The Constitution and the Fight against Corruption

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THE CONSTITUTION AND THE FIGHT AGAINST CORRUPTION

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EDITORIAL NOTE

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NOTA EDITORIAL

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INTRODUCTORY NOTE FROM THE DIRECTOR OF THE UNAM LEGAL RESEARCH INSTITUTE

The convening capacity of Diego Valadés and Antonio María Hernández, once again, has been evident in this collective work coordinated by them and edited by the UNAM Institute of Legal Research and the Institute of Constitutional Studies of the State of Querétaro. It is a work that brings together a deck of texts written by experts on one of the most sensitive and problematic issues worldwide, but, above all, in our American continent: corruption. The approach to this issue that outrages and worries the public is outlined from the constitutional perspective and, with this, the collected texts warn the legal dimension of the problem. But they also reconstruct recent moments and events that casuistically and eloquently illustrate the magnitude of the phenomenon. In fact, one of the core virtues of the volume is the comparative perspective with which the topic of corruption is studied. The authors are reconstructing national cases from Latin America, South America, but also from Europe and even Asia. With this, while offering a global overview of the phenomenon, they allow gauging its magnitude and weighing the different constitutional and public policy responses used to combat it. In doing so, they also pay tribute to an academic tradition in which the coordinators are true experts: the comparative method. For all the above, the work we present is timely, rigorous, and necessary. Timely because it comes at a time when corruption threatens to erode the social and institutional foundations of democracies in many countries; rigorous because the subject is analyzed by experts who know the constitutional discipline and the phenomenon studied, and necessary because studies that constitute, at the same time, a complaint and a contribution are needed, and this work achieves both. As the director of one of the two publishing institutions, I welcome the publication and invite, with conviction, its reading and analysis.

Pedro Salazar Ugarte

INTRODUCTORY NOTE BY THE DIRECTOR OF THE INSTITUTE OF CONSTITUTIONAL STUDIES OF THE STATE OF QUERETARO

For several years we have had a productive academic and editorial relationship with the UNAM Legal Research Institute. Each work represents a contribution to the necessary scientific, critical, creative and proactive analysis and debate, particularly this book coordinated by Diego Valadés, one of the most renowned constitutionalists in Ibero-America, and by the Argentine jurist Antonio María Hernández, in dealing with one of the central problems faced by many countries, complex and multi-causal: corruption. The United Nations Convention against Corruption states that "Corruption is an insidious plague that has a wide range of corrosive consequences for society. It undermines democracy and the rule of law, gives rise to human rights violations, distorts markets, undermines the quality of life and allows organized crime, terrorism and other threats to human security to flourish".*

This book offers us elements to understand, define and identify the causes that originate it, but also the contradictory factors that allow it to be installed as a way of public and social life, i.e., it is known that this phenomenon deepens inequality, generates distrust in institutions, threatens governance, sustainable development, democratic processes and fair corporate practices, but its practice is encouraged or tolerated.

The essays included in the book provide an account of national, regional and comparative visions and experiences. Some of the works show the relationship between corruption and the detriment to the effective safeguarding of human rights and how this has hindered the construction of democratic societies in the region. Others reveal the role of public and private actors and their incidence in the violation of rights. There are also voices that point to the gradual but progressive configuration of anti-corruption standards and institutions. These contributions, taken together, help us to cat-

* United Nations Convention against Corruption, Preamble, párr. 1, *https:// www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.*

egorize the phenomenon under at least three headings: the perception of its extent and frequency; participation or exposure to behaviors; attitudes and values in the face of acts of corruption. With the conviction that this work represents a relevant contribution aimed at tackling corruption in its different dimensions, as a complex social, political and economic phenomenon, I join in the celebration of its publication.

Rogelio FLORES PANTOJA

THE INTEGRITY AGENDA IN THE NEW NORMALITY

Delia FERREIRA RUBIO*

Fighting corruption is not just an instrumental issue limited to modifying legal frameworks and putting a stop to impunity. The fight against corruption aims to control power, prevent abuses, and apply the corresponding sanctions for the common good, the protection of the rights and freedoms of individuals, the strengthening of the rule of law, and the improvement in the quality of democracy.

A global vision of the current world discussion allows us to detect a converging dialogue in various sectors and multiple spaces towards what I call a renewed Integrity Agenda in which the fight against corruption is part of it.

The pandemic has served as a catalyst to consolidate and connect debates and efforts that were dispersed and that today converge in the ideas of "rebuilding better" and "new normality" that guide the post-Covid programs and projects of multilateral credit organizations, international organizations, and countries.

Among the nodal points that converge in this trend we can mention the OECD work on integrity in the public sector;[1] those of the World Economic Forum with special emphasis on the private sector in line with the notion of *stakeholders' capitalism*;[2] the renewed attention to the concept of "purpose" and "public value" of companies;[3] the hierarchy of Compliance discipline towards the *Integrity beyond Compliance* model.[4] Along the

* Doctor of Law from the Universidad Complutense de Madrid. President of Transparency International.

1 OECD, "Anti-Corruption & Integrity Hub", *https://www.oecd.org/corruption-integrity/*.

2 World Economic Forum, "The Future of Trust and Integrity", *http://www3.weforum.org/docs/WEF_47529_The_Future_of_Trust_and_Integrity_report_2018.pdf*.

3 *https://yourpublicvalue.org/*.

4 World Economic Forum, "Ethics and Integrity Beyond Compliance. Agenda for Business Integrity. October 2020.", *http://www3.weforum.org/docs/WEF_GFC_on_Transparency_and_AC_pillar1_beyond_compliance_2020.pdf*.

same lines is the work of the Global Compact[5] and the United Nations 2030 Agenda.[6]

Regarding, specifically, the fight for transparency and against corruption, the Integrity Agenda is clear in the 2030 Strategy of Transparency International[7] and in the work of the Open Government Partnership and its campaign: *Open Response, Open Recovery, Open Renewal.*[8]

There are many aspects in which convergence can be seen in the Integrity Agenda. A good example is the search for transparency regarding the final beneficiaries —real owners— of the companies. Knowing who is who makes it possible to follow the path of money in cases of corruption, illicit campaign financing, and money laundering, as well as detecting possible conflicts of interest that constitute the prelude to corruption.

For years, this was a claim from civil society organizations. Today it is a common agenda[9] that includes governments both at the national level,[10] as well as in international platforms such as the Open Government Alliance[11] or the G20.[12] Organizations that bring together the business sector —such as the World Economic Forum,[13] and *B-Team*—[14] have also com-

[5] United Nations, "Uniting Against Corruption. A Playbook on Anti-Corruption Collective Action", *http://ungccommunications-assets.s3.amazonaws.com/docs/publications/2021_Anti-Corruption_Collective.pdf.*

[6] United Nations, "Sustainable Development Goals. 17 Goals to Transform our world", *https://www.un.org/en/exhibits/page/sdgs-17-goals-transform-world/.*

[7] Transparency International, "Our Strategy. Holding Power to Account – A Global Strategy Against Corruption 2021-2030", *https://www.transparency.org/en/the-organisation/our-strategy.*

[8] Open Government Partnership, "The pandemic has shown just how easily things can break down. But it also offers the opportunity to build them back up, better and stronger", *https://www.opengovpartnership.org/campaigns/open-renewal/.*

[9] Transparency International, "Hundreds of Academics, Civil Society Groups and Business Leaders Join Call for UN General Assembly to end Anonymous Shell Companies", *https://www.transparency.org/en/press/ungass-2021-hundreds-join-petition-to-end-anonymous-shell-companies.*

[10] Transparency International, "Historic Anti-Corruption Measures Become Law", *https://us.transparency.org/news/historic-anti-corruption-measures-become-law/.*

[11] Open Government Partnership, "Overview", *https://www.opengovpartnership.org/policy-area/beneficial-ownership/.*

[12] United Nations, "G20 High-Level Principles on Beneficial Ownership Transparency", *https://www.unodc.org/documents/corruption/G20-Anti-Corruption-Resources/Thematic-Areas/Beneficial-Ownership-Transparency/G20_High-Level_Principles_on_Beneficial_Ownership_Transparency_2014.pdf.*

[13] World Economic Forum, "World Economic Forum submission United Nations Special session of the General Assembly against corruption", *https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/UNGASS_submisson_World_Economic_Forum_PACI_GFC_final.pdf.*

[14] The B Team, "Ending Anonymous Companies: Tackling Corruption and Promoting Stability Through Beneficial Ownership Transparency. The Business Case", *https://bteam.org/assets/reports/B-Team-Business-Case-Ending-Anonymous-Companies-Report.pdf.*

mitted themselves to this effort, since the concealment schemes of the real ownership of the companies affect the business climate and put at risk the legal responsibility of the company for its value chain The confluence in this Integrity Agenda is a step forward, but civil society remains vigilant and reports on the implementation of these commitments.[15]

But beyond the institutional modifications aimed at consolidating an integrity system in which all social actors operate, it is essential to address as a longer-term objective, the necessary cultural changes that will make this integrity system sustainable and solid as a framework for coexistence.

In this sense, the convergence in the Integrity Agenda is linked to a phenomenon that, although it has emerged clearly in public opinion studies for years, has become more acute because of the global emergency unleashed by covid: the lack of confidence. Confidence is a central element to being able to face an emergency; it is a condition of resilience. Without trust in leadership, society loses the capacity for coordination and collective action. Without trust in others, solidarity becomes even more difficult.

Studies like Latinobarómetro[16] and the Barómetro de Confianza from Fundación Edelman[17] show the constant deterioration of trust in institutions and social leadership in general, with institutions and political leaders as the ones that generate less trust in citizens. The focus on politics made us lose sight of the fact that interpersonal trust was, in many cases, even lower than what we had in politicians.

The mistrust climate affects governability, deteriorates the rule of law, compromises democracy and respect for rights and freedoms, dismantles and fragments societies, and generates the perfect breeding ground for the populism of all political stripes. The demand for urgent solutions in the face of emergency and the fear generated by uncertainty create a climate conducive to the concentration of power and the suspension of controls, as was verified in 2020 when many governments used the pandemic as an excuse for the abuse of power.[18]

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[15] Transparency International, "Access Denied? Availability and Accessibility of Beneficial Ownership Data in the European Union", *https://www.transparency.org/en/publications/access-denied-availability-accessibility-beneficial-ownership-registers-data-european-union.*

[16] Latinobarómetro, "*Informe* 2018", *https://www.latinobarometro.org/latdocs/INFORME_2018_LATINOBAROMETRO.pdf.*

[17] Edelman, "The Edelman Trust Barometer 2021", *https://www.edelman.com/sites/g/files/aatuss191/files/2021-03/2021%20Edelman%20Trust%20Barometer.pdf.*

[18] Transparency International, "Why fighting Corruption matters in Times of COVID-19", *https://www.transparency.org/en/news/cpi-2020-research-analysis-why-fighting-corruption-matters-in-times-of-covid-19.*

Trust is the mortar that gives strength to a community. Without trust, we live in a climate of insecurity and suspicion: we must be on guard and defensive, collective construction is increasingly difficult, uncertainty complicates the possibility of forecasting and planning. The attention is focused on "everyone for themselves" in the present without projection of the future, neither personal nor collective.

At the root of the problem of mistrust in institutions and leaders is a lack of interpersonal trust. In my opinion, the phenomenon originates in the rupture of the basic ethical consensus of society: When it is not clear what is right and what is wrong; when there is no difference between what is and what should be; when there is no consensus on what we will tolerate and what is intolerable; when there is no agreement on what the social models are.

This breakdown of ethical consensus is clearly manifested in what I call the *Cambalache* culture, in reference to Discépolo's famous tango.[19] Composed in 1935, it seems a description of the current situation, where everything is the same and nothing is better, where merit has no value, where being honest is the same as being a thief, where privileges are the other side of clientelism. These are societies in which the lack of integrity becomes structural and systemic operates as a model or justification for dishonesty and generates a climate of resignation and relativism that encourages individualism. Politically, this *Cambalache* culture explains why impunity prevails in matters of corruption, why the corrupt continue to win elections to the sound of the argument "They steal, but they work" or "They steal, but it piles up". In this climate, there are no incentives for transparency, access to information, independence, and effectiveness of controls, nor to restore the notion that officials (elected or appointed) are public servants who must be accountable.

The institutional response and the social reaction to corruption depend, partly, on the strength of the basic value consensus. When these consensuses are weak or broken, they increase the tolerance and indifference of the citizenry towards corruption. Corruption is a global phenomenon that can and does occur in any country, even in those perceived as transparent according to Transparency International's Corruption Perceptions Index;[20] the difference between countries depends on the reaction to cases.

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[19] Discépolo, Enrique Santos, *Cambalache*, *http://www.discepolintango.com.ar/letras/letra/c/cambalache.htm.*

[20] Transparency International, "Corruption Perceptions Index", *https://www.transparency.org/en/cpi/2020/index/nzl.*

Basic ethical consensus, when solid, not only lays the foundation for the reaction against corruption but also operates as ordering channels for the conduct of social actors, preventing corruption, even in the absence of a specific legal regime.

When these basic social agreements about what is right and what is wrong are broken, historically, the response that societies have sought is to heteronomously impose these norms in a process of *legalizing* ethics,[21] endowing with the force and coercibility of law certain elementary behaviors. This is how public ethics laws arose in many countries. It was necessary to say with the force of law that officials must act with "honesty, probity, rectitude, good faith and republican austerity".[22] Something as obvious and elementary as that. And despite having laws and sanctions, some public officials do not understand it and judges who help them.

In the case of the United Kingdom, the first legal norm of public ethics was the result of the investigation carried out by the Nolan Commission into a series of corruption cases that had occurred in parliament. In the note elevating the recommendations of the Commission, Lord Nolan —its president— says: "...the changes that have occurred over the years in the roles and work environment of politicians and other public servants have led to *confusion about what is acceptable behavior and what is not.*"[23] Precisely the rupture of this basic ethical consensus that governs the conduct of social actors.

The Integrity Agenda requires the reconstruction of trust based on a renewed basic ethical consensus and in this task one of the main obstacles we face is the relativization of the value of truth that characterizes postmodernity. We live in the age of post-truth, fake news, the manipulation of facts, the "alternative facts" narrative. At a time when Deep Fake and anonymity in social networks hide and misrepresent the true identity of the other, social dialogue becomes more difficult and even aggressive, uncertainty, suspicion, and the generation of bubbles of self-confirmation increase as a mechanism to overcome the feeling of vulnerability. At the political level, these characteristics of social dialogue favor the manipulation of citizens and allow some

[21] Ferreira Rubio, D., "Marco Teórico" in Rodríguez Chang, R (Compilators), *Ética Parlamentaria en Centroamérica y República Dominicana*, IIDH, Costa Rica, 2021, *https://www2.congreso.gob.pe/sicr/cendocbib/con4_uibd.nsf/20CC01F4B2B5901B05257DE300613D36/$FILE/13867.pdf.*

[22] Argentina: Ley 25.188 about Public Ethic, article 2, section b), *http://servicios.infoleg.gob.ar/infolegInternet/anexos/60000-64999/60847/texact.htm.*

[23] Lord Nolan, "Standards in Public Life. First Report of the Committee on Standards in Public Life", *https://webarchive.nationalarchives.gov.uk/20131205113448/http://www.archive.official-documents.co.uk/document/cm28/2850/285002.pdf.*

actors to intensify social fragmentation and confrontation in the friend-enemy logic, so favorable to populist leadership.

The demand for transparency is linked on a more instrumental level with the need to reconstruct the truth as the central axis of the ethical consensus that will serve as a solid base for the generation of trust.

The concept of transparency comprises two equally important aspects: integrity and information. Both information and integrity are central to the prevention and punishment of corruption. Integrity mandates behavior and information enables participation and control.

The Integrity Agenda that aims to rebuild trust includes the need for clear rules that order coexistence in a more just, inclusive, democratic society that respects freedom, equality, and the rights of its members. If we abandon the *Cambalache* culture and renew the agreement on the value of the word, reciprocal respect, honesty as a duty, transparency as a rule, and integrity as the guiding principle of our conduct, then we will have taken an important step in building a better future.

Buenos Aires, July 2021

INTRODUCTION

Diego Valadés, as director of the UNAM Legal Research Institute, presented the First Survey of Constitutional Culture in Mexico,[1] in the context of the VII Ibero-American Congress of Constitutional Law, held in Mexico City in February 2003. And later he invited the Presidents of the Constitutional Law Associations that are part of said Ibero-American Institute to do the same in their respective countries.

Personally, I understood the importance of the regional initiative and fortunately, I was able to direct and publish the two Surveys carried out in Argentina, in 2004 and 2014.[2]

These interdisciplinary experiences, of notable value for the knowledge of the Latin American reality, have been extremely useful for the study and research of our subject, in a subject as relevant as that of constitutional culture and legality.

In this same line of thought, we propose with Valadés to now introduce ourselves to another fundamental issue linked to the previous one, such as that relating to the phenomenon of corruption.

As we will see, this is one of the most serious problems in the region, considering the surveys published for years by Transparency International.

It will already be noted that this is an extremely complex matter, which requires special care in the methodological and conceptual aspects for its study.

Without intending to address the phenomenon in its entirety, in this work we propose a comparative analysis of the issue based on the provisions of the Supreme Laws of the respective countries.

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[1] In the book entitled "Cultura de la Constitución en México. Una encuesta nacional de actitudes, percepciones y valores", with Hugo A. Concha Cantú, Héctor Fix-Fierro y Julia Flores, co-authors.

[2] The first was published in the book "Encuesta de cultura constitucional. Argentina: una sociedad anómica", Institute of Legal Research of the UNAM, International IDEA and Argentine Association of Constitutional Law, Coordinators Antonio María Hernández, Daniel Zovatto and Manuel Mora y Araujo, Mexico, 2005, and the second in the book "Segunda Encuesta de cultura constitucional. Argentina una sociedad anómica", Compilers Antonio María Hernández, Daniel Zovatto and Eduardo Fidanza, Eudeba, Buenos Aires, 2016.

We trust that this initiative will serve to improve knowledge of the reality of the region and to advance in the fulfillment of the preliminary and perennial purposes of the constitutionalism that we profess: to ensure human rights and control, and limit power.

On the other hand, we start from the firm conviction about the convenience and importance of comparative studies, since as Voltaire said: "There is someone so intelligent that he learns from the experience of others".

The work begins with the reflections of the Director of the Institute of Legal Research of the UNAM, Pedro Salazar, and the President of International Transparency, Delia Ferreira Rubio, followed by a Chapter on "Corruption in Latin America" by me.

And then, the successive chapters of each of the chosen countries in alphabetical order and corresponding to the following co-authors: Argentina, also in my charge; Brazil, Marcelo Figueiredo; Chile, Francisco Zuniga Urbina; Colombia, Julio Cesar Ortiz Gutierrez; Guatemala, Alejandro Maldonado; Mexico, Daniel Márquez Gómez, and Beatriz Camarillo Cruz who also make a comparison with Singapore; Peru, Ernesto Blume Fortini and Venezuela, Allan Brewer Carías.

As it is an Ibero-American Institute, we have also considered it pertinent to incorporate the chapters from Spain, led by Miguel Revenga Sánchez and José Joaquín Fernández Alles, and especially from Italy, due to the need to learn about the process called "Mani Pulite", led by Luca Mezzetti and Francesca Polacchini.

The work concludes with Diego Valadés' Theoretical Considerations on Constitutionalism and Corruption.

We especially appreciate the participation of each of the authors convened for their dedication and vocation for the investigation of such a transcendent topic.

Antonio María HERNÁNDEZ

PRELIMINARY NOTE

When Professor Antonio María Hernández proposed that we undertake this work, I immediately accepted, convinced that it is a central issue for the contemporary constitutional State. I show my appreciation to Professor Hernández and the eminent jurists who contribute with their guiding analysis.

Perhaps corruption is the oldest problem of the state organization because it occurs whenever there is arbitrariness and arrogance in the exercise of power, and these are evils that constitutionalism strives to overcome, without having fully achieved it.

In many cases, the fight against corruption is only a rhetorical position; in others, it is a genuine goal but with wrong or incomplete instruments. In this work, the vicissitudes of this struggle will be seen through the examples that Professor Hernández and I consider worthy of the greatest attention.

I thank José Daniel Chávez for his effective collaboration in reviewing the materials that make up this work.

Diego VALADÉS

CORRUPTION IN LATIN AMERICA

Antonio María HERNÁNDEZ*

SUMMARY: I. *Introduction*. II. *The Corrupción: Concept and Classifications*. III. *Corruption at a Transnational Level, International Instruments and Conventions Against Corruption, Transparency International*. IV. *Corruption in Latin America*.

I. INTRODUCTION

Carl J. Friedrich in his classic work on "Democracy as a political form and as a way of life",[1] warns us that "corruption is not an exclusive vice of democracy, but of all forms of government and all political order" and "... that corruption is as inevitable as dirt at home. Therefore, it is a state of things that is always repeated and that derives from its nature, against which there is no better curative remedy than the constant struggle with different means for each form of government.

In this line of thought, this problem can be linked to that of the very nature of the human condition. And even without being able to deepen

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[1] Friedrich, Carl. J., "La democracia desde el punto de vista histórico y comparativo: dominio y cooperación", *La democracia como forma política y como forma de vida*, Madrid, Tecnos, 1961, p. 16.

a topic of moral philosophy, which exceeds this work, we cannot ignore the opinion of great figures of thought who meditated on it. Already from Greek thought, through Thucydides, Socrates, Plato, and Aristotle,[2] the very complex characteristics and contradictions of the human condition were pointed out. Likewise, norms and institutions were established to fight against corruption in the Constitutions.[3] Likewise, norms and institutions were established to fight against corruption in the Constitutions.[4] Human goodness and evil were specially analyzed by Machiavelli, Hobbes, Locke, Montesquieu, and Rousseau in their classic works.[5]

These conceptions were present at the time of the sanction of the first republican and federal Constitution in Philadelphia in 1787. That is why Alexander Hamilton argued in Federalist No. 6 that men are "ambitious, vindictive and rapacious"[6] and Madison wrote in Federalist No. 10 about the danger of factions and human passions, and in No. 51 he asked: "But what is government if not the greatest reproach to human nature? If men were angels, the government would not be necessary".[7]

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[2] In their respective classic works "The Peloponnesian War" by Thucydides, the various dialogues, where the thought of Socrates and the Republic of Plato and the Politics of Aristotle are exposed. See analysis by Philip Pettit, "Republicanism: a theory of freedom and government", Oxford University Press, 1997, Ch. 1.

[3] See Olsen A. Ghirardi, "La Constitución de los atenienses" —Los obstáculos contra la corrupción—, on the website of the National Academy of Law and Social Sciences of Córdoba, *www.acaderc.org.ar*. The institutions among which he mentions: 1. The annuity of the magistracies, 2. The bail, 3. The rendering of accounts, 4. The draw of the charges, 5. The exam, 6. The oath, 7. The ostracism, 8. The action of illegality (la graphe paranomos) and 9. The antidose or change of fortunes or property. This institute was a judgment that could be raised by the rich who received some monetary obligation and who could point to others who were in a better position to do so. Examples of these obligations were the assembly of a trireme and the payment of its crew for a year. The author indicates that there were few cases, mentioning the process that Megaclides successfully initiated against Isocrates in the year 356 BC, for the payment of a warship. Ghirardi attributes the greatness of Athens to the values and spirit of the Athenians and the care of their magistracies.

[4] In his classic works such as "Treaty of the Republic" and "Tusculan issues".

[5] Machiavelli's "The Prince" and "Discourses on the First Decade of Titus Livy", Hobbes's "Leviathan", Locke's "Second Treatise on Civil Government", Montesquieu's "On the Spirit of the Laws" and "The Social Contract" and Rousseau's "Emile", respectively.

[6] Hamilton, Alexander *et al.*, "The Federalist", translation and prologue by Gustavo Velazco, 2a. Reprint of the 2a. ed., Mexico, Fondo de Cultura Económica, 2006, núm. 6, Hamilton, p. 19.

[7] *Ibidem*, núm. 10, Madison, p. 36 y núm. 51 Madison, p. 220. Human evil is masterfully described by Shakespeare in the characters of his classic works and by Dostoyevski in "The Demons", among other masters of universal literature.

This vision of man justified and required a republic based on the division and balance of powers - both horizontally and vertically - to achieve the great and perennial objectives of constitutionalism: to ensure the rights of man and avoid the concentration of power.[8]

Subsequent history and current global, regional, and national, with a permanent presence of acts of corruption, indicates the correctness of this republican conception and the need to deepen the controls.[9]

We maintain that for the integral consideration of this phenomenon, the analysis of its ethical, moral, historical, legal, political, sociological, and economic philosophical aspects is required, with an interdisciplinary methodology, which exceeds the scope and purposes of this work. For this reason, we will develop this problem in more specific relation to political corruption in the Latin American reality, and, particularly, in Argentina.

We consider it necessary to refer initially to the concept and classifications of corruption, wherein the complexity of the subject will be confirmed. Subsequently, we will observe the data and realities in the different spheres, which will include the actions of international organizations, such as the United Nations and the Organization of American States, which have signed treaties and conventions on the matter. Likewise, it is necessary to dwell on the task of an outstanding non-governmental organization such as Transparency International.

Then we will address the analysis of this issue in our country and finally, we will refer to the various proposals to fight corruption, considering its very serious consequences, especially for democracies.

II. The Corrupción: Concept and Classifications

The Dictionary of the Spanish Language indicates that the word "Corruption" comes from the Latin *corruptio* and means "Action and effect of corrupt-

[8] See Hernández, Antonio María (Dir.), "Derecho Constitucional", vol. 1, Ch. 1 "Teoría constitucional", La Ley, Buenos Aires, 2012 and "Estudios de federalismo comparado: Argentina, Estados Unidos y México", Buenos Aires, Rubinzal Culzoni Editores, 2018, chh. II on item 1.4 "El pensamiento y diseño constitucional de Madison y Hamilton sobre el federalismo", pp. 67-74.

[9] Also remember the well-known phrase of Lord Acton: "Power tends to corrupt, but absolute power corrupts absolutely", which has been corroborated historically and today, with a vast majority of authoritarian or totalitarian political systems, and with a high degree of corruption.

In this regard, see the indexes on democracy and corruption of various specialized institutions, which we will cite later. Constitutional democracy, the rule of law and the division of powers, the result of the republican tradition, have tried to prevent the power of the state from being used for private ends.

ing" and "Corrupting" comes from the Latin *corrupte* and has 7 meanings, of which we will quote the first 5: 1. "Alter and reverse the shape of something"; 2. "To spoil, deprave, damage"; 3. "Bribe someone with gifts or otherwise"; 4. "Pervert or seduce a person"; 5. "Spoil, vitiate. Corrupt customs, speech, literature".[10] The plurality of meanings warns us that it is polysemy, and from there, it will be possible to understand the complexity and depth of the subject under analysis.

First, as expressed by Malem Seña following Peter Euben, the "conceptual history of corruption is uncertain, because although the etymological origin is clear, its use has not been so throughout history".[11] And in this sense, he mentions the historical use of the word with two meanings, one which is general, linked to destruction, adulteration, degeneration, debasement, illegality, illegitimacy, or immorality, which encompasses any qualification of corruption, whether political, economic, or social.[12] But over time there have been numerous definitions that have modified its original meaning. The author groups the definitions into three large models: the first

> emphasizes the duties of a public official and the singularization of the public function. The second, in aspects concerning the demand, supply, and exchange of corrupt actions, notions that should be interpreted in the light of modern economic theory. Finally, the third model defines corruption in the public interest.[13]

For the purposes of this work and given that many existing definitions in the doctrine and jurisprudence[14] exhibit conceptual difficulties in this mat-

[10] Royal Spanish Acedemy, "Diccionario de la Lengua Española", Twenty-first Edition, Madrid, Espasa Calpe S. A., 1992, p. 410.

[11] Malem Seña, Jorge F., "La corrupción", Barcelona, Gedisa Editorial, 2002, p. 22.

[12] Malem Seña expresses that Peter Euben has assimilated corruption with these meanings in his article "Corruption", in the work "Political innovation and conceptual change", T. Ball, I. Farr and R. Hanson (comps.), Cambridge University Press, Cambridge, 1989, p. 223.

[13] *Ibidem*, p. 22. Regarding the latest model, Dennis F. Thompson expresses: "Officials commit immoralities out of greed, desire for power or loyalty to their family and friends. But there is a kind of immorality typical of the public function that paradoxically shows a more noble appearance, since it is not committed to satisfy personal objectives but in search of the common good. The problem of "dirty hands" belongs to the politician who violates moral principles in the name of the public interest. In Thompson, Dennis F., "Political Ethics and Public Office", Spanish version, Barcelona, Gedisa Editorial, 1999, Ch. 1, p. 25.

[14] The analysis and debate on this issue in North American doctrine and jurisprudence is very broad and profound. Among many authors, see especially the contributions of Yale Professor, Susan Rose-Ackerman, and in particular in her book "Corruption and Government: Causes, Consequences and Reform", Spanish version, Madrid, Ed. Siglo XXI, 2000

ter, we will limit ourselves to presenting the opinion of Malem Seña. Regarding his notion of corruption, he maintains that

> corrupt acts are those that meet the following characteristics: 1... They imply the violation of a positional duty (causes the transgression of any of the rules that govern the position they hold or the function they perform)[15]… 2… There must be a normative system that serves as a reference (corruption can have an economic, political, legal, or ethical nature, or participate in these different levels at the same time)… 3… It does not always entail a criminally unlawful action (corruption and illegality criminal are, in this sense, independent terms)… 4…They are always linked to the expectation of obtaining an extra positional benefit (this benefit doesn't need to constitute an economic gain, it can be political, professional, sexual, etc.)… 5… They tend to be carried out in secret or, at least, in a discreet framework (the corrupt person will always try to make their actions go as unnoticed as possible).[16]

And so, it defines acts of corruption as "those that constitute the violation, active or passive, of a positional duty or the breach of some specific function carried out within a framework of discretion to obtain an extra positional benefit, whatever its nature".[17]

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and Harvard Professor, Dennis F. Thompson, in particular in his book "Political Ethics and Public Office", Spanish version, Barcelona, Gedisa Editorial, 1999. We also add these articles: Rose-Ackerman, Susan, "Corruption and Democracy", Proc. Ann. Meeting Am. Soc'y Int'l L., vol. 90, 1996, p. 83 and "Corruption: Greed, Culture and the State", The Yale Law Journal Forum, vol. 120, November 10 2010; Stark, Andrew, "Beyond Quid Pro Quo: What's Wrong with Private Gain from Public Office?", American journal of Political Science, vol. 91, 1997, p. 108, Hellman, Deborah, "Defining Corruption and Constitutionalizing Democracy", *Michigan Law Review*, vol. 111, 2013, p. 1385; Issacharoff, Samuel, "On Political Corruption", Harvard Law Review, vol. 124, 2010, p. 118; Warren, Mark. E., "Democracy and Deceit: Regulating Appearances of Corruption", American Journal of Political Science, vol. 50, 2006, p. 160; Thompson, Dennis F., "Two Concepts of Corruption: Making Campaigns Safe for Democracy", The George Washington Law Review, vol. 73, 2005, p. 1035 y Teachout, Zephyr, "The Anti-Corruption Principle", Cornell Law Review, vol. 94, 2009, p. 341.

[15] Malem Seña, on p. 32, specifies that the positional in no way means "that the presence of a public official is necessary for there to be a case of corruption. Corruption is also possible between private agents". And that is why he rejects in Note 21 of said page, the definitions of corruption of Susan Rose-Ackerman and the World Bank that maintain that corruption "is the use of public office for private benefit". *Cfr.* Rose-Ackerman, Susan, "Corruption and Government…", *cit.*, p. 125.

[16] *Ibidem*, pp. 32-35. For a more detailed analysis of the concept of corruption in its philosophical aspects, see Garzón Valdés, Ernesto, "Acerca del concepto de corrupción", in F. Laporta y S. Álvarez (comp.), "La corrupción política", Madrid, Alianza Editorial, 1997.

[17] *Ibidem*, p. 35. The author indicates that said definition essentially coincides with the one proposed by Ernesto Garzón Valdés in the work mentioned in the previous note. Previ-

Regarding the classifications of corruption, we also consider it pertinent to point out only some of them, which seem useful to us for this work. As we saw earlier, there is political,[18] economic, social, trade union, sports corruption, etc., according to the respective area in which it occurs.[19] We already

ously Malem Seña mentions what corruption is not and lists in that sense, on pp. 23-31, which we summarize below: 1. Corruption should not be confused with state measures of a promotional nature (such as tax incentive laws, although this will also depend on the moment in which it is carried out, because if it is done prior to an electoral act can be corrupting of the political system). 2. Nor can it be confused with a misguided exercise of power (since, in some cases, this will not necessarily be the case if there is no positional benefit for the authority in question). 3. Corruption and political clientelism should not be assimilated since there are some conceptual differences. 4. Although the receipt of gifts and financial or other compensation by public officials, politicians, or an individual by virtue of the performance of their work has been considered as generic acts of corruption, it considers that in some cases it may establish a demarcation line between those practices and certain corrupt acts. In this sense, he compares these gifts with bribery and mentions the differences, following John Noonan Jr., in his work "Bribes", New York, Macmillan Publ., 1984, p. 697. 5. It is convenient to distinguish between acts of corruption and receiving, offering, and giving tips. 6. Whoever participates in an act of corruption cannot be confused with a social reformer, such as those who argue that corruption performs functions similar to those performed by economic or bureaucratic reforms in systems of excessive bureaucracy that impedes economic development. And he says "Whoever participates in corruption is not interested in modifying the reference normative system, be it legal, social or political. Nor, of course, the current moral system. And he goes on to quote this opinion of Samuel Huntington: "...Corruption itself can be a substitute for reform, and both corruption and reform a substitute for revolution. Corruption serves to reduce the groups that press for changes in policy, just as reform serves to reduce the classes that press for structural changes". "Modernization and corruption", in the work Heidenheimer, Arnold *et al.* (comps.), "Political corruption. A handbook", 3a. ed., London, Transaction Publ., p. 381.

[18] That "consists of the violation of a positional duty of a political nature, in the breach of a function of the same tenor or is carried out in response to political interests". *Ibidem*, p. 37.

[19] "There can be public and private corruption" —says Malem Seña— "And although little attention has been paid to the latter, it should be said not only that it is conceptually possible, but also that from an empirical point of view it is more frequent than it seems at first glance. first glance. These two types of corruption occur in international trade. However, practically all the analyzes and measures proposed to deal with it are designed as if corruption were fundamentally of a state or public nature. Corruption would be a problem that would arise from the intersection of public and private interests. Perhaps for this reason the State has traditionally been considered the source of all corruption. And among the most notorious causes of the increase in corruption has been pointed out the fact that the Welfare State has assumed powers in economic matters that in the police state were reserved for private agents"… "But the proposal to abandon the Welfare State by the privatizing state to eradicate corruption has not been an adequate strategy". Malem Seña, *op. cit*, p. 214. And the author further refers that "In another place I explained, in some detail, the branches to which the privatized companies belonged, the privatization procedures used, the lack of controls of these processes and the enormous number of resources transferred from the public

know that corruption does not only operate with the presence of public officials. It is a problem that affects both society and the State, beyond the deep interrelationships between these last two terms. That is why later we will refer to countries with a true "Corruption Culture".

Corruption can also be classified in the Public Administration, in the Legislative Power,[20] in the Judicial Power, in the financing of politics, and international trade.[21]

Likewise, one can distinguish between common or ordinary corruption and grand corruption, as Rose-Ackerman does. The author refers that:[22]

> Corruption occurs in people's daily lives and routine business activities as people navigate their relationship with the state. However, of particular importance is the corruption at the top of the state hierarchy that involves political leaders and their close associates and concerns the award of important contracts, concessions, and the privatization of state-owned companies. Such "Grand Corruption" imposes huge costs on ordinary people by siphoning off funds to top political leaders in exchange for "sweetheart" deals with big foreign and domestic companies.

Another classification, from Arnold Heidenheimer,[23] considers the perception that the elites and public opinion of a country have of certain corrupt acts, and thus black, gray, and white corruption is distinguished. The first is when there is consensus about the reproach and the need for its punishment. The second is when the elites and public opinion have an ambigu-

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sector to the private sector. I also pointed out then the social costs that all this produced, and the enormous corrupt fees paid by businessmen to take over public companies, some of them in full swing" (p. 216 and note 4, where he refers to another of his works: "Globalization, international trade and corruption", pp. 1139 *et seq*.). He then quotes Rose-Ackerman in her work on "Corruption and Governments", who argues that even a decline in state activity can leave the current pattern and levels of corruption intact (p. 217).

[20] See Thompson, Dennis F., "La ética política y el ejercicio de cargos públicos", *cit.*, in its Chap. 4: "Legislative Ethics", pp. 145 *et seq*.

[21] See Chaps. 2, 3, 4 and 5 of the cited work of Malem Seña.

[22] Ackerman-Rose, Susan, "Corruption: Greed, Culture and the State…", *cit.*: "Corruption occurs in people's day-to-day lives and in routine business activities as people navigate their relationship to the state. However, of particular important is corruption at the top of the state hierarchy that involves political leaders and their close associates and concerns the award of major contracts, concessions and the privatization of state enterprises. Such "Grand corruption" imposes large costs on ordinary people by diverting funds to top political leaders in exchange for sweetheart deals with big foreign and domestic businesses".

[23] "Perspectives on the perception of Corruption", in "Heidenheimer, Arnold *et al.* (comps.), *op. cit.*, pp. 161 *et seq*.

ous opinion about the need to penalize the acts. And the third, white, is when acts of corruption are tolerable and their criminalization is not vigorously supported.[24]

Finally, we mention the distinction between national corruption and transnational corruption, depending on whether national borders are crossed, and the presence of corporations and international anti-corruption legislation is observed.[25]

III. Corruption at a Transnational Level, International Instruments and Conventions Against Corruption, Transparency International

> Corruption is everywhere. In the rich industrialized countries and the poor regions, in the North and the South, in the East and the West. At first glance, the report on corruption is depressing. Everywhere, corruption seems impossible to eradicate and you might think that we at Transparency International have set ourselves a herculean task. Every day new variants of fraud and bribery appear, such as the heads of the mythological Hydra, which grew back every time they were cut off.[26]

[24] C*fr.* Malem Seña, *op. cit.*, p. 37. In reference to classifications of corruption in North American doctrine, see the article by Yasmin Dawood, "Classifying corruption", Duke Journal Constitutional Law and Public Policy, 9, Annual 2014, p. 103. There the author maintains that: "Scholars have categorized various types of corruption. Thomas Burke has distinguished three types of corruption: quid pro quo, monetary influence, and distortion. Zephyr Teachout has identified five categories: criminal bribery, inequality, voices drowned out or silenced, public discouraged, and lack of integrity. Deborah Hellman has described three main types of corruption: corruption as the distortion of judgment, corruption as the distortion of influence, and corruption as the selling of favors. Although there are various approaches in the literature to classify corruption, I argue that there are two general approaches to conceptualizing the "evil" of corruption. The first approach is that corruption amounts to an abuse of power. The second approach is that corruption violates the principle of political equality. This part also considers Lawrence Lessig's dependency theory of corruption, which offers an alternative approach to understanding corruption. On the other hand, in said article Dawood analyzes the different concepts and classifications that arise from the jurisprudence of the Supreme Court of Justice of the United States, in relation to corruption, especially in political campaigns.

[25] For an analysis of transnational corruption, see Delaney, Patrick X., "Transnational corruption. Regulation across borders", The Australian National University, Asia Pacifica School of Economics and Government, Policy and Governance. Discussion Papers, 2005, *www.apseg.anu.edu.au*.

[26] Peter Eigen, "Las redes de la corrupción", Spanish versión, Colombia, Planeta, 2003, p. 302.

This is the conclusion of Peter Eigen, founder of the aforementioned institution, who nevertheless points to the progress made at the international level in the fight against corruption, in addition to the installation of the issue on the world agenda.[27]

In this sense, we consider it necessary to refer to the different Treaties and Conventions that were established to ensure international cooperation in the fight against corruption.

In this process, the importance of a law enacted in the United States in 1977, the Foreign Corrupt Practices Act (FCPA), which criminalized commercial bribery of foreign public officials by issuers of domestic securities and companies. To implement the prohibitions against commercial corruption contained in the Act, substantial internal control and accounting requirements were imposed on issuers of securities. Congress subsequently substantially amended the Act in 1988 to include a provision requiring the president to seek international cooperation to suppress such commercial bribery. This Law would be the precedent of the multilateral anti-corruption conventions, at the international and regional levels, adopted in 1996 by the Organization of American States (OAS) and in 1997 by the Organization for Economic Cooperation and Development (OECD). Due to the signing of this last Convention by the United States, a new modification was made in the text of the Foreign Corrupt Practices Act, in 1998, for the adaptation of the respective legal texts. Said Conventions differ in their members and characteristics.[28] Likewise, the United Nations Convention against Transnational Organized Crime, adopted in 2000, and the OECD Convention to Combat Bribery of Foreign Public Officials in International Business Transactions should be mentioned.[29]

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[27] The work is an account of his international experience at the World Bank and his retirement in 1993 to create Transparency International, which is a non-governmental organization with national sections in more than 100 countries and which has developed a remarkable fight against corruption. Among other activities that we will mention, this institution is responsible for the well-known Global Corruption Perception Index, which began to be published in 2001. The work refers to corruption in developed countries such as his native Germany and Spain, as well as in Latin American and African countries.

[28] *Cfr.* Arms, Brian C., "Holding public officials accountable in the international realm: A new multi-layed strategy to combat corruption", Cornell International Law Journal, vol. 33, 2000, p. 159.

[29] See Alfonso Santiago's article, "La cláusula ética del art. 36. Normatividad jurídica, normalidad social y la necesidad de un cambio de cultura política", in "A veinte años de la reforma constitucional de 1994", Número Especial de Jurisprudencia Argentina, August, 20 2014, Abeledo-Perrot, pp. 38 et seq., where the four Conventions just mentioned are analyzed, and which, as we will see later, were approved by our country.

Brian C. Harms maintains[30] that:

> The OAS, OECD, and EU Conventions adopt, albeit in variously modified forms, the FCPA principle of extraterritoriality and the criminalization of commercial bribery from home countries, foreign officials of reception and officials of international public organizations. Almost all nations historically prohibited bribery of their officials, although such demand-side regulation was patently ineffective in preventing bribery and extortion in many countries; and it is commonplace, if not universal, to prohibit commercial corruption as well.

