parties and their factions, and there was another factor that Hesse did not consider, because it did not represent a threat to institutional life when he delivered his lecture: the corruption.

Hesse alluded to the power of reality as a conditioning factor of the Constitution, although he also insisted on the capacity of the norm to guide reality. He understood well that there is a reflexive, two-way relationship between reality and norm. However, all his considerations about the factual world met the one-dimensional standard systematized by Lassalle. His findings were useful at the time and may be in ours on the condition of unfolding the facticity between legitimate power factors and illegitimate power

[23] Jellinek, Georg, *Teoría General del Estado*, translation by Fernando de los Ríos, Madrid, Librería General de Victoriano Suárez, 1914, Vol. I, pp. 432 et seq.

[24] See Hesse, Konrad, *Escritos de derecho constitucional*, translation by Pedro Cruz Villalón, Madrid, Centro de Estudios Constitucionales, 1983, pp. 61 et seq.

[25] Lassalle, Fernando, ¿Qué es una Constitución?, translation by Wenceslao Roces, Madrid, Cenit, 1931, p. 64. Roces points out that it was the first translation into Spanish, with which he wanted to make a contribution to the political debate at the beginning of the Second Republic in Spain.

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factors. The former can impose criteria and decisions that contravene the Constitution, but act within formal legality. The illegitimate power factors impose the same type of deviations from the underground, although they can act from within the state apparatus.

Hesse finds that the normative force of the Constitution resides in its capacity, however limited, to motivate and order political life. The first effect of the normative force of the Constitution is projected in the legal system of the State, based on the current Constitution. The adoption of the set of secondary norms and international treaties implies the positivity of the Constitution. As far as the political order, with respect to which Hesse elaborated the theory of it, the constitutional positivity takes place in several planes. One, of a formal nature, concerns the organization of the State. Since it is difficult to find examples in which the apparent organization of the State and the fundamental rule that governs it do not coincide, it must be concluded that in the formal sense there are few cases in which the Constitution does not govern. In this way, the main area in which the deficits of constitutional positivity are located is that of governability.

The task of *reconstitutionalizing* the State consists of recovering governability in accordance with the democratic principles, rules and standards that make up the Constitution itself. This is where the classic real power factors come into play. Unlike what happened in the middle of the 19th century and in much of the 20th, for these factors the validity and positivity of a normative order that gives security to their transactions is crucial. Power factors do not act in isolated spheres, alien to each other. Due to the very dynamics of their activities and interests, they are related, interact, and sometimes complement each other. Your individual identification is valid only as an analytical exercise; from a static perspective that allows each factor to be dissected, but as elements of cultural, economic, and social reality, they are part of a set in which each one has input and output channels that put them in communication of variable intensity with some or all the others.

The problem of the positivity of the Constitution, of its normative force, or of the reconstitutionalization of the State, is much more complex than it has been seen in the classical doctrine. Corruption is a symptom, not always well understood, of a governance deficit. By failing to understand the causes of corruption, error in diagnosis, wrong expectations have been generated to eradicate it, error in prognosis.

From monist perspectives, it tends to be believed that the stimuli for corruption come from the private sector, which perverts the public sector; or that political power suffers from an intrinsic charge of immorality and that corruption is a characteristic of the State. In both cases, the discredit

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of the public function is present, for which the only solution is to punish the servants of the State. This approach leaves out the examination of the relationship between governance and corruption, which makes it difficult to find a way out of the labyrinth. There is no doubt about the need to impose controls on public servants, and rigorously punish them when appropriate, but the phenomenon of corruption is more complex than the individual behavior of those who are in charge of public tasks.

Where corruption maintains high levels of recurrence, the State accumulates a multiplicity of errors, by action and by omission. Some consist of not recognizing, and therefore not remedying, that several causes are in the archaism of their own organization and functioning; others consist of not realizing the need to involve private actors in a more active way. For the private sector it is crucial to act as an ally and not as a rival of the State. The effective action of the State is essential for the population in general to enjoy legal certainty. Only the rule of law offers effective guarantees for legal transactions free from corruption.