And it adds that:

> An impressive array of other multilateral entities, including the United Nations (UN), the International Chamber of Commerce (ICC), the Council of Europe, the World Bank, and the International Monetary Fund (IMF), have adopted resolutions or efforts directed towards the reduction and definitive elimination of international commercial corruption. In particular, the United Nations Declaration against Corruption and Bribery in International Business Transactions and the United Nations Draft Code of Conduct on Transnational Corporations, together indicate a global recognition that commercial bribery is wrong.[31]

And later he adds this reflection: "A global anti-corruption regime implies, in part, what can be considered a plausible moral principle, namely, that bribery and extortion are ethically unacceptable, even if they are economically and politically tolerable. Therefore, norms can arise as a result of moral principles".[32]

Years later, the United Nations Convention Against Corruption would be adopted, on a global scale, of special relevance in this matter, which was adopted by the General Assembly in New York, through Resolution 58/4 of October 31, 2003. And that at the beginning of the Preamble it expresses in a notable summary, the concern of the States Parties, "…for the seriousness of the problems and threats that corruption poses for the stability and security of societies by undermining the institutions and values of democracy, ethics, and justice and by compromising sustainable development and the rule of law".

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[30] *Idem*.

[31] *Idem*.

[32] *Idem*. He then makes interesting reflections on the relationship between globalism and local realities, which present special cultural peculiarities around corruption.

The Convention consists of the Preamble, 8 Chapters, and 71 articles, which comprehensively and systematically regulate the fight against corruption and the required international cooperation. Ch. I is entitled "General Provisions", II "Preventive Measures", III "Penalization and Law Enforcement", IV "International Cooperation", V "Asset Recovery", VI "Technical Assistance and Exchange of Information", VII "Application Mechanisms" and VIII "Final Provisions".

Later we will revise again this universal Convention and the American regional one when analyzing the legislation of our country.

The importance of the fight against corruption carried out by Transparency International (TI) cannot be ignored. As we anticipated, the international non-governmental institution, based in Berlin, Germany, was created at the initiative of Peter Eigen, who was elected as its first president in 1993. Very soon the National Societies and subsidiaries were established, which currently exceed the number of 100 countries.[33] And the intellectual task of developing anti-corruption instruments began. In the first place, the publication of the Source Book or Reference Book includes methods, examples, and means to confront corruption through a system of integrity in laws and institutions. This was followed by the Corruption Perceptions Survey,[34] which began publication in 1995, to great acclaim. In 1999, the Bribe Payers Index was released,[35] showing countries and companies paying bribes in developing countries. In 2000, the Institution helped create the Wolfsberg Principles, by which the world's large banks commit to preventing corruption and money laundering. And from 2001 the Global Report on Corruption is made public.[36]

Other proposals of the Institution were the Integrity Pact and the Code of Conduct for Companies. The first, intended for governments and companies involved in awarding contracts to commit to competition without corrupt methods and with the supervision of independent entities, such as national TI sections. And the second is to ensure the validity of ethical principles in the operation of private companies within the global economy, with the concept of sustainable development.[37]

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[33] See *Cfr*. Peter Eigen, "Las redes de la corrupción", *op. cit*. In 1994 the non-governmental organization *Poder Ciudadano of Argentina* joined Transparency International, as the first non-governmental organization. Currently, TI is chaired by the prominent Argentine jurist and political scientist, Delia Ferreira Rubio, which distinguishes our country, and who also chaired *Poder Ciudadano* for two terms.

[34] *Ibidem*, Ch. 12 "El índice de percepción de corrupción", pp. 111-118.

[35] *Ibidem*, Ch. 13 "El índice de fuentes de soborno", pp. 119-122.

[36] *Ibidem*, Ch. 5 "Crecimiento de la organización", pp. 49-57.

[37] *Ibidem*, Ch. 8 "El Pacto de integridad" and 9, "Cómo deben proceder las empresas", p. 75.

The tools for fighting corruption must be added to this where, in addition to the Source Book or Reference Book, the Tools for Citizen Control of Corruption were developed. While the Book pursues the objective of establishing integrity systems, the Tools are practical experiences on the matter to be used in day-to-day action against corruption at the local level.[38]

We also mention the TI Integrity Award, which is given in recognition of the courage of people committed to the fight against corruption.[39]

Finally, we refer to the Global Corruption Perception Index for the year 2020, published in Berlin on January 28, 2021, by TI, which shows Denmark and New Zealand in first place with 88 points, followed by Finland, Singapore, Sweden, and Switzerland with 85 points, while South Sudan and Somalia appear in the last positions with 12 points, followed by Syria with 14, Yemen and Venezuela with 15 points.[40] The general average is 43 points and by region the European Union and Western Europe rank first with 66 points and Africa last with 32 points, followed by Eastern Europe and Central Asia with 36. More than 2/3 of the 180 countries included in the study have less than 50 points.

The Report concludes that there is an inability of countries to control corruption, which contributes to a crisis of democracy worldwide. A direct correlation can be seen in this regard since countries with full democracies[41] have an average of 75 points, imperfect or weak democracies an average

[38] *Ibidem*, Ch. 10: "Herramientas para combatir la corrupción", pp. 95-102.

[39] *Ibidem*, Ch. 14: "El premio a la integridad de TI, una protección para los whistleblowers", pp. 123-132. For the author, it is about rewarding those who blow the alarm whistle and denounce corruption, which implies taking serious risks. And there are indicated the different winners from 2001, which include people from very different countries. The first was Mustafá Adib, Captain of the Moroccan Army, who uncovered a case of corruption and ended up in jail. The work includes three very important chapters on corruption in Spain (Chap. 15) and in Germany (Chaps. 16 and 17), pp. 133-193. The Epilogue by Hans Kung entitled "La lucha contra la corrupción requiere un marco ético", which begins with these statements: "It is clear that the fight against corruption must be undertaken with all legal means. And it will only succeed if the guilty are held accountable, regardless of their position, and in this way, justice is enforced. But this is not enough. Often there is no political will to fight corruption because there is no ethical will behind it; and many legal provisions against corruption are not applied in practice due to the lack of an awareness of injustice, since elementary ethical guidelines have been lost, both in the population in general and in the elites. The reform of a State is usually very difficult because an ethical basis is lacking" (p. 251).

[40] Keep in mind that 100 points means the maximum of transparency and 0 points, the maximum of corruption.

[41] According to the classification of The Economist Intelligence Unit, dedicated to measuring the quality of democracy worldwide. According to the last report of 2018, there are only 19 countries with full democracies, corresponding to only one country in Latin America that location, which is Uruguay. Chile dropped out of that group, just as it has dropped its

of 49 points, hybrid regimes (with authoritarian elements) an average of 35 points, and authoritarian regimes, with the worst average of 30 points. The entity's Executive Director, Patricia Moreira, expresses in this regard:

> Corruption undermines democracy and generates a vicious circle that causes the deterioration of democratic institutions, which progressively lose their ability to control corruption." "With so many democratic institutions under threat around the world —often with authoritarian or populist leaders— further work is needed to strengthen checks and balances and protect citizens' rights.[42]

We end this point with the expert opinion of Susan Rose-Ackerman:

> Much has been done recently on efforts to control corruption through international treaties and civil society initiatives, such as those spearheaded by Transparency International (TI) and the Extractive Industries Transparency Initiative (EITI). The G20 in its June 2010 statement recognized that corruption is a global problem. This international concern is a positive development that can complement and reward efforts within recipient countries, especially to combat grand corruption by multinational companies. However, the existing initiatives have little real validity as Hard Law (hard law). Its impact depends on the change in customs and the bad publicity that corruption has… These international efforts, laudable as they are, cannot substitute domestic reform.[43]

IV. Corruption in Latin America

On the current situation of this issue in our region, it is expressed in the "Report of the Advisory Group of Experts on anti-corruption, transparency, and integrity for Latin America and the Caribbean" of the IDB:[44]

> Against the backdrop of a series of scandals of unprecedented scope in Latin America and the Caribbean (LAC), it is clear that corruption threatens to erode the foundations of much of the region's economic well-being and political stability, as well as the state of Law. Fed up with corruption and impunity,

ratings on the Global Corruption Index. These questions are considered later in the following point on Latin America.

[42] See "El Índice de Percepción de la corrupción muestra un estancamiento de la lucha contra la corrupción en la mayoría de los países", Transparency International, Surveys, January 29 2019, *www.transparency.org*

[43] *Cfr*. Rose-Ackerman, Susan, "Corruption: Greed, Culture and the State", *cit*.

[44] Authored by Eduardo Engel, Delia Ferreira Rubio, Daniel Kaufmann, Armando Lara Yaffar, Jorge Londoño Saldarriaga, Beth Simone Noveck, Mark Pieth and Susan Rose-Ackerman, IDB, 2018, Publication Code IDB-MG-677, Washington, *www.iadb.org*

> taking concrete and effective action to stop this cancer is one of the priorities of voters and many of the candidates in the numerous elections in the region in 2018 and probably also in the coming years. It is time to take a hard look at what has happened in the region and around the world, and the lessons we have learned from it, as well as what this means for upcoming initiatives to control corruption and improve the prospects of the 650 million of inhabitants of the region...

This work is urgent and necessary. Corruption has managed to penetrate the highest levels of government, society, and the economy. It is linked to the pernicious capture of the state by elites in much of the region and, as the Lava Jato case illustrates, operates across borders. In general terms, the data shows that in the last two decades there have been no significant improvements in the region in key governance indicators, or even worse, with a few exceptions, the region has maintained a poor performance in the implementation of the Rule of Law and the control of corruption. The distorting impact of money on politics in the region is associated with policies and practices that benefit a small elite that, with failed reforms, undermines public confidence in the government and democratic institutions.

Noting that globalization and technology provide unprecedented opportunities to hide the proceeds of crime and corruption, it is stated that: "In most LAC countries, corruption and state capture are systemic. The interconnectedness between networks of political and economic elites often undermines sound policymaking and the rule of law, entrenching impunity and diverting public resources and investment from the common good".

The clarity, precision, and crudeness of this Summary of such renowned experts exempt us from other comments on the matter.

Coinciding with the previous analysis, the view of Daniel Zovatto, Regional Director for Latin America of International IDEA, who, in his insightful study on the state of democracies in Latin America, points out among the threats and challenges for the region the high levels of corruption and opacity along with others such as the weakness of democratic institutions, excessive presidentialism, re-election fever, high rates of citizen insecurity and attacks on the independence of Justice and freedom of expression.[45] He maintains that corruption "has been a historical constant in most of the countries of the region and everything indicates that this scourge is one of

[45] "Zovatto, Daniel, "El estado de las democracias en América Latina: a 35 años del juicio de la Tercera Ola Democrática", Cátedra Democracia Perú, Domingo García Rada, Lima, Jurado Nacional de Elecciones-Fondo Electoral-Escuela Electoral y de Gobernabilidad, 2014, Democracy Chair Series, núm. 1, pp. 38-49.

the most serious and persistent problems in Latin America". He indicates that this has produced a lack of confidence in the institutions, which affects the political parties, the powers of the State —and among them, the Judiciary—, in addition to the police.[46] And he affirms that

> …corruption is not an exclusive problem of politics or State entities. The privatization wave, which to a greater or lesser extent, has swept the region in the last two decades seems to contribute to the perception of citizens about corruption. The low levels of confidence shown by large private companies in various surveys in the region are an indication of this. Almost 45% of Latin American respondents say that the business sector in their countries is "corrupt" or "very corrupt.[47]

For us, there is no doubt that corruption has a decisive impact on the characteristics and qualifications of medium and low democratic quality that are presented in general in our region, beyond its heterogeneity.[48]

However, one cannot fail to point out the extraordinary importance that the so-called Lava Jato process in Brazil has had in this area, which has meant a notable change in the actions of the Judiciary in the fight against corruption, and which has had an enormous impact throughout the region.

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[46] With data from Transparency International's 2013 Global Corruption Barometer.

[47] Keep in mind that this opinion and these data were prior to the *Lava Jato* process.

[48] See Zovatto's analysis, *op. cit.*, pp. 28-37. He cites the following definition by Morlino in this regard: "quality democracy is a stable institutional structure that allows citizens to achieve freedom and equality through the legitimate and correct functioning of institutions and mechanisms" (p. 28). To measure the democratic quality of the region, Zovatto uses 3 indices: that of Freedom House, that of Democratic Development of the Konrad Adenauer Foundation and that of Democracy, of the Intelligence Unit of The Economist. In this last index he distinguishes between full democracies, imperfect democracies, hybrid regimes and authoritarian regimes. According to the 2012 index, only Uruguay and Costa Rica were in the first group, while Argentina, Brazil, Chile, Colombia, El Salvador, Mexico, Panama, Paraguay, Peru, and the Dominican Republic were in the second. They were cataloged as hybrid regimes: Bolivia, Ecuador, Guatemala, Honduras, Nicaragua, and Venezuela and only Cuba as an authoritarian regime (p. 35). The author concludes that "...the 3 indices show the high degree of heterogeneity of Latin American democracies, which can be structured into three large groups, in addition to the special situation of Cuba: 1. A first group formed by Uruguay, Costa Rica and Chile, characterized by having the highest rates of democracy in Latin America; 2. A second group of countries with high to medium democracy indices but with important differences between them: Argentina, Brazil, Colombia, El Salvador, Mexico, Panama, Peru, the Dominican Republic and Paraguay; 3. A third group formed by the countries that have the lowest rates of democracy, made up of Bolivia, Ecuador, Guatemala, Honduras, Nicaragua and Venezuela and 4. The particular situation of Cuba (p. 37). We believe that currently both Venezuela and Nicaragua make up the last group of authoritarian countries along with Cuba.

Although the topic will be developed in detail by my distinguished colleague Prof. Marcelo Figueiredo, it is necessary to make some references in this regard. As well as the "Mani pulite" process[49] implied a before and after in the matter and with profound effects on the Italian political system,[50] the same can be said of what is ongoing in Lava Jato, in Brazil, but with special implications in other countries —especially in the region— since it involved transnational corruption.[51]

Lava Jato means car wash in Spanish since, in one located in Curitiba, there was the office of the exchange operator Alberto Youssef, who was arrested by the Federal Police by order of the Federal Judge of said city Sergio Moro, in an investigation on money laundering and tax evasion. This occurred on March 17, 2014, in what was called the first phase of the operation.[52] Subsequently, a former Director of Petrobras, Paulo Roberto Costa, linked to Youssef, was arrested, who also ended up implicating the most powerful construction companies in the country such as Odebrecht, Camargo Correa, OAS, and Mendes Junior, who were contractors of the state company, in what which was established as the most important judicial process against corruption in Brazil. Through the firmness of the investigation, using the rewarded denunciation and special knowledge of the Mani Pulite case, Judge Moro and the prosecutors led by Deltan Dallagnol advanced to

[49] "Manos limpias" in Spanish. The opposite of "Dirty Hands", the title of the well-known play by Jean Paul Sartre. In relation to this, see Dennis F. Thompson in his cited work "Political ethics and the exercise of public office", in Chap. 1 "Democratic dirty hands", which begins with what is stated in note 13, on the infringement of moral principles for the public interest.

[50] The process began on February 17, 1992, with the arrest ordered by the Milan Public Prosecutor Antonio di Pietro of the Socialist Party leader Mario Chiesa, at the time he was receiving a bribe from the businessman Luca Magni, to gain access to a construction concession. public. The latter had informed the Prosecutor of the facts, which gave rise to an investigation that covered the entire country, since the political system was completely corrupted through public works by bribes, extortion and illegal financing of politics. The mechanics was called "tangentopoli", from tangent, bribery. In a few years, 1,233 politicians, officials and businessmen were sentenced. In an interview granted to Clarín in Buenos Aires, di Pietro pointed out that corruption was a cultural problem, and that in addition to the action of the Judiciary, the accompaniment of society in the fight against corruption was essential, with special emphasis on the importance of Education ("Las lecciones de Mani Pulite", *Clarín*, Opinión, Buenos Aires, August 12, 2018).

[51] Since the Odebrecht company bribed officials from many countries to obtain important public works concessions.

[52] Phase 54 is currently being developed, according to what was stated by the journalist Marcio Resende, in a conference at the Faculty of Law of the National University of Córdoba, on October 2, 2018. He also said that the Odebrecht company came to pay salaries to 60 Argentine journalists.

convict more than 120 politicians and businessmen, including among the latter the most important in the country like Marcelo Odebrecht and Leo Pinheiro,[53] in addition to Ministers, Legislators —including the former President of the Chamber of Deputies Eduardo Cunha— and even the former President of the Republic, Luiz I. Lula da Silva.[54] It should be borne in mind that the first instance sentences were confirmed by the Courts of Appeal and there were also appeals before the Federal Supreme Court, which indicates that the Judiciary in its various instances has been responsible for this extraordinary anti-corruption process, which will have great popular support.

But since Brazilian companies, and especially Odebrecht, obtained construction concessions in other countries, such as Argentina, Peru, Colombia, Ecuador, Venezuela, Panama, Guatemala, the Dominican Republic, Angola, and Mozambique, among others, the bribery method was also used there,[55] which gave rise to two legal proceedings. Some of them with enormous political implications, since the last 4 former Presidents of Peru: Humala, Toledo, García and Kucynski face criminal investigations for this reason. In Ecuador, Jorge Glas, who is serving a sentence for company bribery, had to leave the Vice Presidency.

In the case of our country, Justice is acting very slowly, even though, according to data from the United States Department of Justice, the Odebrecht company has recognized the payment here of 35 million dollars. In this sense, the Federal Judge Casanello has ruled the prosecution of the former Minister De Vido, the former officials Baratta and López, and the businessmen Roggio, Walker, Biagini, and Rodríguez, in addition to the former directors of the Aysa company, for the water treatment works and treatment plant in Tigre and Berazategui, respectively.[56]

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[53] Marcelo Odebrecht was sentenced by Judge Sergio Moro to 19 years in prison in just over 2 years of proceedings. As of March 2018, 188 convictions had been handed down against 123 politicians, officials, and businessmen. Cf. Agencia Efe, Rio de Janeiro, March 17, 2018.

[54] He also received a sentence of 12 years and 11 months in prison for another case of corruption by Federal Judge Gabriela Hart, who replaced Sergio Moro, who later became Minister of Justice of Brazil. In this case, it was proven that he was benefited by the OAS and Odebrecht companies for works carried out on a rural property that he frequented, near the municipality of Atibaia, in the State of São Paulo. *Cfr. La Voz del interior*, Córdoba, p. 18, under the title "New conviction of Lula for corruption".

[55] That, as reported by the United States Securities Commission in 2016, reached a total of 788 million dollars in the countries. For an analysis of what happened in each of the countries involved, see the *CNN Español* report on the web entitled "The Odebrecht bribery scandal: this is the case of each affected Latin American country", February 10 2017, *www.cnnespanol.cnn.com*.

[56] According to information published in separate and successive articles in *La Nación, Clarín, La Voz del Interior*, etc.

We refer next to the Global Index of Perception of Corruption in Latin America, of 2020. There it appears in the first position of the Uruguay region with 71 points and position 21 in the Global Index, followed by Chile with 67 and 25 in the Global Index, and, in the last position, Venezuela with only 15 points and in position 176 out of 179 countries. Very close, Haiti with 18 points and in position 170 of the Global Index and somewhat further are Nicaragua with 22 points, Honduras with 24 and Honduras with 25, in positions 159, 157, and 149 of the Global Index. Paraguay and the Dominican Republic reach 28 points and position 137 in the Global Index. Mexico and Bolivia have 31 points and position 124 in the Global Index. Then there are Panama and El Salvador with 35 and 36 points and global positions 111 and 104. Brazil and Peru with 38 points are in position 94 globally and Ecuador and Colombia reach 39 points and position 92. Argentina with 42 points is in position 78. Jamaica has 44 points and position 69 and Cuba with 47 points in position 63. Finally, Costa Rica with 57 points is in global position 42.[57]

In the Americas, the average is 44 points and the stagnation in that figure during the last 5 years is highlighted, in addition to the advance of populism. Canada and Uruguay achieved the best results with 77 and 71 points, while Nicaragua, Haiti, and Venezuela were the worst with scores of 22, 18, and 15, respectively. It is argued that, in a region characterized by weak government institutions, Covid-19 has highlighted deep social and economic inequalities, with their disproportionate effects on vulnerable populations. Likewise, it is indicated that the applied emergency institutes restricted human rights, weakened institutional checks and balances, and reduced the space of civil society. They also highlight the irregularities and cases of corruption associated with acquisitions related to Covid-19.

We conclude this point by referring to the measures proposed to fight corruption in the IDB Expert Group Report cited above. In this regard, it is argued that this is the time for a systemic transformation:

[57] The FBI announced the installation of an office in Miami to receive complaints of bribery and money laundering, as a result of the advance of corruption in Latin America and after the Petrobras and Oderbrecht cases. It was the director of the Transnational Corruption Section, Leslie Backschies, who announced it in Washington, referring to the need to comply with the Corrupt Practices Act abroad (*Cfr.* "El FBl investigará el dinero de la corrupción en Sudamérica", Internacionales, *La Voz del interior*, Córdoba, p. 18, 6/3/2019, where the report by Michel Balsamo and Erick Tucker of the AP Agency is cited). The note makes references to the fines paid in the United States for these illicit activities, Petrobras, in September 2018, for bribes in Brazil for 853 million dollars and Oderbrecht in December 2016, for more than 3,500 million dollars, for bribery in many countries.

> Recent scandals clearly show that corruption must be countered with political, institutional and legal reform that increases deterrence and ends impunity for people with political connections. Although some countries in the region, together with the IDB, have initiated some anti-corruption reforms during the last decade, these have been uneven and partial, and have focused more on enacting laws and regulations than on their application and more on principles and procedures than on concrete practices. Fighting corruption requires a bolder approach that involves public servants, companies, civil society, and individuals to generate the necessary systemic shock that overcomes the crisis of trust between citizens and investors and strengthens the democratic culture. Governments need to respond to citizen discontent and investor anxiety through structural reforms in public procurement and campaign finance. Greater transparency in government contracts, public budgets and conflicts of interest, and the use of innovative information technology tools can go a long way" ... "As well as a proactive approach to information disclosure information, the criminal justice system needs reform that addresses and prevents state capture by political elites and high-level decision-makers, as well as illegal conduct by the business sector in general. Countries could explore innovative plea bargain solutions, including plea bargaining and transnational cooperation, which can help speed the resolution of cases. Any one of these reforms alone would be a step in the right direction. However, without an integrated approach and a systemic shock would be insufficient to produce sustainable change" … "Reforms must reach both the supply and demand of acts of corruption and have the participation of the public and private sectors. Any meaningful plan must incorporate "grand" corruption (including state capture by elites with powerful vested interests and corruption in politics), such as the usual payments required from ordinary citizens and small businesses.[58]

[58] Report of the Advisory Group of Experts on anti-corruption…, already cited. In the following point 5, the Report establishes "The four pillars for a systemic reform agreement", for the organization of the main actors and interested parties of each country and that consist of 1. regional and global initiatives, 2. national initiatives, 3. participation of the private sector and civil society and 4. the support of the IDB and other international organizations. Likewise, another important international document with OECD anti-corruption measures can be observed, entitled "Recommendation of the OECD Council on Public Integrity"- A Strategy against Corruption", in which we cannot stop for reasons of extension of this document. job. There it is stated that between 10 and 30% of public investment can be lost due to mismanagement and corruption and proposals are made explicit in the different aspects. see *www.oecd.org/gov/ethics*. Regarding the economic impacts of corruption, see also Chap. 2 of the Report of the Expert Advisory Group cited above: "La corrupción y sus costos en América Latina y el Caribe". Consequently, it is very evident that there are clear, precise, and extensive recommendations and proposals to fight against corruption, from the international order, but what is lacking is the political will to apply them.

CORRUPTION IN ARGENTINA

Antonio María HERNÁNDEZ

SUMMARY: I. *Brief Historical and Current Analysis*. II. *Corruption, Public Ethics, International Agreements and the Republican and Democratic System in the National Constitution*. III. *The Public Ethics Law, The Anti-Corruption OFFICE, and The Control Systems in the Federal Government, in The Provinces, in the Autonomous City of Buenos Aires and the Municipalities*. IV. *Conclusions and proposals to fight against corruption*.

I. BRIEF HISTORICAL[1] AND CURRENT ANALYSIS

Since colonial times there have been corrupt practices in our country. This mentions what is linked to the delivery of land, smuggling, and shipments made to Spain. In a list that is not exhaustive, we can remember the following events after the revolution of May 1810: Rivadavia's emphyteusis, which gave rise to large estates, and the ruinous loan from Baring Brothers, which began our external indebtedness, with bribes included. Then the Desert Campaign is mentioned, and the wasteful distribution of land is carried out. The Civic Union also denounced government corruption in times of the 1890 Revolution and, in particular, the fiery oratory of Leandro N. Alem.

Already in the 20th century, this was one of the reasons for the denomination of the Infamous Decade, after the 1930 coup d'état, due to the scandals produced by the purchase of the wills of politicians and councilors by foreign electricity companies for the extension of Italo concessions, To which the investigation promoted by Senator De la Torre on the links of a

[1] Here we follow what is exposed in our work *Fortalezas y debilidades constitucionales. Una lectura crítica en el Bicentenario*", Buenos Aires, Abeledo-Perrot, 2012.

Minister with the English meatpacking companies that evaded taxes and the scandal over the sale of Palomar land was added.

The maneuvers produced by external indebtedness during the last military process should be mentioned later. And, specially, what happened in the 90s, with the privatizations. This gave rise to sales of companies for less value, directed bidding, and presumably criminal links between officials and businessmen. Negotiations such as the sale of arms to Ecuador and Croatia are still being investigated, where even former President Menem was convicted.[2]

And the series of events with strong suspicions of corruption continued with the following Presidencies.[3] Natalio Botana argued about it:

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[2] Marcos Aguinis in his cited work *El atroz encanto de ser argentinos* makes a list of 20 reported cases of corruption that are still unpunished during said government (pp. 216 and 217). And then he expresses: "Faced with such a quagmire, can we continue to affirm that the causes of our deterioration are fundamentally economic?" (p. 218). In one of the few legal proceedings for illicit enrichment, María Julia Alsogaray, who held very high positions at that stage, was convicted.

[3] As indicated by this list, which is not exhaustive either: the buying of votes in the Senate of the Nation during the government of De la Rúa for the modification of labor legislation; the complaints made in relation to the corralito; and the very extensive list of events produced during the government of Néstor and Cristina Kirchner. In this sense, the following cases are mentioned: Skanska; that of the Minister of Economy Felisa Miceli; Antonini Wilson's $800,000 suitcase, presumably for the presidential campaign; the Jaime case; the complaints to Minister De Vido for public works; the purchases and sales of land belonging to the presidential couple in Calafate; the denunciations for the increase in the assets of the Kirchners; the investigations of the Swiss justice of Hugo Moyano; the cases of Lázaro Báez, Cristóbal López and Rudy Ulloa (closely linked to power and who in a few years became important businessmen, (*Cfr.* Agunis, Marcos, "Pobre Patria Mía", Buenos Aires, Sudamericana, 2009, p. 111); the sales of public companies to businessmen close to political power (such as Eduardo Eskinazi at YPF) and relations with state concessionaires that make up a capitalism of "friends" (such as Eduardo Eurnekian, Aldo Roggio and Electroingeniería, in addition to those mentioned above. We had to rule on the rescission of the contract between the National State and A airports Argentina 2000, for the concession of the Argentine airport system, considering the extraordinary degree of non-compliance of the concessionaire, due to the debt that existed in the payment of the fixed canon that reached 700 million dollars and the failure to carry out the public works committed to in the contract See our Legal Opinion within the framework of Commission 301/2001, appointed by President De la Rúa and published in the Rubinzal Culzoni Public Law Magazine, Buenos Aires, núm. 1, 2002). Drug and gambling businesses should also be included (see Agunis, Marco, "Pobre Patria Mía", *op. cit.*, pp. 115-121, with references to the game in the Autonomous City of Buenos Aires and in the province of the same name). In the Province of Córdoba, during the Government of José M. de la Sota, the game was given in concession to the Roggio Group, through the CET Company, for tourist places. In the Government of Schiaretti, the number of slot machines (slot machines) was

> In the Corruption Perception Index of 2010, prepared by Transparency International (a civil organization that demands strict compliance with the United Nations Convention against Corruption), Argentina is in a kind of suburb of the planet in this matter, below the top 100 countries out of a total of 178. On a scale that, from least to greatest corruption, goes from 10 to 0, Argentina marks 2.9 while Chile has 7.2; Uruguay, 6.9 and Costa Rica, 5.3. Brazil (3.7), Colombia, and Peru (both with 3.5) enjoy a better assessment than the one that Argentines give themselves. However, we still have a consolation prize since Nicaragua (2.5) and Venezuela (2.0) are worse off.[4]

We also highlighted another aspect that made the situation more serious, because, despite the sanction of a more than important legislation on the matter, it was not complied with, starting with the regulations of Art. 36 of the National Constitution, to which later I will refer. And he concluded that the problem of corruption had notably worsened in the Second Bicentennial.

And he added on that occasion: "The prevailing impunity produces devastating effects on the ethical and spiritual foundations of our democracy[5]

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increased by 2,100 by law of the legislature (see report by *La Voz del Interior* dated Sunday, March 6, 2011). Although the contract mentioned that the casinos would be installed in tourist areas, of the 19 existing rooms there are some in locations that are not, such as Río Cuarto, Villa María, Deán Funes, Laboulaye, General Roca, Cruz Alta, Corral de Bustos, San Francisco, and Morteros.. Of the game produced, the Municipalities that host the casinos receive only 3%, while 27% is for the Córdoba Lottery and the rest for the concessionaire. Given the seriousness of the gambling problem, the Municipality of Río Cuarto, by ordinance and exercising its police power, tried to reduce the operating hours of the casino, for which the CET company resorted to the Superior Court of Justice to prevent it. This Court upheld the claim, declaring the Ordinance unconstitutional, in clear disregard of the police power of local morality and health. And raised the extraordinary resources and of complaint, they were not attended by said Court and finally by the Supreme Court of Justice. The resolution was in 2017 in application of Art. 280, by majority, since Minister Horacio Rosatti voted in dissent. This precedent does not correspond to the municipal jurisprudence that has been consolidated in our Highest Court and that I have opportunely highlighted.

[4] Botana, Natalio, "Corrupciones del poder", *La Nación*, April 6 2011.

[5] On the mutual dependence between ethics and democracy, the renowned professor of Political Philosophy at Harvard University, Dennis F. Thompson, already quoted, maintains: "It is a more intimate relationship than what philosophers and political scientists generally suggest. Ethics and politics pose serious problems for each other, but they also exchange resources to solve them. Political ethics supports democratic politics and does so in a variety of ways. It provides criteria by which citizens can more accurately judge the acts of officials and attribute responsibilities to them. It points out what resources are needed to promote democratic accountability and helps to overcome principled objections to this. Democratic

and trust in institutions, as evidenced by the different surveys carried out.[6]

And here again, appears the undeniable responsibility of the political and administrative control bodies, and especially of the Judiciary, in the jurisdictions most linked to these events, that is, criminal, electoral, and tax.

That is why here I insist again that another of the cardinal principles of the republican system is affected: the independence of the Judiciary.

It is painful to verify that there is an unwritten law, which has very few exceptions: criminal investigations do not advance when it comes to officials who exercise power.

It is unfortunate to see how the Prosecutors do not promote criminal actions in crimes of public action when it comes to facts linked to powe. Or how they dispute over the competition between them —just like the judges—, to excuse themselves from intervening in those cases. Or how, on other occasions, both judges and prosecutors act with great diligence to dictate the dismissals that benefit the political power in power... In addition, the slowness of Justice is of such magnitude, that the Civil Association for Equality and Justice has estimated in 14 years the duration of the cases of corruption, for which it exempts from further comments.[7]

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politics in turn underpins democratic ethics. Many of the controversies in this area, even those concerning fundamental principles, must ultimately and at least partially be resolved through some kind of democratic process. And further on he adds: "...an adequate conception of democracy should include, as a necessary condition, the collective deliberation of controversies over fundamental values. It is essential then that the democratic process complies with certain ethical restrictions, such as the publicity requirement, which requires officials to act according to principles accepted by all citizens." Thompson, Denis, "La ética política y el ejercicio de los cargos públicos", Barcelona, Gedisa Editorial, 1999, pp. 13 y 14. The original title of the book is "Political ethics and public office", Massachusetts, Harvard University Press, 1987.

[6] See Hernández Antonio María, Zovatto Daniel and Mora y Araujo Manuel, "Encuesta de cultura constitucional. Argentina: una sociedad anómica", in *percepciones sobre el Congreso y sobre el Poder Judicial y el sistema judicial*, pp. 74-76 *et seq*. and Hernández Antonio María, Zovatto Daniel and Fidanda Eduardo, "Segunda Encuesta de Cultura Constitucional. Argentina: una sociedad anómica", Buenos Aires, Eudeba, 2016, Ch. II, "Percepciones sobre la democracia y las instituciones", pp. 42 *et seq*.

[7] Hernández, Antonio María, "Fortalezas y debilidades constitucionales…", *cit*., p. 155.

More recently, books and articles by investigative and opinion journalists such as Hugo Alconada Mon,[8] Daniel Santoro,[9] Luis Majul,[10] Carlos Pagni,[11] Joaquín Morales Solá,[12] Diego Cabot,[13] and Jorge Lanata,[14] that exposed the phenomenon of systematic and structural corruption that our country suffered, especially between 2003 and 2015. The judicial complaints made by some legislators, such as Elisa Carrió, Margarita Stolbizer, and Graciela Ocaña, among others, should also be highlighted. There were also books on the subject by Mariano Grondona[15] and by Héctor Mairal[16] and articles by Jorge Vanossi,[17] Alfonso Santiago[18] and Eduardo P. Jiménez.[19]

[8] With his books "El secreto de la valija: del caso Antonini Wilson a la petrodiplomacia de Hugo Chávez", Buenos Aires, Planeta, 2009; "Boudou Ciccone y la máquina de hacer billetes", Buenos Aires, Planeta, 2013; "La piñata: el ABC de la corrupción de la burguesía nacional kirchnerista y del "capitalismo de amigos", Buenos Aires, Planeta, 2015; and specially "La raíz de todos los males", Cómo el poder montó un sistema para la corrupción y la impunidad, Buenos Aires, Planeta, 2018. In this last work, the author analyzes corruption in different spheres, demonstrating its systematic nature and highlighting the existing impunity. In this sense, he recalls the phrase of businessman Alfredo Yabrán, in the 90s: "Power is impunity".

[9] With his books "La ruta del dinero K: La trama secreta de los escándalos de Lázaro Báez, Hotesur y otras causas que llevarán a rendir cuentas ante los Tribunales a Máximo y Cristina Kirchner", Buenos Aires, Ediciones B, 2014; "La ruta secreta de la efedrina", Buenos Aires, Ediciones B, 2017 and "El mecanismo: la corrupción kichnerista: contratos energéticos, delatores y Oderbrecht", Buenos Aires, Planeta, 2018.

[10] With his book "El Dueño: historia secreta de Néstor Kirchner, el hombre que maneja los negocios públicos y privados de la Argentina", Buenos Aires, Planeta, 2009.

[11] Through, especially, his opinion articles in La Nación and on his TV show "Odisea argentina" on LN+.

[12] Through, especially, his opinion articles in La Nación and on his TV show "Desde el llano" on TN.

[13] In his book "Hablen con Julio. Julio de Vido y las historias ocultas del poder kichnerista", co-authored with Francisco Olivera, Buenos Aires, Editorial Sudamericana, 2007 and in his opinion articles in La Nación. He was also the journalist who received the Notebooks in 2018 and who began the most important investigation into corruption in the country, which will be analyzed later.

[14] With his book "La década robada", Buenos Aires, Planeta, 2014, his opinión articles on Clarín and on his TV show "Periodismo para todos" and on Radio Mitre.

[15] Author of the book "La corrupción", Buenos Aires, Planeta, 1993.

[16] Author of the book "Las raíces legales de la corrupción", O de cómo el derecho público fomenta la corrupción en lugar de combatirla", Buenos Aires, BA Edit. Rap, 2007, with a foreword by Agustín Gordillo.

[17] Vanossi, Jorge, "La problemática constitucional de la corrupción", Boletín Informativo de la Asociación Argentina de Derecho Constitucional", August 1993.

[18] The article on "La cláusula ética del art. 36".

[19] Jiménez, Eduardo P., "Corrupción y ética pública (algunos apuntes institucionales)", El Derecho, July 21 1997 and "En defensa del orden constitucional y la vida democrática",

From all this, it can be affirmed that our country is painfully one of the cases described by the Group of Experts of the IDB that I mentioned before since the appropriation and capture of the State took place for its looting through a system of corruption that covered all spheres of public works, concessions, transportation, subsidies, and gambling. To which must be added corruption in the business, trade union,[20] political, judicial, and press sectors, in addition to that which occurs in the daily life of our society. On the other hand, when verifying that there is no rejection of corruption in vast sectors of the population, it can be considered that there is a "Corruption Culture" in the country.[21]

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on "A veinte años de la reforma constitucional de 1994" Alberto García Lema and Antonio María Hernández (coords.), in número especial de Jurisprudencia Argentina, Buenos Aires, August 20 2014, pp. 44 *et seq*.

[20] The corruption and eccentricity of some union leaders, turned into wealthy businessmen and who remain in their positions for decades, in what constitutes one of the most powerful corporations in the country, is particularly impressive. We cite as an example Raúl Álvarez, who for 19 years has been the General Secretary of FATAGA (Argentine Federation of Gaseous Water and Related Workers), a union that appears as one of the 3 owners of Friesian horses (those used by the Dutch Monarchy) in the country, in addition to 74 cars, some luxury, which can be seen in a field of 70 hectares. in General Rodríguez, Province of Buenos Aires (*Cfr*. Clarín, Política, electronic versión, Octuber 7 2018, that refers to the respective Jorge Lanata TV Program, "Periodismo para Todos"). Another well-known example is that of Marcelo Balcedo and his family, who for years managed the Union of Minority and Education Workers and Employees (SOEME), one of the Education Unions of the Province of Buenos Aires, and who owned the luxurious Mansion: "El Gran Chaparral", in Piriápolis, Uruguay, with high-end cars, in addition to the newspaper Hoy de La Plata, among other goods. Balcedo and his wife were arrested in the neighboring country, with international capture by order of Judge Ernesto Kreplak of La Plata, for tax crimes and money laundering, according to information from Infobae, dated January 4, 2018.

[21] Remember the well-known phrase of the union leader Luis Barrionuevo that: "We have to stop stealing for at least two years", pronounced in 1990 and reissued in 2012 when he said: "This government has to stop stealing for 30 seconds and we will get ahead" (*Clarín Política*, September 6, 2012). "From prison he is running to be Mayor of Pilar again", is the headline of *La Voz del Interior* on February 7, 2019, referring to Diego Bechis, who was removed from office and has been imprisoned for acts of corruption since 2018, but as there is no conviction yet, there would be no legal impediment to it… The news causes astonishment, but it is revealing of what we are exemplifying. And later, the Municipal Mayor of Pichanal, Julio Jalit, said before the Deliberative Council at the opening of the 2019 Sessions, that "you had to be smart even to steal and I consider myself an intelligent guy", to the applause of the attendees. He has been Mayor since 2003 and has had an enormous wealth growth, which includes dozens of fields with soybean production, despite the fact that he previously worked at a service station, according to Infobae, in the March 7, 2019 edition. On the other hand, this culture of corruption is closely linked to the lack of constitutional and legal culture that we suffer from, as we have analyzed in our work "Segunda Encuesta de

Regarding what happened in this matter, it should be noted that after the change of government-operated at the federal level in 2015, there was a more adequate functioning of the republican system, which implied greater independence of the Judiciary, a greater balance between the Powers Executive and Legislative, and the operation of the Anticorruption Office, in addition to the exercise of a concerted federalism. Likewise, more efficiency was noted on the part of the Council of the Judiciary and significantly, Laws of special importance in the fight against corruption were sanctioned, such as Access to public information No. 27,275 of 2016, of the repentant No. 27,304 of 2016, and Criminal Responsibility of Private Legal Entities No. 27, 401 of 2017.

In this political and institutional framework, the beginning of the most important judicial investigation in Argentine history on corruption took place, which was called the Notebooks of bribery or corruption K.

It all started when the journalist Diego Cabot of La Nación, on April 10, 2018, made a statement and complaint of more than 5 hours before the Federal Judge Claudio Bonadío and gave him a copy of the 8 Gloria Notebooks, written by the driver Óscar Rye on corruption. Centeno was the driver of Roberto Baratta, Secretary of Coordination and Management Control of the Ministry of Federal Planning and Public Works, in charge of Julio De Vido.

Cabot specified that he had received that copy on January 8, 201,8 and upon noticing its importance and after ordering and corroborating the data, he decided to make the judicial presentation, delaying the publication of the news until August 1, 2018, the date on which that Judge Bonadío ordered the first arrests for that cause.[22]

Cabot says that the Notebooks exhibited

> …the route of the bribes, which started from the instructions of Néstor Kirchner, continued with the millionaire tours of the slopes of Julio De Vido by the contracting companies of the State to collect bags full of millions of dollars. dirty dollars and ended up in the Quinta de Olivos, in the Chief of Staff or the apartment of the family of the former Presidents, in Juncal and Uruguay. The author's driver, a silent witness to what was happening in his Toyota Corolla in which he transported Roberto Baratta for at least ten years, took it upon himself, with the precision of a goldsmith, to take note of everything he

Cultura constitucional. Argentina: una sociedad anómica", Hernández, Zovatto and Fidanza Compilers, Buenos Aires, Eudeba, 2016.

[22] Cabot, Diego, "Los cuadernos de las coimas: la enigmática Caja que contenía una bitácora de la corrupción K", La Nación, August 1, 2018.

> could hear. He tried with each story to varnish his story with veracity, he did not let even a number that he saw pass by escape, he took the addresses, the names, the amount, and the physical characteristics of those who he did not know. And even the weight of bags and suitcases.[23]

Unlike what happened on previous occasions, the aforementioned Federal Judge Bonadío, together with Federal Prosecutors Carlos Stornelli and Carlos Rívolo, began an investigative task that has already been completed, and that has caused a before and after in the fight against corruption. Using the figure of the repentant especially,[24] evidence and testimonies were accumulated that corroborated what was stated in the Notebooks and the complaints made before, and that supported the indictment and preventive detention of high officials of the previous government and some of the most powerful businessmen in the country.

On September 17, 2018, Judge Bonadío resolved this by prosecuting 42 people, including former Presidents Kirchner and Fernández de Kirchnr, for leading an illicit association that received illegal funds between 2003 and 2015 and that included the former officials and businessmen. Among the prosecuted businessmen were Angelo Calcaterra, Carlos Wagner, Carlos Mundin, Luis Betnaza, Aldo Roggio, Gerardo Ferreyra, Néstor Otero, Enrique Pescarmona, Juan Carlos Lascurain, Hugo Dragonetti, Osvaldo Acosta, and Juan Chediack, among others.[25] Subsequently, the CEO of Techint, Paolo Rocca, who is the most powerful businessman in the country, was prosecuted.

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[23] *Idem.*

[24] Among those who include businessmen such as Aldo Roggio, Angelo Calcaterra, Carlos Wagner, among others, in addition to those who were very close to former Presidents Kirchner, such as Ernesto Clarens, the financier, Víctor Manzanares, the personal accountant, and Carolina Pochetti, the woman of the former Private Secretary Daniel Muñoz, who owned apartments in Miami and New York for a value of 70 million dollars. These latest statements were producing new investigations, such as that of Clarens who presented a list of bribes in public works, for which Judge Bonadío began on February 20, 2019 to receive inquiries from 101 businessmen, including the corresponding to the most powerful economic groups in the country such as Eduardo Eurnekian, José Cartellone, Angelo Calcaterra, Aldo Roggio, Gerardo Ferreyra, Osvaldo Acosta, among others, as well as officials such as the former President, former Minister De Vido and their Secretaries José López and Roberto Baratta, to which are added the former Directors of the National Road Directorate. The modality of payment of bribes declared by the repentant Aldo Roggio, who identified 5 former officials and for an amount of 3 million dollars, is very illustrative. See the note by Carreras, Sergio, in *La Voz del Interior*, on Monday, September 17, 2018, entitled "Cuadernos: Aldo Roggio identificó a los cinco funcionarios que le pidieron fondos".

[25] See the copy of the resolution in the file "Fernández Cristina Elizabeth s. Asociación Ilícita", *Clarín*, September 17, 2018, electronic version.

The prosecutions were confirmed by Chamber I of the Federal Criminal Court of Appeals, made up of Judges Leopoldo Bruglia and Pablo Bertuzzi, on March 7, 2019, although the qualifications of several businessmen who had been identified as members of the illicit association, except in the case of Gerardo Ferreyra. This case continues and should be brought to trial in times to come, although it is not exempt from some maneuvers to stop it.[26]

Two Federal Judges from Comodoro Py have been implicated in this cause of the notebooks:[27] the already retired Norberto Oyarbide, since the Accountant Víctor Manzanares denounced that he manipulated an expert opinion to close the investigation for illicit enrichment against the Kirchner couple[28] and the current Luis Rodríguez, already that Carolina Pochetti, widow of the Kirchner's Private Secretary, Daniel Muñoz, denounced him for receiving a bribe of 10 million dollars, to benefit her husband who was dismissed for illicit enrichment.[29] This confirms what we have been maintaining about structural and systemic corruption, which shows the special responsibility of the Judiciary, for having enshrined impunity, which is even more serious than corruption.

On the other hand, it is very difficult to specify the amount of what was stolen from the Argentine State and people, but the magnitude of the loot-

[26] Federal Judge Alejo Ramos Padilla, from Dolores, prosecuted the Prosecutor Carlos Stornelli, the false lawyer Marcelo D Alessio and the journalist Daniel Santoro, accused of extorting the businessman Etchebest, so that he is not involved in the cause of the bribery notebooks. In turn, Prosecutor Stornelli denounced D'Alessio for fraud for asking for bribes in his name. *Cfr. Clarín*, February 13, 2019, p. 8. This case will be investigated by Federal Judge Casanello. Likewise, Stornelli recused Judge Ramos Padilla for partiality and has raised his incompetence to intervene in this case. For her part, Deputy Carrió has denounced a maneuver to try to get Prosecutor Stornelli out of the cause of the notebooks. *Cfr. Clarín*, February 9, 2019, p. 9. In relation to this, the Federal Prosecutor Federico Delgado publicly declared: "If the cause of the notebooks fails, the crisis of Justice will be terminal". *Cfr. La Nación*, March 7, 2019, electronic version. In a very important ruling at the end of 2020, Judges Jiménez and Tazza of the Federal Chamber of Mar del Plata, revoked the prosecutions against Prosecutor Stornelli and journalist Santoro, with severe criticism of the Judge of First Instance. In any case, the cause of the Notebooks and other causes of corruption are delayed, as I will explain later.

[27] Headquarters of the 12 Federal Courts of the Federal Capital, in the City of Buenos Aires, where the largest number of cases related to the corruption of the Federal Government are concentrated.

[28] For which reason, the Financial Information Unit (FIU) was already accepted as a plaintiff in the claim to reopen the case that investigated said illicit enrichment, for being a "cause judged irrational". *Cfr.* Clarín, February 13, 2019, p. 12.

[29] Reason for which Judge Rodríguez is being investigated by the Judicial Council, through its Accusation and Disciplinary Commission. *Cfr. ambito.com*, March 6, 2019, electronic version.

ing can be measured in some way, through the embargoes decreed by the Justice between 2017 and 2018 in only 10 cases of corruption of Kirchnerism, and amounting to the sum of 270,000,000,000 pesos, as reported by Laura Alonso, head of the Anti-Corruption Office.[30] Consequently, it is understood the urgent need to have the legal instruments and the corresponding judicial decisions, to recover as soon as possible those funds so required by the complex situation of our finances.[31]

In this regard, it is important to state that, despite the objections made against the legislation on the repentant, finally the Federal Chamber of Criminal Cassation upheld the constitutionality of this decisive means of evidence.[32]

The slowness of the Justice system in our country never ceases to amaze, since everything is delayed, not only the instruction but also the initiation and processing of the oral trials, so that later the same thing happens in the endless appeals process, until ending in the Supreme Court of Justice of the Nation.[33]

In 2019, some oral trials began to judge the highest officials of the Kirchner governments, including the former President, who has 12 prosecutions.[34] The first of the oral trials began on May 21 and corresponded to the direction of the public works, which would especially benefit Lázaro

[30] *Cfr. La Voz del Interior*, Córdoba, February 3, 2019, p. 15.

[31] In Congress, the sanction of a law of extinction of the domain has been delayed for several years, for which the Executive Power issued a Decree of Necessity and Urgency in this regard, No. 62 of January 21, 2019, which was rejected by the Bicameral Commission and that must be dealt with by each of the chambers.

[32] By Judgment of November 30, 2020. See Canela, Ini's note in La Nación, dated December 1, 2020 entitled "Cuadernos de las coimas: la Cámara de Casación Penal validó las declaraciones de los arrepentidos".

[33] Earlier I referred to the delay in corruption cases that last an average of 14 years and in which only 1% of those accused are convicted.

[34] On March 7, 2019, the Supreme Court of Justice of the Nation rejected a complaint appeal filed by the defense of the former President, finalizing its prosecution in the case related to the signing of the Memorandum with Iran, which is related to the investigation of the attacks on the Amia and the Embassy of Israel, still unpunished. The other causes with prosecution are those of Hotesur, Los Sauces, the cartelization of Public Works, the Corruption Notebooks, the Road Administration, irregularities due to subsidies for trains and subways, irregularities due to subsidies to the groups, that of road corridors, that of the use of official planes to send newspapers and other objects from Buenos Aires to Río Gallegos or El Calafate, that of the purchase of liquefied natural gas and that linked to the possession of a letter of San Martín to O'Higgins and background of President Yrigoyen (See "Cristina Kirchner ya suma 13 procesamientos y 7 prisiones preventivas", Infobae, Buenos Aires, June 6, 2019. Five of these cases are in the oral trial stage. She was dismissed from her prosecution No. 13, by Chamber 1 of the Federal Chamber of Criminal Cassation in the case of the

Báez, who in a few years would become an important businessman, even though he was a bank employee in Santa Cruz, linked to Nestor Kirchner.[35]

Amado Boudou, who was Vice President of the Nation, was sentenced for passive bribery and negotiations incompatible with the public function, for trying to irregularly stay with the Ciccone Calcogràfic Printing Press to obtain the printing of banknotes and official documents with the State. The sentence of the Federal Oral Court No. 4 was confirmed by the Federal Chamber of Criminal Cassation and was definitively final with the rejection of a complaint that it had filed with the Supreme Court of Justice of the Nation, dated December 2, 2020.

Other senior former officials were also convicted, such as former Minister Julio de Vido, for fraudulent administration to the detriment of the State, in the case called the Eleven Tragedy, for not having properly controlled the provision of the train service, in the 2012 accident in the said railway station, which caused 52 deaths. The sentence was issued by the Federal Oral Court No. 4 and confirmed by the Federal Chamber of Criminal Cassation, dated December 22, 2020.[36] Likewise, the former Secretaries of Transport Ricardo Jaime and Juan Pablo Schiavi, among others, were previously convicted of said railway tragedy, with a sentence of the Federal Oral Court No. 2 of 2015, confirmed by the Federal Chamber of Criminal Cassation, in 2018.[37]

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future dollar, with a ruling of April 13, 2021. See, "Casación dismissed Cristina Kirchner in the case for the future dollar", *La Nación*, Buenos Aires, April 13, 2021.

[35] Baéz received the concession of 52 works for a value of 46,000,000,000 pesos, during the years 2004 to 2015. The cause lasted years before reaching this instance. There was a first complaint by Elisa Carrió in 2008 and later by the National Road Directorate in 2016. In the last two years, the former President, De Vido and Báez delayed the case with 51 complaints filed with the Federal Chamber of Criminal Cassation. (*Clarín*, Buenos Aires, Tuesday, May 21, 2019, p. 5). On the other hand, the former President launched her candidacy for the Vice Presidency of the Republic, announcing Alberto Fernández as her running mate for the Presidency. It is a situation similar to the one that occurred in Brazil with the frustrated candidacy of Lula da Silva in 2018, due to the judicial conviction that she suffered for corruption. But there is a very significant difference, since the Brazilian Judiciary has stood out for its demonstrated independence and for the strict application of the law in very short periods of time. Here everything is unpredictable, and uncertainty characterizes our reality, beyond the well-known problems of low institutional quality and the culture of corruption.

[36] See "Tragedia de Once: confirmaron la condena a de Vido por cinco años y ocho meses de prisión", Buenos Aires, Infobae, December 22, 2020.

[37] "Tragedia de Once: Le otorgaron la libertad a Ricardo Jaime pero seguirá detenido", Buenos Aires, Infobae, September 26, 2020, where pretrial detention is refered as another cause of corruption.

José López, former Secretary of Public Works of the Nation, was convicted in 2016 of illicit enrichment in the so-called case of the bags since he was filmed at the time, he was taking them with almost 9 million dollars to a Convent. The sentence was issued by Federal Oral Court No. 1.[38]

In addition, Lázaro Báez together with his 4 children, the Accountant Pérez Gadin and the financiers Elaskar and Fariña were sentenced in the case known as the "K Money Route", by the Federal Oral Court No. 4 of the City of Buenos Aires, dated February 24, 2021, for money laundering of approximately 55 million dollars.[39]

And currently, the case for the public works in Santa Cruz, referred to above, continues, which is being judged by the Federal Oral Court No. 2, where Báez is charged along with Cristina Fernández de Kirchner, Julio de Vido, and José López, among others.[40]

Since the change of federal government in December 2019, extremely serious developments have been taking place in these judicial matters related to the investigation of corruption cases.[41] It is already clear that despite the pandemic that affects humanity and our country in particular, a substantial part of the official agenda was and is intended to prevent the

[38] See Salinas, Lucia, "Trial for corruption. José López was sentenced to six years in prison for the bags with money in the convent", Clarín, Buenos Aires, June 12, 2019. On April 13, 2021, López was released by a ruling of the Federal Oral Court No. 1, although he did not finish serving his sentence of more than 7 years and despite the fact that he is prosecuted in the case of the Bribery K Notebook. See the journalistic notes "Un ícono de la corrupción kirchnerista: José López queda en libertad bajo fianza", in Perfil, Buenos Aires, April 13, 2021 and Joaquín Morales Sola, "La Justicia no siempre es justa", *La Nación*, April 14, 2021. On the other hand, this is what has happened with almost all of the former officials convicted and prosecuted, it being evident that the judges and prosecutors have yielded to the pressure exerted. Keep in mind that the President of the Republic himself has advocated the innocence of the Vice President on several occasions, in violation of Art. 109, which states "In no case can the President of the Nation exercise judicial functions, claim knowledge of pending cases or restore the dead ones".

[39] This cause had originated with the television broadcast made by the journalist Jorge Lanata in April 2013 in his program Periodismo para todos, of the statements of Leonardo Fariña, with a hidden camera, where he explained the criminal actions of money laundering carried out by Báez.

[40] See "Tras la condena a Lázaro Báez por la "ruta del dinero K" hoy continúa el juicio en otra de las causas donde está acusado", Buenos Aires, Infobae, March 1, 2021".

[41] See note "Avanzada judicial: una por una, las acciones del kirchnerismo que impactaron en causas judiciales", *La Nación*, Buenos Aires, May 19, 2020, where it is indicated what has been done by the Anticorruption Office, the Human Rights Secretariat, the Treasury Attorney and the Judicial Council, among other actions.

advancement of the causes that especially affect the current Vice President of the Nation.[42]

In the Anticorruption Office, for example, it was decided to withdraw from the role of plaintiff in cases where the Kirchner family is accused,[43] in addition to other former officials.

Correlatively, the actions of the Judges who intervened in the cases of corruption began to be criticized and from the Council of the Judiciary, the representative of the Executive Power Ustarroz questioned the legality of the transfers of 3 of those Federal Criminal Chambers: Bertuzzi, Bruglia and Castelli. Given this, these Magistrates filed legal actions in defense of their stability, requesting that their positions be declared definitive.[44] Finally, the Supreme Court in the "Bertuzzi Pablo y Otro-Amparo" case,[45] in a divided and very extensive ruling, decided to keep them temporarily in their positions until new competitions were held and modified the jurisprudence that allowed these transfers, in a practice described as *contra legem* and

[42] See note by Cappiello, Hernán, "Corrupción K: Cristina Kirchner no mejoró su situación judicial tras un año en el poder, pero sus aliados sí", Buenos Aires, La Nación, November 15, 2020. There, a precise reference is made to each of the cases, which continue to be substantiated although with considerable delay, and on the other hand, the resolutions that benefited other high officials of his government are indicated. However, recently, the vice president has been dismissed in the future dollar case and has also ordered the return of the assets of Hotesur and Los Sauces and other assets of the succession of Nestor Kirchner (26 properties) to the Kirchner family, at the request of their lawyer Carlos Beraldi, despite the fact that these cases continue (See note by Salinas, Lucía, "TOF 5: La Justicia les devolvió a los Kirchner el manejo de sus empresas, hoteles y propiedades", *Clarín*, April 6, 2021).

[43] See notes by Winazki, Nicolás, "Corrupción K. La Oficina Anticorrupción dejó de ser querellante en dos causas emblemáticas de la familia Kirchner", *Clarín*, Buenos Aires, May 4, 2020, where criminal procedures *Hotesur* and *Los Sauces* are refered, of which Cristina Fernández de Kirchner and her children Máximo and Florencia are indicted; and by Paz Rodríguez, Niell, "Oficina Anticorrupción: cuáles son las 32 causas contra exfuncionarios en las que el gobierno dejará de ser querellante", *La Nación*, Buenos Aires, October 21, 2020, refered to former members of Menen, Kirchner and Fernández de Kirchner's administrations, as Boudou, De Vido, López, Jaime, Milani, Picolotti, Aníbal Fernández, among others, by serious cases of corruption, such as the "case of the notebooks", Oderbecht, the sale of YPF, Ciccone and illicit enrichment by Bodou, López and Milani, among others.

[44] An appeal was filed in the first instance by Bertuzzi and Bruglia and, given their rejection, they appealed for an extraordinary appeal per saltum before the Supreme Court of Justice. The Chamber members requested the declaration of unconstitutionality of Resolution 183 of the Council of the Judiciary, since at the time they had been appointed by the Council itself and based on Acordadas 4 and 7 of 2018 of the Supreme Court of Justice itself.

[45] Of September 29, 2020, with a majority vote of Ministers Lorenzetti, Maqueda and Rosatti plus the concurring vote of Highton de Nolasco and the dissent of Rosenkrantz.

through the declaration of unconstitutionality of Resolutions of the Council of the Judiciary. This ruling was criticized by some authors.[46]

For my part, I believe that some important criteria in this matter set by the Court for the future should be highlighted: l) the only way to appoint Magistrates is through the procedure of Arts. 99 inc. 4 and 114 of the National Constitution; 2) the designations thus made are definitive, while the transfers are always transitory; 3) practices contrary to the Constitution are invalid and contribute to the anomie referred to by Carlos Nino, as expressed in Considering 25 of the Majority Vote;[47] 4) respect for the precedents "Uriarte", "Rosza", "Rizzo" and "Aparicio" are insisted on and Resolution 183/2020 of the Judicial Council is declared unconstitutional, for not respecting Art. 99 inc. 4. Remember that in the first of these rulings, the Court declared the unconstitutionality of Law 27,145 on subrogation, since this practice was extremely serious for the federal judicial system of our country; and 5) Congress is requested to pass a new transfer law and greater speed to fill vacancies.[48]

[46] Daniel Sabsay argued that it was an irresponsible ruling by the majority, that it modified the previous jurisprudence of the Court, and that it did so retroactively, affecting constitutional principles on the stability and independence of the Judiciary. He agreed with Dr. Rosenkrantz's minority vote and added that legal certainty was unknown. That this practice of judicial transfers is more than 70 years old and that with this new precedent, more than 60 magistrates were now left in the same situation as the claimants (Radio Continental, November 4, 2020 and "Daniel Sabsay: el fallo de la Corte es una tragedia institucional para el país", Perfil, November 6, 2021). Alberto Garay expressed similar arguments in his note "The Court's ruling: an unnecessary and enormous damage to the judicial system", in Clarín, on November 5, 2020. For his part, Roberto Gargarella, in his article "A propósito del fallo de la Corte", in Clarín on November 12 of November 2020, pointed out that the criterion of Acordada 7/2018 was modified, where the Court had endorsed the transfer of the judges before a consultation by the Minister of Justice and that this sentence is explained by the urgencies of politics rather than by the demands of the Law and that there was a lack of dialogue and joint reflection on this constitutional issue.

[47] Since the ruling "Grau" of 1945 of the Supreme Court, reference is made to judicial transfers, that is, a practice of more than 75 years. During his Presidency, Fernández de Kirchner ordered 18 transfers and Macri did it 22 times.

[48] The Majority Vote indicated that the average duration of a new appointment with the participation of the Council of the Judiciary, the Executive Power and Congress is 3/2 years, although other examples of much slower pace can be mentioned. This caused the existence of a large number of vacancies and on many occasions, this was used to carry out transfers and designate substitutes, with which the independence of the Judiciary and its proper functioning were unquestionably affected. Consider that there are currently 291 vacancies out of 988 positions in the Federal Court. But, in addition, the 153 short lists raised by the Council of the Judiciary to the Executive Power have remained there, by decision of the new government elected in 2019.

Likewise, the Executive Power promoted a Judicial Reform by sending a draft Law for the modification of the Federal Criminal Justice, and on the other hand, created a Commission for the analysis of other aspects, which included the operation of the Council of the Magistracy, the Public Ministry and the Supreme Court of Justice of the Nation. This is the fourth judicial reform promoted during the governments of Menem, Kirchner, Fernández de Kirchner and now Alberto Fernández.[49]

The Federal Criminal Justice Reform Bill,[50] which has already been approved by the Senate since August 28, 2020, is now awaiting treatment by the Chamber of Deputies and consists of 3 Titles.

The first, aimed at the unification of the Federal Criminal Jurisdiction with the National Economic Criminal Jurisdiction of the City of Buenos Aires. This means that from the current 23 Courts (12 federal criminal courts and 11 national economic criminal courts) the number will increase to 46, with the denomination of Federal Criminal Courts. 4 National Economic Criminal Oral Courts are transformed into Federal Oral Criminal Courts, which are added to the 8 existing ones and 5 more Oral Courts are also created. Note then the enormous number of charges that are made for the City of Buenos Aires, a subject that I will deal with again later. Likewise, the National Chambers in Criminal and Correctional Matters and Economic Criminal Matters will be transformed into a new Federal Chamber of Appeals in Federal Criminal Matters. In addition, for substitutions in the new courts created, Article 16 provides that the National Criminal and Correctional Chamber, within 10 days after the Law is sanctioned, will submit

[49] The first reform was carried out in the Government of Menem and consisted of increasing the number of Ministers of the Supreme Court from five to nine and the number of Federal Judges in Federal Criminal Matters of the Federal Capital from 6 to 12, who are the ones who they have the largest number of cases on corruption and that they have their headquarters in the Comodoro Py building. The second reform was during the government of Néstor Kirchner, which reduced the number of members of the Judicial Council from 20 to 13, through Law 26,080 of 2006, whose unconstitutionality for not respecting the balance of Art. 114 of the Supreme Law, by promote the participation of the political sectors, as opposed to that of the lawyers and judges, was declared by a Federal Contentious-Administrative Chamber and for 5 years has been subject to a decision by the Supreme Court of Justice of the Nation for an extraordinary appeal.. In the government of Fernández de Kirchner several reform laws were sanctioned, under the objective called by the Government of democratizing justice. Perhaps the most significant of them, No. 26,855, which provided for modifications in the Judicial Council, was declared unconstitutional by the Supreme Court of Justice of the Nation in the "Rizzo" case, ruled in 2013. And now it is trying the fourth reform during the current Presidency of Alberto Fernández.

[50] See the article by Oyhanarte, Marin, "Reforma de la justicia federal: un análisis crítico", La Ley Online, Buenos Aires, AR/DOC/2704/2020.

to the Judicial Council the list of applicants among the current National Judges. in Criminal and Correctional. And that the Council will make the appointments within 30 days, with a maximum term of 1 year for substitute judges.

However, this unification of different jurisdictions that includes some national ones, such as the economic criminal and others of the Second Title, provides for the transfer of national justice in criminal matters to the Autonomous City of Buenos Aires, or rather what remains after this transformation, which absorbs a very important part of that national justice.[51]

The Second Title orders the unification of the Federal Civil and Commercial Jurisdictions with the National Federal Administrative Litigation Jurisdiction, under the name of Federal Civil, Commercial and Administrative Jurisdiction, based in the City of Buenos Aires. Creates a Chamber in the jurisdiction and Courts of First Instance in Civil, Commercial, and Federal Administrative Litigation and Federal Tax Execution Courts. As previously anticipated, jurisdictions are unified, with a part corresponding to the National Justice and also, with very different competencies.

And the Third Title, strengthening federal justice in the interior, creates 73 new Federal Courts and 14 new Federal Courts of Appeal or Chambers that are added to the existing ones. All this implies the creation of 908 new positions, even though in the Project of the Executive Power it was 279.[52]

This project has received severe criticism: 1. Inopportuneness, lack of consensus, lack of studies, and enormous economic costs that the country cannot bear, as expressed by the senators of the opposition;[53] 2. It is a partial federal criminal reform, which multiplies the problems of Comodoro Py by creating so many new Courts in the City of Buenos Aires through the unification of jurisdictions;[54] 3. The inconvenience of unifying different jurisdic-

[51] For a long time, I have insisted on compliance with Art. 129 of the National Constitution and on the urgent need to transfer to the Autonomous City of Buenos Aires the so-called national justice, which never was and will never be federal, but which continued to oversee the Federal Government, due to the corporate pressure of the judges, who achieved the sanction of the unconstitutional regulatory law 24,588. See Hernández, Antonio María, "La Ciudad Autónoma de Buenos Aires y el fortalecimiento del federalismo argentino", Buenos Aires, Jusbaires, 2017.

[52] Según lo expusieron en el debate la Senadora Rodríguez Machado y el Senador Julio Cobos. See the article by Domínguez, Juan José, "Reforma Judicial: El Senado dio media sanción a una ley clave con mayoría del oficialismo", *La Voz del Interior*, Córdoba, August 28, 2020.

[53] *Idem.*

[54] According to the opinion of Prof. Alberto Binder, published in his article titled "La expansión de Comodoro Py", La Nación, August 10, 2020. He maintains that the serious struc-

tions such as federal and national and with different powers;[55] 4. Continue and deepen the serious problem caused by surrogacy[56] and 5. The creation of so many positions of Judges is surprising, when the new accusatory system is sanctioned, which requires a greater number of Prosecutors.[57]

On the other hand, the Executive Power of the Nation created a Commission called "Consultative Council for the strengthening of the Judicial Power and the Public Ministry", through Dec. 635/2020,[58] to study and propose reforms on various issues and was made up of 11 members.[59]

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tural problems of the federal justice system that have produced impunity have not changed, and points out in particular the seriousness of the intervention of the espionage services and the delay in the implementation of the accusatory system. For his thoughts on the reform we need, see his article "Cinco medidas para reformar la justicia federal", La Nación, February 4, 2020.

[55] See note 111, on the breach of Art. 129 of the National Constitution. That is why I maintain the unconstitutionality of the project that, instead of transferring the entire National Justice to the CABA, orders its unification and transformation into a federal one. On the other hand, this criterion has been assumed by the jurisprudence of the Supreme Court of Justice in the "Corrales" and "Nisman" precedents, on the differences between the federal and national jurisdictions and the need to transfer the latter to the CABA. And more recently in 2019, in "Gobierno de la Ciudad Autónoma de Buenos Aires c. Provincia de Córdoba" and "Bazán Fernando", where the original jurisdiction of the Court for the City, like the provinces, is admitted and competences are recognized to the Superior Court of the CABA in relation to national justice. For his part, Martin Oyhanarte had pointed out the same, since the criteria of the Supreme Court in Agreements 4 and 7 of 2018 were unknown, which required a specific designation for these jurisdictions due to their differences, in accordance with what is indicated by the National Constitution. (See his work cited in note 110). Likewise, it is what our Highest Court has ratified in the "Bertuzzi Pablo y otro-Amparo" judgment of 2020, previously mentioned.

[56] See the articles already cited by Alberto Binder and Martín Oyhanarte. And the rulings of the Supreme Court in "Uriarte", "Aparicio" and "Bertuzzi Pablo et al." On the other hand, Law 27,439 in its article 14 prohibits substitutions when it comes to Courts that are created, as in this case.

[57] This lack of criteria exhibited by the project already sanctioned by the Senate, corresponds to an aspect that should be highlighted and already mentioned: that of the budgetary situation of the Judicial Power. Indeed, during 2019 the infrastructure emergency was declared and in 2020 during the pandemic, the problems of lack of computer systems and connectivity became evident. That is why the magnitude of the criticism is understandable and also, that its treatment is paralyzed in the Chamber of Deputies, since the ruling party lacks the necessary majority of 129 Legislators. Hence, the next legislative election in 2021 is so decisive.

[58] B*oletín Oficial de la Nación*, Buenos Aires, July 30 2012, *https://www.boletinoficial.gob.ar/detalleAviso/primera/232757/20200730*.

[59] Drs. Beraldi, Arslanián, Gil Domínguez, Ferreyra, Palermo and Bacigalupo and Dras. Sbdar, Kogan, Herrera, Weinberg de Roca and Battaini. They were mostly members of the Judiciary, 2 Professors of Constitutional Law, Ferreyra and Gil Domínguez, and 2 Lawyers,

The lack of impartiality of the appointed Commission[60] and other aspects of this Judicial Reform has been criticized by Alberto Garay,[61] Roberto Gargarella,[62] and Daniel Sabsay.[63]

The Opinion produced[64] covered important issues such as the Supreme Court of Justice, the Public Ministry, the Judicial Council, Trial by jury, and the transfer of powers in non-criminal federal matters to the Autonomous City of Buenos Aires, in 4 Chapters, whose Further analysis exceeds the purpose of this article.

There were different opinions in the Opinion on the modifications to the Supreme Court of Justice. The sanction of a special Organic Law was proposed in this regard, in addition to the creation of an intermediate court

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Beraldi and Arslanián, with the particularity that they exercise criminal defense of those accused of corruption, and in particular the former, who It belongs to Fernandez de Kirchner.

[60] See the note titled "Criticas de abogados por la falta de pluralidad del consejo asesor que conformó Alberto Fernández para la reforma de la Corte Suprema", Infobae, Buenos Aires, July 28, 2020, where it is noted that the vast majority of the members they respond ideologically to the President and Vice President of the Nation.

[61] See his opinions in the article published in Clarín, Buenos Aires, dated August 3, 2020, entitled "La reforma judicial: el Gobierno, en el camino equivocado", with criticism of the opportunity, integration of the Commission or the creation of an intermediate court, in addition to referring to the language used by the President. On the contrary, he advocated a reform with the consensus of the different political and social sectors. And in the note "Alberto Garay, constitucionalista: "Es una insensatez una reforma judicial ahora", Infobae, Buenos Aires, August 4, 2020, where he reviewed the history of the Supreme Court and the attempts at political domination over the Judiciary. He also especially criticized the participation of criminal lawyers Carlos Beraldi and León Arslanián.

[62] Garzella, Roberto, "Razones para la reforma judicial", La Nación, Buenos Aires, August 5, where the author maintains that the reform is in the wrong direction, it is inopportune, it does not have democratic procedures, it indicates unattractive objectives and it does not face the most important problems, among other criticisms. He says that two of the tragedies of our Judiciary that are not addressed are inequality and the impossibility of access for the poorest and the service that has been rendered to the impunity of power. And he points out the need for a democratic dialogue in a reform that is carried out from the bottom up.

[63] Battaglino, Roberto, "La reforma judicial es un plan de impunidad", *La Voz del Interior*, Córdoba, of August 7, 2020, note by Roberto Battaglino, where he refers to a conference by Prof. Sabsay. In addition to the statement that gave the note its title, there were other criticisms such as the inopportuneness, the cost, the true objectives pursued, etc. And he also argued that the Supreme Court must rule on the case pending for 5 years on the unconstitutionality of Law 20,680 on the integration of the Judicial Council.

[64] See Dictamen del Consejo Consultivo para el fortalecimiento del Poder Judicial on the web site *argentina.gob.ar*. For a summary of the proposals made, see the note "El informe completo del Consejo Consultivo para la reforma de la Justicia Federal", *Palabras de derecho*, January 12, 2021, in *www.palabrasdelderecho.com.ar.*

for matters of arbitrariness, the setting of deadlines for sentences and public deliberations, the direct filing of extraordinary appeals, among other aspects. The counselor Ferreyra in his vote proposed the expansion to 9 of the number of ministers.[65]

The modification of the Law of the Public Ministry was proposed by ten of the members, to shorten its mandate to 5 years.[66] Regarding the reduction of the two-thirds majority to an absolute majority for his appointment, there was no consensus, since while six members supported it, another five were in favor of maintaining the current majority.[67] It was also proposed that the FIU (Financial Information Unit) not become part of the Public Ministry. Likewise, it was stated that the Anti-Corruption Office should not be transferred to the Public Ministry either and that it should continue depending on the Executive Power.

Concerning the Council of the Judiciary, it was stated that it must have 16 Members, at a rate of 4 per sector, -instead of the 13 that it currently has by Law 20,680,[68] so that the balance ordered by the Constitution for

[65] For an analysis of the constitutionality of the proposal to divide the Court into Chambers, see Manuel García Mansilla, Revista Jurídica Austral, No. 2, 2020. And in relation to the increase in the number of members of the Court, by the same author, the article "No", *La ley*, Supplement No. 7, November 2020.

[66] The remaining member, Andrés Gil Domínguez, maintained that his mandate should last until he turns 75, in accordance with the guarantees of independence provided by Article 120 of the National Constitution.

[67] There is a Project of the Executive Power to modify the Law of the Public Prosecutor's Office, already approved by the Senate, which reduces the majority of two-thirds of Senators to an absolute majority, for the appointment of the Attorney General, in addition to a reduction of his mandate. In addition, the Government is pressuring the current interim Attorney Eduardo Casal to leave his post. The project is now under consideration by the Chamber of Deputies. Severe criticism exists against said project, since it does not respect the independence and autonomy of said institution, in accordance with the provisions of Article 120 of the National Constitution. Nine civil society organizations: the Bar Association of the City of Buenos Aires, FORES, Cadal, Será Justicia, Republican Professors, Jubi Judges, Usina de Justicia, Legislative Directory and Foense Accountants created an NGO called Network of Entities for Independent Justice in Argentina (REJIA) and signed the declaration "Without independent prosecutors there is no Justice", where the Chamber of Deputies is asked to reject the project under consideration. (See note "Rechazan la reforma la ley del Ministerio Público Fiscal- Crearon una red de ONG para defender la independencia de Jueces y Fiscales", *Clarín*, Buenos Aires, April 16, 2021).

[68] The Federal Chamber of Appeals in Federal Administrative Law declared the unconstitutionality of said Law for 5 years, so the issue is now under consideration by the Supreme Court of Justice. For its part, the National Academy of Law and Social Sciences of Córdoba also upheld its unconstitutionality, for not respecting the balance between the sectors provided for in Article 114, according to the opinion approved on March 14, 2006.

its integration is respected. The exclusive dedication of the Members was proposed, for which the Legislators should designate representatives. The constitutional competence of the Council in the financial administration of the Judiciary was reaffirmed. Concerning the Judicial School, there was a proposal for regular refresher exams for Judges.

Regarding the implementation of the trial by jury in a majority way, it was recommended for the federal order, with an integration of 12 members. There were different criteria for trial by jury in criminal matters.

And regarding the transfer of non-federal criminal matters to the CABA, the sanction of law was proposed that establishes a term of 3 years to complete the process, which must include the pertinent resources and the implementation of the accusatory system.

A well-founded Report of the Independent Consultative Council[69] convened by FORES (Forum for Studies on the Administration of Justice), published in December 2020[70] has also been known. And more recently, a critical study was carried out at the Faculty of Law of the UBA.[71]

On the other hand, the implementation that is being carried out of the Code of Criminal Procedures of the Nation must be observed very carefully, which began with its application in the Provinces of Salta and Jujuy and that must later continue in other provinces, due to the change towards the crimi-

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See Hernández, María Antonio, "A veinticinco años de la reforma constitucional de 1994", Córdoba, National University of Córdoba, 2019, p. 86.

[69] Composed of Drs. Caminos, Cayuso, Chayer, Del Carril, Garay, García Mansilla, Munilla Lacasa, Ostropolsky, Palacio de Caeiro and Sacristán.

[70] See the web site, *https://foresjusticia.org/2021/01/29/informe-final-del-consejo-consultivo-independiente.*

[71] At the "Ambrosio L. Gioja" Research Institute, with the coordination of Prof. Roberto Gargarella and Marcelo Alegre, with severe criticism of the creation of that Intermediate Court, among other aspects. See "Reforma judicial: un estudio de la UBA critica las conclusiones del Consejo Asesor", note by Cappiello, Hernán, La Nación, April 14, 2021. Personally, I consider a serious judicial reform very necessary, and in all orders, not only federal but also provincial and CABA. It is that problems as serious as the politicization of justice and judicialization of politics, inequality in access to justice and in its operation, lack of independence and social trust, among others, are observed. The reform should tend to ensure the independence of the judiciary, change the procedural codes, educate and train judges, facilitate access to justice, make justice more technical, etc..., with the consensus of the political forces in Congress and after a wide debate with the participation of the interested sectors. See the data referring to the Judiciary in the work "Segunda Encuesta de Cultura Constitucional. Argentina una sociedad anómica", Antonio María Hernández, Daniel Zovatto and Eduardo Fidanza (comps.), Buenos Aires, Eudeba, 2016, *op. cit.*, on Ch. 2 "Percepciones sobre la democracia y las instituciones" de Daniel Zovatto and Ch. 3 "Percepciones sobre la Constitución, las leyes y algunas cuestiones federales" by Antonio María Hernández, pp. 29 *et seq.*; pp. 63 *et seq.*, respectively.

nal system. accusatory. It is that the Commission for Monitoring the Implementation of the Code, managed by the ruling party and beyond its powers that correspond to Congress, has ordered that other articles of the new Code be put into effect, among which 375 stands out. This rule serves to lengthen criminal proceedings even more, since only the one that finally has the intervention of the Supreme Court of Justice itself can be considered a final sentence, for the execution of the sentence. This goes beyond the provisions of Article 8 of the American Convention on Human Rights, which requires double compliance in this matter and will serve to enshrine impunity.[72]

To this must be added the verbal violence deployed by the highest government officials against various judges and journalists who acted in cases of corruption. The President of the Republic himself, in his message to Congress on March 1, 2021, expressed that "The Judiciary is in crisis, it seems to live on the margins of the republican system". And he argued that Congress must control said Power in addition to announcing the sending of a project to create a court an intermediate court on arbitrariness issues, which affects the Supreme Court of Justice itself.[73]

For his part, the new Minister of Justice, Martín Soria, in his first public statement, maintained that he had come to put an end to lawfare, that some judges had crossed the line, that the Supreme Court was complacent, and that the vice president was innocent and that she wanted Justice itself to release her from guilt and charge.[74]

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[72] See the article by Vega, Juan Carlos, entitled "La falsa tesis de la tercera instancia judicial", *Clarín*, Buenos Aires, 26-2-2021. The author, who chaired the Criminal Legislation Commission of the Chamber of Deputies of the Nation, maintains that with this modification the processes will last 20 years, and impunity will be consolidated, especially for crimes of corruption and power, not for those of the poverty. He affirms that the need for a third judicial instance is false and that it is absurd to try to base it on the principle of innocence and human rights. He invokes that with this lengthening of the process, which prevents the application of penalties, the Arts are unknown. 25 of the American Convention, which establishes the rights of victims to have the guilty punished and to recover what was stolen, and 24, on the principle of equality, since only the causes of political, economic, and political power reach the Supreme Court. union, not those of poverty. And he recalls Resolution 1/18 of the Inter-American Commission on Human Rights in Bogotá, stating that corruption is one of the biggest human rights violations in the continent, and that the weakness of the Judiciary is the cause of impunity. He reiterates that Art. 8 inc. 2 (h) of the Convention only requires a second instance, not a third, and that is what follows from the "Valle Ambrosio" ruling of the Inter-American Court of Human Rights, dated 7-20-20, where the National State was condemned and to the Province of Córdoba for that reason.

[73] See "Alberto Fernández volvió a criticar a la Justicia y anunció la creación de un tribunal para limitar el poder de la Corte Suprema", *Infobae*, Buenos Aires, March 16, 2021.

[74] See "Martín Soria: "La Vicepresidenta quiere que la misma Justicia la libere de culpa y cargo", *Infobae*, Buenos Aires, March 16, 2021.

Likewise, Eugenio Raúl Zaffaroni[75] has upheld the concept of lawfare[76] and has proposed the issuance of a pardon by the Executive Power or an amnesty law by Congress to end these causes of corruption.

This notorious and continuous advance on the independence of the Judiciary[77] aimed at preventing the progress of corruption cases has also been accompanied by a sustained attack on investigative journalists, who played a decisive role in such an important matter.

In this sense, it is surprising that, even though our country we have the highest level of constitutional protection of freedom of expression, deepened with the incorporation in Article 43 of the secrecy of journalis-

[75] That he was a Minister of the Supreme Court of Justice of the Nation and that he is currently a Judge of the Inter-American Court of Human Rights. He recently co-authored with Cristina Caamaño and Valeria Vegh Weis the book "Bienvenidos al Lawfare", edited by Capital Intelectual.

[76] The English language term is a contraction between Law and Warfare and means judicial war, used to attack certain political sectors through legal and media actions. In our region, supporters of Lula, Correa and Fernández de Kirchner invoke this concept, criticizing the corruption processes that involved them, while others deny its existence. See the opinions in this regard of Roberto Gargarella, who maintains that "The story of lawfare comes to hide the fact, in our case, that Kichnerism has been, as Macrism later was, protagonists of pressure on justice. And that, furthermore, much of what is at stake are real acts of corruption, which have always occurred in the region". Schvartzman, Américo, "La liberación de Lula evidencia que el lawfare es una tontería", *Lavanguardia*, March 12, 2021. And he adds: "This is not an international conspiracy of justice, media and politics against popular governments, but what there is is a Justice that, in a context of concentrated political power, tends to work with the power of the day", pointing out as examples the cases of Argentina, Chile, Peru, Colombia, Ecuador, Nicaragua, Bolivia or Venezuela. Piscetta, Juan, "No hay lawfare, sino una burda y patética historia de dominio de poder sobre la justiciar", Infobae, Buenos Aires, January 17, 2021. Roberto Saba in his note "La paradoja del lawfare", *Clarín*, Buenos Aires, February 21, 2021, affirms that "if we question the impartiality of the entire Judicial Power, what do we have left?". And he proposes as a solution to that paradox that you have to trust the judicial processes, and not necessarily the judges. And that "the center of the debate on how to improve our justice must go through the way in which we improve those processes, otherwise, constitutional democracy will be caught in the crossfire of mutual accusations of lawfare". And then he maintains: "If law is power, then there is no law. Just power. Constitutional or liberal democracy is at the antipodes of this thought. This is built on the opposite idea that the deliberative process in Parliament and the judicial process before the courts are the appropriate mechanisms to make the best possible decisions".