Hesse built a very suggestive concept, *Will of the Constitution*, to denote the superiority of the normative over the factual and the rejection of arbitrariness.[26] It is possible to return to that idea and add new content to it, inasmuch as the Will of the Constitution is not only that of power or only that of society, but rather that which results from consensus, and in this case from an informed consensus, capable of establishing the governance through appropriate institutional designs.

To constitutionalize means to introduce a norm, a principle, a practice or an institution to the Constitution. A second meaning of constitutionalizing corresponds to the process by which the constitutional State is built, based on a founding agreement and successive adjustments also agreed upon that generate an incremental dynamic. But processes that follow an inverse route are also possible, so that the constitutional State is exposed to regressions. *Deconstitutionalization* consists of the loss or erosion of the elements of the constitutional State. This can happen thanks to formal modifications that introduce elements that interact negatively with the rest of the system, or by behaviors that violate the system that tend to normalize as part of the life of the State.

Negative interactions result from unintentional poor design or the deliberate intent to produce institutional collisions. For example, in a plebiscitary presidential system, any addition that strengthens this type of consultation fosters the concentrating effects of presidential power and weakens

[26] *Op. cit.*, p. 76.

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the representative system. To the extent that the hegemonic presidents have greater discretion to dispense with the representative apparatus and make direct appeals to the electorate with whom they understand, there is a tendency towards *deconstitutionalization*.

The normalization of conduct contrary to the Constitution has two main expressions: one, comes from the holders of power themselves, another, from external agents. In the first case, the distortion originates from those who are obliged to comply with and enforce the law; in the second in those who act against the order and are not subject to effective corrective actions. The result in both cases translates into diminishing governability. In addition, the two factual factors may coincide in time, thus enhancing the deconstitutionalization process. The deficit of governability denotes that the factors adverse to the system are subtracting from the coercive action of the State and that they are capable of imposing their own patterns of conduct. This happens when a series of criminal behaviors exceed the decision-making or action capacity of the State or when violence takes over a territory. Corruption is included among criminal behaviors, so that its normalization is directly related to the deconstitutionalization of the State.

The remedy of this process implies *reconstitutionalizing* the State. This is not always considered, especially when the fight against corruption is contracted to administrative, criminal, and procedural mechanisms. In a constitutional State it is enough to adopt instruments of this type, but when the institutional supports are expired, even in part, the measures of a functional State do not give results. This happens when corruption has reached critical levels, identified by the World Bank with the concept of a *captured state*. Although this is not a technical category, since, by definition, a State that someone seizes ceases to be a State, it is descriptive. The concept arose during the process of transition from Soviet statism to partial democracy, to refer to the private use of the public apparatus on a scale higher than that which is usually identified as *patrimonialism* after Max Weber. It does not consist in the simple appropriation of the public function, but in using it as one's own thing and for personal benefit, violating the current regulations. This breach of legality is carried out in a stealthy manner, although there are cases in which its concealment is impossible and then the cynical and unpunished ostentation of power is incurred as a means of enrichment.

When these extremes are reached, the administrative, criminal, and procedural mechanisms cease to be functional because those who must apply them are in collusion with the corrupt agents, or only fight them in order to replace them. In a case like this, we are facing a case of deconstitutionalization of the State and to defeat corruption, its reconstitutionalization is

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necessary. This does not mean that by necessity the Constitution must be changed, since this could be a new diverting action to take a speech with a constructive appearance that would allow us to continue to thrive with and from political power. *Reconstitutionalizing* the State means suppressing vertical, hegemonic, power-concentrating structures, and introducing open, controllable, functional, responsible, transparent government institutions, accompanied by a powerful, professional jurisdictional and administrative system, alien to patrimonial practices, and by a solid, dynamic representative system, in which minorities exercise the rights of control that correspond to them in any democracy, in accordance with the principle that the majority governs and the minority controls.

V. Constitutional Design and the Fight Against Corruption

In August 1928 Bertolt Brecht premiered his famous Threepenny Opera (*Die Dreigroschenoper*), with the unmistakable music of Kurt Weill. It was a denunciation of the corruption that shook the Weimar Republic. Almost a hundred years later, this work of art is still a reference to identify the magnitude that the degradation of power can reach. Brecht was inspired by the work of John Gay, *The Beggar's Opera*, staged two hundred years earlier, in January 1728, in the atmosphere of intense London corruption. Gay used satire, very much in vogue at the time, to exhibit the decadence that was undermining English public life. Seen today, both operas stand out for their artistic quality, but in the context of their time they involved a strong shake in the conscience of their contemporaries.

The character that Gay portrayed and that came to Brecht was Jonathan Wild, a sordid individual who trafficked in people and stolen goods, with the protection of high-ranking politicians and policemen who participated in his lucrative criminal activity. To support his position, from time to time Wild offered clues to apprehend other criminals, his competitors. When his network of complicities dissolved, his fortune changed, and he was hanged three years before Gay took it as an operatic theme.[27]

Corruption was a common fact of public life in Europe and the United States throughout the 17th, 18th, and 19th centuries. Congressmen in Philadelphia warned early that they must close the door on ethical deviations from power; they had in view the ravages caused by the concentration of

[27] See *Encyclopedia Britannica*, Londres, 1955, vol. 23, p. 595.

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absolute power and for this reason they included in the Constitution a first key to prevent corruption: "The United States shall not grant titles of nobility, and no person who performs remunerated or trusted employment may, without the consent of Congress, accept any gift, emolument, employment or title of any kind, and proceeding from any king, prince or foreign State" (Art. 1, section 9, final paragraph). This notwithstanding, in the 19th century corruption broke out on multiple fronts. Territorial expansion, slavery, the construction of railway networks, monopolies, and electoral appetites, among many other pretexts, gave rise to the multiplication of acts of corruption. Many were discovered by an inquisitive and critical press.[28] The first major response in the United States was the *Federal Corrupt Practices Act* of 1910.

Colonialism, the opium wars, economic imperialism, warmongering, slavery, racism, the intense concentration of wealth made corruption a generalized phenomenon, whose expansion also contributed to the weakness of democracy. If we accept that there is only democracy when there are guarantees to elect the rulers through universal, periodic, direct, secret suffrage, where the rights of minorities are guaranteed and where political power is exercised in a responsible and controlled manner, we will arrive at the conclusion that before the 20th century there was no state that could be classified as democratic. In electoral matters, for example, it is not sustainable to speak of democracy before women exercised the vote; In terms of fundamental rights, it is not arguable that there is democracy where discrimination is practiced or tolerated or confessionalism subsists, and in terms of the exercise of power, it is not possible to characterize as democratic those States where concentration of powers, irresponsibility policy and the absence of effective controls.

A count of the States that have crossed the threshold of doubt and that have consolidated democratic life reveals that they are the same ones that have managed to tame the phenomenon of corruption. Even so, there are recent examples of uncontrolled corruption, as happened with the global financial crisis of 2008, or with wars such as those unleashed around the Suez Canal or Middle East oil.

Of course, it would be naive to assume that full democracy is sufficient to reduce corruption to the lowest possible levels. Justice institutions, the media, organizations, parties and parliaments are also subject to deviations. Hence the importance that all social expressions intervene in this combat,

[28] Brisochi, Carlo Alberto, *Corruption*, Washington, Brookins Institution Press, 2017, pp. 107 et seq.

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as part of a network of reciprocal controls that have the people as actor and witness. At this point it is necessary to admit that idealizations contrast with reality. The large popular contingents can also be the object of demagogic manipulation, but the sum of problems and obstacles to deal with corruption are not a reason for skepticism. For this reason, good governance plays a key role in this fight.