[77] See the article by Morales Solá, Joaquín, "A una Comisión le falta sólo la guillotina", *La Nación*, April 25, 2021, where it refers to an opinion of the Bicameral Commission of intelligence services, which also proposes the formation of another commission to investigate judges and prosecutors during the previous Macri government.

tic sources of information,[78] in addition to the international law of human rights, the criminalization of such activity is still insisted upon.[79]

For these reasons, the recent report No. 45 on Human Rights in the world of the United States Department of State points out concerning the period 2019-2020 that: "Weak institutions[80] and a judicial system that is often ineffective and politicized undermined systematic attempts to curb corruption. Executive, legislative, and judicial officials engaged in corrupt practices with impunity". He cites the cases of corruption against Fernández de Kirchner in the case of the Notebooks and against Macri. And that there is a "lack of effective implementation of the law", in addition to mentioning the murders committed by the security forces in several provinces.[81]

I end this point by emphasizing the notable importance of the continuity of these processes against corruption, which should mean a change in the decadent reality of the country in this matter, characterized by impunity. But the fight against corruption requires the investigation of other aspects of the structural corruption that we have suffered, such as, for example, concessions for public works, public services, and gambling, which has proliferated in the country and it reaches the Federal Government, that

[78] In my capacity as Vice President of the Drafting Commission I was the author of said incorporation in the National Constituent Convention of 1994. See Hernández, Antonio María, "A 25 años de la reforma constitucional de 1994", Córdoba, Printing of the National University of Córdoba, 2019, pp. 137 et seq.

[79] In the *Amicus Curiae* that I presented before the Federal Chamber of Mar del Plata in favor of the journalist Daniel Santoro, due to his indictment by Judge Ramos Padilla, I pointed out the different criminal cases that other distinguished colleagues had previously supported - authors of books and articles against the corruption - and how the jurisprudence, especially of First Instance Judges and some Chambers, did not respect the guarantee of secrecy of sources. Said Chamber, in a very important ruling that refers to the Amicus Curiae, with the vote of Judges Eduardo Pablo Jiménez and Alejandro Tazza, established an adequate jurisprudential criterion in this regard, with a precise constitutional reading of the new guarantee. See the note by García Mansilla, Manuel, "El caso Santoro: un hito en defensa de la libertad de prensa", *Clarín*, Buenos Aires, December 22, 2020. Unfortunately, unaware of this, Federal Judge Luis Rodríguez has just prosecuted the aforementioned journalist again, which has already provoked the reaction of the respective institutions, such as ADEPA, FOPEA and the National Academy of Journalism. See note "Procesaron al periodista Daniel Santoro en una causa por supuesto intento de extorsión", *La Nación*, April 19, 2021.

[80] Regarding the weakness of the institutions in the region, see "La ley y la trampa en América Latina", Siglo XXI, 2020, by María Victoria Murillo, Stephen Levitsky and Daniel Brinks; also see Guillermo O´Donnell that in his renowned work on delegative democracies he mentioned that legislative and executive bodies were like paper tigers.

[81] See notes "Estados Unidos considera que Argentina tiene un sistema judicial ineficaz y politizado", Perfil, Buenos Aires, March 31, 2021 and "Estados Unidos volvió a advertir sobre la impunidad en Argentina", *La Nación*, March 31, 2021.

of CABA and that of the provinces. In addition, no progress has yet been made against corruption in the Provincial or Municipal Governments, in many of which the same companies now investigated in the cause of the notebooks acted and act.[82]

II. Corruption, Public Ethics, International Agreements and the Republican and Democratic System in the National Constitution

I believe that the National Constitution has established with unchanging clarity the bases and guidelines for the fight against corruption, in various norms, principles, and republican and democratic values, to which I refer below.

Article 36, incorporated in the great constitutional reform of 1994, on the defense of constitutional order and democracy, in its second part, says:

> ...Likewise, whoever incurs in a serious intentional crime against the State that entails enrichment, will also attempt against the democratic system, being disqualified for the time that the laws determine to occupy public positions or jobs. Congress will sanction a law on public ethics for the exercise of the function.

Although I cannot dwell on the exhaustive interpretation of the aforementioned article, I want to recall some concepts that I pronounced in this regard in the Plenary of the Constituent Convention, in my capacity as Vice President of the Drafting Commission:

> ...Allow me to say what is the nature of this norm that we are going to incorporate into the National Constitution. We believe that we are facing constitutional criminal law. Already the Constitution of the Nation in articles 15, 22, 29, and 103 specifically introduces crimes of a constitutional nature. Here

[82] The acts of corruption produced in the pandemic should also be investigated. It has been pointed out that almost 90% of the contracts have been direct and, in some cases, it has been observed that the prices of the purchases vary enormously, such as, for example, those of an equipped ambulance that was paid 4.3 million pesos by the Provinces of Córdoba, Catamarca and Entre Ríos and 13.6 million by the Province of Buenos Aires. See the following article by Vega, Juan Carlos, "El argentino y la corrupción, síndrome de Estocolmo", *La Voz del Interior*, Córdoba, April 28, 2021, and "La corrupción en los tiempos del COVID-19", *Clarín*, July 16, 2020. Likewise, Joaquín Morales Solá has proposed the creation of an investigative commission in relation to the problem of vaccination, due to the lack of transparency in the negotiations for vaccines with the companies AstraZeneca and Pfizer. Morales Solá, Joaquín, "La Argentina pudo estar ya inmunizada"; *La Nación*, April 28, 2021).

> we do the same and refer to a protected legal asset that appears very clearly: the constitutional order. We define in the norm the incriminated behavior and the protected legal interest; we make a reference and the drafting and application of other penalties in this regard are also referred to the National Congress. It is the same constitutional technique used in the other cases.

And after indicating the dissuasive meaning of the norm and the importance of recognizing resistance to oppression as an enumerated right, as well as the reference to public ethics as a presupposition of democracy, I said about the constitutional order:

> ...for us the constitutional order is the Nation itself. This was the clear definition of one of the great men of the nationality, Juan María Gutiérrez, when he said that the Constitution was the Argentine Nation made law. From the initial moments of nationality in that formidable debate on May 22 in the Cabildo Abierto of Buenos Aires, the ideas of freedom, equality, the Republic, and federalism were integrated into the depths of Argentine nationality. Many years of fratricidal struggles and many constitutional attempts were necessary after the project of our first constitutionalist who was the eminent Mariano Moreno until we, in 1853, and later in 1860, closed that exercise of original constituent power that began precisely in that distant 22 of May.
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> ...Consequently, it is appropriate to say that the idea of constitutional order and the defense of democracy, which is an essential value of our Constitution, unquestionably mean the defense of the best ideas that the Argentine nationality has had, painstakingly elaborated over the years. throughout our painful history. Declarations are solemn statements made in the Constitution about man, society, and the State. In this sense, this standard is also a declaration in the highest degree; it is based on the painful history we live in and on the deep conviction we have about the effectiveness of democracy for the time to come. It broadly expresses the consensus of this great Constituent Convention, and we consider it highly valuable that it be incorporated into the constitutional text.[83]

Consequently, there is no doubt that, since the Federal Supreme Law in this Article 36, corruption has been prescribed as a constitutional criminal offense and that, in addition, with all success, it has been characterized as an attack on democracy and the constitutional order.

But I must add another norm linked to this transcendent question: that of the inc. 22 of Art. 75, which recognized constitutional status for certain

[83] *Cfr*. "Reforma constitucional de 1994. Labor del Convencional Constituyente Antonio María Hernández", Buenos Aires, Press of the Congress of the Nation, 1995, pp. 57-59.

International Human Rights Treaties and supra-legal status for the rest of said Instruments. And this is closely linked to this fight, since international collaboration is essential, as we have observed. In this sense, the Conventions against Corruption were approved, both the regional one of the Organization of American States and the world one of the United Nations. The first was adopted by the Assembly of the Organization of American States in Caracas in 1996 and approved by Congress Law No. 24,759 of our country, sanctioned on December 4, 1996. For its part, the United Nations Convention against Corruption was adopted by the General Assembly in New York in 2003 and approved by Law No. 26,097, sanctioned by Congress on May 10, 2006. Likewise, the "Convention of the United Nations Organization against organized transnational crime", of the year 2000 was approved by our Law of Congress No. 25,632 of the year 2002 and the "Convention to combat bribery of foreign public servants in international commercial transactions of the OECD" of the year 1997, was approved by Law of the Congress No. 25,319 of 2000.

Consequently, due to the prevailing reality of the corruption that I analyze, it is verified that full compliance with both the Constitution and the International Conventions that I mention could not be achieved.

On the other hand, it should also be included among the regulations, principles, and constitutional values of the fight against corruption, which corresponds to the establishment of a republican and federal system of government and State. Indeed, I have already referred to the importance of controls, which are essential to prevent corruption and the concentration of power in one or a few hands.[84] I believe that the political-philosophical essence of our Constitution is republican and federal democracy, which is observed throughout the text and in articles of great importance such as 1, 5, 14, 15, 16, 29, 75 inc. 24, 121, and 123, which I cannot dwell on now, for reasons of extension of this work.

It must be remembered that the republic is based on a series of principles, elements, and values: the sovereignty of the people; the division, balance, and control of powers; freedom and equality; the responsibility of public officials; the publicity of the acts of government and the limited duration of the mandates that make alternation possible. Likewise, this system

[84] Remember the well-known phrases of Madison "the concentration of all power in one hand is the true definition of tyranny". *Cfr.* Hernández Antonio, María, "Estudios de federalismo comparado: Argentina, Estados Unidos y México", Buenos Aires, Rubinzal Culzoni Editores, 2018, Ch. II and by Lord Acton that "absolute power corrupts absolutely". On the other hand, there is a correlation between the republic and the federation in their great objectives of limiting power and ensuring the rights of citizens.

must be based on "political virtue", which in Montesquieu's opinion means love for the country, love for the Republic, compliance with the laws, the principles and values of the Constitution, democracy, and equality, and austerity of customs.[85]

The analysis that I have carried out on corruption confirms the inadequate functioning of our democratic, republican, and federal system and the breach of its norms, values, and principles.

III. The Public Ethics Law, The Anti-Corruption Office, and The Control Systems in the Federal Government, in The Provinces, in the Autonomous City of Buenos Aires and the Municipalities

The Public Ethics Law No. 25,188 of 1999, in compliance with Art. 36 of the Supreme Law, regulated the duties and guidelines of ethical behavior (Chapter II), the system of sworn declarations (Chapter III), the background (Chapter IV), incompatibilities and conflicts of interest (Chapter V), the system of gifts to public officials (Chapter VI), created a National Public Ethics Commission (Chapter VIII) and reformed several articles of the Penal Code (Chapter IX).[86]

However, it was later modified in 2013 by Law No. 26,857, to establish less severity in its provisions on sworn statements and to eliminate the operation of the National Commission of Public Ethics.

The Anti-Corruption Office, depending on the Ministry of Justice and Human Rights, was created by Law of Ministries, for the fulfillment of the functions that corresponded to the National Prosecutor for Administrative Investigations, according to arts. 26, 45, and 50 of Law 24,946, Organic of the Public Ministry of 1998. The Regulation of the Office was carried out by Decree 102/99 in the Presidency of De la Rúa, where in addition to the aforementioned powers of that Prosecutor's Office, those corresponding to the Inter-American Convention against Corruption. It should be noted that the substitution of the National Prosecutor for Administrative Investigations by the Anticorruption Office meant a serious institutional change

[85] See Montesquieu, Charles Louis de Seconday, "Del espíritu de las leyes", Mexico, Porrúa, 1977, pp. 15-26, where the author bases the political virtue that distinguishes the democratic republic. There he argued that when virtue ceases, ambition and greed enter hearts and the Republic is corrupted.

[86] For an analysis of this Law, see the article by Alfonso Santiago cited above "La cláusula sobre ética pública del art. 36".

since the status that the Organic Law of the Public Ministry assigned to the National Prosecutor cannot be compared, as part of the Ministry that acted in the sphere of the Attorney General, with the guarantees corresponding to a Magistrate (Arts. 43 and 44), with the position of the head of the Office, which depends on the Ministry of Justice and who is appointed and removed by the President. In 2015, Law No. 27,148 modified the previous Organic Law of the Public Prosecutor's Office and concerning this, in Article 22 of Specialized Attorney General's Offices, it established in Subsection 1 that of Administrative Investigations.

It is verified once again that there was non-compliance with the legislation, both in public ethics, —which was also modified around the sworn declarations of assets and for the elimination of the National Political Ethics Commission— and in that of the Public Ministry, in concerning National Prosecutor's Office for Administrative Investigations, which ceased to function. In other words, another recurrent expression of the anomie that characterizes us and that exhibited the lack of political will to combat corruption.

On March 5, 2019, the Executive Power of the Nation sent to Congress a Draft Law for the integral modification of the Public Ethics Law, which proposed important modifications that had been claimed in this matter. It is proposed to expand the number of people who must present sworn declarations, including union leaders, social workers, and political parties, in addition to the presentation of a single electronic form for all the powers of the State, which with annual control allows detecting unjustified growth of wealth and conflicts of interest, given that the Anti-Corruption Office controls only the Executive Power. Conflicts of interest are fully regulated, including the powers of the State, beyond the Executive Branch, per the regulations of the International Conventions against corruption. Prohibitions are established for the appointment of relatives up to the 2nd degree in the different powers of the State, including the Legislative, the Judicial, and the Public Ministry. A public register of gifts and trips paid for by third parties is prescribed. A Federal Council for Public Ethics and Transparency is created, with representatives from all the provinces, which must be convened every six months to consider the degree of progress in public ethics, transparency, and access to information in each of the jurisdictions. It is ordered that all the powers of the State must create autarchic organisms as enforcement authorities of this Law. Official advertising is limited and the personal promotion of public officials is prohibited. This project was coordinated by the Anticorruption Office, with the participation of public and private entities and the advice of the World Bank and the OECD. I consider

it of special importance that Congress deal with this important initiative as soon as possible.

Likewise, two international instruments of special significance govern our country: the Inter-American Convention against Corruption and the United Nations Convention against Corruption, to which we referred earlier and which have a constitutional hierarchy superior to the laws. Needless to say, the deficiencies that I have been pointing out have been observed in its fulfillment.

As for the current Criminal Code, it presents different penal figures linked to corruption, and although its reform is necessary, it did not have its adequate application, due to the actions of the Judicial Power, which made impunity possible, as we have seen.[87] A Preliminary Draft of a new Criminal Code was considered by the Executive Power of the Nation, which introduced modifications and new tools against corruption and which was presented as a bill in the Senate of the Nation.[88]

Likewise, I recall what was previously stated about the different laws approved in recent years on access to public information, on repentant persons, and the criminal liability of private legal entities. In other words, we have more than enough legislation to confront this true cancer of our political regime, which is corruption, and yet no appreciable results have been achieved so far in this fight.[89]

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[87] We already mentioned that the average duration of corruption cases is 14 years. This problem of the slow pace of Justice cannot be ignored, which imposes the need for profound changes in substantive and procedural legislation, in addition to another operation of the *Council of the Magistracy, with greater controls over Judges and the Public Ministry. On the o*ther hand, it is necessary to modify the jurisprudence that, beyond the double conformity of the Pact of San José of Costa Rica, allows endless appeals that often end up in the Supreme Court, and without effective fulfillment of sentences, with the argument that There are firm convictions. That is why it is very difficult for there to be prisoners for corruption processes, while the prisons are populated by those who do not have enough resources. Hence, there is a wide perception of the inequality of the law in the country, in addition to the lack of confidence in the Judiciary. See Hernández, Zovatto and Fidanza (comps.), "Segunda Encuesta de Cultura Constitucional. Argentina: una sociedad anómica", *op. cit.*

[88] The Commission was appointed by the Executive Power of the Nation and was chaired by the Judge of the National Chamber of Criminal Cassation Dr. Mariano Borinsky, who presented the Preliminary Draft in 2018. In it, the anticipated confiscation of assets and the increase in penalties in the figures of illicit enrichment, bribery and transnational bribery were proposed, in addition to their mandatory compliance. An aggravating circumstance was proposed in the crime of money laundering when public officials are involved, in addition to expanding the criminal liability of legal entities. *Cfr.* Cappiello, Hernán, *La Nación*, March 9, 2019.

[89] Very few have been convicted throughout our history for corruption. Currently, former Vice President Amado Boudou has been added to that list, for the Ciccone cause, and

On the other hand, in the constitutional reform of 1994, the institutional controls typical of the republican system were accentuated.

Indeed, on the one hand, greater powers were granted to Congress, which is the most important constitutional body and the one whose function is both to legislate and to politically control the other Powers. In effect, the attenuation of our strong presidentialism was designed with the figure of the Chief of the Cabinet of Ministers, who must appear alternately once a month before the Chambers of Congress, to render reports, according to the provisions of Article 101. This, which is very important for control, was also accompanied by the possibility for Congress to challenge him for a motion of censure and even to remove him from office, by the provision of the rule.[90]

Likewise, and with a close functional relationship with Congress, constitutional status was granted to two very important control institutions: the General Audit Office of the Nation and the Ombudsman. The first, prescribed in Art. 85, which states:

> ...He will be in charge of the control of legality, management and audit of all the activity of the centralized and decentralized public administration, whatever its organizational modality and the other functions that the law grants. It will necessarily intervene in the process of approval or rejection of the collection and investment accounts of public funds.

And the Ombudsman, who by Art. 86 has as its mission: "…the defense and protection of human rights and other rights, guarantees and interests protected in this Constitution and the laws, in the face of facts, acts or omissions of the Administration; and the control of the exercise of pub-

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the former Minister of Federal Planning, Julio De Vido, together with his secretaries Ricardo Jaime and Juan Pablo Schiavi, for the Once railway tragedy that occurred in 2012, which caused 52 deaths. Likewise, Lázaro Baéz and his relatives were convicted of money laundering, as we have seen before. But it should be noted that there have never been so many detainees, investigated and prosecuted as in the current case of the Notebooks, which, with its culmination through convictions, can mean a notable advance in the fight against corruption and impunity.

[90] However, the objectives set by the Constituent Assembly were not achieved, since the institution has not served to mitigate the hyper-presidentialism that we have suffered. In addition to this, it has been surprising to observe that for long periods the Chief of the Cabinet of Ministers did not appear before each of the Chambers for his reports nor before the Permanent Bicameral Commission after the dictation of Decrees of Necessity and Urgency. For example, the current Chief of Staff has only attended the Chamber of Deputies once and the Senate once, despite the fact that he has been in office since December 2019. See Hernández, Antonio María, "A veinticinco años de la Reforma Constitucional de 1994…", *cit.*

lic administrative functions". As I have pointed out before,[91] the objectives pursued by the reform were partially fulfilled, concerning the strengthening of Congress, and as for the new control bodies, only the Audit Office has been able to adequately fulfill its functions, even though its regulatory law to the respective constitutional article; while, in the case of the Ombudsman's Office, it has been 12 years without a new head being appointed.[92]

Likewise, another of the objectives of the Reform was to ensure the independence of the Judiciary, through the incorporation of two institutions: the Council of the Judiciary, the Trial Jury, and the Public Ministry, in Arts. 114, 115, and 120, respectively. Also, here a partial fulfillment of what was designed was achieved, considering what is exposed in this article, not being able to dwell on this issue, for reasons of extension of this contribution.[93]

I also conclude this point by insisting that the weak constitutional and legal culture has prevented the full validity of republican principles and controls, which has facilitated corruption.[94]

Concerning the regulations of the Provinces, the Autonomous City of Buenos Aires, and the Municipalities, on public ethics, anti-corruption offices or prosecutors and control systems, I express that this corresponds to our federal form of government and State, characterized by the coexistence of various state and governmental orders, with respective competences in this regard. Having made this clarification, on the one hand, I reiterate the need for progress in the fight against corruption in all spheres of our Federation, and on the other hand, I excuse myself from developing this regulation, because it exceeds the scope of this study.

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[91] See Hernández, Antonio María, "A veinte años de la reforma constitucional de 1994", in the Número Especial de Jurisprudencia Argentina, "A veinte años de la reforma constitucional de 1994", Alberto García Lema and Antonio María Hernández, (coords.), Buenos Aires, Abeledo-Perrot, August 20th of 2014, pp. 29-36 and "A veinticinco años de la Reforma Constitucional de 1994…", *cit.*

[92] Since Eduardo Mondino resigned from the position in 2009.

[93] In addition to what has been said about the judicial reform that is currently being processed, where references are made to this issue, see the work already cited of my authorship, "A veinticinco años de la Reforma Constitucional de 1994", for a more exhaustive analysis of the problems of regulation and compliance with the constitutional mandates in such a decisive matter.

[94] See Hernández, Antonio María, "Fortalezas y debilidades constitucionales. Una visión crítica en el Bicentenario", Buenos Aires, Abeledo-Perrot, 2012, where I analyze our cultural problems such as anomie, violence and corruption, which prevent adequate compliance with the Supreme Law.

IV. Conclusions and proposals to fight against corruption

Alfonso Santiago expressed that

> The Constitution is a legal norm, but also a political document and expression of a certain political culture that defines the values of coexistence in common. The call is formulated in the last part of Art. 36 is not limited to the normative production, but the effective practice of public ethics as a foundation of legitimacy and efficacy of our constitutional system of government. Twenty years after the constitutional reform of 1994, very little has been done and much remains to be done.[95]

For this reason, I believe that our country requires the adoption of a systemic concept of fighting corruption, with special emphasis on the need to change our deficient constitutional, legal and political culture, which has made possible a culture of corruption. It is a long-term task, full of challenges and great difficulties because we must face the strength of the *status quo*, represented by the powerful corporations that defend their privileges, in addition to the anomic behavior of our society.

I maintain that we have no other option than to advance in this cultural change that will lead us to the full validity of the philosophical and political quintessence of the Constitution, which is republican and federal democracy and its values and principles.[96]

Consequently, and as I have been proposing,[97] civic and democratic education must be promoted and deepened at all levels of education. Said education must be based, in the first place, on the principles and values of the National Constitution, which is our Supreme Law and the great political project of Argentines. This entails the revision of the study plans at the different levels, both Ministry of Education of the Nation and the Provinces

[95] Santiago, Alfonso, *op. cit.*, p. 43.

[96] Rose-Ackerman wrote: "Corruption is not the inevitable result of history and culture. Social norms can be deeply ingrained and self-reinforcing, but sometimes they change. They are not necessarily frozen in time. And, if a society is to build a legitimate democracy, the norms must change. Otherwise, widespread corruption will inexorably undermine respect for the rule of law and lead to serious distortions in the efficiency and fairness of service delivery". Rose-Ackerman, Susan, "Corruption: Greed, Culture and the State", Yale Law Journal, 2010.

[97] In our works: Hernández, Antonio María (Dir.), Derecho constitucional, Buenos Aires, La Ley, 2012, vol. I, Ch. 1; "Fortalezas y debilidades constitucionales…", *cit.*; Hernández, Antonio María; Zovatto, Daniel and Fidanza, Eduardo (comps.), *op. cit.*, and "Estudios de federalismo comparado: Argentina, Estados Unidos y México", Buenos Aires, Rubinzal Culzoni Editors, 2018.

and Municipalities, through the Federal Council of Education, to comply with Law No. 25,863, which so arranged. Said legal instrument also determined that May 1st is the Day of the National Constitution. Failure to comply with this law is yet another proof of the anomie we suffer from.

To contribute to the previous proposal, programs that spread the values and importance of the Constitution, the laws and the institutions should be broadcast from the state television and radio media.

Once again, we must remember Sarmiento: "Up the Constitution as a board and down the school to learn to spell it".[98]

It must be understood that with the knowledge and effective application of the Federal and Provincial Constitutions, Municipal Organic Charters, and the respective laws, we will have active citizens who can exercise their rights and adequately fulfill their obligations.[99] In order to active citizens", Norberto Bobbio postulated a "call to values",[100] pointing first to the ideal of tolerance,[101] followed by non-violence,[102] that of the gradual renewal of society through the free debate of ideas and the change of mentalities and way of life[103] and finally, the ideal of brotherhood (the "fraternité" of the French Revolution).[104]

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[98] *Cfr.* Summary Recapitulation that precedes Volume VIII of his Complete Works, Editorial Luz del Día.

[99] Norberto Bobbio under the title: "El ciudadano no educado" considered this as the sixth unfulfilled promise of democracy. And he remembered John Stuart Mill in his work "Considerations on representative government", with his distinction between active and passive citizens, pointing out that democracy required the former. On the contrary, the latter gave rise to political apathy as a serious phenomenon that questioned even consolidated democracies. Bobbio, Norberto, "El futuro de la democracia", Barcelona, Plaza & Janes, 1985, pp. 38-40.

[100] *Ibidem*, p. 48.

[101] "If today there is a threat to world peace, it comes once again from fanaticism, or else from the blind belief in the truth and in the force capable of imposing it. Needless to give examples: we have them before our eyes". *Idem*.

[102] "I have never forgotten the teaching of Karl Popper, according to which what essentially distinguishes a democratic government from a non-democratic one is the fact that only in the former can citizens get rid of their rulers without bloodshed. The much-mocked formal rules of democracy have introduced, for the first time in history, coexistence techniques, whose purpose is to resolve social conflicts without resorting to violence. Only there are these rules respected, the adversary is no longer an enemy (who must be destroyed), but an opponent, who tomorrow will be able to take our place". *Idem.*

[103] "Only democracy allows the formation and expansion of silent revolutions, as has happened in recent decades with the transformation of the relationship between the sexes, which is perhaps the greatest revolution of our times". *Ibidem*, pp. 48 and 49.

[104] "Much of history is made up of fratricidal fights. In his Philosophy of History, Hegel defines history as an "immense slaughterhouse". Can we take away the reason? In no coun-

Furthermore, teach and disseminate the examples of those who embodied the republican political virtues in public life,[105] starting with the heroes of May like Moreno, Castelli, and Belgrano.

In this way, we will affirm the solidity of our republican institutions and participatory and deliberative democracy, based on values that reject corruption.[106]

Politics must be prioritized and closely linked to ethics. Political parties must be strengthened and in compliance with Art. 38 of the National Constitution, educate and train their members and leaders, with interdisciplinary studies, among which those of public law stand out because they must govern with the Constitution in hand in a rule of law.

The effective implementation of the right of access to information must be ensured more transparent governments[107] and more empowered and participatory society. The remarkable importance of freedom of expression and the pr, essential for democracy, cannot be ignored. Indeed, a free, critical, and independent press is essential for reporting and investigating corruption, as occurred in our country.[108]

The anomie that we endure is very closely linked to the inadequate functioning of the two institutions that have the greatest responsibility in ensuring compliance with the laws: the Judiciary and the Police.[109] Conse-

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try in the world can the democratic regime endure without becoming a custom. But can it become a custom without recognition of the brotherhood that unites all men in a common destiny? It is a much more necessary recognition today, in which every day we become more aware of this common destiny, for which we must, guided by that little bit of light of reason that illuminates our path, act accordingly". *Ibidem*, p. 49.

[105] To which Montesquieu referred and that we have mentioned previously in this work.

[106] In effect, both in the judicial processes of "Mani pulite" and in "Lava Jato", the solid and constant popular support was decisive for the success achieved.

[107] Bobbio considers as the fifth unfulfilled promise of democracy that of not having eliminated the existence of invisible powers. After pointing out the importance of the transparency of power in democracy, he recalls Kant's principle enunciated in the Appendix to Perpetual Peace: "All actions relative to the rights of other men whose maxim is not susceptible to publicity are unjust". Bobbio, Norberto, *op. cit.*, p. 34, We have already analyzed previously that one of the characteristic elements of corruption is secrecy.

[108] The constituent work of 1994 should be highlighted in this sense, because among other aspects, it incorporated as a fourth guarantee in Art. 43, that of the secrecy of the sources of journalistic investigation, based on the proposal formulated as Vice President of the Drafting Commission. *Cfr.* Hernández, Antonio Maria, and Chiacchiera Castro, Paulina, "El derecho a la libertad de expresión", in Hernández, Antonio María (dir.), Derechos humanos del derecho constitucional, Buenos Aires, La Ley, vol. I, Ch. X, in the point "El secreto de las fuentes de información periodística", pp. 659 et seg.

[109] In the "Second Survey of Constitutional Culture", which we directed with Zovatto and Fidanza, the majority of those interviewed pointed out the malfunctioning of the Ju-

quently, we consider the respective reforms to be of special importance because they are the institutions that must combat corruption as efficiently as possible. Concerning Judiciary, its most important value must be ensured as the basis of the republican system: independence from both political and economic powers.

For me, the elevation of the constitutional culture and legality is essential, since, with the fulfillment of the norms, principles, and values of our republican and federal democracy, a substantial advance will inexorably take place in the fight against corruption.

I do not doubt that the strict application of the constitutional regulations and of the international and national instruments that we have analyzed, with an adequate functioning of the various control bodies of the republican systems enshrined in the Federal, Provincial, CABA, and in the Municipal Charters and Organic Laws, it would distance us from the culture of corruption.

Next, I present other proposals to improve the normative tools of this fight, without an order of priority in this regard, since I reiterate that it is a systemic approach:

1. Those carried out by the Group of Experts of the IDB and mentioned in the point on Corruption in Latin America, to which I refer to avoid repetition.

2. Those of Transparency International in the Integrity Pact and Code of Conduct for Companies and Tools for citizen control of corruption, referred to above.

3. As I had mentioned above, three Projects of great importance in the fight against corruption must be sanctioned as Laws by Congress: the reform of the Public Ethics Law, the extinction of domain to recover what was stolen, and the new Penal Code.

4. Concerning a specific and relevant issue, such as the financing of political parties, I share these proposals by Daniel Zovatto for comprehensive reform:

> One, bank the contributions to reduce cash donations as much as possible and favor their traceability. Two, improve the fair conditions of electoral

diciary as the first cause of anomie. Cf. Hernández, Antonio María, "Perceptions on the Constitutions, laws and some federal issues", in Hernández, Antonio María; Zovatto, Daniel and Fidanza, Eduardo (comps.), *op. cit.*, p. 66. On the other hand, both Institutions, Justice and Police, deserved low weighting in the analysis of trust in institutions. *Cfr.* Zovatto, Daniel, "Perceptions on democracy and institutions", in Hernández, Antonio María; Zovatto, Daniel and Fidanza, Eduardo (comps.), *op. cit.*, pp. 38 et seq.

> competition, regulate official advertising, and increase the period of prohibition of government acts aimed at capturing the vote. Three, penalize patronage and the use of public resources for partisan purposes. Four, allow companies to make contributions, with a maximum limit of 2% of the total expenses allowed for a party, accompanied by clear limits regarding those companies that must be excluded to avoid conflicts of interest. Five, increase transparency and accountability to combat the current high levels of opacity. Six, implement the registration of contributions and expenses in real-time. Seven, launch an online supplier registry. Eight, include the regulation of social networks along with traditional media. Nine, strengthen Electoral Justice (increasing the number of auditors of the National Chamber and the flow of information from various sources). Ten, toughen the sanctions regime, including the candidates among the responsible subjects.[110]

5. Regarding the Judiciary, the following proposals by Daniel Sabsay must be taken into account to ensure the independence of the Judiciary: 1) Modify Law 26,080 of 2006 to ensure the balance of the sectors in the composition of the Judicial Council; 2) Reestablish the powers of administration of the Judiciary by the Council, as provided by the Constitution; 3) That the Congress appoints prestigious jurists to represent it before the Council; 4) That the Council advance in the fulfillment of its functions of control of the Judiciary.[111]

To this, I add the modification of the Federal and Provincial Criminal Procedure Codes, to speed up the processes against corruption. I insist that the existing impunity must end, which is one of the most determining causes of our underdevelopment and anomie.

Likewise, the ethical obligations in the exercise of judicial positions must be controlled, per the respective regulations.[112] It is worth remembering here the opinion of Francis Bacon: "The Judge must be more wise than ingenious, more respectable than likable and popular, and more circumspect than presumptuous. But first, he must be complete, this being for him the main virtue and the quality of his trade".[113] By the way, I am referring

[110] "Political financing: a comprehensive reform is urgent, not a sum of patches", *La Nación*, *www.lanacion.com.ar*, February 21, 2019.

[111] See the article "No more can be expected: the corrupt elements of Justice must go", Infobae, electronic version of February 28, 2019. Reference was also made to the complaint involving Federal Judge Luis Rodríguez in the case of the notebooks and their prosecution was requested.

[112] See Malem Seña, Jorge, "The corruption of the judges", pp. 145 et seq.

[113] Bacon, Francis, "Essays on morality and politics", Spanish version, Buenos Aires, Editorial Lautaro, 1946, p. 257.

not only to the Federal Judicial Power but also to those of the Provinces and the CABA.

I am convinced that to achieve the high objectives set forth by the 1994 Constitutional Convention concerning the Judiciary, —which must be the pillar of the rule of law, as proposed in coincidence by point 16 of the 2030 Agenda for Sustainable Development of the UN—, special emphasis must be placed on strengthening the institutions created, according to the constitutional design carried out, that is, the Council of the Judiciary, the Trial Jury and the Public Ministry.

Likewise, careful attention must be paid to questions of the professional ethics of judges and lawyers and the teaching of Law in our Universities.

Concerning the ethics of judges, it is necessary to advance in the strict application of the Ibero-American Code, approved by the Ibero-American Judicial Summit, and the same for the ethics of lawyers, by the respective Bars.[114]

Likewise, this issue should be the object of special interest in the training of our Law professionals at Universities.

6. An Ethics Commission must be created in each Chamber of Congress and the Provincial and CABA Legislatures and Deliberative Councils for the Monitoring and Control of compliance with the laws and ordinances sanctioned against corruption in each of the various orders state, in addition to those relating specifically to each of these legislative bodies.[115]

7. Anti-corruption measures must be implemented in the Public Administrations of the various state orders. In this sense, Malem Seña highlights the study carried out by the Anticorruption Office of our country, between 1998 and 1999, entitled "Exploratory study on transparency in the Argentine Public Administration", where the existing problems were pointed out, which require changes in administrative procedures, in tenders, in contracts, in personnel, and administrative careers. Likewise, and as a guide in this matter of the ethics of the public function, the author proposes to recall the conclusions of the Report on "Standards of conduct in Public

[114] See Orgaz, Alfredo, "La moral del abogado", a conference given on August 29, 1959 in the Hall of Lost Steps of the Palace of Justice of Córdoba, when he was president of the Supreme Court of Justice of the Nation. There he refers to the notable examples provided in the exercise of the profession by the Lawyers Abraham Lincoln and Mahatma Gandhi. (Review of the Córdoba Bar Association, No. 2, 1977, pp. 9 et seq.)

[115] For example, in the United States Congress, the Committees on Ethics in the Senate and Standards of Official Behavior in the House of Representatives, which analyze the conduct of Legislators. *Cfr.* Thompson, Dennis F., *op. cit.*, Ch. 4, "Legislative Ethics", pp. 159 and 160.

Institutions" of the Nolan Commission, created in Great Britain in 1994. There, 7 principles were proposed basics in this matter: altruism, integrity, objectivity, responsibility, transparency, honesty, and leadership.[116]

Finally, I insist that the fight against corruption must be developed systemically, encompassing all its aspects, both cultural and normative. It is a task as formidable as it is urgent given the extreme gravity of the situation and it will surely require a long time to be carried out. However, I encourage an acceleration in this process, through the exemplary role and ethical and republican leadership of political and social leadership that acts up to its responsibilities.

[116] *Ibidem*, Ch. 2, "Public Administration and Corruption", pp. 72 et seg. The study was done by the Direction of Planification of Transparency Policy.

THE FIGHT AGAINST CORRUPTION IN BRAZIL, RECENT EVENTS AND THEIR CONSEQUENCES

Marcelo FIGUEIREDO*

SUMARIO: I. *Introducción*. II. *Good Governance —Good Administration— A Constitutional Right of Citizenship*. III. *The Main Instruments to Fight Corruption in Brazil*. IV. *Corruption in Brazilian Laws and Customs*. V. *The "mensalão"*. VI. *The "Lava Jato"*. VII. *Conclusion*. VIII. *Recent Events involving the Lava-Jato Operation*.

I. INTRODUCCIÓN

Corruption is as old as man. Law has always sought ways to combat it. However, the issue was never a central concern of classical *Constitutional Law*. On the other hand, we almost always find the figure of corruption as a crime, infraction or crime, both in criminal law and in sanctioning administrative law. Lately, with the profound changes in human societies brought about by the Scientific-Technological Revolution, and within it, by the Communications Revolution, which fostered the formation of regional, supranational, and international blocks, attempts have been made to implement standards common to corruption, globally and wherever it is committed: in the public or private sphere.

As it is known, the keyword introduced by *globalization* in the mutating State is *efficiency*. Both in its external and internal action, the primacy of warlike efficiency, which was so important in the era of great powers, is no

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longer enough, but that of a new and peculiar political efficiency to act in multilateral relations.

No longer just simple economic efficiency, understood as increased production, with reduced inputs and increased profits, but also socioeconomic efficiency, which consists of producing better quality goods and services, but quickly and in greater quantity, to supply increasingly demanding societies; no longer just the efficiency that depends solely on the action of isolated states, but rather that which is achieved through an *institutionalized* concert of solidarity states.

Thus, the post-positivist rehabilitation of principles, by redefining the supremacy of fundamental rights, and the widely disseminated demonstration effect of the most successful political jus experiences, have revealed a new operational concept of public administration, which starts from a precise and adequate vocation of the functions assigned to each provider entity, so that they satisfy, in the best possible way and with the lowest costs, the traditional and emerging demands of societies of all latitudes, without minding so much who will be in charge, in the end, of said benefits: if it will be a public, private, local, regional, national, multi or metanational entity.[1]

Thus, alongside the perennial concern with *administrative morality*, is added the perception that corruption increases the cost of products and services made available to society, *diverting* them towards groups of people with selfish and non-republican interests.

Corruption hinders development, harms economic growth, sacrificing the poorest disproportionately and undermines the effectiveness of investments and financial aid, therefore, strategies to combat corruption need to be integrated into a development model formulated to help countries to eradicate poverty.

There is no doubt that the greatest impact of corruption is on the poorest citizens, who are unable to absorb its costs. By diverting public resources, corruption compromises services such as health, education, transportation, and surveillance – exactly the most important for the less favored classes.

Corruption exists in both democratic and non-democratic countries, as well as in countries with extensive freedom of the press and in countries with almost no freedom of opinion.

Its universalization or international character lies in the fact that it is possible both to agree with a diagnosis of the situation of a given nation that

[1] Moreira Neto, Diogo de Figueiredo (coord.), "Uma avaliação das tendências contemporâneas do direito administrativo", *Obra em homenagem a Eduardo García de Enterría. Anais do Seminário de Direito Administrativo Brasil-Espanha*, Rio de Janeiro, Renuevar, 2003, p. 550.

considers parameters that can be shared with other countries, and to institute control practices, whose effectiveness can be measured using the same references. used to establish the diagnosis.

In short, *globalization* has set in motion a new and expanded concept of *political efficiency*, in which the *organization of power*, whatever it may be and regardless of its size, as well as the *functions* to be performed, should be *subsidiarily* adapted to the new demands, in the extent to which, as a result of information, the old and disconcerting *tolerance for inefficiency in the public sector*, one of the causes of which is undoubtedly the phenomenon of corruption, would gradually diminish.

It is not by chance that today there are numerous International Conventions concerned with corruption in various dimensions and perspectives.

This being so, although as we have already observed, corruption is not a concern of *classical* constitutional law,[2] this reality has changed. And it has changed for several reasons. Basically, global integration is responsible for it. Gradually we see that the international legal system and the internal legal system are not separate units but integrated.

In truth, the processes of "globalization" and "universalization" of law, and particularly of international law, have given rise, on top of the traditional network of States, to an "integrated political system at various levels", which is governed by its own legal regulation.

For example, remember that international law forms, together with the internal law of the States, a "multi-level political system", constituted based on the political systems of the member States, and which in turn they can hold, internally, a multilevel structure.

There are clauses of different opening in the democratic Constitutions of the whole world, including in Latin America, that facilitate the comfortable entry of Conventions of all kinds, including those that deal with the fight against corruption as a global phenomenon.

Remember, as an example: the United Nations Convention of New York, dated October 31, 2003, and others that are projected in the systems of the different continents, the Inter-American Convention against corruption, of Caracas (03/28/1996) and the Convention on Civil Corruption of the Council of Europe, carried out in Strasbourg, on 11/4/1999, in addition to the African Union Convention to prevent and combat corruption, approved by the Heads of State and Government on June 12, 2003.

[2] Of course, we have always found norms in favor of public ethics and morality (good customs) throughout the Law, an issue with a different perspective than the current one.

Almost all the countries of Latin America or as some want, belonging to the "Hispanic-American" systems, have also adopted important provisions aimed at combating corruption and, in general, they have also implemented norms of the international or regional Conventions. There is no point in commenting on them.[3]

II. Good Governance —Good Administration— A Constitutional Right of Citizenship

We affirm that corruption has never been a central concern in classical Constitutional Law. In other words, at the time of the elaboration of the first constitutions, it was desired, above all, to control power, establish political and civil rights, deal with finances and internal and external public security.

This situation changed substantially with the contemporary Constitutions that expanded, dealing with a series of issues unimaginable in the eighteenth century.

[3] The international community celebrated, on December 17, 1997, the CDE Agreement to Combat Bribery of Foreign Public Officials in Transnational Business Transactions. The OAS, on March 29, 1996, signed the Inter-American Convention against Corruption. On December 9, 2003, in Mérida (Mexico), the UN prepared the United Nations Convention against Corruption, with the purpose of promoting and strengthening measures to prevent and combat corruption more effectively. On December 15, 2000, in force since September 29, 2003, the United Nations Convention against Transnational Organized Crime was celebrated in Palermo, establishing as the main measure the need to harmonize the criminal types in force in the different States, and in particular, the typification of the crime of participation in organized crime groups. The European Union, through Council Act 97-C 195/01m of 05/26/1997, established a Convention on the fight against corruption involving officials of the European Communities or of the Member States of the European Union. Likewise, the Group of States against Corruption of the Council of Europe (GRECO) was formed, in which control procedures of the States are arbitrated, with provision for mutual assistance and international cooperation, extradition, spontaneous information, direct communication between central authorities and information on available cooperation mechanisms. The European Judicial Network was also created on June 29, 1998, with the aim of facilitating criminal judicial cooperation between the Member States of the Union. We must also remember the relevant role played by the Utstein Anti-Corruption Resource Center globally. International transparency also deserves reference. Finally, it is timely to record that the World Bank presented a practical guide and created an internet portal, with the purpose of promoting collective action against corruption. This is the document entitled Fighting Corruption Through Collective Action-The Guide for Businesses (2008), the result of a coalition of institutions led by the World Bank, made up of NGOs, multilateral organizations such as the United Nations Global Compact, the International Center for Private Enterprise (CIPE), Transparency International and various private sector companies.