Utopias play a relevant constructive role as they identify ideal goals. Our time has not led to new utopias, but the classic ones are guidelines in terms of honesty. Getting as close to its goals as is reasonable and possible is a way of charting a route along which to direct the design and operation of democratic constitutional institutions. The dominant idea in the construction of a constitutional democracy is to achieve equality, freedom, and legal certainty at the highest possible levels, and to have the necessary guarantees to enforce them. Corruption affects the exercise of rights and limits equality, freedoms, and legal certainty; therefore, it is an obstacle to democracy.

Susan Rose-Ackerman and Bonnie J. Palifka,[29] on the one hand, and Michael Johnston,[30] on the other, have identified the aspects of democracy that leave open spaces for corruption. His works offer a systematic contribution to understand the corruptive phenomenon, marking some discrepancies between them.

As far as organization and political functioning are concerned, Rose-Ackerman and Palifka point out three issues that are relevant to corruption: the re-election of rulers, the electoral system, and the financing of campaigns. They consider that re-election exposes the rulers to the pressures and temptations coming from economic groups, in which they are right. Regarding the electoral system, they examine the effects of the election of representatives by majority election and by proportional election. From a perspective of greater or lesser exposure to corruption, they conclude that the risk is not only in the campaigns but also in the performance of parliamentary tasks. At this point they warn, and they are correct, that the proportional system has a greater impact on the parties while the majority is linked to the people. Consequently, whoever must respond directly to his electorate is more exposed to his surreptitious understandings being known than whoever attends the elections on a list. The place occupied on this list determines the greater or lesser chances of reaching a parliamentary seat,

[29] Rose-Ackerman, Susan, and Palifka, Bonnie J., *Corruption and Government. Causes, consequences and reform*, Cambridge, Cambridge University Press, 2016, pp. 341 et seq.

[30] Johnston, Michael, *Corruption, contention and Reform. The power of deep Democratization*, Cambridge, Cambridge University Press, 2016, pp. 29 et seq.

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so the position depends on a negotiation that is not always transparent; the voters only have an indirect influence, since the allocation of spaces in Parliament is carried out according to the proportion of votes obtained by each party, according to the applicable rules. The authors add that in this case those who prepare the lists, that is, the party leaders, are exposed to corruptive pressures. As regards the financing of campaigns, they base their arguments on the difficulty of controlling the amount and origin of contributions from individuals.

The authors' arguments are convincing, and the constitutional solutions are affordable. Democracy and the fight against corruption are strengthened when there is a general prohibition of re-election for the rulers, since perpetuation in power, especially if it is a very concentrated one, favors the formation of cliques willing to obtain undue advantages. The thesis that majority decisions should prevail in a democracy in all circumstances and citizens should not be restricted from endorsing their support for a ruler as many times as they wish to do so, lacks support. Electoral periodicity would lose meaning if it were used to perpetuate in power someone willing to use the means of control, influence, and manipulation in their favor for an unlimited permanence in office. Many dictatorships have used this stratagem. The key to overcoming Rose-Ackerman and Palafika's objections is to regulate re-election options, suppressing them in government tasks and limiting them in representative ones.

Regarding majority or proportional representation, in addition to its greater or lesser impact on corruption, its relevance to the representative system must be assessed. The authors assert that candidates running in majority districts are less vulnerable to corruption because they are subject to direct voter scrutiny. Even accepting that this is the case, it has also been shown that majority systems generate a very significant inequality in terms of the parliamentary presence of political minorities. In this sense, it should be considered as a form of corruption of a system, not of individuals in particular, to exclude political currents not framed in the larger organizations from political representation. To overcome the advantages and disadvantages of each electoral system it is possible to find legal solutions. The presence of systems that combine integration through majority and proportional representation, for example, is one of them. In the event that only the proportional one is adopted, in addition to the option of open lists to which the authors allude, which in practice is confusing for voters and complicates the allocation of parliamentary seats, there is the possibility that the lists are not open, so that the voter does not choose candidates from the different lists presented by the different parties, but they are unblocked,

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so that the determination of the order of preferences within the same list is set freely by the voter.

An additional aspect to those pointed out by Rose-Ackerman, Palifka and Johnston is that part of their attention is directed to the relationship between political and economic agents. In this case, corruption translates into an illegal relationship between legitimate actors; but there is also another source of corruption when it occurs between those who act from a legal investiture and those who do it from criminal secrecy. There may be a corrupt relationship between protagonists of the public and private spheres, but there may also be corrupt situations between the protagonists of those sectors and a third group that acts informally outside the law, and that equally imposes or induces corruption to public and private organizations. These types of cases occur above all within States in which governance and the rule of law show deficits of different magnitudes. The governance deficit exposes officials to corruption by colluding with third parties, or by the intimidation that criminals exert even on honest officials in a context in which the State does not apply responses consistent with democratic governance. In these terms, as has already been said, a circuit is triggered where corruption and anomie feed off each other.

Another factor that must be considered in terms of characterizing corruption is intent. Corrupt relations between officials and criminals can occur due to the willingness of both parties to establish and illegal understandings: the purpose of both parties is to obtain mutual benefits. But there are cases in which the official allows himself to be extorted to avoid harm to himself or his family, so that he does not act motivated by obtaining a benefit but to avoid harm. Illegal agreements or concessions between legal actors do not come into play here, but between one that is legal and another that is illegal. It can be said that a public interest is present as opposed to a private one, but what is relevant is that the second always exists and acts against the norm.

There are cases in which the potential sanction for violating the rule is less intimidating for an official than the risk caused by not agreeing to extortion from the offender. In this case, the crux of the problem lies in criminal impunity, which exposes officials to being trapped in the networks of those they persecute or those who force them to serve them from public office. This type of corruption shows the need for power to be transparent, to defend the officials themselves.

In essence, corruption has different aspects in institutionalized States, where the relationship between the public and private sectors must be ensured in accordance with current rules and the best standards of a democratic system, and in States with precarious institutionalism. In this last

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scenario, relationships are even more complex since corrupt deviations can arise within the public and private sectors. In this case, it is not that the drives between conflicting interests and forms of organization seek their respective preeminence through agreements or corrupt behavior. When the institutional framework is precarious, intra-sectoral dysfunctions appear, so that within the public sector and within the private sector, corrupt relationships can arise. The most vulnerable area is the public, because if the internal relationship styles are highly conflictive and lack effective rules to settle their differences, the risk of corruption as a substitute for the rule or good practice increases. This type of phenomenon accompanies weak institutions. Johnston examines this phenomenon as part of the fragility in which societies find themselves after a dictatorship or a major conflict,[31] but the phenomenon also occurs when the institutional apparatus has not been reformed on time or has only done so in a timely manner. asymmetrically, for example, when progress is made in electoral matters, promoting pluralism, but archaic elements are maintained in other power structures. This conflict between political pluralism and concentration and irresponsibility in the exercise of power makes the new and the archaic dysfunctional, with consequences such as institutional precariousness and corruption, which tend to feed off each other.

The panorama becomes even more complicated when this institutional precariousness fosters the strengthening of informal, illegitimate and illegal organizations. A State that allows, or does not have the capacity to prevent, the emergence and prosperity of a network of power parallel to the legal one, is subject to corrupting pressures beyond its control. In every state there is the latency of a marginal world; if the efficiency of the institutions does not allow to absorb the tendencies to entropy, a rupture takes place that leaves the organs of the regulated power in deficit conditions. When the State reaches this point, only a profound reform can give it the instruments of the constitutional State to restore governability.

VI. Internationalize the Prosecution of Corruption

In Latin American countries there are numerous obstacles to effectively prosecute corruption. A large part of these difficulties are associated with deficiencies in the design of the institutions. The most frequent consists of the

[31] *Ibidem*, pp. 57 et seq.