Today there is no written Constitution that does not show great concern for the administration and management of public affairs, public resources, budget matters, public policies, how they are formulated, and above all, executed.

The so-called "governance" or "governability" affects not only the central government agencies (Executive) but also all entities, public or private companies that apply, manage or contract with the State.

Accountability has become a fundamental matter not only for the power that oversees the executive, legislative and its auxiliaries, the courts of accounts, but also for civil society, for citizens who have the power to push their representatives in the right direction.[4]

Most of the contemporary Latin American Constitutions have dealt a great deal with corruption to the extent that they have expanded, as much as possible, the role of agents and bodies in charge of supervising the application of public resources. public resources. "Prosecutor's Offices", Comptroller's Offices, Audit Courts, Ombudsmen, Ethics Commissions, Public Ministry, are eloquent examples of this.

To this extent, citizens have also been "empowered" to actively participate in the management of what, ultimately, belongs to them. As experience shows, the parliament, the government, the judiciary, and the courts of accounts improve their performance with respect to transparency and democracy, with effective collection from society.

[4] Freitas, Juarez, *Direito Fundamental à Boa Administração Pública*, 3rd. Ed., Malheiros Editores, São Paulo, p. 21 et seg defines the right to good administration as follows: "...trata-se do direito fundamental à administração pública eficiente e eficaz, proporcional cumpridora de seus deveres, com transparência, sustentabilidade, motivação proporcional, imparcialidade e respeito à moralidade, à participação social e à plena responsabilidade por suas condutas omissivas e comissivas". In English: "It is about the fundamental right to efficient and effective public administration, proportional to fulfilling its duties, with transparency, sustainability, proportional motivation, impartiality and respect for morality, social participation and full responsibility for its omissive and commissive conduct". Later, in the concept proposed by the author, the following rights are protected, among others: "o direito à administração pública transparente, o direito à administração pública sustentável, o direito à administração pública dialógica, o direito à administração pública imparcial e desenviesada, o direito à administração pública proba, o direito à administração pública respeitadora da legalidade temperada, o direito à administração pública preventiva e eficaz". In English: "the right to transparent public administration, the right to sustainable public administration, the right to dialogic public administration, the right to impartial and non-biased public administration, the right to probate public administration, the right to public administration that respects tempered legality, the right to preventive and effective public administration".

It is essential that citizens and civil society organizations, among others, are well supplied with information – in quantity and quality for citizen action, mainly for the prevention of the misuse of public property.

It is therefore necessary to form alliances between organized civil society and government institutions to maximize efforts to combat corruption manifested in all segments.

In Brazil, instruments have been created to strengthen citizen action in practically all areas subject to state action.

III. The Main Instruments to Fight Corruption in Brazil

The Brazilian Constitution is full of norms that deal with ethics and administrative probity directly or indirectly. Let's mention the main ones. Article 5, item LXXIII provides, with respect to popular action, that it will also protect administrative morality. It means that the Constitution has not considered it sufficient to proclaim the principle of legality, certain that administrative morality is inserted in it, nor has the lesson of the doctrine that the administrative act is made up of elements and one of them , of greater importance, is that of the purpose —the administrative act must always have a purpose of public interest— and that the administrative act contrary to morality is an act that does not serve the purpose of public interest.

And the Constitution went further. The principle of administrative morality constitutes, with the 1988 Constitution, an autonomous legal concept. As we have already stated:

Today we have an idea of the principle of morality as a much broader principle, to the point that morality would no longer be contained in legality, or, if you want it another way, the principle of morality is an autonomous principle, conjugated in the constitutional legal system along with many other values that prestige.[5]

From the same fact, as is known, investigation and civil, criminal and administrative responsibility can be derived depending on the independence of the instances.

There is a true arsenal of legal norms, mechanisms to combat corruption, among which we highlight:

[5] Figueiredo, Marcelo, *O controle da moralidade na Constituição*, São Paulo, Malheiros, 2003.

a) Public Ethics Commission, created in May 1999 and the Code of Conduct of the High Federal Administration, instituted in August 2000.
b) Council for Public Transparency and the Fight against Corruption (Law no. 10,683/2003);
c) Law of Administrative Improbity (Law n. 8.429/1992) commented below; Public Civil Action Law (Law no. 7,347/1985), Complementary Law no. 64/1990, Law no. 9,424/1996, Complementary Law no. 75/1993, Law no. 1,079/1950 and Decree-Law no. 201/1967.
d) Law on Regulatory Agencies (Law no. 9,986/2000);
e) Brazilian Penal Code and Law no. 10,467/2002, which adds the crime of active corruption in international commercial transactions and the crime of influence peddling in international transactions;
f) Law on Tenders and Contracts in the Public Administration (Law no. 8,666/1993);
g) Statute of the Federal Public Official (Law no. 8.112/1990);
h) Code of Ethical Conduct of Public Agents of the Presidency and Vice Presidency of the Republic (Decree No. 4,081/2002).

Law no. 8,429/1992, an important instrument to combat administrative improbity in Brazil, which provides for the sanctions applicable to public agents for the practice of acts of administrative improbity, which finds its genesis in the Federal Constitution, article 37, §4, is, therefore, instrument of realization of the major principle, that of administrative morality.

The §4 of article 37 of the Constitution of the Republic provides:

> Article 37. The direct and indirect public administration of any of the Powers of the Union, of the States, of the Federal District and of the Municipalities will obey the principles of legality, impersonality, morality, publicity, and efficiency, and also, to the following: ...
>
> §4º Acts of administrative impropriety will cause the suspension of political rights, the loss of public function, the unavailability of assets and compensation to the treasury, in the form and gradation provided by law, without prejudice to the corresponding criminal action.

Regarding the cassation of political rights, the Constitution also provides, in its article 15, that "the cassation of political rights is prohibited, the loss or suspension of which may only occur in the cases of: ... V – administrative improbity, in the terms of article 37, §4".

Any public agent, servant or not, including political agents in general, those hired for an indefinite or temporary period, and those subject to the CLT [*Consolidation of Labor Laws*], that is, no matter what the Agent's relationship with the direct Public Administration of the three Powers and with the direct, indirect, or foundational Public Administration, which commits an act of improbity, is subject to the precepts of Law n. 8,429/1992.

Law no. 8,429/1992 defines three types of administrative acts, those that imply illicit enrichment (article 9), those that cause damage to the treasury (article 10) and those that violate the principles of the administration (article 11).

In addition, the Law contemplates the following sanctions: a) loss of goods and assets illegally increased to the patrimony; b) comprehensive compensation for the damage; c) loss of public function; d) suspension of political rights; e) civil fine; f) Prohibition of contracting or receiving tax benefits.

Law no. 12,846/2013, on the other hand, provides for the liability of legal persons in the administrative and civil spheres, for the practice of acts against the public administration, national or foreign. This Law entered into force on January 29, 2014.

Among the Brazilian institutions for combating corruption, the Federal and State Public Ministry stands out, which is responsible for prosecuting and judging acts against public property in general, the Comptroller General of the Union (CGU), created in 2001, organ of direct assistance to the President of the Republic, especially in matters related to the defense of public assets and transparency in the management of said assets, within the scope of the federal administration.

There are also the Courts of Accounts of the Union and of the States and Municipalities, in charge of supervising and judging the regularity of the accounts of the administrators and others responsible for public money. They are external control bodies of the Executive Power that act as auxiliaries to the Legislative Power in the control of public spending.

The National Congress (Parliament), made up of the Chamber of Deputies and the Federal Senate, has the main responsibility of preparing laws and proceeding with the accounting, financial, budgetary, operational, and patrimonial control of the Union and of the entities of the direct and administrative Administration. hint. Internally, we find the Parliamentary Inquisition Commissions destined to investigate facts of relevant interest for public life and for the constitutional, legal, economic, and social order of the country.

Without detriment to all the existing legal instruments and the efforts against corruption in our continent, the World Bank report *Governance* 2006: *Governance Indicators in the World*, published in June 2007, reveals that only four Latin American countries (Chile, Uruguay, Costa Rica, and El Salvador) rank in the top half of the 212 countries in the *control of corruption* category, while five countries (Ecuador, Nicaragua, Honduras, Paraguay, and Venezuela) rank in the bottom quarter.

Transparency International's 2006 *Corruption Perceptions Index report* paints an even bleaker picture: only Chile and Uruguay have received a rating above 5.0 (on a scale of 0 to 10), with 10 indicating less corruption, while seven countries in the region received less than 3.0 points.

Quite rightly clarifies Peter DeShazo:

> The high and persistent levels of corruption in the region not only undermine confidence in democracy and economic development, but also weaken the ability of societies to defend themselves against crime and threats to international security. Poor results in combating corruption breed a growing conformity to the *status quo* among the population - a driving force for reform. However, that dissatisfaction also opens the door to populist leaders with an authoritarian bent, who launch attacks against the system but who, once in power, do little to promote government ethics or transparency. Police corruption undermines the ability of law enforcement in many parts of the region, leaving states more vulnerable to criminal groups and international terrorism, while a lack of transparency in the justice system has widely dissuaded international and domestic investment.[6]

Indeed, there are no miracle solutions to combat corruption.

More information is needed, more participation of civil society, more attention not only to the Executive Power and its policies (central power) but also to those people and institutions dedicated to monitoring the performance and good government management, that is, the controlling organisms of the system.

Despite progress in the fight against corruption, we note that in general terms, the response given by legal systems is still unsatisfactory, especially when it comes to holding politicians involved in acts of corruption accountable.

In relation to the problems and gaps observed in the fight against corruption, we have verified:

[6] DeShazo, Peter, "Esfuerzos contra la corrupción en América Latina. Lecciones Aprendidas", Washington, D.C., CSIS American Program, 2007, p. 2.

1. Corruption is combated with a partial approach. The current instruments of control and sanction (laws, regulations, comptrollerships, computerized systems of control and direct surveillance, judicial processes) are not enough to stop corrupt behaviors since they leave aside the essential, everything that refers to the internal sphere of the individual, his education, his values, his perception and convictions, that is, the prelude to his actions;
2. It is fought by reaction, ignoring prevention policies. Prevention measures constitute a less costly investment in the long term, with a positive impact on the public service that favors the relationship with citizens;
3. The lack of political professionalization. Not all states have a basic profile with well-defined values for people who hold public office, which leaves a wide margin for any individual, even if they lack values, to find themselves in a position to hold a state office. Before the law, any person can hold a public office if they are suitable. It is precisely this element of suitability that makes the difference, that is to say, State positions should not be for just anyone but for the fittest, the most loyal to the Constitution, the most capable of practicing justice, for those who truly have dedication to service [...] Currently those who hold public office are not necessarily the most capable or the most committed to the plurality of interests. Charisma has replaced ability, lies for truth, and image for sensitivity. Improvisation in public office is a constant in Latin America;
4. The trivialization of electoral processes. Politics has become a show or spectacle that even falls into grotesque situations in which its protagonists, the politicians, act like true buffoons, detracting from the seriousness and respect of the position. Today, singers, actors, athletes, and entertainers have access to public office, which reflects a trend in the culture of our time that is manifested practically throughout Latin America and that is none other than to consider that they are neither necessary nor specific training to take charge of the resolution of citizen needs.
5. The absence of filters that prevent corrupt candidates from accessing public office. There are no obstacles that prevent persona non grata who carry out corrupt practices or who are suspected of doing so even if it cannot be proven, hold public office and have access to power.[7] To

[7] In Brazil, on June 4, 2010, Complementary Law No. 135 was enacted, which alters Complementary Law no. 64, of May 18, 1990, which establishes, in accordance with Para.

participate in the game of politics, it is enough to be part of a party and have financial support, personal or provided by others (here is the origin of political commitments or debts). This situation causes real gangsters to frequently participate in the political game.

6. The weakness of ethical values in the public sphere. The neglect or omission of instruments, whether normative, or tools of control, supervision, and evaluation, as well as the lack of induction, education and training programs focused on the promotion of ethical values, provides a fertile field for the development of corruption in public institutions.
7. The omission of ethical instruments of practical application. In 1974, after the resignation of Richard Nixon, accused of corruption in the *Watergate* case, two basic instruments to combat corruption were created in this country: the Government Ethics Office and the Public Ethics Law. Three decades later, few Latin American countries have similar instruments. The practical implementation of ethical instruments in a State can undoubtedly make contributions to the democratic process and move towards a "Democracy with ethics".
8. Inconsistency of political discourse in relation to practice. Demagoguery and lack of political will are a constant in Latin American governments. Actions are implemented to change even if nothing changes. Taking the fight against corruption seriously implies strongly and responsibly committing the main decision-making levels, in such a way that the initiatives, programs and measures in this regard are reproduced in a cascade from higher strata to the most modest window official.[8]

IV. Corruption in Brazilian Laws and Customs

We have the terrible habit of saying that corruption is a phenomenon embedded in political power. That is not true. Corruption is everywhere and everywhere. Unfortunately, we too, who belong to the legal family, are not immune to the phenomenon of corruption.

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9 of article 14 of the Federal Constitution, cases of ineligibility, terms of cessation and provides other measures, to include hypotheses of ineligibility aimed at protecting administrative probity and the morality in the exercise of the mandate (Law of the Clean File).

[8] Bautista, Oscar Diego, "El problema de la corrupción en América Latina y la incorporación de la ética para su solución", *Espacios Públicos Magazine*, Madrid, 2012.

Or in other words, it is difficult to accept that there is also corruption in the broad sense in the judicial family, in the agencies and entities that should defend the Constitution and its values.

Unfortunately, that is the harsh reality. We, as defenders of Law and Justice, should set an example and not apply or twist the Law to accommodate our interests, even if they violate administrative probity.

But, unfortunately, that is not the harsh reality. There are several examples of conduct clearly, in our opinion at least, in violation of the principle of administrative morality practiced by the agencies and entities that should protect and defend it. When the so-called guardians or watchdogs of administrative morality are more concerned with consciously[9] or unconsciously violating it, the timing is worrying.

How can we demand compliance from third parties and the jurisdiction (including political and business power), if the judicial family itself insists on defending privileges and royalties that are dissonant with administrative morality?

On the subject, we have already stated:[10] We believe that political power is still very poorly managed in our country. And more, that politicians and the legal system, in general, if not with gaps, are extremely protective of illegalities in the face of situations that fatally lead to the abuse of the ruler or the public servant, or the public concessionaire, always to the detriment of the fundamental right. of citizens to a upright and honest government.

We can give some examples of this reality.

The *forced retirement* ["*compulsória*" (sic)] of judges as a "sanction"[11] for those who violate the legal order and commit acts of corruption and venality, provided for in the old Organic Law of the National Judiciary (Loman) is a true absurdity law that violates the national conscience, the public treasury and rationality.

The institution of the *privileged jurisdiction (or the prerogative of jurisdiction fuero)*,[12] most of the time (except *express and justified* constitutional provision), is not justified and appears as an intolerable privilege. An archaic concept that

[9] Due to an immoderate corporatism that leads to a gradual policy of preserving institutions and people with intolerable privileges in a Democratic State of Law.

[10] Here we work again the previous text, without being imprisoned to the conclusions established there.

[11] Rarely imposed by Judges of Justice, more recently by the National Council of Justice, sometimes endorsed by the Federal Supreme Court.

[12] On the topic, see Fischer, Douglas, "Renúncia a mandatos eletivos e a alteração da competência penal em razão da função: uma limitação à luz dos preceitos constitucionais", Interesse Público Magazine, vol. 69, 2011.

collides with citizenship and its most expensive values, such as the principle of *responsibility* in a Republic.[13]

The hiring of relatives and political sponsors in all the powers of the republic is also an evil that is being combated, but that still plagues some corners where apparently the prohibition does not seem to be enough.[14]

The abuses committed by politicians, in general, from the President of the Republic[15] to federal deputies, senators, state deputies, state governors,

[13] The Association of Brazilian Magistrates (AMB) has collected data showing that the Federal Supreme Court received, in 2006, 127,535 files, which means an average of 12 thousand files per minister (there are 11 ministers), not counting what has been accumulated for years. Crimes committed by public authorities under the jurisdiction of the Federal Supreme Court were surveyed. In that year, there were 130 lawsuits in progress. The files dragged on indefinitely, without a solution of merit. A large part of the lawsuits processed in the Federal Supreme Court were returned to the First Instance, surely because the term of office of the defendant or defendant had ceased (35.38%). Some were archived due to the extinction of the punishability, due to the death of the inmate, due to peremption or reprocessed as files, due to the transformation of the investigation. Thus, in the investigation carried out by the AMB, no conviction has resulted against any authority, that is, there are zero (0) convictions against aggressors of public property or accused of any type of crime. With respect to the Superior Court of Justice, the data also walks towards the same solution. Numerous files went to the lower court (26.09%). Some convictions resulted in termination of punishment; others were archived with an indication of the reason: others due to resignation, etc. There are only five (5) convictions, which corresponds to 1.04% of the total claims. The conclusion of the AMB is that the "large number of lawsuits against authorities that they held were privileged, as well as the lack of final judgment of these cases, contribute decisively to the feeling of impunity and institutional discredit that currently afflicts Brazilian society". See Oliveira, Régis Fernandes de, "Foro privilegiado no Brasil", Revista do Advogado da AASP, No. 99, 2008.

[14] What has forced the Supreme Federal Court, in Brazil, to edit the *Súmula Vinculante*, No. 13: "The appointment of a spouse, partner, relative in the straight line, collateral or by affinity, up to the 3rd degree, inclusive, of the authorizing authority of the appointment or of the server of the same legal person, invested in a position of direction, leadership or advice, to the exercise of a position in commission or trust, or, also, of a paid function in the direct and indirect Public Administration, in any of the Powers of the Union, of the States, of the Federal District and of the Municipalities, including the adjustment through reciprocal designations, violates the Federal Constitution".

[15] Despite having expelled a President of the Republic by impeachment in 1990 (Collor de Mello), holding a Head of State accountable before or after the mandate seems very difficult to happen, with rare exceptions around the world. We would hardly read a report in a Brazilian newspaper like the one we read in *Le Monde* on May 9, 2012, p. 10: "Pour Nicholas Sarkozy, la perspective est particulièrement désagréable: lui qui avait tant tenu a la marquer sa différence avec un Jacques Chirac cerne par les juges risque à son tour, une fois son immunité présidentielle arrivée à son terme- un mois après la fin de son mandat, soit le 15 juin a la minuit- d´être convoqué par des magistrats. Redevenu justiciable ordinaire, M.Sarkozy s´expose en effet, dans les procédures où son nom est cité, a la des convocations auxquelles Il aurait a la répondre en cualité de témoin, de témoin asisté, voire de mis en examen [...]

mayors, mayors and the broad protection of *constitutional immunities*[16] found in the Constitution, above all, the first three, in our opinion, are not justified in the Constitution of a country that declares itself as a Democratic State of Law.[17]

Of course, abuses are generally committed in a non-ostensive way. For example, we understand that a President of the Republic who is a candidate for *re-election* is undoubtedly favored by having the administrative machinery in his hands.

In general, deliberately, there is a gap in the regulations that not only allows for a period of incompatibility but also does not establish any type of

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Dans le volet politique du dossier Bettencourt, instruit a la Bordeaux, le président sortant est soupçonné d´avoir été financé illégalement par le couple de milliardaires lors de sa campagne présidentielle of 2007. L´ancienne comptable des Bettencourt, Claire Thibout, a declare avoir remis a la Patrice de Maistre, alors gestionnaire de fortune, 50.000 euros en espèces. Une somme, à en croire Mme Thibout, destinée à Eric Woerth, trésorier de la campagne de M. Sarkozy".

[16] Article 53 of the 1988 Federal Constitution provides: "Deputies and senators are inviolable, civilly and criminally, for any of their opinions, words and votes. Paragraph 1. Deputies and senators, from the moment they take office, will be judged by the Federal Supreme Court. Paragraph 2. From the time they take office, the members of the National Congress may not be detained, except in flagrante delicto that cannot be bailed. In that case, the records will be sent within twenty-four hours to the respective House, so that, by absolute majority of votes of its members, it can decide on the prison. Paragraph 3. Once the complaint against the Senator or Deputy has been received, for a crime committed after taking office, the Federal Supreme Court will inform the respective House, that, at the initiative of a political party represented in it and by majority vote of its members, it may, until the final decision, suspend the course of action. Paragraph 4. The request for suspension will be assessed by the respective House, within the non-extendable period of forty-five days counted from its receipt by the Board of Directors. Paragraph 5. The suspension of the process suspends the prescription, while the mandate lasts. The responsibility of the President of the Republic is provided for in articles 85 and 86 of the Federal Constitution of 1988. Paragraph 4 of article 86 provides: "The President of the Republic, during his mandate, *cannot be held responsible for acts unrelated to the exercise of their functions*.

[17] Likewise, the option of the 1988 federal constituent regarding the *secret ballot in the event of a parliamentary loss of mandate seems wrong to us*. It does not honor the principle of publicity or transparency. As affirmed by Minister Carlos Britto, of the Supreme Federal Court, in the Direct Action of Unconstitutionality n. 2,461-2 of Rio de Janeiro, "it is forgotten that the parliamentarian does not simply vote for himself; he has to give satisfaction to his voters or his representatives, differently from the individual voter, from the citizen, who only gives satisfaction to himself". Subsequently, as we know, due to the enormous popular pressure that arose from the case of Deputy Natan Donadon, the National Congress ended up amending the Constitution to introduce open voting in the voting to annul mandates. Otherwise, we will surely continue to have absolutely contradictory and vexatious situations in Brazil, as happened in this case. Deputies sentenced to 20 years in prison with their full elective mandates, a true logical, ethical and political nonsense.

restriction to the occupant of the position who launches to contest re-election always with an advantage for the simple fact of being holding office.

It will be said that there is no way to avoid inequality in this case. We disagree.

A year of distancing (de-incompatibility), for example, to dispute the charge, would be a way to *lessen the effects of the agent's manipulation*, which is otherwise unavoidable.

Another very common example is the abuses committed by parliamentarians in the exercise of their mandates, or even before being or to be elected.[18]

Electoral legislation is, in general, very permissive and superficial, which makes it possible to abuse economic power in elections.[19] In addi-

[18] On the topic, see Mendes, Antonio Carlos, "Apontamentos sobre o abuso do poder econômico em matéria eleitoral. Cadernos de Direito Constitucional Eleitoral", São Paulo, Imesp, 1998, No. 3: "o abuso do poder econômico em matéria eleitoral consiste, em princípio, no financiamento, direto ou indireto, dos partidos políticos e candidatos, antes ou durante a campanha eleitoral, com ofensa à lei e às instruções da Justiça Eleitoral, objetivando anular a igualdade jurídica (igualdade de chances) dos partidos, tisnando, assim, a normalidade e legitimidade das eleições" "The abuse of economic power in electoral matters consists, a priori, in the financing, directly or indirectly, of political parties and candidates, before or during the electoral campaign, offending the law and the instructions of the Electoral Justice, with the purpose of annulling the legal equality (equal chances) of the parties, thus tainting the normality and legitimacy of the elections". And later: "O Congresso deveria assumir a responsabilidade de disciplinar, com minudências, os gastos partidários e eleitorais, entregando à Justiça Eleitoral e ao Ministério Público os instrumentos necessários para coibir o abuso do poder econômico, assegurando a lisura e a moralidade dos pleitos eleitorais. Por isso, a proposta de Fábio Konder Comparato guarda absoluta pertinência com a matéria aqui deduzida. Assim, a Constituição Federal deveria abrigar preceito com o seguinte teor normativo: a lei estabelecerá limites de dispêndios, para os candidatos e os partidos, nas campanhas eleitorais, bem como fixará o montante máximo de contribuições que cada candidato é autorizado a receber". "Congress should assume the responsibility of disciplining, with trifles, party and electoral expenses, giving the Electoral Justice and the Public Ministry the necessary instruments to curb the abuse of economic power, ensuring the smoothness and morality of electoral lawsuits. For this reason, Fábio Konder Comparato's proposal is absolutely relevant to the matter raised here. Thus, the Federal Constitution should contain a precept with the following normative tenor: the law will establish spending limits for candidates and parties in electoral campaigns, as well as set the maximum amount of contributions that each candidate is authorized to receive.

[19] It is true that the edition of the "Clean File Law" has been an advance. However, reactions from lawyers specializing in Brazilian electoral law are also observed. This is the case, for example, of Marcelo Ramos Peregrino Ferreira, who compares these concepts and the jurisprudence of the IACHR to observe: "A Lei das Inelegibilidades, nos termos da jurisprudência da Corte Interamericana, ao criar uma extensa lista de obstáculos aos direitos políticos, de maneira um tanto assistemática, pretendeu capturar a desonestidade e expurgá-la do cenário do regime democrático. Para tanto, com o objetivo de atingir tal importante

tion, once elected, the deputies and senators, in general, obtain, by themselves or through intermediaries, concessions of radio channels, sometimes television, obtaining advantages and prestige in their ["currais"] electoral trenches.

We all know that the "owners" of radio concessions in the interior of the vast Brazil are mostly politicians, directly or indirectly, despite the applicable constitutional norms (articles 54 and 55 of the Federal Constitution of 1988), which Others do not contain express prohibitions in this regard.

In addition, the flow of parliamentarians (deputies and senators) towards the Executive Power, by virtue of the possibility opened by article 56 of the Federal Constitution of 1988,[20] does not harmonize with the principle of administrative morality.

The conflict of interest and the promiscuity of the information received in the Executive (and the original relationship with the Legislative), in these situations, most of the time, makes that relationship of cohabitation promiscuous and intolerable. The parliamentarian does not leave his ties from day to night when assuming a temporary and temporary position in the Executive and the same when he returns to the Legislative, with information collected in the Executive.

Also, personally, we do not accept, due to an express offense to the principle of administrative morality, the possibility that a Promoter of Justice (member of the Federal or State Public Ministry) hold the position of state or federal deputy.

There is a *visceral incompatibility* between occupying the position of promoter of justice, defending the unavailable social and individual interests of the population and the legal order and being, at the same time, a state or federal deputy or senator.

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desiderato, tentou aprisionar em conceitos objetivos aquelas pessoas indesejáveis para a participação em eleições". Ferreira, Marcelo Ramos Peregrino. "O controle de convencionalidade da Lei de Ficha Limpa–Direitos Políticos e Inelegibilidades" Dissertação de Mestrado. Orientação do Prof. Dr. Roberto Dias da Silva, São Paulo, Pontifícia Universidade Católica de São Paulo (PUC-SP), 2014.

"The Law of Ineligibility, according to the terms of the jurisprudence of the Inter-American Court, by creating an extensive list of obstacles to political rights, in a somewhat unsystematic manner, has tried to capture dishonesty and purge it from the scenario of the democratic regime. To This, with the aim of achieving such an important desideratum, tried to imprison in objective concepts those undesirable people to participate in the elections". Ferreira, Marcelo Ramos Peregrino, *op. cit.*

[20] "Article 56. The Deputy or Senator will not lose their mandate: I) invested in the position of Minister of State, Governor of the Territory, Secretary of State, of the Federal District, of the Territory, of the Capital Municipality or head of a temporary diplomatic mission".

And it is not said that a license from the institution that allows the promoter to occupy the parliamentary mandate would solve the problem. Clearly that would not be the solution. For the same reasons, it is not admitted that the judge (federal or state) can hold another public office other than that of university professor.[21]

They are certain functions of the State in defense of society that do not allow accumulation with other attributions or sphere of interests outside the chosen career. [22]

However, we note the existence of some promoters of justice occupying the position of state and federal deputies, elected, and authorized by their institution of origin, even after the 1988 Constitution. These facts do not harmonize with the principle of administrative morality so defended by the Public Ministry itself in forums throughout Brazil.

The Brazilian Public Ministry has received, for the first time in the history of Brazil, broad constitutional regulation. This defines it as a permanent institution, essential to the jurisdictional function of the State, and in charge of defending the legal order, the democratic regime, and unavailable social and individual interests.

The Constitution establishes unity, indivisibility, and functional independence as institutional principles of the Public Ministry. In addition to the traditional functions of *legis* costs, prosecutor of the law, and promoter of public criminal action, of direct action of unconstitutionality or constitutionality, of interventive representation, and of electoral functions, there are new functions (post 1988) institutions of the Public Ministry promote public civil investigation action and public civil action for the protection of public and social heritage, the environment, and other diffuse and collective interests.

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[21] With schedule compatibility. Although we recognize that occasional abuses also occur here. There are some judges who violate the rule, teaching in more than one Institution of Higher Education (HEI) or even in just one (formally) teaching courses and in other HEIs, receiving cash to prevent the control of who should supervise them. The same happens on a larger scale with the Public Ministry. But it is necessary to recognize that the National Council of Justice (CNJ) has tried to face this problem, unlike the CNMP which, unfortunately, has not found its constitutional identity until now, being constantly attracted or neutralized by the structures of the (Ministry Public) in the States and by the corporatism of impunity.

[22] Unfortunately, we know of the existence of promoters of justice who are owners of business firms, shareholders of limited companies. They affirm that they do not exercise management or administration in said companies. Many times, the one who alleges that condition is also the intellectual leader of the company, be it of a cultural or scientific (educational) nature or even his true intellectual mentor.

It is also the responsibility of the institution to ensure that the public authorities and public services respect the rights guaranteed in the Constitution, judicially defend the rights and interests of the indigenous population and exercise, in addition, external control of police activity.

Therefore, with so many and such relevant powers, it would no longer be possible for the members of the Federal or State Public Ministry to "accumulate" other functions.[23]

Furthermore, in addition to the problem of undue accumulation, today we have an obvious super-affectation of the powers of the Public Ministry that ends up plastering the state administrative machinery. Under the pretext of supervising the Public Administration, many times what we see is a clear and intolerable improper invasion of the Public Ministry in the administrative management of government, not only of the Direct Administration but also Indirect at the various levels of the Brazilian federation.[24]

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[23] We have not even mentioned another equally serious problem, which is the abusive exercise of powers. There are situations, for example, in which the Public Ministry should not act because there is simply no relevant public or social interest present and, even so, that body insists on intervening, wasting public and human resources and spending its energy on merely private matters. See, for example, the case of soccer. It is not uncommon for the Public Ministry to discuss the *results of soccer championships* through public civil action under the pretext of complying with the "statute of the fan". The newspaper El *Estado de Sao Paulo*, from April 10, 2014 (p. A-27) prints the following headline: "CBF obtains victory in the dispute with LUSA. Court of Justice of SP denies a Public Civil Action filed by the promoter XXX "The MP's public civil action alleges non-compliance with the Fan Statute in sanctioning the loss of four points imposed on LUSA due to the irregular call-up of midfielder Héverton, which caused the team's relegation. According to the understanding of the MP, the athlete's suspension should have been published on the CBF page, which did not happen". He wonders: what would be the public interest that justifies the action of the Public Ministry in this case? Fortunately, the The Court of Justice considered that the MP *does not have the legitimacy to propose such an action.*

[24] For this reason, Minister Celso de Mello of the Federal Supreme Court rightly affirms that the elections made by the Public Administration in the exercise of discretionary administrative powers should not be annulled or questioned by the Public Ministry, except for evident illegality, disproportionality, and administrative immorality. However, in practice, unfortunately the Public Ministry, in many cases *ends up interfering in any and all public policy* trying, not uncommonly, to replace the public administrator in his legitimate elections and adopted technical criteria. It confuses auditing with legitimate decision-making. In some cases, it intends to completely suppress the freedom enjoyed by the indirect Public Administration and its public companies and mixed economy companies to act in compliance with their statutory and legal objectives. In this sense, *inter-plures*, see: MS 24845, MC-DF Rel. Min. Celso de Mello judged on March 25, 2004, and Resp 429570, Rel. Min. Eliana Calmon, Resp 469.475, Rel. Franciulli Netto, judged on May 13, 2003.

The problem is much bigger than the number of attributions; It is about the evident quality and importance of the powers that effectively do not admit the exercise of another function, except for a single *one of teaching*.[25]

For this reason, Generaldo Brindeiro, former Attorney General of the Republic, tells that, in 1996, he entered the Federal Supreme Court with two direct actions of unconstitutionality against the party affiliation of the members of the Public Ministry simultaneously with the exercise of his institutional functions.[26]

And more, Promoters of Justice, Magistrates, Public Attorneys and Public Defenders may not occupy, in our opinion, any other public position

[25] Norm also openly mocked without control by the corregidores of the Public Ministry and the Judiciary in Brazil. It is known that there are judges and promoters with more time in Law Academies, Law Schools, on national and international trips than in their jobs. The question always arises: How do they manage to keep the demands that are under their responsibility in order? Surely it is not them, but their advisers who "judge" or who give their opinion, thus blatantly violating the Constitution and its values. In the end, the Constitution also establishes for its Members of the Public Ministry guarantees and prohibitions analogous to those of the Judiciary. Its lifetime, immovable nature and the irreducibility of salaries are guarantees whose purpose is exactly to ensure its independence *for the exercise of its functions*, and not for its intellectual delight or even to increase its salaries with talks, classes and conferences, everywhere. of the world. Certainly, the National Council of the Public Ministry and the National Council of Justice have a lot of work to do in the future. We must make it clear: we support the constant improvement of magistrates, promoters, defenders, attorneys, etc., including through their respective professional schools. That is one thing, another, very different is that the magistrate or the promoter, dedicate more time to teaching (in an Institution "formally" and in another 10 informally), preferring the Academy to their Institution of choice, by public competition. The two lose, because the work will surely be of poor quality in both, in the academy and in the Judiciary or in the Public Ministry, Ombudsman, Attorney General's Office, etc. We recognize that the National Council of Justice (CNJ) has advanced seeking to confront the problem. Unfortunately, we cannot say the same about the CNMP. In general, there is a wrong understanding of the issue. A limit of 20 hours is set in the teaching profession as tolerable to accumulate the position of professor with that of promoter of justice or judge. The issue is much more complex, since a certain promoter or judge may have an official link and also two or three other informal ones in preparatory courses, for example, flouting the rule in its essence. Or also declare that he is within the limit of 20 hours (academic) and occupy – irregularly – due to visceral incompatibility with his constitutional powers, a management position (administrative) in law schools, even receiving administrative hours in addition to academic hours. Or even maintain two links with false hours. In other words, he claims to have 10 hours in each institution, although adding in fact the time dedicated to his students in postgraduate courses, and other activities carried out in the Academy(s), evidently, he commits himself globally and consumes much more time. of which he has declared, flouting the Constitution. The question, as can be seen, is not resolved only by controlling the hours dedicated to academic activity or its limits, but by means of a broad and exhaustive investigation of the different functions and attributions effectively maintained by the promoter or judge outside the function.

[26] *Revista Trimestral de Direito Público*, (RTDP), vol. 13, 1996.

or private paid or command function, except (a single function) in the superior teaching profession.

No exception to this rule should be allowed under penalty of absolute subversion in the spirit that must govern said careers and their institutional purposes.

V. The "mensalão"

The *Mensalão* is undoubtedly one of the largest corruption schemes in Brazilian history. It involves members of the National Congress, political parties, directors of agencies of the direct and indirect federal public administration, financial institutions, and private companies.

The name *Mensalão* derives from periodic payments (some of them made month after month), of illicitly obtained amounts, to parliamentarians and political parties, in exchange for support for the Government's proposals and applications in the National Congress.

It has been verified that the political-partisan indication for occupation of command positions in various agencies and entities of the federal Public Administration, resulted in the capture of public resources through overinvoicing of prices in hiring, receipt of tips and other spurious means. The resources obtained were used to finance electoral campaigns, attract parliamentarians and parties to the support base of the government in the National Congress and illicitly enrich public agents, politicians, businessmen and other participants in the scheme.[27]

According to Lucas Rocha Furtado, the resources that fed the *Mensalão* scheme came, in large part, from the administrative contracts entered by various agencies and entities of the Federal Public Administration with the advertising companies DNA Propaganda Ltda. and SMP&B Comunicaciones Ltda. linked to businessman Marcos Valério Fernandes de Souza.

At first, in the State of Minas Gerais, then governed by the PSDB, the scheme prospered. The companies mentioned obtained the main accounts of the State Government, and due to the influence of some mining politicians, as of 1998 1998, they obtained some accounts in the federal sphere.

Similarly, after winning the presidential elections, the Workers' Party (PT), with a view to, among other goals, negotiating political support with

[27] Furtadp, Lucas Rocha, "As raízes da corrupção no Brasil. Estudos de casos e lições para o futuro", *Belo Horizonte: Fórum*, 2015, pp. 351 et seq.

parliamentarians and other parties and paying electoral campaign expenses, tried to approach Marcos Valerio, so that the advertiser would implement, in the federal sphere, the same scheme operated in Minas Gerais.

Once the agreement was signed, the corruption scheme was organized. In his complaint, the Attorney General of the Republic dismembered the scheme into three aspects of participation: the central nucleus, formed by José Dirceu (then Chief Minister of the Civil House) and Delúbio Soares, José Genoíno and Sílvio Pereira (at the time, treasurer, president and secretary of the Workers' Party, respectively); the first operational and financial nucleus, in charge of the publicist Marcos Valerio and his companies, and the second operational and financial nucleus, formed by the senior management of Rural Bank.

To carry out the corruption scheme, the advertising agencies DNA Propaganda and SMP entered several contracts with federal state agencies and entities. In 2003, Marcos Valerio also got the important advertising account of the Chamber of Deputies.

In the complaint, the Attorney General of the Republic highlighted the close relationship between the Federal Government and Marcos Valerio's companies.

In the contracts signed between the advertising companies of Marcos Valerio and the Federal Government, several irregularities were found: tax evasion, maintenance of parallel accounting, issuance of false invoices to justify costs in the provision of services, among others. All these irregularities were related to the mechanism of illicit collection of resources aimed at financing the corruption scheme.

The facts were made public after the disclosure, by the press, of the existence of a video recording in which the former Postmaster was caught requesting an undue advantage to benefit businessmen interested in entering the role of suppliers of the state.

The talks also revealed an exchange of political support in the National Congress for command posts and positions in state-owned companies and various public agencies. Initially, a Parliamentary Commission of Inquiry was created (2005). Subsequently, the then deputy Roberto Jefferson ended up revealing that the corruption scheme in which he participated was not limited to the state Post Office company, but, rather, to a complex system of illegal financing of the political support base of the Government in Congress. National.

He also clarified that the action of members of the Federal Government and the Workers' Party to guarantee the support of parliamentarians for projects of interest to the government was carried out through the politi-

cal assignment of public positions, which he called "money factory", and for the distribution of a "monthly payment" to parliamentarians, which he called *Mensalão*.[28]

Lucas Rocha Furtado points out as reasons that led to the fraud, the existence of flaws in Brazilian legislation, the excessive number of positions in commission (of trust) in the Executive Power and its political rigging. From the political angle, the existence of money laundering schemes, diversion of public resources and flaws in the Brazilian political structure. It would take "a profound political reform" in the vision of some Brazilian politicians.

In addition to the successive condemnatory decisions of the Justice in Brazil involving those guilty[29] of these schemes, several proposals were presented to modify the legislation, to avoid the repetition of such problems and illicit acts. Among them, we highlight modifications to the Administrative Integrity Law, reduction of discretion in public tenders, institution of the incentive program for disclosures of public interest, creation of the National System to Combat Corruption (SNCC), transformation of the National Council of Control of Financial Activities (COAF) in the National Financial Intelligence Agency (ANIF), reformulation of the current Brazilian System for the Protection of Confidential Information, end of the privileged jurisdiction reserved for various federal and state authorities, end of private financing of political campaigns and more transparency in the public machine.

Lamentablemente pocas de las medidas propuestas se transformaron en ley y/o en medidas concretas. Otras llegaron, sin embargo, buscando cambiar esa realidad y combatir la corrupción.

For example:

1. The privileged jurisdiction in the Federal Supreme Court still exists in Brazil. Deputies and Senators have formal and material immunity and can only be detained in flagrante delicto. In addition, its Chamber may decide on imprisonment (art. 53, §2 of the Federal Constitution).

The previous regime was even more protective since the Parliament had to authorize the establishment of the action. Today, that requirement no longer exists. But even so, the jurisprudence of the Federal Supreme Court resolved to create an equivalent rule, requiring that the police and/or the

[28] *Ibidem*, p. 359.

[29] Except for politicians with privileged jurisdiction whose accountability has been very slow.

Public Ministry request authorization – from the Federal Supreme Court – to investigate those who enjoy privileged jurisdiction. This reinforced the idea that there are citizens of different classes in the country.

In addition to other drawbacks, the privileged jurisdiction, by providing for the trial of politicians and other high authorities of the Republic in the Supreme Federal Court, is also inconvenient because the Supreme Court is already a constitutional court with hundreds of thousands of files and does not have vocation to originally judge complex criminal cases that require procedural instruction,[30] not uncommon in the most varied states of the Brazilian federation. The production of the evidence, the testimonies, in short, the entire investigation of a criminal procedure is not compatible with the functions of a constitutional court based in Brasilia, with 11 ministers. And this without mentioning the risk of prescription in several processes.

The matter is pending in the Federal Supreme Court. We hope that a more realistic interpretation of the privileged jurisdiction will emerge shortly, especially with regard to political mandate holders and a constitutional reform that reduces the jurisdiction to an indispensable minimum for very few authorities.

2. The end of the possibility of private financing in political campaigns was approved after enormous popular pressure and anti-corruption institutions, including the Brazilian Order of Lawyers.

It is evident that the private financing of political campaigns by companies – normally large corporations – causes problems of abuse of economic power, administrative contracts signed after the election, and unbalances political disputes between candidates with greater or lesser economic power.

But there is a huge distance from there to radically prohibiting direct or indirect private financing. We understand the public outcry that associates electoral donations with corruption, but personally, we have never been in favor of the simple extinction of all types of private financing.[31]

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[30] While the United States Supreme Court rules 100 cases per year, the Brasilian one rules 100,000.