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concentration of presidential power, which generates negative chain effects in terms of the functioning of the institutions, since it limits the constructive game of the parties and therefore the tasks of parliamentary political control, in addition to accentuating the dependence of the supervisory and jurisdictional bodies. Of course, the reductionism of seeing only one aspect as the cause of impunity should be avoided, but without a doubt the concentration of power has an adverse impact on the functioning of the chain of political and jurisdictional controls, which hinders a successful fight against corruption.

In the case of the supervisory and jurisdictional authorities, the concentration of power leads to the heads of the respective bodies being appointed based on their relationship with the concentrator of political power, in whose interests it is to have loyalties that confer security margins while exercising power and after leaving it. On the other hand, it offers him an additional instrument of potential coercion, which increases his power. In this way, the *colonization* of the organs related to the persecution of corruption operates as one more form of concentration of power and impunity.

National solutions require democratizing the exercise of power, which is impeded by the vicious circle generated by impunity: concentration of power-impunity-more concentration of power, and so on. To cover appearances, cutting-edge criminal and administrative regulations are introduced, which are then not applied, and some matters are even selectively pursued to give an impression of effectiveness in the fight against corruption while taking advantage of it to punish or intimidate political enemies.

The foregoing makes it advisable to shorten the path and build instruments that allow matters to be brought before international jurisdiction. This thesis is based on the growing trend in the sense of considering corruption as an affront to human rights.[32] This possibility would force greater care in the internal management of each State, breaking the prevailing inertia. Changing the course would make it possible to redesign the instruments of political and jurisdictional control, put them in tune with each other and open the space for an evolution that would gain speed as international actions were seen as part of a process towards full democracy.

As an example, to explain what this change towards the internationalization of the fight against corruption would consist of, I present the following proposal for a protocol of additions to the American Convention on Human Rights (Pact of San José):

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[32] See Petters, Anne, "La corrupción como una violación a los derechos humanos", *Revista del Centro de Estudios Constitucionales*, Supreme Court of Justice of the Nation, No. 10, January-June, 2020, pp. 123 et seq.

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i) Article 3. Right to Recognition of Legal Personality
READS AS:
Every person has the right to recognition of their legal personality.
I PROPOSE FOR IT TO READ AS:
Every person has the right to recognition of their legal personality AND TO A LIFE FREE OF VIOLENCE AND CORRUPTION.

ii) Article 13. Freedom of Thought and Expression
Reads as:
5. All propaganda in favor of war and any advocacy of national, racial or religious hatred that constitutes incitement to violence or any other similar illegal action against any person or group of persons, for any reason, shall be prohibited by law, including of race, color, religion, language, or national origin.
I propose for it to read as:
5. Any propaganda in favor of war and any advocacy of national, racial, religious or any other gender hatred that constitutes incitement to violence or any other similar illegal action against any person or group of persons will be prohibited by law, for any reason, including race, color, religion, language, national origin or way of think.

iii) Article 23. Political Rights
Reads as:
All citizens should enjoy the following rights and opportunities:
a) .....
b) .....
c) .....
I propose for it to read as:
All citizens should enjoy the following rights and opportunities:
a) .....
b) .....
c) .....
d) To enjoy the right to democracy, which includes transparency of governmental activities, probity and responsibility in public management.

The characteristics of this proposal are:

1) In article 3, two elements are added:

a) The first refers to “a life free of violence”, from article 3 of the Inter-American Convention to Prevent and Eradicate Violence Against Women, known as the Belém do Pará Convention, adopted by the General Assembly of the Organization of States

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(OEA) in 1994. Therefore, it is a matter of extending this principle to the entire population.

b) The second alludes to the fact that this freedom is also exercised to enjoy a life free of corruption. It is irrefutable that corruption affects the universe of subjective human rights and their respective guarantees.

2) In article 13, the following changes are introduced:

a) Punctuation after the words "racial" and "language", to add other elements. They are grammatical aspects.

b) The expression "any other gender" is added since the apology of hatred can be an alibi to cover up acts of corruption. It is frequently directed against the judges, the media, social organizations and even against political opponents, to invalidate their actions in favor of a less corrupt space. In addition, there are currently apologetic expressions of hatred on the grounds of political or philosophical criteria or positions, by authorities, which affect fundamental rights, the democratic principles of the constitutional State and the secularism of the State.

c) The expression "or way of thinking" is added, which is not covered by the current statements of race, color, religion, language and national origin. Given that the Convention protects freedom of thought, it is reasonable to prevent the apology of hate for supporting different ideas, which include denunciations of corruption.

3) Article 23 proposes the addition of a fourth paragraph that incorporates the content of two precepts of the Inter-American Democratic Charter, adopted in 2001 by unanimous decision of the Assembly of the Organization of American States. The approval of this Charter was preceded by a long period of analysis, starting with a first project presented by Peru. Therefore, these two precepts have already been well thought through, discussed, and signed by the States party to the Pact of San José. As for the word probity, it is used in the sense of honesty, rectitude, integrity in action, which is the opposite of corruption. The current articles of the document:

Art. 1. The peoples of the Americas have the right to democracy and their governments have the obligation to promote and defend it.

Art. 4. The fundamental components of the exercise of democracy are the transparency of government activities, probity, the re-

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sponsibility of governments in public management, respect for social rights and freedom of expression and of the press.

With the proposed additions, the San José Pact would incorporate principles that would give rise to a new human right: the right to *good governance*. In practical terms, by making corrupt behaviors justiciable before international bodies, the high rate of impunity that prevails would tend to decrease.

Corruption has generated a strong attack against the national judicial systems, the media, social organizations and in some cases even against academic centers. As for the study centers, the harassment usually occurs by cutting financial support; obstacles are placed on social organizations and fiscal resources are restricted; The media is harassed through different means, and in the case of the judiciary, attempts are made to discredit and infiltrate them. Both forms of harassment have given partial results in some countries, so a radical change is important that allows unresolved or poorly resolved issues to be brought before international judges, oblivious to the pressures that are registered in national spaces because of the corruption.

In terms of international instruments, the initiative for their adoption or modification rests exclusively with the governments. This limitation affects the constitutional state insofar as there is a tendency to equate constitutional provisions with conventional ones. This contrasts with the constitutional formulations that, at least formally, obey a democratic process in which political representatives always intervene and in many cases the voters themselves, directly. On the other hand, the elaboration of treaties is an exclusive decision of the governments, and especially of their technical teams, and the representative bodies have only a limited function since they approve or reject the provisions agreed by the national governments with other powers. Only in a limited way has the participation of the organs of political representation been allowed in terms of denouncing treaties. As for the possibility of proposing new international instruments, or of suggesting reforms or additions, democratic practice is almost non-existent. In the case of the Pact of San José, article 77 provides that the additional protocols must be presented by the governments before the General Assembly.

Democracy must also prosper in terms of international treaties and conventions, especially when human rights are involved. Constitutions limit popular legislative initiative to national legislation and, in some cases, to constitutional reform. If the growing importance of national regulations from external sources is considered, it will be appreciated that this is a democratic restriction that is accentuated insofar as congresses are only empowered to approve the signing, modification, or denunciation of treaties,

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but not to make proposals that governments should take to international forums.

The foregoing explains the proposal made here, in the sense of internationalizing the jurisdiction in the fight against corruption. National governments are obliged to pay attention to the growing demand to combat corruption effectively, beyond adopting regulations that they are not able to or willing to apply or raising proclamations that sometimes only cover up the vicious practices that they appear to combat. Eradicating corruption requires a supranational effort; Otherwise, the effort will be more tortuous and prolonged, with social damage that is deeper every day due to the generalized discouragement caused by the fruitlessness of the struggle.