[31] We share the understanding of Bruno Speck (minority) in the sense that "private money for electoral campaigns strengthens democracy, but that there must be rules to prevent parties from becoming dependent on large financiers ... It is that in most countries, donations made by associations and unions are allowed and are important pillars of the healthy party system" ... As long as politicians depend on a small number of donors for their campaigns, the problem of corruption will continue latent" (Interview, Veja Magazine. April 4, 2006). See: Fonseca, Thiago do Nascimento, "Doações de campaña implicam en retornos contra-

We believe that the problems would be lessened with the institution of a reasonable contribution ceiling by companies and individuals with strong control by the Electoral Justice. It happens that the latter alleges that it does not have the conditions to carry out audits or better control over corporate donations. There begins a vicious circle when private donations are prohibited due to the lack of adequate control.

Today corporate donations are prohibited, especially because of the latest scandals. The solution found by Congress does not please Brazilians because it has created millionaire public financing in a country in economic recession.

The project —which contemplates funds of R$ 4.4 billion in the 2018 Annual Budget Law— still depends on presidential sanction, although everything indicates that it will be approved.[32]

Worrying, however, in the project is the forecast that allows the party commandos to decide how the money will be distributed among the candidates, strengthening what has been called political *caciquism.*[33] The strongest leaders and politicians will receive more resources than the candidates with less strength and penetration in the political environment.

3. Specific modifications in the Administrative (Im) Honesty Law (Law no. 8.429/1992) and the institution of the Clean File Law (Complementary Law no. 135/2010).

The Administrative Improbity Law meant progress in the fight against corruption because, in a more effective way, it seeks to prevent and punish the illicit enrichment of public and private agents. Being a civil and not a

tuais futuros? Uma análise dos valores recebidos por empresas antes e depois das eleições", Journal of Sociology and Politics, vol. 25, No. 61, March, 2017.

[32] The Plenary of the Chamber of Deputies approved on October 4, 2017 the creation of another public fund to finance candidates. The proposal continues for the sanction of the President of the Republic. Case sanctioned in 2018, about R$2 billion of public resources will be allocated to the parties. The proposal also includes the end of party propaganda (not electoral propaganda) on TV and radio. That was always the intention of the Legislature, especially after the decision of the Federal Supreme Court that prohibited, in 2015, that the companies continue financing the parties and, consequently, the candidates. Among the proposed changes is the release of paid advertising on the Internet, electoral telemarketing and some modifications in the rules of electoral debates on TV, in addition to an amnesty of fines already applied to political parties by the Electoral Justice.

[33] Among the recently approved proposals we have a spending ceiling on electoral campaigns. Until 2014, it was the parties that defined their expenses. For the approved proposal that continues to be sanctioned or vetoed by the President of the Republic, there is a ceiling of R$ 70 million for a candidate for president, and R$ 21 million for governors, depending on the size of the state.

criminal law, which provides for severe sanctions such as the unavailability of assets and the suspension of political rights and loss of public function, it has in its favor the possibility of capturing political and private individuals in its meshes, in addition to not being reached for the criminal immunity of politicians.

Over the years, the Administrative Improbity Law has been widely used by the Public Ministry to prosecute acts of administrative improbity in the three spheres of the Brazilian federation.

At his side we also have the "Clean File Law", the result of a successful *popular initiative* campaign[34] led by the Movement to Combat Electoral Corruption (MCCE) and other civil society organizations, with the purpose of giving responses to the social demand for increased rigor in the criteria for defining candidacies and to the constitutional determination of article 14, §9 of the Federal Constitution, which charged the National Congress with this provision.

In summary, the hypotheses of ineligibility contemplated in the "Clean File Law" are the following: a) judicial convictions (electoral, criminal, or for administrative improbity, pronounced by a collegiate body; b) rejection of accounts related to the exercise of public position or function (necessarily collegiate, when dictated by the Legislature or by the Court of Auditors, as appropriate); c) loss of office (elective or effective appointment), including the forced retirement of magistrates and members of the Public Ministry, and for the military, indignity or incompatibility with the official position; d) Resignation of an elective public position before the imminence of the establishment of a procedure capable of causing the loss of the position; and e) exclusion from exercising the regulated profession, by decision of the corresponding professional body, for violation of ethical-professional duty.

It is impossible to analyze all these hypotheses or show all the positive and negative comments alluding to the Law. For our purposes in this article, it is enough to report its existence.

4. Approval of the Anti-Corruption Law (Law n.12,846/2013)

This is a new law that provides for the administrative and civil liability of legal entities for the practice of acts against the public administration, national or foreign, and determines other measures.

Despite the classification of the crime of corruption in the Brazilian Penal Code, society accused the lack of a norm that also reaches the compa-

[34] With more than 1,600,000 subscriptions.

nies involved in the various cases of corruption, since the positive sentence was only applied to the personal sphere.

Until then, the punishment of legal entities caught in situations of this nature consisted only of being prevented from participating in public tenders and entering contracts with the Administration (suspension or declaration of suitability).

Finally, after long years of processing in the National Congress —in flagrant response to the numerous street protests that occurred in June 2013, which highlighted widespread corruption at all federal levels— and even in response to an international claim, the new law comes to fill an existing gap in Brazilian legislation by reaching the companies of the corrupter, extending the punishments of public officials involved in corruption crimes to the companies where they work.

In short, the law allows administrative and civil penalties to be sanctioned against a company considered corrupt, forcing it, in practice, to compensate public coffers, in addition to authorizing, in extreme cases, its forced extinction by court order.

The law, therefore, adopts the mechanism of *strict liability* of the legal person for acts that violate public assets, national or foreign, against the principles of the Public Administration or against the international commitments assumed by Brazil, practiced in its interest, without the need to prove bad faith or negligence, of the individual responsibility of natural persons (directors) or any other person or participant in the illegal act.

e) The Awarded Delation (or Collaboration) Law and the Criminal Organizations Law

Perhaps the most important set of criminal laws to deal with corruption in Brazil consists exactly of these laws. Since 1998 we have Law n.9.613, of March 3, 1998, which provides for the crimes of "laundering" or concealment of assets, rights and values, reformulated by Law n.12.683, of July 9, 2012.

With the emergence of the "Operation *Lava Jato*" developed by the Federal Police of the State of Paraná, involving financial diversions of great magnitude from the state-owned Petrobras, the institution of the award-winning denunciation was gaining prominence during said criminal persecution. It began to be continuously disclosed, not only in the police and forensic media, but also by the press, in all its communication segments.

The rewarded denunciation is an institution of a penal nature, since it constitutes a factor of reduction of the legal reprimand or judicial pardon, extinctive cause of punishability.

Following the North American and Italian traditions on the matter, the institute of rewarded denunciation was timidly introduced in Law n.8.072/1990, which dealt with "gang or gang" crimes; finally, in Law n.9.080/1995, which disciplines crimes against the tax and economic order and determines other measures.

In several other later laws, we find the institute. As in the drug crime law (Law n.11.343/2006), in the law for the protection of victims and witnesses (Law n.9.807/1999) and in the law that defines "criminal organization" (Law n.12.850 /2013).

Michelle Barbosa de Brito[35] teaches that Law n.12,850, of August 2, 2013, in addition to having addressed an old jurisprudential and doctrinal demand for the definition of a criminal organization, has provided for criminal investigation, the means of obtaining the evidence, correlative criminal offenses and the criminal procedure to be adopted in cases involving organized crime, repealing Law n.9.034/1995.

Among the means of obtaining evidence allowed in any phase of the criminal prosecution, provided for in article 3 of Law No. 12,850, the rewarded denunciation, under the name of "rewarded collaboration", has gained procedural discipline in its 4th articles, 5th, 6th and 7th. In addition to the benefits already canceled, such as judicial pardon, the reduction of the sentence and the substitution of the custodial sentence for restriction of rights, the possibility of the Public Ministry refraining from offering the complaint in the case was considered. that the collaborator is not the leader of the criminal organization and is the first to provide effective collaboration (article 4, §4).

With divergent positions in the Brazilian doctrine, the institute of denunciation continues to be a powerful instrument of investigation.

Along with it, or at its side, we also have the leniency agreement, partly inspired by its North American counterpart leniency program, applied first in the field of competition law (Law n.12,529/2011), and later, in the field criminal and criminal procedure (Law n.12.846/2013).

Undoubtedly, Law n.12.850/2013, by expanding the assumptions of awarded collaboration, has generated a significant increase in criminal investigation actions. Following the logic that the State benefits from the contribution of the agents involved in illicit actions perpetrated by criminal organizations —which enables a greater scope of its repressive action— the rule grants benefits to the collaborator to the extent of the assistance provided.

[35] Brito, Michelle Barbosa de, "Delação premiada e decisão penal: da eficiência à integridade", Belo Horizonte, D´Placido, 2016.

As in antitrust (competition) legislation, rewarded collaboration[36] inserts the destabilizing element of criminal organizations by granting a significant advantage to those who inform on others involved in the illegality.

As Valmir Moysés Simão and Marcelo Pontes Vianna:[37] "even the most cautious doctrinaires admit the use of awarded collaboration when weighing its usefulness against the harmfulness of the criminal organization's actions and the difficulty in combating it".

On the subject, Nucci teaches:

> ... t seems to us that rewarded denunciation is a necessary evil, since the greatest good to protect is the Democratic State of Law. It is not necessary to point out that organized crime has wide penetration in the heart of the state and has the conditions to destabilize any democracy, without being able to combat it efficiently, disregarding the collaboration of those who know the scheme and are ready to denounce co-authors and participants. In the universe of good human beings, without a doubt, betrayal is unfortunate, but we do not believe that the same can be said when transferring our examination to the field of celito, by itself, unregulated, opposed to legality, contrary to monopoly conflict resolution state, governed by esdrújulas and extremely severe laws, completely distant from the governing values of fundamental human rights.

For us, immoral is not "negotiating" with the corrupt to disrupt gangs and criminal organizations, but to stop uncovering crimes that devastate Brazilian and world public heritage.

VI. The "Lava Jato"

On March 17, 2001, several money changers were being investigated by the federal police and by federal judge Sergio Moro. The target of the diligence was not Petrobras, but the owner of a service station, located in Brasilia, where the name of the "Lava-Jato" operation was born.

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[36] Awarded collaboration (or awarded accusation) is a means of obtaining evidence in cases involving criminal organizations. The collaboration is recognized in international treaties, such as the United Nations (UN) conventions against transnational crime and against corruption.

[37] Simão, Valmir Moysés and Vianna, Marcelo Pontes, "O acordo de leniência na Lei Anticorrupção", São Paulo, Trevisan, 2017, p. 94.

It was already known that the main operator of that money laundering scheme was the money changer Alberto Yousef who had already spent more than 2 years in prison and was serving a home sentence. From the investigation of Yousef's activities, Paulo Roberto Costa, former director of Petrobras, was appointed in 2004 at the request of the Progressive Party. There was discovered the "distribution" of the directors of Petrobras in the PT government. The top three were awarded to the PT, PP and PMDB, but other parties also benefited.

Both confessed their participation in multiple crimes and betrayed many people, including several politicians and businessmen, who would also be stubborn criminals. At the same time, the involvement of the political-business sector was discovered from the rewarded denunciations and the emergence of new evidence.

Strictly speaking, not only at Petrobras, but also at *Mensalão*, the corruption scheme, in a general way, involves politicians, businessmen, public agents and financial operators, who each acted in their specific core, as follows:

1. The political nucleus formed by parties and their members, mainly parliamentarians, who indicated and maintained high-ranking officials in the Public Administration, receiving undue advantages paid by the companies that make up the economic nucleus;
2. The economic nucleus, formed by the cartels of companies that were contracted by the Public Administration and that paid undue advantages to high-ranking officials and members of the political nucleus;
3. The administrative nucleus, made up of high-ranking officials of the Public Administration, who were indicated by the members of the political nucleus and perceived undue advantages from the company cartels that made up the economic nucleus;
4. The financial nucleus, formed by the operators both from receiving the undue advantages of the cartels of companies that made up the economic nucleus and from passing on that tip to the components of the political and administrative nucleus, through strategies of concealment of the origin of these values.[38]

[38] The performance of the Economic Nucleus was intrinsically dependent on the performance of the Political Nucleus, since it was responsible for indicating and maintaining an Administrative Nucleus in the contracting public organisms geared towards carrying out illicit interests. The Economic Nucleus paid illicit advantages to the members of the Political

It is true that with the denunciations of Paulo Roberto Costa and Yousef, the Petrobras scandal became public. As the remembered Minister of the Federal Supreme Court Teori Zavascki has said, "for each feather that is plucked in the process, a chicken comes out".

More than 150 (in the year 2017) rewarded denunciations[39] were made both by directors of the Odebrecht company, as well as by politicians and different authorities. The result was devastating. The largest corruption scheme ever seen in Brazil was discovered.

The great effort of the "Lava-Jato" —which has given rise to hundreds of other investigations and criminal proceedings, in addition to revealing a web of promiscuous relations between the public and the private, with serious interference in the electoral process— has shown the country to the possibility of a coordinated, fast and efficient action between the Federal Police, the Corregidor General of the Union, the Public Ministry, various professionals such as tax auditors and the inspection bodies of the Brazilian federation. Today, the "Lava-Jato" operation reveals impressive numbers.[40]

The tips paid are estimated at around R $6.4 billion. The recovery of the diverted money has already reached R$10 billion, the result of prize-winning collaboration agreements and prize-winning denunciations. Until December 2016, there were already 24 convictions, against more than 120 people, with 1,300 years of prison sentences. Even the most skeptical and distrustful recognize the merits of the "Lava-Jato", which is still criticized for not having reached all the political parties of various ideologies.[41]

Nucleus, either to benefit from public contracts, or to obtain political protection (Proc. n. 54347/2017-GTLJ-PGR-STF).

[39] Since its inception, the "Lava-Jato" in the first instance convicted more than 120 people, while the Federal Supreme Court (STF) did not have, until 2017, any sentence of merit in this area. In the first instance, 259 inmates have already been charged. In November 2016, 362 investigative actions against persons enjoying privileged jurisdiction were underway at the STF, or under its direction. Of these, 23 actions were being processed for more than six years. Seven of them more than ten years ago. This shows the disaster was privileged.

[40] And it goes on, it is not known when it will end, since it has unfolded in several other operations and investigations.

[41] Gomes, Luiz Flávio, "O jogo sujo da corrupção", São Paulo, Astral Cultural, 2017, p. 143.

The "Lava-Jato" operation[42] has also had the merit of exposing the corruption embedded in the Brazilian political system.[43] Many attribute part of the problems to so-called coalition presidentialism. In this model, the President of the Republic, to govern, needs to set up a broad base of parliamentary support in the National Congress.

In the early years, the system has functioned reasonably and has guaranteed the governability of the country, but over time, a large balcony of spurious business has been revealed.

Although all the evils of corruption cannot be attributed to the electoral system[44] – which is true – it is necessary to modify the party system by re-

[42] The recent testimony of a former minister of the Civil House, Antonio Palocci, of the Lula and Dilma governments was devastating in the field of "Lava-Jato". He attributed to former President Lula the command of the attack on the coffers of Petrobras to make possible the succession of Dilma Rousseff. Add to this the complaint by the Attorney General of the Republic, placing the current President Temer at the center of a criminal organization, which operates in the field of the sale of legislative acts, public contracts and access to community resources, such as the FAT, give the dimension of the political degradation that we have reached. But Oscar Vilhena is right, who, when analyzing the present political situation, affirms: "As expected, the reactions of those involved, investigated and denounced have been virulent, questioning not only the integrity of the operation, but also its possible benefits for the society. Moralist, selective, messianic, persecutory and irresponsible are some of the adjectives attributed to the operations. Indeed, some actions of law enforcement agents, such as information leakage, illegal wiretapping, unnecessary extension of procedural prisons, culminating in the obscure participation of a member of the Public Ministry in the superawarded denunciation agreement of Joesley Batista, they are intolerable. That is why they must be annulled and those responsible duly punished. However, you have to be very careful not to "throw the baby out with the bath water". The Mensalão trial, as well as the Lava-Jato Operation, with all its deficiencies, are barely imposing a new paradigm in the conduct of public business in the country. Its disruptive nature has been putting in check not only the perverse model of law enforcement, which for centuries has ensured the broadest impunity for the powerful of all kinds, but also a lazy, cruel and inefficient model of capitalism that makes the taxpayer, especially the poorest, the wives of big businessmen, such as Eike Batista, Marcelo and Joesleys, as well as the clique that serves them from the palaces of the Republic. Thus, the possible failures of said operations, which must be corrected, cannot jeopardize the civilizing benefits of said movement of universalization of the rule of law". Vilhena, Oscar Vieira. *Folha de S. Paulo*, September 16, 2017.

[43] In large part, because of the *awarded denunciation* that several people have made. From these denunciations, it has been possible to discover an entire underworld of organized crime unknown to the majority of the Brazilian population.

[44] In a general way, we can say that political corruption is characterized by the use of public goods or values to obtain benefits or private advantages of any kind. Public goods or values can be of various kinds, such as, for example, a public position for himself or for relatives or friends, or illicit means used by the public servant (in the broad sense) for private or personal benefits for himself or herself. for third parties that in the end have benefited him. From a conceptual point of view, corruption is a phenomenon that transcends politics

ducing the number of parties; It is also necessary to allow the renovation of the Brazilian political cadre, perhaps with new politicians and independent candidacies, today prohibited in Brazil.

También parece importante disminuir la influencia del *marketing* en las campañas electorales que fabrican candidatos y conceptos sin cualquier relación con el mundo real y sus problemas.

Political campaigns must be reformulated and so must their method of financing, with more participation from the Electoral Justice, a combination that encourages the private sector to participate in politics, without corrupting it, and the public sector to contribute a portion of funds public.

The parallel accounting of political parties and companies (box 2) arises to finance organized crime and political parties and will not end the mere and naive prohibition of private financing, *tout court.*

Everyone must contribute to form citizenship without any distinction. Obviously, clear and objective limits must be established so that one or several large corporations do not finance politics or only a few politicians with million-dollar administrative contracts negotiated before and after the elections.

Patronage and physiologism still mark the Brazilian scene. It is necessary to break this vicious cycle, broaden and perfect the mission of the Republic's oversight agents, condemn corruption and impunity, and educate the people for citizenship.

Finally, as in any purification process, we do not know where we will arrive. If there will be a reaction from the corrupt, aborting anti-corruption efforts – as has happened in some countries, or if we will go ahead without fear.

Flávia Cristina Piovesan is right[45] when teaching:

> Latin America has the highest degree of inequality in the world. Poverty in the region has decreased from a level of 43% to 33.2%, in the period from 1990 to 2008. Five of the most unequal countries in the world are in Latin America, including Brazil. The accentuated degree of inequality is not enough, the region also stands out for being the most violent in the world.

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and does not end in certain historical moments as it is also not exclusive to a certain political regime. It can be widely understood as a set of actions that break with the rules of conduct, transgress ethical principles, and may or may not violate the law. All acts of corruption are identified with acts of dishonesty, although not necessarily all dishonesty can be considered an act of corruption.

[45] Piovesan, Flávia Cristina, Temas de derechos humanos, 9th ed., São Paulo, Saraiva, 2016, p. 130.

It concentrates 27% of homicides when it represents only 9% of the world population. Ten of the twenty countries with the highest homicide rates in the world are Latin American. Security emerges as one of the main problems in the region. In surveys conducted by the Latino-barometer, in 2013, on support for democracy in Latin America, although 5% of those interviewed consider democracy preferable to any regime, the affirmative answer finds in Brazil the endorsement of only 49% and, in Mexico, 37%. According to the survey, 31 believe that there can be democracy without political parties and 27% believe that democracy can function without a National Congress. The Latin American region marked by post-colonial societies has thus been characterized by a high degree of exclusion and violence, to which are added democracies in the consolidation phase. The region suffers from an authoritarian centralism of power, which generates the phenomenon of "*hyper-presidentialism*" or forms of "*delegative democracy*". Democratization has strengthened the protection of rights, without, however, specifying profound institutional reforms necessary for the consolidation of the Democratic State of Law. The region also lives with the reminiscences of the legacy of dictatorial authoritarian regimes, with a culture of violence and impunity, with the low density of States of Law and with the precarious tradition of respect for human rights at the domestic level.

You see that we have many challenges ahead.

VII. Conclusion

1. Corruption is as old as man. Today, the aim is to establish common *standards* capable of combating this phenomenon globally and wherever it is present, both in the public and private spheres.
2. Corruption hinders development, harms economic growth, taxing the poorest disproportionately and undermines the effectiveness of investments and financial aid, therefore, combat strategies must be integral parts of a formulated development model to help countries eradicate poverty.
3. Corruption exists in both democratic and non-democratic countries, in countries with freedom of the press and in countries with almost no freedom of opinion.
4. Corruption can and must be tackled globally. The democratic Constitutions of the whole world, including in Latin America, allow, through various Conventions, the gradual change of this scenario of corruption.

5. There must be good governance, good administration at the local, regional, national and international levels, as well as broad popular participation in the control of the administration and of money and public affairs.
6. Information and technology are essential for understanding the problems and solutions involved in the issue of corruption.
7. There is no lack of laws in Brazil to combat corruption. However, we continue with scandals and great acts of corruption in the country. At the same time, several new anti-corruption practices and an effort to combat them have emerged. It is necessary to strengthen preventive mechanisms to combat corruption.
8. Few are the countries of Latin America with positive indices regarding the control of corruption. Political power and the electoral process still lack profound changes to achieve more efficiency and good governance in the countries of the region.
9. There are still not enough mechanisms to prevent notoriously corrupt people from occupying public positions and positions.
10. Corruption does not distinguish power. It reaches all political "powers" without exception (legislative, executive, and judicial).
11. Customs and laws, including those of a constitutional nature, are not always in accordance with the high standards of administrative morality always required in the fight against corruption and places.
12. The "judicial family" that should set a good example in combating corruption often yields to a "negative corporatist" conception, which makes it grow.
13. The "*mensalão*" and the "*lava-jato*" are huge and recent corruption scandals in Brazil that have undermined the credibility of politicians and various business sectors.
14. The controversial instrument of "awarded denunciation" has been widely used in the fight against criminal organizations in Brazil.

VIII. Recent Events involving the Lava-Jato Operation

In an individual, surprising and unusual decision, the Minister of the Federal Supreme Court Edson Fachin, on March 8, 2021, annulled all the processes against former President LULA, restoring his political rights; they say, an alleged attempt to protect former judge Sérgio Moro, who had issued the rulings in the first instance.

The argument used – incompetence of the 13th Federal Court of Curitiba to prosecute and judge the former president, because there was no direct connection with the corruption and contracts related to the Petrobras scheme. Minister Fachin understands that the accusations against the former President are not specifically restricted to Petrobras, and, therefore, will exceed the limits of action of the 13th Federal Court. The causes, as he has established in his decision, must continue in the Justice of the Federal District, in Brasilia.

According to the current version in the Brazilian press, the Second Chamber of the Federal Supreme Court, which includes Fachin, already gave concrete indications that it would accept a request for a declaration of partiality from Judge Moro, petitioned by LULA's defense. This circumstance, if confirmed, would not only annul the main sentence imposed on the former president, but would open the way for other defendants to also escape from the Judiciary. It would be, as he (Fachin) himself states, the total implosion of Operation Lava-Jato, the password for a "general amnesty" without criteria, which would confirm that the powerful continue to be above the law.

Dissatisfied, the Attorney General's Office appealed to the Supreme Court (STF), trying to reverse the ruling in favor of the former president. According to the understanding of the Attorney General, the jurisdiction of the 13th Federal Court of Curitiba, in the state of Paraná, should be maintained to judge the four criminal actions in progress against the former President, the cases of the triplex of Guarujá, of the fifth of Atibaia , of the headquarters of the LULA Institute and of the donations to its Institute, "with a view to preserving legal certainty and procedural stability", and, according to the PGR, the convictions must be maintained and the processes continued.

If the Court does not accept the request that the 13th Federal Court of Paraná remain responsible for criminal actions, the PGR postulates that the decision take effect from now on, that is, it requires that all procedural acts of instruction and decision made in Curitiba.

For its part, the defense of former president LULA has declared, naturally, that the decision of the Second Chamber of the STF "strengthens the justice system" by decreeing the bias of former federal judge Sérgio Moro, who sentenced the PT in the case of the Guarujá triplex.

Some points of this surprising judgment deserve reflection. The first, concerning the vote of the Rapporteur Judge, which in practice disavows not only his previous interpretation on the matter, but all the instances of

the Brazilian Judicial Power that had already judged the former president. They are seven years of judicial work "revoked" by a simple individual resolution, as if judges of first or second instance were worth nothing. The Federal Regional Court of the 4th Region, which examined the rulings of the magistrate in the first degree, more than once, in various appeals filed by the defense, has also been summarily discredited.

No one, either, had accused this court, until then, of having been biased or not independent.

The truth is that Operation Lava-Jato had its importance, reaching powerful politicians and businessmen. However, as has happened in Italy with Operation Clean Hands, it reached its peak and began its decline, propitiated by the *establishment* itself.

The Lava-Jato Operation went through 80 stages. There was a total of 120 rewarded accusations, approved by the Federal Supreme Court itself, which have given rise to the payment of fines totaling R $1.37 billion reais. Lava Jato modified the game of power, fueling the *impeachment* of Dilma Rousseff, in 2016, until it was undermined by resolutions of the Federal Supreme Court itself and the Attorney General's Office. In addition, the image of the operation was corroded by the disclosure of messages stolen by hackers, exchanged between Moro and the prosecutors who acted in it.

The sociologist and member of the Brazilian Academy of Sciences, Simon Schwartzman, in an article published in the newspaper O Estado de São Paulo, edition of March 12, 2021 (page A2), comments:

> The decisions of the ministers of the Federal Supreme Court (STF) that annulled the processes of the Lava-Jato Operation due to formal errors of jurisdiction or alleged improper behavior of judges and promoters, may be issued with conviction, but they do not cease to be contribute to the growing demoralization of our courts. This demoralization had already been accentuated by the successive rulings of "guarantee" judges, who, before public opinion, are no more than "Chicanas" in favor of those prosecuted for corruption.

The notion that, without adequate procedures, people cannot be convicted, finds as one of its inspirations the historic decision of "*Miranda v. Arizona*", of the US Supreme Court, in 1966, which annulled the sentence of a confessed criminal because his right to defense had not been duly respected. This decision has been of enormous importance in establishing limits to the often prejudiced, arbitrary and violent behavior of the police in the US,

which, like in Brazil, tends to affect, above all, minorities, and the poorest people. Compared to its profits, the fact that some criminals get away with it is a small price to pay.

The other side of the coin is that, for it to continue to be valid, the vast majority of criminals must be convicted. It is the effectiveness of the judicial system, and not the formality of its decisions, that makes society respect and consider its authority legitimate.

To achieve this respect, the Judiciary needs to act with balance and common sense, guaranteeing formalities and punishing criminals, without letting one side prevail over the other. In Brazil, in the absence of a clear policy to defend civil rights, many people without resources are arrested and sentenced for alleged crimes, if not killed by the police, while criminals with more resources manage to escape through formal breaches of the law.

The Judiciary is feared, but little respected, and this serves as a breeding ground for extreme right-wing movements against human rights and for the impunity of police violence. The first "*Mensalão*" and the "*Lava-Jato*" Operation, later, have brought great notoriety and legitimacy to the leadership of the Brazilian Judiciary, which has shown itself capable, for the first time in history, of judging and condemning politicians and powerful businessmen, which has also given the STF legitimacy to manage the institutional crises that have become increasingly frequent since the *impeachment* of Dilma Rousseff.

Said legitimacy, however, has been eroding daily due to the increasingly clear perception that, since the STF's decision on the end of the prisons, despite having been sentenced in the second instance, they are conspiracies to achieve impunity. from the political class from the extreme left to the extreme right, passing through the notorious "Center", and not the defense of the legality of the procedures which have prevailed in the Superior Courts of Justice.

At the same time, the sensation of impunity and of a strong setback in the effective fight against corruption in Brazil is latent in all the powers of the Republic. In the Executive, where e. g. at every moment the sons of the President are "shielded" through political pacts or by action of the Presidency of the Republic itself; in the Legislative, which, full of deputies and senators who are corrupt or accused of acts of corruption, seek to legislate, not in favor of Brazil or society, but in order to reduce the sanctions that

should correspond to them[46] and to the Judiciary itself,[47] which also has been condescending in the effective fight against corruption, with few honorable exceptions.

As Law Prof. Joaquim Falcão,[48] Counselor of International Transparency and Director of the Law School of FGV-Rio says:

> Minister Edson Fachin turned the table. Not that of the Second Chamber of the Supreme. There, he lost. But the table of hidden manipulations, of procedural strategies in which, under the cloak of legality, the fight against corruption is abandoned. The Supreme Court does not judge whether there has been corruption. The Supreme dodges and hides in front of the visible facts in Brazil. He doesn't dive. He stays on the edge".
>
> Ministers Lewandowski, Carmen Lúcia and Mendes have not given an answer to what Brazil wants to know. Hacking can produce proof? Lawful or Illicit? In the session, they repeated that they were not based on the recordings. They did not exist, even though they were present. Lewandowski said the recordings "are just to bolster the argument". Carmen Lúcia said: "I repeat, I am not basing myself on interceptions". Mendes, with rhetorical contempt: "No hacker babble". The Supreme Court hesitates because, if it declares lawful evidence, it will encourage hackers, everywhere. Meanwhile...
>
> Minister Fachin has confronted the issue. Hacked recordings should be investigated. The Regional Court of the 4th Region must open a process. They are not denouncing individuals or groups, but rather a justice system that may be far from the ethics and standards that a democratic rule of law requires.
>
> Minister Kassio Marqués has also addressed the issue. He stated that the hacked tests are illicit. He has done it gently, serenely, and with the respect that a minister owes to another minister. And he defended his State, Piauí, Victim of gross aggression. Moment in which he reminded me of João Ca-

[46] They process in the Chamber of Deputies and in the Federal Senate bills whose clear objective is to benefit corrupt politicians or those accused of corruption and similar crimes. Eloquent examples of said political movement are: reforms to the money laundering law, to the criminal data protection law, to prison after being confirmed in the second instance, to the law of administrative improbity, of accountability not presented by politicians and non-regulation of nepotism, allowing the appointment of relatives.

[47] The Superior Court of Justice also consolidates the reputation of being a true "cemetery of operations" of the Federal Police, sealing the outcome of operations that have made politicians and their relatives, executives, bankers and private companies uncomfortable. Since 2011, the investigations of the operations "Castelo de Areia", "Satiagraha", "Boi Barrica" and Operation France, have been shot down by determination of said Court. Now, the case of the "*Rachadinhas*" in the former cabinet of President Bolsonaro's son, Flávio Bolsonaro, risks reaching the same result.

[48] Newspaper, *O Estado de São Paulo*, March 24 2021, p. 8.

> bral de Mello Neto, Pernambuco poet: "Good eloquence is to speak loudly, but without fever".
>
> It should be noted that, at no time, no pronouncement of the Judiciary addressed the reversal of the judgments (merit) of the illicit and crimes committed or attributed to the former President of the Republic, Lula da Silva.

The Organization for Economic Cooperation and Development —entity in which Brazil is applying to join— is concerned about the "surprising end of Operation Lava-Jato", the use of the law against the abuse of authority and the difficulties of sharing of information from financial organizations for investigations

Faced with what has been seen as a setback in the fight against corruption, the Organization has made an unprecedented decision: to create a permanent monitoring group on the matter in Brazil.

The measure, never adopted with respect to any country, represents an escalation in the positions of the OCD, which since 2019 has issued public alerts to the Brazilian government and even sent a high-level mission to talk with authorities and try to reverse actions to destructure the investigative capacity against corrupt practices.[49]

As the jurist Márcio Cammarosano has rightly said:

> Em poucas palavras: inacreditável que, depois de tantas investigações exitosas da Polícia Judiciária, que culminou por desvendar o maior esquema de corrupção institucionalizada no Brasil, especialmente, mas não só, na Petrobras, com tantas colaborações premiadas, homologadas até pelo Supremo Tribunal Federal, que ensejaram produção de provas a mão cheia, e condenações de tantos corruptos, muitos dos quais réus confessos, com decisões transitadas em julgado, o próprio STF venha agora, na undécima hora, proclamar o que deveria ter sido proclamado há vários anos, no que concerne à violação do devido processo legal desde o nascedouro com algumas ações penais já julgadas até por Órgãos Colegiados de segunda e terceira instâncias. Sem adentrar no mérito dessas ações, e considerando que os vícios processuais já vinham de há muito sendo apontados, fica aquela sensação que deixou-se passar tanto tempo para que recomeçar tudo agora só venha ensejar a ocorrência de prescrição, ou, quando menos, extinção da eficácia de sentenças condenatórias. Pode haver maior frustração e descrédito na Justiça? Sem embargo, continuo teimosamente a repetir: Em uma República não há intocáveis, observado o devido processo legal.[50]

[49] *Ibidem*, March 16 2021 edition.

[50] Facebook post by Prof. Márcio, March, 2021.

In a nutshell: it is unbelievable that, after so many successful investigations by the Judicial Police, which ended up uncovering the greatest institutionalized corruption scheme in Brazil, especially, on the ground at Petrobras, with so many award-winning collaborations, even approved by the Federal Supreme Court, which has given rise to the production of abundant claims and convictions of so many corrupt people, many of them confessed, firm consents, the STF itself comes now, at the last moment, to proclaim what should have been proclaimed before several years, in what concerns the violation of the due legal process, since its origin, with some criminal actions that have been judged, including, by Collegiate Bodies of second and third instances. Without entering into the merits of these actions and considering that the procedural vices had been pointed out for a long time, that feeling that it has been going on for so long that, recommencing everything now can only result in the course of the prescription falls, or, at least, in the extinction of the effectiveness of condemnatory sentences. Could there be more frustration and discredit in Justice? However, I continue to insist insistently that in a Republic there is no untouchables, observing the due legal process".[51]

[51] Facebook post by Prof. Márcio, March, 2021.

THE CONSTITUTION AND THE FIGHT AGAINST CORRUPTION IN CHILE

Francisco ZÚÑIGA URBINA*

SUMMARY: I. *Preliminary*. II. *Historical-Legal Background*. III. *Political-legal dimension*. IV. *Prospectives*. V. *Conclusions*.

I. PRELIMINARY

The Spanish legal scholar Francisco Murillo Ferrol recalled in his Political Theory classes more than three decades ago a more than thousand-year-old Chinese writing known under the title of "Mandarin Commandments", which read: "Only the corrupt endures". Certainly, that evocation of the teacher Murillo Ferrol, typical of his anarchist spirit, incites skeptical curiosity, since the link to political power and the state machine room of the binomial corruption - probity is a recurring theme.

We must also keep in mind that the logic of political power, of quantitative increase, leads us to accept as a corrector the predicament, sometimes misunderstood and vulgarized, of Lord Acton, who in a well-known epigram of his booklet "Liberty and Power" he maintains that "power corrupts and absolute power tends to corrupt itself absolutely".[1] In Acton's logic, what is corrupted is precisely that tendency to excess in power, which justifies in contemporary history the conformation of the State as a Rule of Law.

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[1] Dalberg-Acton, John, *Ensayos sobre la Libertad y el Poder*, Madrid, IEP, 1961.

Consequently, for the purposes of our work, the general framework for analyzing corruption is the State and the public function (although the subject exceeds the State), since in the ethical-political component of the modern State, thanks to liberal constitutionalism and social, imposes techniques of restriction and limitation of political power, such as the principle of legality and subjective public rights. The German legal scholar K. Loewenstein is probably right when he points out, regarding the cratology or science of power, that power is one of the three incentives of individual and collective action of man, along with faith and love.[2] Then, it is not an exaggeration to affirm an "erotics of power", which in the logic of power (increase), has a bitter fruit in corruption.

From the foregoing, it follows that the corruption-probity binomial is a thematic field of public law, of the science of politics and administration, scientific disciplines that apprehend a part of the studied reality.

For public law, the binomial corruption - probity is related to the public function, especially administrative, and therefore with the statutory regimes of said function, with official criminal legislation and disciplinary legislation. For the science of administration, the binomial corruption - probity refers to behaviors framed in the theory of organization and bureaucracy.[3] Finally, for political science, the corruption-probity binomial is linked to bureaucracy and the intermediation of interests in the subsystem of political parties and in the subsystem of pressure groups.[4]

In this vein, the French political scientist J. M. Denquin points out that corruption is a means of action of pressure groups in pluralist democracies, within the framework of direct strategies (information, agreement and participation, open threat and hidden action) and indirect strategies (action of groups in public opinion through propaganda, strike and public disorder).[5] To conclude, the German political scientist K. Von Beyme links the strategies of pressure groups in terms of their means, to the work of the "lobby" and "lobbyists", who, in the mediation of interests and obtaining public decisions, use as medium corruption.[6] This last approach of political science

[2] Loewenstein, Karl, *Teoría de la Constitución*, Transl. A. Gallego, Barcelona, Ariel S. A, 1983, pp. 23 et seg.

[3] Baena del Alcazar, Mariano, *Curso de ciencia de la Administración*, 4th Ed., Spain, Tecnos, 2000.

[4] Manuel Pastor *et al.*, *Ciencia Política*, Madrid, Mc. Graw-Hill, 1989, pp. 222 et seq.

[5] Denquin, Jean-Marie, *Sciencie Politique*, Paris, PUF, 1985.

[6] Beyme, Klaus Von, *La clase política en el Estado de los partidos*, Madrid, Alianza Editorial S.A, 1995, pp. 194 et seq., and *Los grupos de presión en la democracia*, Argentina, Belgrano, 1986, pp. 266 et seq.

has the advantage of enriching the formal legal analysis of public law, to introduce a dynamic component in political systems, in which corruption is the result of the activity of parties and private pressure groups against the State and its bureaucracy. Only from this perspective can we adequately understand corruption in its active and passive face.

On the other hand, we must specify that corruption in its ethical-political dimension must necessarily be linked to the public function and the State, which leads to differentiating corruption from opportunism. The Italian political scientist G. Pasquino, differentiating these concepts, notes that in both there is a search for benefits in the public activity without consideration of ideal and moral principles, but corruption is characterized by favoring the particular interests of a group or faction more than personal interests, the latter purpose of opportunism in politics.[7]

From a democratic point of view and considering the regulations, Warren points to the regulation of normative institutions to define corruption, starting from the basis that people must have the power to participate at the institutional level and influence collective decisions on equal terms. of conditions and have equal opportunities to influence public judgment, where corruption affects people by excluding people from decisions, in order to obtain profits or advantages to the detriment of the community, specifically a deceptive exclusion or fraudulent.[8]

In the etymological and lexical investigation of the concept of corruption; the Dictionary of the Royal Academy of Language indicates that its root is Latin: *corruptio*, *corruptionis*, that in the meaning that interests us indicates the action and effect of corrupting or corrupting oneself, it matters "altering and disrupting the shape of something", "spoiling", "bribing or bribing the judge or any person, with gifts or in another way ", among other meanings. H. Capitant also illustrates us in his "Vocabulario Jurídico" with a legal-formal definition of corruption, namely:

> Crime consisting of an official of the administrative or judicial order, or an agent or employee of an administrative department, accepting offers or promises or receiving donations or presents, to carry out an act of your function or employment, even if it is correct, but for which you do not have to receive

[7] Norberto, Bobbio *et al.*, *Diccionario de política*, Mexico, Siglo XXI, 1995.

[8] Warren, Mark, "What does corruption mean in a democracy?", American Journal of Political Science, Vol. 48, No. 2, 2004, pp. 328-343, on Aguiló, Pedro and Nash, Claudio, *Corrupción y Derechos Humanos: una mirada desde la jurisprudencia de la Corte Interamericana de Derechos Humanos*, Santiago de Chile, Human Rights Center of the Faculty of Law of the University of Chile, 2014, pp. 18 and 19.

> remuneration; or also for refraining from carrying out an act that fell within the scope of his duties (Cód. Penal, art. 117, paras. 1 and 2) (passive corruption). Crime consisting of any person obtaining or trying to obtain, by means of promises, offers, donations or gifts or also by means of deeds or threats, from a public official, agent or employee of a public department, whether it is a favorable opinion, or summaries, statements, certificates or assessments contrary to the truth, or places, jobs, awards, companies or any other benefits, or any other act that corresponds to the position of the official, agent or employee, or in short, the abstention of an own act of the exercise of their duties (Criminal Code, art. 117, par. 1) (active corruption)".[9]

Also Joaquín Escriche in the "Diccionario Razonado de Legislación y Jurisprudencia" defines the concept of corruption as the crime of which those who, being clothed in some public authority, succumb to seduction, are guilty; as well as the crime committed by those who try to corrupt them; of luck that corruption can considered as active and passive: active on the part of the corrupters, and passive on the part of the corrupted.[10]

II. Historical-Legal Background

It should be noted that the first source or the first antecedents on the probity or honesty that public officials must have, as such, is found in the masterpiece of Common Law in Spain: "el Código de las Siete Partidas", by Alfonso X, the Wise, whose writing was carried out approximately in the year 1256, officially entering into force in the year 1348.

The obligations of the royal officials can be found in the Second Partida; where the political and administrative law of the Kingdom of Castile is included. It gives an "exact and philosophical idea" of the nature of the monarchy and the authority of monarchs; their rights and prerogatives are defined: their obligations are established, as well as those of the different classes of the State, public persons, political magistrates, chiefs, and military officers, most of which are found in Title IX, comprising 30 laws (M.T. Quirke and another).[11]

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[9] Capitant, Henri, *Vocabulario Jurídico*, Transl. Ariadna Guaglionone, Buenos Aires, Depalma, 1981.

[10] Escriche, Joaquin, *Diccionario razonado de legislación y jurisprudencia*, Paris-Mexico, Librería de la Viuda de Ch. Bouret, 1911.

[11] Quirke, María Teresa *et al.*, *Implicancias jurídicas sobre la corrupción*, XXV Jornadas de Derecho Público, Valparaíso, Edeval, 1995, Vol. III, pp. 121 et seq.

In republican public law, the Treasury and Public Administration Plan (1820) stands out in Chile, a concern for official probity, proposing the creation of a Court of Accounts that judges the accounts that the accountant must give and that "energetically represents the superiority is any excess, waste or disorganization…", judgment that is not limited to the simple examination of the number" but limits to the "veracity and justice of each item, to the effect that public funds are never wasted" (art. 95). Likewise, the Constitution of 1818, in its chapter I, art. 13, enshrines a finalist principle for the state civil service (L. Valencia A. "Anales de la República").

On the other hand, the Moralist Constitution of 1823 has peculiar characteristics, whose drafting corresponded to the publicist Juan Egaña, and which reflects confusion in its political-constitutional ideas and a concern for public morality, which extends to the public function. In this way, the Constitution in its title XI establishes the qualification and censorship of officials, as control mechanisms for the fulfillment of the duties of those who perform public functions, power of censorship that corresponds to the National and Provincial Electoral Assemblies and the Departmental Councils. Corollary of the above is Title XII on "National Morality", providing article 249 that

> In the legislation of the State, the code that details the duties of the citizen in all the times of his age and in all the states of the social life will be formed, forming habits, exercises, duties, public instructions, rituals and pleasures that transform laws into customs and customs into civic and moral virtues.

Of the aforementioned early constitutional antecedents of the 19th century in Chile, we observe little after the establishment of the national State in which, together with the republican ethos, such central institutions as the Council of State and the Court of Accounts stand out, which must exist until 1925. From the Political Constitution of 1925 and its reform of 1943, the Comptroller General of the Republic is an institution of control of legality of the Administration which will have as its basic function the safeguard of probity.

With the democratic transition from 1990, probity and administrative modernization become a central concern. Subsequently, in 1994, faced with the multiplication of cases of corruption, which assumed various forms of administrative, civil and criminal offenses, the Government created a National Commission of Public Ethics, which delivered a report entitled "Ética pública: probidad, transparencia y responsabilidad al servicio de los ciu-

dadanos". This Commission was made up of prominent public figures. As a result of the work of said Commission, various bills were presented, including constitutional reform, recognition of the principle of civil servant probity and transparency, and sanctions and disregard for corruption and other deviant or dysfunctional civil servant conduct, which will not come to prosper. This experience resulted in a legislative package whose maximum expression is the "Law on Integrity" from 1999.

The aforementioned report accepts that the phenomenon of corruption, in a sense, concerns the public function, and the infraction of legal or regulatory norms that regulate them. Likewise, the aforementioned report adopts a functional conception of public corruption, recognizing it when

> a public agent in the exercise of his functions attributed to him by current legislation, and through them obtains a private benefit. In corrupt behavior there is a deviation from normal obligations that includes a public function and the violation of the norms that regulate it, with the purpose of satisfying a private interest.

As a result, the Commission proposed the strengthening of public ethics by giving constitutional status to the principles of public probity, responsibility, transparency and disclosure of heritage, and legislative development through a Code of Public Probity.

Likewise, the National Public Ethics Commission makes a set of lege ferenda proposals in its report, namely:

a. A statute of the public function that ensures the impartiality and independence of public agents, especially in the face of conflicts of interest between private parties or between the private and the public.
b. Refinement and deepening of control tools or instruments to prevent corruption: such as the Investigation Commissions.
c. Regulation of state contracts and tenders. Even in comparative law, we can find model legislation, in its technical perfection in this matter, such as the recent Spanish one.
d. Improvement of the criminal system to account for the phenomenon of corruption, now included in the Criminal Code as prevarication or bribery (art. 223, 248-250 of the Criminal Code), including the crime of incompatible negotiation and influence peddling, since our legislation is outdated and insufficient in this field.
e. Financing of political activity, whether of political parties or their campaigns, and also regulating their income and expenses with transparency. At that time, the Commission paid special attention

to the high cost of political campaigns in our country as a potential source of corruption, since the contributions or donations come from pressure and interest groups or simply from nominated businessmen or bankers.

f. Social control and prevention of corruption that ultimately involves forming public opinion about the ethical-public principles of the public function.

In compliance with what was proposed by said Commission, various legal modifications arose, among them, Law No. 19,653 on Administrative Integrity of 1999, which incorporated modifications to several regulations, and Law No. 19,645 of 1999, which modified the Penal Code in relation to crimes of public officials.

Later in 2006, various proposals were delivered by the Working Group on Integrity and Transparency leading to favor efficiency, objectivity, public responsibility, and professional quality of State management. Although they do not refer directly to corruption, without a doubt the matters dealt with are aimed at strengthening citizen confidence in the public function and were measures that contributed to anti-corruption, the most important:

1. Access to public information to improve transparency and probity in public management, favoring social control. In this, public initiative is privileged, expressed in the duty of States to make relevant information available to the public, as well as greater precision through a special law to make effective the citizen's right of access to public information.
2. Creation of an autonomous body, with constitutional rank, for access to public information with competence that reaches all State bodies, based on the constitutional principle of publicity as part of the Bases of Institutionality.
3. Reforms to the senior public management system, improving public tender procedures and incorporating new bodies and services into said system.
4. On the financing of campaigns and political parties, reinforce transparency in the relationship between money and politics, fine-tune illicit and electoral law sanctions, improve electoral oversight and greater control of private and anonymous contributions.
5. Strengthen the State control system, redefining the functions of control and review of the organization and control procedures of the Office of the Comptroller General of the Republic.

6. A system of protection for whistleblowers in good faith, ethics commissions or good parliamentary practices, regulation of lobbying and improvement of purchases and public contracting.

That same year, 2006, the United Nations Convention against Corruption was enacted in our country, which, although it does not include an express definition of said term, does contain behaviors and measures that are proposed to combat "more effectively and efficiently corruption", among them, preventive measures such as the formulation and application of coordinated and effective policies against corruption "that promote the participation of society and reflect the principles of the rule of law, the proper management of public affairs and public goods, the integrity, transparency and the obligation of accountability" (article 5) with the establishment of bodies that apply said measures and that have the necessary independence to carry out their functions without any undue influence (article 6).

Other proposed measures are related to the public sector and systems for summoning, hiring, retaining, promoting and retiring officials based on principles of efficiency, transparency, with adequate remuneration, training, responsibility and disciplinary system, public hiring, among others.

Likewise, measures are considered to increase transparency in the Administration, in the organization, operation and decision-making processes of the State (article 11), among others:

1. The establishment of procedures that allow the public to obtain information from the Public Administration and the decision-making processes;
2. Simplification of administrative procedures where appropriate in order to facilitate public access to decision-making authorities;
3. The publication of information, which may include periodic reports on the risks of corruption in the Administration.

Finally, we highlight the measures that are recommended for the participation of civil society in relation to the prevention and fight against corruption, as well as to make public opinion aware of its existence and seriousness, measures such as:

1. Increase transparency and promote citizen input in decision-making processes;
2. Guarantee access to information;
3. Carry out public information activities to encourage intransigence with corruption;

4. Respect, promote and protect the freedom to seek, receive, publish and disseminate information related to corruption.

It is obvious that these measures cannot be included in the Constitution, but they can be included in the basic principles from which they can be specifically regulated in other laws.

Finally, as the most recent experience in working groups on corruption, we cannot fail to mention the Presidential Advisory Council against conflicts of interest, influence peddling and corruption, from 2015 (also known as the "Engel Commission"), starting of the diagnosis of President Michelle Bachelet who stated that

> we have seen how some use the power of their money to influence the decisions of democracy, that is, to influence the decisions that affect us all. And we have also seen how some use the influence granted by democratic and public positions, which are there to serve all citizens, to obtain personal advantages.[12]

This Council recommended numerous proposals regarding the following topics: *a)* Corruption Prevention; *b)* Regulation of conflicts of interest; *c)* Financing of politics to strengthen democracy; *d)* Confidence in the markets, y *e)* Integrity, ethics and citizen rights.

III. Political-legal dimension

Comparative experience makes it possible to establish certain areas of the public function that are more susceptible or exposed to corruption, where conflicts of interest between the public and the private are poorly, insufficiently, or inadequately regulated and controlled. This uncertainty induces or facilitates bribery, and the bribery associated with contracts, tenders, foreign trade operations, customs franchises, public credits, judicial processes, social policy benefits, among others, and that contributes to the illegitimate transfer, misuse and appropriation misuse of state assets and public funds, nepotism, patronage, and bad electoral practices. These corrupt practices contribute to political instability, anomie, illicit enrichment of public agents, demoralization, among other factors that paint a worrying picture that is repugnant to the idea of a rule of law and a stable democracy.

[12] Presidential Advisory Council against conflicts of interest, influence peddling and corruption, Final Report, April 24, 2015, Santiago, Chile, p. 28.

In our case, we can say that there has been progress in transparency, access to public information and accountability that are fundamental in the fight against corruption, however, the deterioration of the citizen's perception of probity in the public function is has been seriously affected by the corruption cases known in the last period, in which various situations of individual (or group) use have been revealed, mostly economic.

The regulations that currently deal with the fight against corruption in our legal system can be found mainly in our Constitution, established as principles. But outside the Fundamental Charter there are also other regulations that are directly or indirectly related to corruption, among them, the Criminal Code on crimes against public faith (forgery of public and private instruments), crimes that can be committed by officials (prevarication, embezzlement of public funds, fraud, illegal exactions, unjustified enrichment and bribery); in special laws, such as Law No. 18,575, Organic Constitutional General Bases of State Administration, Law No. 20,285 of 2008 on access to public information, Law No. 19,863 of 2003, on remuneration of government authorities and critical positions of the Public Administration and gives rules on reserved expenses, Law No. 19,653 on administrative probity applicable to the organs of the State Administration, Law No. 20,205 that protects the official who reports irregularities and lack of probity, Law No. 20,730 that regulates lobbying and the procedures that represent private interests before authorities and officials, among others.

For its part, the national Constitution reformed in 2005 and 2010 contains transcendental norms in the fight against corruption, particularly article 8 on the principle of probity in the exercise of public functions, the principle of publicity of the acts and resolutions of State bodies —incorporated with the constitutional reform of 2005— and the obligation of certain authorities to declare their interests and assets publicly after a reform in 2010 through Law No. 20,414. The article points out:

> Article 8o. The exercise of public functions obliges their holders to strictly comply with the principle of probity in all their actions.
>
> The acts and resolutions of the organs of the State, as well as their foundations and the procedures they use, are public. However, only a law of qualified quorum may establish the reserve or secrecy of those or of these, when the publicity affects the due fulfillment of the functions of said organs, the rights of the people, the security of the Nation or the national interest.
>
> The President of the Republic, the Ministers of State, the deputies and senators, and the other authorities and officials que a constitutional organic law indicates, they must declare their interests and assets publicly.

> Said law will determine the cases and the conditions in which those authorities will delegate to third parties the administration of those goods and obligations that suppose a conflict of interest in the exercise of their public function. Likewise, it may consider other appropriate measures to resolve them and, in qualified situations, order the alienation of all or part of those assets.

Integrity is an ethical-political principle that applies to the public function and that refers to integrity in the fulfillment of the obligations and duties of public office. Correlative of probity is the principle of responsibility that allows associating the public inspection of the activity of the public agent and the sanction of this against the infraction of the law or regulations. The principle of transparency or publicity includes the agent, management and public acts, so it is particularly important in the field of contracting for the Administration, administrative contracts and concessions. Lastly, publicizing the assets and interests of public agents is an imperative of probity.

Other constitutional norms that contain specific principles and tools related to the corruption-probity binomial, and responsibility and control systems are:

1. Article 1, fourth paragraph of the Constitution, which enshrines a personalist conception of the State, in such a way that it as a system of powers and its resources are at the service of the human person, its groups and civil society as a whole.
2. Article 52 of the Constitution, which enshrines the function of political control of the Chamber of Deputies, which is verified through various instruments of inspection and information of the acts of Government, whether they are political acts or of the Administration.
3. Articles 58, 59 and 60 of the Constitution that establishes incompatibilities and inabilities in the parliamentary position.
4. Likewise, article 79 that establishes the responsibility and sanctions for bribery and prevarication of judges.
5. Article 98 of the Constitution establishes the Office of the Comptroller General of the Republic as a court of accounts and assigns the function of ensuring the integrity of public assets (Law No. 10,336).
6. Article 38, first paragraph of the Constitution that refers to the Constitutional Organic Law on the organization of the State Administration and the principles of the administrative public function (Law No. 18,575 and Law No. 18,834) that explicitly enshrine rules on probity and certain obligations, prohibitions, and incompatibilities.

From the foregoing we can infer a conjectural reflection: the corruption-probity binomial in the current responsibility and control system has a complete regulation in the *lege lata* that has been improved by various special laws that we have already had the opportunity to mention, so It is necessary to adjust and print political decision in the prevention and punishment of corruption in the public function. The proposals put forward by the Advisory Council are valuable and the progress of the 62%[13] of them, but they are of no use if the instruments and controls provided for in the current system do not operate, so that they do not become "rusty swords" of a Rule of Law incapable of making effective the basic ethical-public principles such as probity, transparency, responsibility and publicity of the public function.

Perhaps the political class suffers from a certain complacency in the face of the phenomenon of corruption, accepting as true that the international ranking of transparency, on the scale of 10 a 100[14] Chile appears in 2016 with 66 (Transparency International), dangerous complacency that leads to indolence, which is the beginning of the generalization of the phenomenon and which is evidenced in the constant decline of the index, demonstrating that the level of corruption increases year after year.

IV. Prospectives

In the last decade, illegal financing of politics, corruption, bribery, conflict of interest, influence peddling, tax evasion, collusion, misappropriation, and improper use of privileged information are all terms that abound in the media today and that have become part of the language in use and the institutional landscape.

The above is inserted in the box that is the "sociedad de la desconfianza"[15] and a certain "electoral anomie", made visible in the deterioration of citizen confidence in politics, the elites, and the ruling class. Indeed, the percentage of people who say they have a lot or a lot of trust in the Government, the National Congress, political parties, and businessmen, respectively, has fallen by half in the last fifteen years (CEP survey).

[13] Figure provided by the Smart Citizen and Public Space Anti-Corruption Observatory.

[14] From 1996 to 2011 the maximum score is 10, with 1 being the highest risk of corruption and 10 the lowest risk of corruption. Since 2012 the methodology has changed and the maximum score is 100, with 10 being the highest risk of corruption and 100 the lowest risk of corruption.

[15] Rosanvallon, Pierre, "*La contrademocracia: la política en la era de la desconfianza*", Buenos Aires, Manantial, 2008.

The table briefly described forced a political response: the creation of the Presidential Advisory Council Against Conflicts of Interest, Influence Trafficking and Corruption. The work of the Council was permeated by the idea that these problems are closely related to weaknesses in our institutions, and by the idea that the crisis had to be used to set in motion a comprehensive probity agenda that spanned politics and business.

The Council proposed more than 200 measures in the following areas: prevention of corruption, regulation of conflicts of interest, separation between the financing of politics and business, strengthening of the tools for a better functioning of the markets, and other ideas directed towards greater integrity and ethics in our society.

Three groups of proposals stand out in the Commission's report for greater probity in business that I would like to highlight in this space: better regulation of the "revolving door", greater powers so that the inspection agencies can carry out their work effectively, and the strengthening of corporate governance of companies.

The "revolving door" refers to the back and forth of people between legislative or regulatory positions and private for-profit and non-profit companies operating in the regulated sector. Door that is complementary to the "musical chairs" that operate within the State. One director is a parliamentarian, a high-ranking government or administration official, or a supervisory entity who leaves the public sector to take up a relevant position (director, manager, investor, consultant or "lobbyist") in the sector that he or she has regulated. In the opposite direction, it is a high-level executive or manager of a regulated company who takes a position in the Government, the Administration, the National Congress or in a supervisory entity. A "revolving door" that turns without guards allows to benefit a former or a potential employee, and to use sensitive information that was obtained in the position. Thus, it allows obtaining private advantages for the fact of having held a public office and is not different from receiving a prize or emolument.

The biggest challenge of "revolving door" regulation is to strike a balance between attracting highly-skilled people to the state – while also protecting freedom of labor – and preventing conflicts of interest so that public agents act impartially and independently.

The Council also proposed expanding the set of agents subject to incompatibilities after performing public employment, defining a "cooling off" period in which a certain position cannot be taken in the private sector nor can property or entrepreneurship be maintained in the area; everything associated with compensation and sanctions; plus a monitoring or inspec-

tion system. As for the auditing entities, the Council considered it necessary to provide them with more effective tools for the examination of compliance with regulations. Without oversight and monitoring, deterrence and effective sanctions are difficult to implement. In essence, the report proposes to give new powers to the agencies that monitor and prosecute illicit. They must go hand in hand with greater independence, which is why modifications to their corporate governance and the way in which their authorities are appointed and/or removed were also suggested.

New powers are allowing these audit entities to share sensitive information quickly and effectively, and to have intrusive powers and greater regulatory strength.

In the field of business and the economy, it was proposed to strengthen the compensated denunciation and protection programs for informants to promote complaints and self-reports, tools that have been recognized internationally as effective in the arrest and prosecution of crimes; and together with this increase the fines or pecuniary sanctions.

To conclude, the Council proposed a series of measures to strengthen the effectiveness of companies' corporate governance, self-regulatory mechanisms, and internal and external audit processes to prevent illicit conduct from occurring, and to detect fraud and corruption by inside companies. Among the proposals is the definition of standards and regulations on transactions or operations related and unusual transactions with donations, and the remuneration policy and incentives for executives, including the forms of payment.

In short, it seeks to recover the confidence of citizens in the institutions and organizations that support our democracy, and the economic development model, and in this way, the probity agenda goes beyond the confines of the state to enter the economy and society. It is a complex agenda because it covers a wide variety of issues. But it is also important because it means demanding higher standards of probity and transparency than the current ones, and more importantly, it implies giving up power and privileges.

The recent legislation on conflicts of interest, lobbying, blind trust, among others, in the State and its relationship with the public private or on the institutionality of regulated markets (securities, insurance, banking, finance) that assesses the creation of the The Financial Market Commission, which will replace the Superintendencies of Securities and Insurance and in the future the Superintendency of Banks and Financial Institutions, is based in its design on the ideas of the Engel Commission that we have summarily collected before.

V. Conclusions

Corruption as a phenomenon has been common in several countries in the region, and in recent years in our country it has hit hard the trust in politics of public opinion and citizenship, seriously affecting the democratic system in a kind of disenchantment with the power, institutions and the political class. The notorious cases of Penta, Milicogate Caval, Soquimich, and the fraud in Carabineros have affected the level of confidence of the citizenry, even more so when it comes to the relationship between politics and economic issues.

In addition to this, the problem of corruption generates concern beyond the economy and politics due to the effects it has on the functioning of the democratic political system and especially on the enjoyment of rights, which can occur massively when it comes to of a structural barrier or individual, affectation that in any case can be clearly seen when it comes to economic, social and cultural rights.

Concern about the issue of corruption is now happening not only at the most central political level, but also in direct relation to citizens, which is evidenced when 22% of the population claims to have paid a bribe or given a gift to an official to obtain a service or document or when 80% say that corruption has increased in the country.[16] Contemporary democracy must face the challenge of recovering citizen trust, dealing with corruption and putting an end to the problems it generates in the rule of law, which must be considered a priority given the urgency of low political participation in our country and inequality in Chilean society.

Progress must be made not only in the prevention of cases of corruption, but also in the capacity to prosecute crimes associated with this phenomenon. Indeed, in our country the penalties for crimes against probity are low compared to those established by other countries and to the recommendations and standards set by international organizations, with legal gaps, weaknesses in oversight and a lack of specialized personnel in the police and Public ministry. There is also no monitoring of the incidence of corruption crimes.[17]

The current national debate is undoubtedly permeated by the various conflicts of interest and cases of corruption that have come to light, for which various voices have advocated the repair of institutions and the cor-

[16] Transparency International, "People and corruption: Latin America and the Caribbean", *https://www.transparency.org/whatwedo/publication/las_personas_y_la_corrupcion_america_latina_y_el_caribe*.

[17] Presidential Advisory Council against conflicts of interest, influence peddling and corruption, *cit.*, p. 46.

rection or inclusion of those regulations that allow a greater correspondence with public probity. However, it should not be forgotten that as a fundamental norm the Constitution establishes the basic rules of the political system and of social coexistence, the protection and guarantees of fundamental rights (which, as we have seen, can be affected by acts of corruption) and, therefore, , may contain principles such as probity, access to public information and transparency in the actions of the Administration bodies and the correct exercise of public functions that are the basis for the fight against corruption, abandoning the legacy of the regime authoritarian that still weighs on our system.

The constitutional and legal reception of a panoply of norms and institutions that ensure probity and allow combating corruption must be accompanied by solid citizen participation in political life and the recovery of trust, as well as full respect and guarantee of fundamental rights, encouraging a culture of accountability, of social control of political power by public opinion, of a vigilant citizenry that can denounce in a protected manner in a full democracy beyond political representation. In this sense, the proposal for an Ombudsman's Office is gaining strength again (*Ombudsman)* as an autonomous body, considering the violation or facilitation of violation of rights that occurs with corruption, acting as a promoter of rights and exercising actions in their defense. In this, it is important to add as a measure that the media must become a truthful and objective collaborator in the task of responsibly denouncing acts of corruption.

In addition, a solid employee ethic must be cultivated that emphasizes the basic principles of public service: honesty, fidelity, veracity and integrity, as well as modifying the control procedures that already exist, in order to achieve with them brevity, impartiality and promptness in the establishment of responsibilities and sanctions.

In a structure faithful to the values and principles of constitutional democracy, the phenomenon of corruption must be linked to the structural principles of the rule of law. Indeed, the rule of law based on the principles of rule of law, legality, separation of powers and protection of fundamental rights, a legal-political formula is chosen to impose limitations and guarantees on political power and set a dam to the process of quantitative and qualitative increase of power, in short, a dam to the corruption of power and institutions in a broad sense, and in a strict sense, a dam to corruption in the state public function. As Bielsa reminds us: "The republic is the legal, institutional structure, the moral concretion of citizenship".[18]

[18] Bielsa, Rafael, "Democracia y República", Buenos Aires, DePalma, 1985, p. 129.

From the perspective of pluralist democracy, it should be noted that the phenomenon of corruption leaves its mark on the activity of political parties and pressure and interest groups; that is to say, since corruption is a phenomenon with two faces, active and passive, there will always be a corrupt person and a corrupter, a public agent and a private agent, in the plot of deviant conduct that violates the principles of probity, responsibility, transparency and advertising. The downsizing of the State, from a business and services State to a regulatory State, imposes new challenges in the face of the phenomenon of corruption, since there is a strong dialectic of what is public and what is private in the current organization of power.

Thus, from the Constitution, a State is promoted that, from its structure, tends its interest towards the public and social, to the vicariate in the exercise of power, to public service, to the common good and not to the individual, which discourages corrupt or deviant conduct. officials and the Administration, overcoming the crisis of legitimacy and the relationship between money and politics, involving all the country's actors in this national task in a kind of "republican patriotism".

THE COLOMBIAN CONSTITUTION OF 1991. THE FIGHT AGAINST CORRUPTION AND UNFINISHED HISTORICAL TASK

Julio César ORTIZ-GUTIÉRREZ*

SUMMARY: I. *Introduction*. II. *The Political and Regulatory Evolution of the 1991 Political Charter*. III. *The Substantial Contents of the Current Constitution*. IV. *The reality of the fight against corruption*. V. *Constitution and legal reforms*. VI. *A recent perspective of Colombia*. VII. *Conclusions*.

I. INTRODUCTION

1. In this paper we examine some of the most important constitutional issues that have arisen in Colombia in the fight against corruption in politics and administration since the introduction of the new provisions of the 1991 Constitution. In addition, we examine some of the issues politicians who arise with the new institutional forms of institutional fight against corruption at the beginning of the 21st century.

This approach is not reduced to raising some historical reflections on an institutional battle of a national ethical and political nature, nor to understanding the quantitative elements of the scope of a punctual war of all public control agencies and public opinion against that evil.

Indeed, that harmful expression of the life of societies is also an expression of a serious current political and human pathology that appears in all forms of organization of power and government, with various manifesta-

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tions and intensity, and our countries are experiencing a period of aggravation and the generation of new modalities of expression of these crimes.

The dominant idea of Colombian political opinion in the examination of modern cases and of the new forms of corruption that we live in these times, is that it must be combated relentlessly and that the national political leaders must be expelled from the public institutions that they represent. The impression that national voters and academics have is that corruption in the public administration and in Colombian politics has reached unimaginable and unknown levels in our history and that it is the cause of the fall in the legitimacy of political parties and of institutions such as the Congress of the Republic, the armed and police forces, judges, magistrates, and prosecutors.

Indeed, the serious concern about the current expressions of the phenomenon of administrative corruption is of such a nature that several of the representatives of the Colombian control agencies and judicial institutions call on the political leaders of the regime for fear of the collapse of the political system and the rise of another model of State contrary to the Rule of Law and Democracy.

As a matter of principle, the examination of public, political and administrative corruption in the history of humanity encounters serious theoretical and practical difficulties, since it is a social and human phenomenon that appears constantly from the first forms of administrative and political organization of societies, is presented in different ways and achieves different material and subjective expressions.

The truth is that corruption in our countries is also a phenomenon that is difficult to eradicate, since it is configured in an aggravated way by special social, economic, cultural conditions, and unique human situations. The dominant idea in public opinion on this matter is that corruption among us in Colombia must be combated relentlessly and those responsible must be expelled from public institutions, even though their closest relatives and followers are re-elected as a foreign body.

In essence, political and administrative corruption consists of behaviors deviated from the normative prescriptions that are oriented towards the search for the private appropriation of public resources or the public diversion of public resources with various types of ends essentially contrary to the normative correctness and the institutions of political democracy and the right.

The existence of political corruption on public resources and in the state administration feeds on multiple conditions and situations related to human factors, social developments and the political environment and in

general with the system of administration of justice and the fight against crime impunity. As we will see, the history of the fight against corruption in Colombia suffers a kind of watershed after the issuance of the Political Constitution of 1991.

It seems that administrative and political corruption has always existed, it appears and takes multiple forms and, in some cases, it can involve the extraction of public and private resources for illegitimate purposes such as vote buying, payment of electoral costs or support for administrative management without support and lacking bases of governability. It is traditionally supported by patrimonial clientelism of a bureaucratic order, in the media manipulation of paid opinion with contracts and public benefits such as appointments, work orders, advertising guidelines, among other forms. These are just some expressions of corruption in our days.[1]

When it comes to an integral approach to the knowledge of corruption as a pathology of government affairs and public interest, we find that it and the fight against it is not a typically legal matter and involves experiences in legal sociology and political science of multiple forms and measures that leaves much room for the human condition and the cultures and subcultures of power and political, personal, and family ambition.[2]

From what is known, the fight against corruption is a unique and always unfinished task. In any case, it is full of stories of successes and failures that do not end or end in a few results, no matter how important they may be. As in the Colombian case, the fight is increased and exorbitant with the presence of money from drug trafficking in political campaigns and from paramilitarism, also drug traffickers, criminal and horrendous.[3]

Although there are specialized organizations in the international arena that provide scales, ranges and classifications of corruption at this level and even internally, their results cannot be measured only by perception surveys, since, essentially, corruption as a pathological phenomenon of societies, is made up of completed episodes or unfinished and half-told stories and anecdotes of suggestive episodes and reprehensible behavior and are enriched by popular and journalistic creativity and fantasy. There are also the versions of the opposition, adversaries and other subjects that today contribute

[1] Gómez Lee, Iván Darío, "La grave sofisticación de la corrupción", *Revista de la Auditoría General de la República*, Bogotá, 2010; Gómez Lee, Darío, *Control fiscal y seguridad jurídica gubernamental*, Bogotá, Externado University of Colombia, 2006.

[2] Turbay Quintero, Julio C. *et al.*, *Hacia un nuevo control Fiscal en Colombia*, Bogotá, Office of the Comptroller General of the Republic, 2009.

[3] López Hernández, Claudia, *Y refundaron la patria. De cómo mafiosos y políticos reconfiguraron el Estado Colombiano*, Bogotá, Random Hoyse Mondadori-Debate, 2010.

in a good way to its discovery and persecution, such as the citizen oversight offices and the specialized oversight offices with greater capacity to reveal the facts and acts of corruption than those themselves prosecutor investigators and auditors of the Comptroller General of the Republic.[4]

That fight resembles the constant fight for life and for the reinvention of the ethics of public affairs, and it is always challenging and will be new since it must be updated daily with effective and efficient strategies and policies and with the decision to defeat his expressions too and always creative and innovative. The fight against corruption has always demanded sufficient capacities to prevent, investigate, sanction, and prosecute it and the sufficient disposition of elements to combine fiscal, disciplinary, criminal and citizen participation resources in the additional challenges of accepted and repudiated impunity.

It is worth mentioning the long list of presidential candidates assassinated in Colombia in transit to the Presidency of the Republic for nearly a hundred years. This list begins with Rafael Uribe Uribe, continues with Jorge Eliecer Gaitán, Luis Carlos Galán Sarmiento, Jaime Pardo Leal, Bernardo Jaramillo, Carlos Pizarro León Gómez and ends with Álvaro Gómez Hurtado who already warned of the need to replace the regime completely taken over by the corruption and drug trafficking.[5]

The fight against corruption today appears in the scenarios of international cooperation and of the States among themselves, as in the case of Colombia, the US and Brazil for the crimes of corruption of Brazilian construction companies, Colombian congressmen, national public officials, and private individuals who covered up.

It is worth emphasizing the great importance of the international vision of the fight against corruption, that is, the duty to comply with and enforce the international conventions on the fight against corruption in the terms of the law of cooperation treaties between governments.

Fortunately, in recent years, corruption in public affairs and on official resources is seen as a global and globalizing scourge of many other evils that affect business in all spheres. The disturbing effect of public corruption is of such a nature that it deserves the alliance of all state powers and even the international order to stop it. That fight also needs coordination with public agencies with private organizations to learn about it and establish modern

[4] Salazar, Pedro *et al.*, *¿Cómo combatir la corrupción?*, Mexico, UNAM-IIJ, 2017; Turbay Quintero, Julio C. *et al.*, *Excelencia y calidad en el control fiscal*, Bogotá, Comptroller General of the Republic, 2009.

[5] Gómez Hurtado, Enrique, *¿Por qué lo mataron?*, Bogotá, Controversia, 2011.

and dynamic conventions, agreements, and treaties from the evidentiary and judicial component to strengthen it.

In the same way, its projections and the contemporary configurations of globalization, openings and deregulation, make many investors and private actors in the world markets raise their serious concerns about it as a destructive factor of the credibility of the states, of the legal certainty and free competition and free concurrence, and that there are conglomerates for the contracting of public resources that specialize in taking advantage of social, legal, political and economic conditions to corrupt state officials and to be susceptible to corruption on the part of public servants.

II. The Political and Regulatory Evolution of the 1991 Political Charter

1. *The origins of constitutional change*

The Colombian Constitution of 1991, which is still in force among us with some important and abundant reforms especially introduced precisely in development of the Colombian fight against political, electoral and administrative corruption, on the one hand; against the organized crime of drug trafficking, on the other and in the search for peace with the armed insurgent groups as true armies contrary to public order and citizen peace, meant the formulation and execution of a great institutional, normative and organic challenge of a historical, unfinished, certainly unfinished and in many cases, such as drug trafficking and political and administrative corruption, partially frustrated and ineffective.[6]

That constituent meeting was effectively a pluralist and highly deliberative assembly, made up of representatives of almost all the legitimate political sectors active in the Colombian political system, and was inspired by the projects of the national government of César Gaviria, the initial heir to the profoundly liberal and transformation of Luis Carlos Galán, in the nuanced conservative political thought of Álvaro Gómez Hurtado, in the socialist doctrine of Spanish and German origin of the leaders of the essentially social democratic April 19 Movement (M19), and in the ideas of traditional conservative groups, led by Misael Pastrana Borrero and in that of other groups reintegrated into Colombian civil and political life.

[6] Acevedo, Darío *et al.*, *Parapolítica, verdades y mentiras*, Bogotá, Planeta Colombiana, 2008.

In essence, that meeting was a National Constituent Assembly that collected a large part of the multiple ideological aspirations of Colombians, including those of the Catholic Church and the new churches that had already broken into the world of Colombian politics, and dealt with their normative drafting works, including the delicate topic of the family, paternity and the rights and responsibility towards children, among many other matters that are rarely constitutionalized among us, such as those of assisted procreation.

Of course, the so-called FARC[7] and the interested parties from the powerful drug trafficking groups of the two cartels that existed at the time, known as the Medellín Cartel and the Cali Cartel, were left out of that meeting. These last cartels wanted to exert their powerful influence to advance some proposals such as the prohibition of the extradition of Colombians and they achieved it in various ways.[8]

This transforming task of the Constituent Assembly of 1991, had in mind the political doctrine of the liberal leader Luis Carlos Galán who had been assassinated by the Colombian drug trafficking mafias in agreement with dark interests executed with the complicity of some security agents of the State or of the Administrative Department of Security DAS, on the one hand, and the doctrinaire speeches of the conservative candidate Álvaro Gómez Hurtado, also assassinated later, during the government of the then president Ernesto Samper Pizano, apparently also by dark forces of the

[7] Those were a true guerrilla army called the Revolutionary Armed Forces of Colombia, today they appear converted into a political party with the same acronym that has been presented in the 2018 elections with candidates for Congress and the Presidency of the Republic. Today it is questioned whether they keep their assets and their illicit capital and whether these are going to be used and spent in the elections that are taking place.

[8] The fight against those drug cartels made notable progress to the point of applying justice for almost all their leaders and agents who ended up dead, imprisoned and extradited and the occupation of many of their valuable assets. Nevertheless, the so-called drug-trafficking industry in our country is still in force, it has grown remarkably, many of its bosses today are heirs to their old businesses and properties and manage structures of political, financial, economic, real estate corruption and control of rural and urban territories and spaces in the so-called combos, offices, structures, gangs, and cartels. Their alliance with the now demobilized FARC guerrillas and the so-called National Liberation Army (ELN) gave them much fruit and power, and they have found refuge and partners in Venezuelan territory. They exercise control of routes and territories in alliance with Mexican and Guatemalan cartels and pose new challenges to criminal justice and the national army with a view to maintaining the security of the territories and national legal rights. In the last year, the traffic figures have grown exponentially, and it is estimated by the electoral authorities that their profits will be reflected in the increase in the costs and expenses of the electoral campaigns in development.

State, allied with drug traffickers in a case where it has not been possible to advance in criminal convictions and that has just been classified as a crime against humanity to avoid prescription and to reactivate procedural causes.

This unsuspected constitutional task, achieved by the criminal and terrorist presence of the Medellín cartel throughout the national territory and with the substantial capacity for influence of the agents of the Cali Cartel, was later removed from the Constitutional Charter, which gave rise to the re-established institution of the extradition of nationals as a substantial instrument of international collaboration against organized crime.[9]

We cannot ignore the antecedents that explain the call and multiparty meetings of the so-called National Constitutional Assembly, the serious process of deterioration of public order and selective crime, the urban terrorism of drug traffickers that led to the sacrifice of four presidential candidates of the democratic left and liberalism and the sacrifice of hundreds and thousands of innocent civilians, fallen under the bombs or the fire of the assassins of the drug cartels.

2. *Other Causes of the Constitutional Change*

With the unusual and unprecedented convocation of the Constitutional Assembly in 1990 for the so-called Seventh Ballot of the students of Bogotá and with the decisions of the national executive power that invoked powers and conditions of the State of Siege and those of the Supreme Court of Justice that endorse it as a constitutional judge, he tried to provide the

[9] This has been for several decades, and even today it is a powerful instrument in the fight against political corruption generated and agitated by the presence of the money of its cartels and sub-cartels in the financing of costly national and territorial electoral campaigns and in the exercise of the legislative function of several of our congressmen precisely related to their criminal interests, giving rise to a mega criminal process against many of them called "Process 8000".

Even today, with the collaboration of the American judicial and police authorities, the extradition of several national public servants and many Colombian individuals is projected for using the US financial system for money laundering and for carrying out payments and acts of public corruption. Precisely, the extradition of the head of anti-corruption prosecutors has been decreed as head of the so-called "Cartel de la Toga" for the alleged complicity of several former magistrates of the Supreme Court of Justice and the extradition of several lawyers and prosecutors committed to crimes against the administration of justice.

Similarly, there are several hundred Colombian nationals extradited to the United States of America linked to drug trafficking, money laundering, acts of corruption in the armed forces and members of armed paramilitary gangs dedicated to drug trafficking and serious systematic violation of human rights.

Colombian State with adequate and sufficient capacities and instruments to confront organized crime, the gangs and armies dedicated to armed struggle of various etiologies that plagued Colombians so much, and to renew the institutions of participatory and deliberative democracy to allow civil society to participate in complaints and investigations against political and administrative corruption that prevailed in the two pre-existing decades and that now with new and suggestive modalities remain vigorous.

In this sense, in order to understand the so-called popular outcry that called the attention of the judiciary at the time and within the background of the Colombian constitutional transformation, it is hardly worth remembering as background the criminal sacrifice of four presidential candidates, the systematic murder of dozens of policemen and soldiers, judges, magistrates and lawyers, victims of individual and terrorist attacks throughout the entire Colombian territory.

Este reto fue adicionado y agravado con instituciones y disposiciones normativas pensadas para enfrentar las nuevas modalidades de la corrupción política y administrativa postconstitucionales, fundadas en la presencia agresiva de los dineros del narcotráfico en la política y luego con los dineros de la corrupción administrativa sobre los recursos públicos nacionales transferidos a las entidades territoriales (departamentos, distritos y municipios) y los administrados por entidades nacionales.

This challenge was added to and aggravated by institutions and regulatory provisions designed to deal with the new forms of post-constitutional political and administrative corruption, based on the aggressive presence of money from drug trafficking in politics and then with money from administrative corruption over resources. national public entities transferred to territorial entities (departments, districts and municipalities) and those administered by national entities.

The exceptional and extra-constitutional summons of 1990 allowed the Colombian nation to assume the duty of restructuring the State and the constitutional institutions and with that foundation, in a multi-party Assembly with the presence of various groups of former guerrillas such as the M19 and the EPL, assumed in 1991 the great institutional costs that the introduction of a new Constitution meant in our old political system with new institutions and judicial organs and with new vigorous faculties in the hands of the so-called control and vigilance.

As background, it is necessary to point out that in the years 1977 and 1979 two important constitutional reforms had been issued that had been proposed to strengthen the Administration of Justice, the territorial organi-

zation and participatory democracy that were declared unconstitutional by the Supreme Court of Justice as a constitutional judge in a kind of unusual blockade apparently based on stony clauses and fundamental political decisions with the declaration of unconstitutionality but based on procedural vices of regulatory origin.

3. *The harsh vicissitudes of the constitutional change in Colombia*

This challenge, which certainly remains unfinished, with a number of deep frustrations, quite aggravated so far in the 21st century, is also surrounded by accomplishments, achievements and strengths, especially related to the defeat of the armed paramilitary bands and the persecution and conviction of several dozen professional politicians dedicated to the appropriation and diversion of public resources. We can begin by noting that these groups managed to accumulate immense fortunes with global and transnational projection that still survive today and continue to exercise their political and administrative influence.

There is no doubt that the constitutional change of 1991 meant several radical challenges and several painful and bloody wars in a literal sense, such as the fight against the old drug cartels and against the mafias of traffickers of all kinds of goods and values, many of them which have been the object of serious processes of extinction of domain and state occupation.

A large part of the constitutional provisions introduced or modified in the Colombian constitutional law from the Political Charter of 1991, correspond to the constituent design of establishing the best and most efficient instruments of institutional and democratic struggle against the serious scourge of political corruption and organized crime, which plagued society from the great power of drug trafficking and organized crime derived from that illicit business of transnational projection.

In addition, in the constitutional process of 1991, an attempt was made to overcome the strong doses of regional political corruption that had taken over the public administration of the territorial entities and the organs of political representation at all levels, especially at the territorial level, basically on the local and departmental public resource and on the payroll of employees and workers at the service of public administrations.

Since the 1970s and throughout the 1980s, the local and territorial castes and political classes have been consolidated, largely nourished by the money and power of regional drug trafficking, and have become insurmountable powers, even for the national administration.

The power of paramilitarism and its definition of the destinies of territorial politics led them to say that the self-proclaimed United Self-Defense Forces of Colombia, AUC, had direct influence over a third of the Congress of the Republic and over hundreds of municipalities and departments from which they belonged. They appropriated by exercising armed violence and the constriction of voters to elect mayors and governors, demanding the surrender of public entities and the appointment of their agents to appropriate the budget and public goods.

Of course, in this criminal practice they dedicated themselves to expelling peasants from their lands, to massacring and disappearing those who were reluctant, to destroying all the values of the nationality. The disastrous night of Colombian paramilitarism involved the commission of the most horrendous crimes against humanity and the appropriation of hundreds of billions of pesos and the control of the territory and of the territorial administrations to settle their operations of displacement and appropriation of property and lives, and to engage in drug trafficking and money laundering from drug trafficking itself.

On the other hand, these constitutional provisions incorporated in the new constitutional text of 1991, also responded to the need to introduce institutions and judicial bodies for the investigation and trial of common criminals and agents of regional politics, against whom there was nothing more. That traditional judicial and police agencies are weak, supremely fragile and anchored in the doctrine and structures of the old constitutional model of the administration of justice typical of the 19th century.

The great power of Colombian drug trafficking in the 1980s had already transcended borders and it was essential to transform the police, judicial, and scientific instruments, and agencies in the fight against this scourge, also to attend to international claims about the responsibility of the Colombian State in those matters. This left a trail contrary to public ethics and permeated the consciousness of new generations in the ideas of easy enrichment and ignorance of the ethical limits of public resources.

On the other hand, the generalized situation of breakdown of public order, aggravated thanks to the increase in military and territorial power of the various guerrillas that maintained armed control in vast remote regions far from the center of political power, made it impossible to protect the businessmen of the countryside and the intermediate towns and cities of the country, placing the sensation of a failed State and the gradual consolidation of a kind of narco-State, with narco-politicians and narco-businessmen, on the day-to-day of politics.

These, despite the various peace processes celebrated with them, such as the peace agreed with the M19 movement, and others frustrated with the FARC, the ELN, the EPL, among other groups of armed insurgents, had rearmed, strengthened and some of them had consolidated spatial, territorial, and human domain in several of the vast jungle regions and remote from the national territory.