While corruption lacerates the national State and generates multiple internal complicities, it is a priority to leave local approaches behind and assume that it is about rescuing the State from an erosive process that is already having an impact in the international arena. It is impossible to contain corruption within national borders. In such an interconnected world, distortions in the exercise of national power spread to third States. The phenomena associated with corruption, such as impoverishment, the violation of human rights, criminal violence, drug trafficking, do not have selective effects only suffered by the inhabitants of a State; they transcend their borders and impact their neighbors and are even projected to a greater distance.

In addition to being desirable, international cooperation to combat national corruption is an unavoidable and possible measure.

VII. Conclusion

Corruption has exposed state institutions to conditions of extreme vulnerability that can culminate in the derailment of constitutional systems.

In a report that uses instruments to measure corruption and governance, prepared by request of the World Bank in 2000, the concept "Captured State" was coined. This modality of the State is part of the scenarios of the so-called "great corruption". Transparency International defines this degree of corruption as "the abuse of high-level power to benefit a few to the detriment of the majority, which causes widespread discomfort in individuals and in society and generally goes unpunished".

Grand corruption occurs at all levels and government bodies and corresponds to highly complex processes in which private interests, both illegitimate and legitimate, are confused with public ones to obtain undue advantages.

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I reiterate that, in legal terms, there is no "captured State", since if there were forces superior to the State that dominated it, they would be the State. This notwithstanding, enunciated as "failed state" or "captured state", typical of political science, have a descriptive function that serves to locate the weak points of the institutions as well as their potential remedies. The combination of the concepts "great corruption" and "captured State" allows us to identify the magnitude of the damage caused by the first and define the magnitude of the effort required in the reconstruction of the constitutional State.

To reduce corruption personal temperance, exemplary leadership and a list of severe punishments are necessary, but this is not enough. The cost of omitting all the other decisions required by the seriousness of the problem would lead to the accumulation of failures, with negative effects on the effectiveness of the State and on social trust.

Organized political power, that is, the State, has among its central objectives the prevention of violence, insecurity, arbitrariness, inequity and injustice. When instead of resolving these ailments, power adds to them and even promotes them, it means that a complete review of the deviations of the State and the required corrections must be carried out.

In the case of municipal power, the closest to the governed, corruption turns into violence, as shown by the multiplication of acts of intimidation, bribery and even physical elimination of mayors, candidates, and journalists. At the local level, the high and rising number of former officials persecuted, prosecuted, or sentenced shows the depth of corruption.

International indicators on corruption place Latin America in critical ranges. This includes collusion with private interests that correspond to the phenomenon of grand corruption.

Examples of the State subject to private interests, including illicit ones, abound. The reorganization of power requires, from those who exercise it or aspire to do so, knowledge of the shortcomings, resources, and institutional potentialities. The reconstruction of the State is a gigantic task that exceeds the possibilities of the voluntarism of government leaders, even accepting that it is genuine, and requires the coordinated assistance of the leaders of politics, society, academia, business, and the media.

At the national and local levels of each country, nothing will improve as long as *caciquismos* subsist. There is relief when the styles of government change, but there will only be effective remedies when the institutions change. The captured State and the great corruption denote a generalized pathology of power that will not be cured only with the election of new protagonists.

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It should be borne in mind that the solutions must seek breadth and completeness; if they are not as broad and comprehensive as possible, they will hardly function as short-term and ephemeral remedies whose partial effects will erode confidence in the State's ability to deliver good results. Fighting corruption with good reasons for success requires keeping in mind that grand corruption resides at the center of power. Knowing its location is essential to know how to reduce it to its minimum expression. This means that the measures to be adopted cannot be fragmented, isolated, occasional or oscillating. A systemic problem is only solved in the system as a whole.

The accumulation of frustrations is not due to the invincibility of corruption, but rather to the fact that all the appropriate instruments offered by constitutionalism have not yet been used.

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