It should be remembered that in the years prior to the meeting of the National Constitutional Assembly, later self-proclaimed Constituent Assembly, the guerrilla takeover of the Palace of Justice with more than a hundred Ministers of the Court and their collaborators and as many guerrillas had died or been disappeared and heavy episodes of political violence were relieved that are still being examined.[10]

III. The Substantial Contents of the Current Constitution

1. This "new" Constitution, which has been in force for more than twenty-five years and has been intensely active, with extensive contents that are expressly social-democratic of a contemporary nature and with many tasks contrary to the old traditional Colombian political practice, was apparently inspired by the texts of the constitutions of Spain, Portugal, Brazil and the USA, and to a large extent in the national constitutional tradition under rationalizing and self-limiting formulas such as in the cases of states of exception, in those of extraordinary powers and in the clauses of the economic regime and of public finances in a modality that combines principles and rules of neoliberalism, the Social State of Law and the social market economy.

Within those ideological and doctrinal costs, we can mention, as a preliminary and very thick reflection, the declaration of the Social and Democratic State of Law, the Normative Character of the Constitution,[11] the introduction of the catalogs of the new constitutional, fundamental rights,

[10] Patino, Otty, *Historia privada de la violencia*, Bogotá, Random House Mondadori-Debate, 2017.

[11] Article 1. Colombia is a Social State of law organized in the form of a unitary Republic, decentralized, with autonomy of its territorial entities, democratic, participatory and pluralistic, founded on respect for human dignity, work and the solidarity of the people who comprise it and in the prevalence of the general interest.

Article 4. The Constitution is a rule of rules. In any case of incompatibility between the Constitution and the law or other legal norm, the constitutional provisions shall apply.

It is the duty of nationals and foreigners in Colombia to abide by the Constitution and the laws, and to respect and obey the authorities.

collective rights and the environment, the constitutional rights of social content and those of economic content, as well as the already mentioned popular actions, of compliance, for diffuse interests and rights and the incorporation of the Constitutionality Block as an essential and substantial component of the new constitutional text as legal norm of full judicial value.

In addition, in the same sense, it is worth mentioning the creation of the Constitutional Court and the overcoming of the old model of control of constitutionality and constitutional justice, the introduction of the very vigorous and dynamic Action of Guardianship or protection among other constitutional actions to protect the integrity of the Political Charter and the defense of constitutional rights.[12]

In addition, the criminal justice regime and the administration and government of the judicial branch were modified with the introduction of a very poorly treated Superior Council of the Judiciary and an initially incipient Attorney General's Office, today vigorous and well-endowed legally and materially. The misfortune of the entire Superior Council of the Judiciary, especially its Disciplinary Jurisdictional Chamber, is due to structural problems of the political composition of the judiciary, which has always resisted all kinds of government, even some forms of self-government such as the one established in Colombia in 1991.

2. It is worth reiterating that in the new Political Constitution of Colombians of 1991, iron institutions were introduced, such as the Loss of Investiture of Congressmen in a disciplinary process, at any time, correctional, concentrated and of a single instance in the judicial headquarters of the Council of State. under the terms of articles 183 and 184,[13] the Criminal,

[12] Article 86. Every person will have a guardianship action to claim before the judges, at any time and place, by means of a preferential and summary procedure, by himself or by someone acting on his behalf, the immediate protection of his fundamental constitutional rights, whenever he wishes. that these are violated or threatened by the action or omission of any public authority. The protection will consist of an order so that the one with respect to whom the guardianship is requested, acts, or refrains from doing so. The ruling, which will be immediately enforced, may be challenged before the competent judge and, in any case, the judge will refer it to the Constitutional Court for eventual review. This action will only proceed when the affected party does not have another means of legal defense unless it is used as a transitory mechanism to avoid irreparable damage. In no case may more than ten days elapse between the request for guardianship and its resolution. The law will establish the cases in which the tutela action proceeds against individuals in charge of providing a public service or whose conduct seriously and directly affects the collective interest, or with respect to whom the applicant is in a state of subordination or defenselessness.

[13] Article 183. Members of Congress will lose their investiture: 1. Due to violation of the disqualifications and incompatibilities regime, or the conflict of interest regime. 2. Due to non-attendance, in the same period of sessions, at six plenary meetings in which legislative

Direct and Concentrated Jurisdiction in a single instance in the Criminal Chamber of the Supreme Court of Justice.[14]

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bills, laws or motions of censure are voted on. 3. For not taking office within the eight days following the date of installation of the Chambers, or the date on which they were called to take office. 4. Due to improper allocation of public money. 5. Due to duly proven influence peddling. Paragraph. Causes 2 and 3 will not apply when there is force majeure.

Article 184. The loss of the investiture will be decreed by the Council of State in accordance with the law and in a term not exceeding twenty business days, counted from the date of the request made by the board of directors of the corresponding chamber or by any citizen.

[14] Article 186. The Supreme Court of Justice, the only authority that can order their arrest, will hear exclusively the crimes committed by Congressmen. In case of flagrante delicto, they must be apprehended and immediately placed at the disposal of the same corporation. It will correspond to the Special Investigation Chamber of the Criminal Chamber of the Supreme Court of Justice to investigate and charge before the Special Chamber of First Instance of the same Criminal Chamber the sailors of the Congress for the crimes committed. The appeal will proceed against the sentences pronounced by the Special Chamber of First Instance of the Criminal Chamber of the Supreme Court of Justice. Its knowledge will correspond to the Criminal Cassation Chamber of the Supreme Court of Justice. The first conviction may be challenged.

Article 234. The Supreme Court of Justice is the highest Court of Ordinary Jurisdiction and will be composed of the odd number of Magistrates determined by law. This will divide the Court into Chambers and Special Chambers, will indicate to each of them the matters that must be heard separately and will determine those in which the Court must intervene in plenary session. In the case of constitutional judges, the Criminal Cassation Chamber and the Special Chambers will guarantee the separation of the investigation and the trial, the double instance of the sentence and the right to challenge the first sentence. The Special Investigation Chamber will be made up of six (6) Magistrates and the Special First Instance Chamber by three (3) Magistrates. The members of these Special Chambers must meet the requirements to be Magistrates of the Supreme Court of Justice. The same regime will be applied to them for their election and period. The Magistrates of the Special Chambers will only be competent to hear exclusively the matters of investigation and trial in the first instance under the conditions established by law. The regulations of the Supreme Court of Justice may not assign to the Special Chambers the knowledge and decision of the matters that correspond to the Criminal Cassation Chamber. The Magistrates of the Special Chambers may not hear administrative or electoral matters of the Supreme Court of Justice, nor will they be part of the Plenary Chamber. Paragraph. The constitutional appraisers of article 174 of the Political Constitution have the right to challenge and double instance as indicated by law.

Article 235. The powers of the Supreme Court of Justice are: 1. To act as a court of appeal. 2. Know the right to challenge and appeal in criminal matters, as determined by law. 3. Judge the President of the Republic, or whoever acts on his behalf, and the senior officials referred to in article 174, prior to the procedure established [in numerals 2 and 3 of] article 175 of the Political Constitution, for any punishable conduct that they are imputed. For these trials, the Criminal Chamber of the Supreme Court of Justice will also be made up of Special Chambers that guarantee the right of challenge and double instance. 4.Investigate and try members of Congress. 5. Judge, through the Special Chamber of First Instance, of the

It should be noted that in the month of January 2018, less than two months before the general elections to the Congress of the Republic and at the beginning of the last year of the government of President Juan Manuel Santos, Law 1881 has just been issued, by which modifies the procedure for the loss of investiture of the congressmen, the double instance is consecrated, term of expiration of the Action of Loss of Investiture of the congressmen of a part. On the other hand, the Legislative Act or constitutional reform 01 of 2018 was issued by which articles 186, 234, and 235 of the Political Constitution are modified and the right to double instance and to challenge in cases of trials is implemented. Criminal cases of congressmen and other high-ranking officials subject to constitutional jurisdiction before the Supreme Court of Justice.

The preferential disciplinary powers of the Attorney General of the Nation over all kinds of public servants, including those of popular election and even private individuals, the incipient creation of the Attorney General's Office, Citizen Participation in matters of fiscal control in the terms of article 270 of the 1991[15] Constitution, the Internal Control system in all public entities according to article 269 of the higher codification in ac-

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Criminal Chamber of the Supreme Court of Justice, prior accusation by the Attorney General of the Nation, the Deputy Attorney General of the Nation, or their delegates from the unit of prosecutors before the Supreme Court of Justice, the Vice President of the Republic, the Ministers of the Office, the Attorney General, the Ombudsman, the Agents of the Public Ministry before the Court, before the Council of State and before the Courts, Directors of the Administrative Departments, to the Comptroller General of the Republic, to the Ambassadors and head of diplomatic or consular mission, to the Governors, to the Magistrates of Courts and to the Generals and Admirals of the Public Force, for the punishable acts that are imputed to them . 6. Resolve, through the Criminal Cassation Chamber of the Supreme Court of Justice, the appeals filed against decisions issued by the Special First Instance Chamber of the Criminal Chamber of the Supreme Court of Justice.7. Resolve, through a Chamber made up of three Magistrates of the Criminal Cassation Chamber of the Supreme Court of Justice and who have not participated in the decision, as determined by law, the request for double judicial conformity of the first conviction of the judgment handed down by the remaining Magistrates of said Chamber in the matters referred to in numerals 1, 3, 4, 5 and 6 of this article, or of the rulings handed down in those conditions by the Superior or Military Courts. 8. Hear all contentious business of diplomatic agents accredited before the Government of the Nation, in the cases provided for by international law. 9. Give yourself your own rules. 10. Other powers indicated by law. Paragraph. When the afore mentioned officials have ceased to hold office, the jurisdiction will only be maintained for punishable conduct that is related to the functions performed.

[15] Article 270. The law will organize the forms and systems of citizen participation that allow monitoring the public management that is carried out at the various administrative levels and its results.

cordance with article 209, 267,[16] constitutional actions of a judicial nature such as the Guardianship, the Popular Actions,[17] the Compliance Actions and the actions for diffuse interests and the Group Actions in articles 89 and 92 of the Constitution.[18]

3. Indeed, directly we find provisions such as the one established in the constitutional right to petition article, which states that everyone has the right to submit respectful petitions to public authorities for reasons of general or particular interest and to obtain a prompt resolution that appears regulated in the well-known constitutional article 23, which can also be exercised before private organizations to guarantee fundamental rights.

On the other hand, in article 90 of the Colombian Political Charter, it is established that in the event that the State is sentenced to patrimonial reparation for the unlawful damages caused by the willful or seriously negligent conduct of an agent of its own or by public authorities for his action or his omission that he must repeat against these.

Also, in article 92 of the Constitution, public and popular action is established to request the application of criminal or disciplinary sanctions derived from the conduct of public authorities. It should also be noted that article 93 ordered the incorporation of the Colombian State into the Rome Statute and recognized the validity and operation of the jurisdiction of the International Criminal Court of utmost importance among us in attention to the very serious situations of violation of constitutional rights, life, and physical integrity of many Colombians by paramilitary groups, guerrilla groups and State agents such as military and police involved in crimes against humanity.

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[16] Article 269. In public entities, the corresponding authorities are obliged to design and apply, depending on the nature of their functions, internal control methods and procedures, in accordance with the provisions of the law, which may establish exceptions and authorize contracting of said services with private Colombian companies.

[17] Article 88. The law will regulate popular actions for the protection of collective rights and interests, related to heritage, space, public safety and health, administrative morality, the environment, free economic competition, and others of a similar nature. that are defined in it. It will also regulate the actions originated in the damages caused to a plural number of people, without prejudice to the corresponding private actions. Likewise, it will define the cases of objective civil liability for the damage inflicted on collective rights and interests.

[18] Article 87. Any person may go before the judicial authority to enforce compliance with a law or an administrative act. If the action succeeds, the sentence will order the reluctant authority to comply with the omitted duty.

Article 89. In addition to those enshrined in the previous articles, the law will establish the other resources, actions, and procedures necessary for them to advocate for the integrity of the legal order, and for the protection of their individual, group, or collective rights. against the action or omission of public authorities.

In addition, we find that article 122 of the Political Charter establishes the duty of all public servants to swear defense, respect, and compliance with the legal system and to attend to the fulfillment of the duties that correspond to them. There is the duty to declare the amount of assets and income of public servants before taking office, upon leaving the same or when the competent authority requests it.

Similarly, we find in constitutional article 123 that public servants are at the service of the State and the Community and that they will exercise their functions in accordance with the principle of legality in the manner provided for in the Constitution, the law and the regulations, as you wish, In addition, the law can establish the responsibility of public servants and the way to make it effective in the terms of article 124.

Of singular legal importance we find in article 126 of the same superior codification that established a kind of disability regime for cases of nepotism and patronage, now modified by Legislative Act 02 of 2015 in which, among other elements, a kind of political reform to seek an incipient balance of powers aimed at the powers of the high dignitaries of justice.[19]

In the same way, we find the provisions of article 127 of the Political Charter, which establishes the incompatibilities for public servants who cannot enter into any contract with public entities or with private persons by

[19] Article 126. Public servants may not, in the exercise of their functions, appoint, apply for, or contract with persons with whom they are related up to the fourth degree of consanguinity, second degree of affinity, first civil, or with whom they are linked by marriage or permanent union.

Nor may they appoint or apply as public servants, or enter into state contracts, with those who have intervened in their application or appointment, or with people who have the same links with them indicated in the previous paragraph.

Appointments made in application of current regulations on entry or promotion based on merit in career positions are excepted from the provisions of this article.

Except for competitions regulated by law, the election of public servants attributed to public corporations must be preceded by a public call regulated by law, in which requirements and procedures are established that guarantee the principles of publicity, transparency, citizen participation, equity gender and merit criteria for their selection.

Whoever has exercised in property any of the positions in the following list, may not be re-elected for the same. He may not be nominated for another of these positions, nor be elected to a popularly elected position, but one year after having ceased to exercise his functions:

Magistrate of the Constitutional Court, of the Supreme Court of Justice, of the Council of State, of the National Commission of Judicial Discipline, Member of the Commission of Aforados, Member of the National Electoral Council, Attorney General of the Nation, Attorney General of the Nation, Defender of the People, Comptroller General of the Republic and National Registrar of Civil Status.

themselves or through an intermediary or on behalf of another. that manage or administer public resources, except for legal exceptions.[20]

Article 128 of the Political Charter also establishes a mode of incompatibility for the simultaneous performance of more than one public job and to receive more than one allocation of public resources.[21] In addition, article 129 of the same constitutional code establishes that public servants may not receive positions, honors and rewards from foreign governments or international organizations, nor enter contracts with them, without prior authorization from the Government.

One of the most far-reaching provisions in the regulation of possible hypotheses of corruption of congressmen in Colombia is article 180 in which the regime of incompatibilities related to their possible influence on the public administration and its resources was established. Likewise, constitutional article 181 states that the incompatibilities of the congressmen will be valid during the respective constitutional period and that in case of resignation they will be maintained during the year following their acceptance, if the period remaining for the expiration of the period is greater. In the same way, said inabilities and incompatibilities extend to those who are called to occupy the positions.[22]

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[20] Article 127. Public servants may not celebrate, by themselves or through an intermediary, or on behalf of another, any contract with public entities or with private persons that manage or administer public resources, except for legal exceptions.

State employees who work in the judicial branch, in electoral, control and security bodies are prohibited from taking part in the activities of parties and movements and in political controversies, without prejudice to freely exercising the right to suffrage. The limitations contemplated in article 219 of the Constitution apply to members of the Public Force in active service.

Employees not contemplated in this prohibition may only participate in said activities and controversies under the conditions indicated by the Statutory Law.

Using employment to pressure citizens to support a political cause or campaign constitutes grounds for misconduct.

[21] Article 128. No one may simultaneously hold more than one public job or receive more than one assignment from the public treasury, or from companies or institutions in which the State has a majority share, except in cases expressly determined by law. Public treasury is understood as that of the Nation, that of the territorial entities and that of the decentralized ones.

[22] Article 180. Congressmen may not:

1. Hold public or private office or employment.

2. Manage, on their own behalf or on behalf of others, matters before public entities or before people who administer taxes, be proxies before them, enter any contract with them, by themselves or through an intermediary. The law establishes exceptions to this provision.

3. Be a member of boards or boards of directors of decentralized official entities of any level or of institutions that administer taxes.

Article 182 established the duty of congressmen to inform the respective Chamber of moral or economic situations that inhibit them from participating in the processing of matters submitted for their consideration and matters related to conflicts of interest and challenges.

Also, as we have seen, article 183 of the Constitution establishes the already announced grounds for Loss of Investiture of congressmen for violation of the disqualifications and incompatibilities regime, or the conflict-of-interest regime or for non-attendance at plenary meetings, due to improper assignment. of public money, for influence peddling or for not taking office within the constitutional terms, which will be decreed by the Council of State in accordance with the law and within a term not exceeding twenty business days, counted from the date of formulation by request of any citizen or the board of directors of the respective chamber. The regime of Direct Criminal Jurisdiction for congressmen is provided for in article 186 of the same Political Charter in which it is said that the crimes committed by congressmen, will be exclusively heard by the Supreme Court of Justice, the only authority that can order their arrest and that in case of flagrante delicto they must be apprehended and placed immediately at the disposal of the same corporation.

In the international arena, cooperation, and commitments in the fight against corruption are the Inter-American Convention Against Corruption adopted and approved by Law 412 of 1997 and the United Nations Convention Against Corruption under the terms of Law 970 of 2005.

On the other hand, we find the provisions of Law 80 of 1993 on public procurement, including measures of transparency and science, Law 190 of 1995 aimed at preserving morality in the Public Administration and eradicating administrative corruption, the aforementioned Anti-Corruption Statute that other provisions are the rules on the duty to inform about the existence of disabilities and contrary to some statements that, from the lack of academic rigor, say that the Statute has not been very useful, the truth is that since its issuance, said standard has been consolidated as a powerful tool that materializes concrete advances in the different fields that it regu-

4. Enter contracts or take steps with natural or legal persons of private law that administer, manage or invest public funds or are contractors of the State or receive donations from it. The acquisition of goods or services that are offered to citizens under equal conditions is excepted.

1st Paragraph The exercise of the university chair is excepted from the regime of incompatibilities.

2nd Paragraph. The official who, in contravention of this article, appoints a congressman for a job or position or enters into a contract with him or accepts that he acts as a manager on his own behalf or on behalf of third parties, will incur a cause of misconduct.

lates. Indeed, the combination of administrative, criminal, disciplinary, fiscal and educational measures and the work of special anti-corruption agencies aimed at better interstate coordination at the national and local levels, as well as greater dialogue between the State and society civil society, have been essential in combating corruption.

Throughout this document, the main advances in the implementation of Law 1474 of 2011 will be presented, seeking to offer state entities and citizens in general a report on the advances, achievements, and challenges of the Statute, from the date of its issuance to the 2016, so that its most relevant aspects are public knowledge. Corruption is a difficult phenomenon to combat, but even so, the Santos Government, during its two terms, has concentrated on expelling this phenomenon from our public and private institutions.

The figure of specialized disciplinary control over magistrates, judges and prosecutors was also introduced in the misnamed Disciplinary Jurisdictional Chamber of the Superior Council of the Judiciary, but the bad treatment given by the jurisprudence of the Constitutional Court to that in three sentences of constitutionality completely dismantled it by reducing it to a corporation with two completely separate chambers and without disciplinary functions over the magistrates of the high courts.

In these matters, I must reiterate my regret and concern because in these weeks of February 2018, two major reforms were introduced into the constitutional text that weaken the so-called Loss of Investiture of Congressmen and the Full, Direct and Complete Criminal Jurisdiction. before the Criminal Chamber of the Supreme Court of Justice, which will make the process more complex.

This challenge formulated against political corruption and against drug trafficking, meant a strong human challenge against the traditional political powers that has not concluded, and that shows balances of different color, mainly negative in terms of political corruption and organized drug trafficking, which have demanded a great effort from the legislative power to incorporate a Single Disciplinary Code in Law 743 of 2002, an anti-corruption statute in Law 1474 of 2011 and other legal reforms to fiscal control procedures.[23]

[23] Many of the regulatory reforms introduced in the Colombian legal system in the development of the fight against corruption have been incorporated and developed in the legal order, as occurs precisely with the so-called Anti-Corruption Statute found in Law 1474 of 2011. At the end of this work, we will make a presentation and summary of the very important contents of it.

4. Certainly in the general balance of the state of affairs of corruption in Colombia and after 26 years of implementation and operation, the profound constitutional transformation of the instruments for the prosecution of crimes and the fight against corruption in its different modalities and scenarios introduced by the National Constituent Assembly, it is found that this is not a resounding and absolute failure as many actors responsible for the institutional fight against corruption in Colombia think. In this balance we find lights and deep shadows, scenarios of achievements, results and positives, and very harsh and astonishing accounts of the new manifestations of the incorrectness of the public servants representing the new parties that have occupied the Presidency of the Republic.

In this sense, this balance coincides with the main spokesmen of the political parties in the electoral contest that is being processed this year, including the last institutional spokesmen of that fight, such as the Comptroller General of the Republic,[24] the General Attorney [25] and the Attorney General of the Nation.[26]

[24] It should be noted that the Office of the Comptroller General of the Republic (CGR) oversees monitoring the fiscal and official management of public resources and the management of the funds and assets of the Nation and of establishing the responsibility that derives from it. In addition, it is their duty to promote before the competent authorities, providing the respective evidence, criminal, or disciplinary investigations against those who have caused damage to the patrimonial interests of the State. In an extraordinary way, the CGR may demand known truth and good faith kept, the immediate suspension of officials while the investigations or the respective criminal or disciplinary processes are completed. It also has normative functions of a regulatory nature since it can dictate general rules to harmonize the fiscal control systems of all public entities of the national and territorial order.

[25] The Office of the General Attorney of the Nation (PGN) is the head of the so-called Public Ministry in Colombia since in this matter it monitors compliance with the Constitution, laws, judicial decisions, and administrative acts, defends the interests of society and mainly exercise superior oversight of pubic officials.

[26] Article 250. The Office of the General Attorney of the Nation is obliged to advance the exercise of criminal action and carry out the investigation of the facts that have the characteristics of a crime that come to its knowledge through a complaint, special request, complaint or ex officio, if there are sufficient reasons and factual circumstances that indicate the possible existence of the same. Consequently, it may not suspend, interrupt, or waive criminal prosecution, except in cases established by law for the application of the principle of opportunity regulated within the framework of the criminal policy of the State, which will be subject to the control of legality by the judge who exercises the functions of control of guarantees. Crimes committed by Members of the Public Force in active service and in relation to the same service are excepted. In the exercise of its functions, the Office of the General Attorney of the Nation must:

1. Request the judge to exercise the functions of control of guarantees, the necessary measures that ensure the appearance of those accused in criminal proceedings, the conservation of evidence and the protection of the community, especially of the victims.

The current reality of such a task must face increasingly dark and harmful realities such as those that occur in territorial administrations, in large administrative, planning, regulation and provision of resources and public services agencies.

The judge who exercises the functions of control of guarantees, may not be, in any case, the judge of knowledge, in those matters in which he has exercised this function. The law may empower the Office of the General Attorney of the Nation to make exceptional arrests; Likewise, the law will set the limits and events in which the capture proceeds. In these cases, the judge who fulfills the guaranteed control function will do so within the following thirty-six (36) hours at the latest.

2. Advance records, raids, seizures, and interceptions of communications. In these events, the judge who exercises the functions of control of guarantees will carry out the respective subsequent control, at the latest within the following thirty-six (36) hours.

3. Ensure the material evidence, guaranteeing the chain of custody while its contradiction is exercised. If additional measures are required that imply an infringement of fundamental rights, the respective authorization must be obtained from the judge who exercises the functions of control of guarantees to proceed.

4. Present an accusation brief before the hearing judge, to start a public, oral trial, with immediacy of the evidence, contradictory, concentrated and with all the guarantees.

5. To request before the judge of knowledge the preclusion of the investigations when according to the provisions of the law there is no merit to accuse.

6. Request before the hearing judge the necessary judicial measures to assist the victims, as well as order the reestablishment of the right and full reparation for those affected by the crime.

7. Ensure the protection of victims, jurors, witnesses and other participants in the criminal process, the law will establish the terms in which the victims may intervene in the criminal process and the restorative justice mechanisms.

8. Direct and coordinate the functions of the judicial police that the National Police and the other organisms indicated by law carry out on a permanent basis.

9. Fulfill the other functions established by law.

The Attorney General and his delegates have jurisdiction throughout the national territory. In the event of presenting a writ of accusation, the Attorney General or his delegates must provide, through the hearing judge, all the evidentiary elements and information of which he is aware, including those that are favorable to the accused.

1. The Office of the General Attorney of the Nation will continue to fulfill the functions contemplated in article 277 of the National Constitution in the new system of inquiry, investigation and criminal trial.

2. To combat terrorism and crimes against public security, and in those places in the national territory where there is no judicial authority that can be resorted to immediately or where access by ordinary judicial police officers is not possible. possible due to exceptional circumstances of public order, the Office of the General Attorney of the Nation will form special Judicial Police units with members of the Armed Forces, which will be under its direction and coordination. For the development of the tasks of this function, the members of the Unit belonging to the military forces will be governed, without exception, by the same principles of responsibility as the other members of the special unit.

In addition, the current reality in the fight against corruption in Colombia has spread to judicial servants in several of whose services and agencies unsuspected corrupt practices have appeared throughout the course of our republican life. Today, for example, outrageous names have been coined about these forms of public corruption, such as the so-called "Cartel de la Toga", public health cartels such as orphan or catastrophic disease cartels.[27]

This commitment led to transformations such as the overcoming of traditional bipartisanship and the rationalization of authoritarian presidentialism founded from its origins in the State of Siege and the Presidential Extraordinary Powers without material or temporal limit.

For this reason, new constituencies or electoral districts were established that were detached from the so-called rotten departmental fiefdoms, such as the Senate with a single national election, the constituencies for ethnic minorities and others such as that of Colombians residing abroad, the popular election of mayors and governors. The figure of the vice president or the so-called presidential formula was also established, elected together with the vice presidency in an absolute majority and in the double round with the absolute prohibition of re-election. Subsequently, serious modifications related to the statute of the parties, their discipline, disabilities, incompatibilities, and ineligibility and causes for loss of investiture have been introduced to the constitutional text of 1991, which now extends to deputies and councilors of the administrative territorial bodies.

IV. The reality of the fight against corruption

1. Administrative corruption today is a constant that varies in intensity and extension from time to time, remains hidden during periods and events and is used for many and varied purposes; in these decades it is one of the issues that occupies a lot of space on the public agendas of the judicial bodies of each State and of the international community, even involving international police agencies. In our continent it has been possible to combat it at levels

[27] In this order of ideas, criminal organizations dedicated to fraud have been discovered public resources destined for social programs of health, education, and agricultural development such as the so-called cartels of Hemophilia, AIDS, recovery treatments for mentally ill, among many others. in which certificates, alleged patients, treatments not applied, among many other corrupt practices, are falsified and adulterated to authorize the payment of billions of pesos to fraudsters, among whom are governors, owners, and administrators of health entities.

of the highest hierarchy of the public, and others that have not been able to overcome the barriers established by state impunity.

However, in many cases it does not necessarily imply the claim of personal enrichment of public servants or their relatives, since it may well imply their modalities aimed at satisfying political needs for governance and institutional stability other than personal or family enrichment and contributing to public peace. or to a balance of forces of various kinds.

There are situations of possible institutional chaos and perverse conditions of political settlement in which the payment of public money flows corresponds to the habitual exercise of perverse modalities of commitments and inter-institutional crossing of them and cases in which political corruption assumes unsuspected modalities in a way that preliminary in which it also serves to buy governability or for illicit purposes related to the maintenance of causes and causes that ensure stability, continuity and non-democratic compensation of a regime.[28]

2. Corruption in Latin America has acquired new and unusual dimensions, and, now in the years that have gone by in the 21st century, it assumes deeply unfortunate modalities as it has also extended to the bleeding of public resources legally appropriated to meet the needs minimum and essential in health, food and basic sanitation of the poorest and most neglected populations.

In the Colombian case, it has been judicially proven that in the 2014 presidential elections many resources were distributed by foreign companies and Colombian businessmen to regional political bosses to illegally finance the expenses of their campaigns and this has not produced criminal or legal consequences. Political and less electoral, despite the fact that it is about delivering economic benefits aimed at obtaining road concessions or higher income from contracts in development or to benefit from future contracts in the event that one of the financed candidates is elected.[29]

3. Electoral campaigns have also been illegally financed with the idea that the elected and financed party grants the financiers new contracts not only at the national level but also at the territorial level. In many cases, kickbacks and bribes have been known to be paid in cash and used to pay for political campaign expenses in situations of urgent need. Their payment is sometimes made in large sums of cash or transfer deposits in the opaque financial regimes in many regions of the planet.

[28] Hernández Gamarra, Antonio, *Control fiscal, funciones de advertencia y lucha contra la corrupción*, Bogotá, Office of the Comptroller General of the Republic, 2006, vol. II.

[29] Coronell, Daniel, *Más allá de cualquier duda*, *Revista Semana*, Bogotá, núm. 1870, March 3, 2018.

4. In Colombia, the old corrupt practices of bureaucratic patrimonial clientelism, contractual bribery, so-called bribes or tangents have increased notably and now include almost all construction contracts, supplies, concessions, adaptations, among many others with figures and unsuspected and unimaginable amounts.

All this made it essential to modify from the Political Constitution the regime of discipline and behavior of the congressmen and establish the regime of benches to put discipline in the line of the candidates for the Barril de los Puercos of the Department of National Planning, of the OCAD, of FONADE and of the hundreds of presidential funds for the administration of the resources of the general systems of royalties and of territorial participations such as the Fund for Adaptation to Climate Change.[30]

5. Corrupt practices have been denounced in the military forces with multiple expressions, such as the sale of healthy blood from soldiers to medical marketers instead of keeping it available in military hospitals. Corrupt practices have also been reported in the purchase of uniforms, boots, vehicles, weapons, submarines, planes and explosives. There have also been convictions against public servants for illegal actions against the magistrates of the Supreme Court of Justice and several journalists known as the wiretaps and surveillance in an extremely perverse form of crime and corruption.[31]

Corruption today is essentially transnational, international and uses all the forms and facilities created by the financial regimes of the countries to hide, launder, clean and throw back into the world of the legality of law, items and sums of money product of the bribery, bribery, extortion, embezzlement, theft and their payments.

6. The new modalities with which public corruption appears among Colombians are now similar to those that appear in the international political concert and in response very serious voices are heard that want to set off the alarms such as the so-called institutional leaders against corruption such as Mr. so-called Comptroller General of the Republic and the so-called Attorney General of the Nation who warn that "...corruption is destroying the State..." and that "...we are already on the brink of the abyss..." well, if a great national agreement to combat it, "...the State as such would be in danger...".

In this sense, it should be noted that despite the immense achievements in these matters, the continuous action of the corrupt apparently and in

[30] Padrón Pardo, Floralba, *El concepto y función de las bancadas: Las transformaciones de la representación política*, Bogotá, Externado University of Colombia, 2015.

[31] Martínez, Julián F., *Chuzada. Ochos años de espionaje y barbarie,* Bogotá, Ediciones B Colombia, 2016.

perception studies and specialized surveys, generates fraud of approximately 40 billion Colombian pesos per year. In this sense, the institutional perception of the Colombian control agencies regarding the possible loss of about 20 percent of the annual national budget, which today amounts to almost 250 billion Colombian pesos, has been recognized and disseminated.

Of course, the struggle of our countries has not been in vain and thousands of cases have been discovered, investigated and sanctioned by our administrative and judicial authorities, as in the cases of Brazil. In this matter, Colombia is very similar to Brazil, Peru and Mexico and the bribes for the award of concessions and construction contracts, among others, are very similar in modalities and amounts. In these countries, the etiology of crime against public resources is similar and its causes are not different.

Now, that is a living, vigorous phenomenon, it reproduces like the snakes and scales of the Gorgon Medusa condemned by the enraged goddess Athena and there does not seem to be a Perseus to decapitate her, but in the institutional war against her she has been able to sever dozens of harmful extensions.

7. By way of initial reflections related to the current situation of the institutional fight against corruption in Colombia, we find that corruption as a social phenomenon of economic and political importance has been radically transformed and has achieved and allowed the incorporation of sophisticated tools and resources from the point of view of from a technical and political point of view, as well as from the point of view of regulations and the doctrine of criminal law, which make it more efficient, effective and in some cases more forceful but in any case insufficient to defeat in an important way. In summary, of the known regulatory developments, it is worth highlighting the issuance of the aforementioned Anti-Corruption Statute in Law 1474 of 2011, whose main regulations contain, in summary, several extremely important devices that we will see later.

8. As we have seen, the so-called Single Disciplinary Code was also issued through Law 734 of 2002, which serves to investigate and sanction public servants from the disciplinary and correctional point of view with functions contrary to the Inter-American Convention on Human Rights and which has been applied for political and ideological purposes as in the case of the Mayor of Bogotá Gustavo Petro Urrego among many others.

Thus, Colombian institutions have now been endowed with very important rules, procedures and vigorous, innovative and powerful organisms in the fight against political, administrative, financial and private corruption like never before in national life, and its constitutional and Laws are examined with great interest by the democratic regimes of Latin America

as an example of the commitment of the legal regime and the main political actors and the current constitutional system to overcome the serious defects created by corruption and the mafias and cartels of politicians and criminals. to appropriate public resources and political institutions that they bleed and squeeze in favor of their private coffers.

9. Given the permanent challenges of the different actors of corruption and the relative successes of the methodologies used in the Colombian State against their criminal actions, it has been necessary to constantly innovate with efficient institutions and go beyond certain traditional procedural guarantees that have produced good results but that were insufficient and that have failed in some cases for several years, since the practices of corruption, as we said, have permeated the political regime from the highest structures of power, beginning with the office of the Presidency of the Republic and the main departments of the national administration, which has been intensely replicated at the territorial level.

Edgardo Maya Villazón responsible for overseeing the fiscal management of public resources, even after four years of important service as Comptroller General of the Republic, eight years as head of the Attorney General's Office, and eight years as magistrate responsible for monitoring and sanctioning the disciplinary conduct of prosecutors, judges, and magistrates of the judiciary, warns that the evil of corruption has spread so much that:

> Corruption in Colombia can no longer be seen from the point of view that it is a conjunctural fact, but that it is a phenomenon that is in the structure not only of the State but of society in all its immensity and is causing great damage to the opinion. I, as comptroller and with my experience as attorney general for eight years and as a magistrate for another eight, have seen that the film repeats itself, but every day the dimension is greater and that "...the strongest party in Colombia is the hiring party…".

For the Comptroller General of the Republic that the costs of political campaigns have led the country to finance them with public resources of corrupt origin and from there arises the strongest party that exists in Colombia today, which is the party of the contractors, since they are the ones who end up financing these campaigns, since the money invested is later "recovered".

10. In our country there are specific cases of mega corruption such as the higher costs of the Cartagena Reficar Refinery, which was contracted for 3,960 million pesos and cost 8,000 million, and the La Línea tunnel,

which is contracted for 600,000 million pesos, and until today it has an investment of 2 billion pesos, and it is estimated that another billion is missing to finish it. Other acts of corruption of great dimensions are also denounced in the so-called Ruta del Sol in several of its sections. In the same way, other processes of notable corruption are denounced in Colombia in different lines of spending and distribution of public resources, especially in health, in school meals, in education, in general infrastructure, also at the departmental and municipal level.

Many of the opinion makers in our country maintain that in Colombia there are high levels of hopelessness during the electoral political process, which can lead to a massive reaction from society and that some illegitimate actors can capitalize on it. However, corruption is not attributable solely to the public sector and only its agents; they do not act alone and need the assistance of private sector agents in various expressions of co-authorship, complicity or cover-up.

11. In addition to the important institutions that were incorporated into the Constitution in 1991 and that we have just mentioned, very effective citizen oversight bodies have been developed and have proven that control bodies by themselves do not put an end to corruption. These began as a legal development from the Comptroller General of the Republic during the administration of Carlos Ossa Escobar and has been one of the great national political transformations based on participatory fiscal control and citizen participation.

In addition, only with the construction of public policies based on citizen control, with specialized citizen oversight and with the promotion of public complaints supporting the comptrollers, the Prosecutor's Office and the Attorney General's Office have achieved very important actions of persecution and punishment of the corrupt.

In summary, it is possible that a great national agreement against corruption is needed as a result of a State policy as the greatest political bet in combating it in all legal ways, since corruption has dimensions unimaginable in 1991, but said agreement must be celebrated outside of the circle of power and its hegemonic bloc that today carries the greatest discredit in national history.

In my opinion, I do not believe that the State is in danger due to the modifications and new forms of corruption, and I do not believe that we are on the verge of the abyss if corruption is not eliminated, least of all when we have carried out such a task of institutional adjustment and have managed to discover a good part of newly minted corrupt practices.

12. Corruption does not destroy the State but rather allows other corrupt actors to displace the actors of the regime and so on, as has been the history of humanity since the State existed. Neither is Colombian society destroyed by the cases of hemophilia, health, infrastructure, the environment, or education, since what scandals generate due to the acts of corruption discovered is the discredit of society and its leaders and can provoke substitutions of elites and of the blocs in power and the social backwardness that causes so much pain.

On the other hand, the accusatory criminal system and oral and public trials that were set up, and especially the issue of criminal justice for the purpose of effectiveness and efficiency in the prosecution of crime, sponsors denunciation, collaboration, submission, acceptance advance charges and serves to dismantle criminal gangs.

In Colombia, new tremendously unfortunate corrupt practices are now being prosecuted against public resources, such as that of the so-called hemophilia, AIDS, rehabilitation and therapy cartels for people with disabilities, the elderly and abandoned people, school feeding among many others, which supposes a long chain of private actors involved that include the health sector attended by private companies that certify non-existent procedures, supplies not made and exaggerated and unheard of costs of medicines, incapacities, very high exams unrealized cost.[32]

Corruption of a new kind also has expressions such as the recognition of non-existent students, of deceased members of health systems who receive high-cost treatments and procedures paid for by the public administration. Cases of labor rights and pensions to teachers without requirements, even forced by judicial means of amparo to include clans and groups of judges and judicial officials immersed in these corrupt practices to bleed public resources in the long term.

13. The new modalities of corruption of public resources are growing beyond the minimum traditional limits of human correction and in a certain way, in some countries like Colombia, they threaten to defeat the minimum rules of legitimacy that are expected of democratic and republican governments.

In a large part of the acts of corruption, it has been found that they serve to remunerate the barons and the electoral captains and to cover the immense costs of the electoral campaigns in our country. These costs are

[32] In the fiscal audits carried out on the so-called health cartels and only with the issue of hemophilia, it is stated that corruption cost the State 54,000 million pesos when none of the alleged patients was sick and even though they appeared with certificates that they were false.

unpayable with legitimate resources given that, in addition, the presidency and vice-presidency are elected by the double-round method, the Senate is elected in national constituencies and the campaigns of thousands of local mayors, municipal councilors, deputies must be financed. departmental, more than one thousand two hundred mayors, 37 governors, 102 senators, 165 representatives to the chamber, president, and vice president of the republic in two rounds. In most of the elections, immemorial acts of vote-buying and irredentist clienteles have been detected that persist in a virulent and irrepressible way in conditions of poverty and human and social inequality.

Today it is argued that in the 2018 general elections in Colombia there will be an electoral collapse of the political regime that would seriously overturn the historic fight against impunity in political and administrative corruption and that would lead new actors to their public destinies in the next general election.

14. On the other hand, the increase in the availability of fiscal resources and public spending in our States has occurred in the last three decades thanks to the relative economic growth of almost all our countries and the application of provisions and measures of neoliberal origin. and openness, creators of immense private wealth and the public capitalization of state resources, which allows the public treasury to assume very large commitments in terms of infrastructure and in social matters typical of the social state and the social market economy.

In addition, this increase in the availability of fiscal resources is potentialized in terms of favoring the establishment of acts of public corruption due to the consequent capacity to arbitrate resources, not only monetary but also legal, such as permits and concessions for roads, ports, airports, tolls, dredging, with the creation of free zones, with the establishment of tax exemptions, with the granting of permits, licenses, authorizations, economic incentives, subsidies, fees and other benefits of state origin.

All of this is also a product of the globalization of the markets with free trade agreements, with economic tightening and from the relaxation of almost all commercial borders in our states.

This availability of resources is also due to the growing globalization of capital and the credit capacities of the Latin American States, as well as the mining and extractive wealth of almost all of them, mainly Brazil, Venezuela, Chile and Mexico. For example, in recent years in Colombia, public spending represents close to 28 percent of the Gross Domestic Product (GDP) and a good part of it ends up in the hands of the corrupt and

private individuals who benefit from the alteration or disregard of criminal and contractual applicable rules to state businesses.

All this has transferred the rules of the old democratic governance to the new scenarios of corrupt and patrimonial governance that generate flows of resources to sustain electoral campaigns and to enrich the popular representatives who have been assigned the direction of the public entity.

In Colombia, the constitution was modified to create governance bodies known as OCAD, and dozens of presidential and governmental funds were created in charge of receiving and managing with the Governors, Mayors, senators, representatives and ministers the destination of public funds in public works. and in contracts oriented and defined largely through bribes paid by the contractors appointed from those constitutional scenarios of Governance.[33]

De otra parte, en las instancias del Congreso de la República, las comisiones encargadas de hacer control político a los jefes superiores de la administración logran grandes beneficios de las empresas contratistas si promueven sus necesidades contractuales y orientan la gestión gubernamental a favor de las empresas de quienes reciben sumas millonarias en dólares como sobornos.

This can be seen in several countries, such as in the cases of Brazil, Colombia, Argentina, and Peru, where in order to ensure the stability of governments, public administrations at all levels are patrimonialized and actors are assured monthly or weekly flows of resources from the administrative entities distributed among the politicians who support a management or sit at the famous tables of national unity or local government. In Colombia, as we will see, these figures are called the indicative quotas, the jam and the flow.

The increase in indebtedness of all our states supposes large amounts of resources for investment in infrastructure works and for the operation of public entities, it has generated an immense number of opportunities to manage and administer public spending at almost all levels of state administrations.

We no longer find among us demagogic or military governments like those that ruled the region for two thirds of the 20th century, but the new progressive, anti-progressive or authoritarian populism of pseudo-lefts like the self-styled socialist revolutions of the 21st century, which have enthroned

[33] Ortiz, Julio César, *La importancia de la Constitución económica y la destrucción paulatina de la Constitución Política*, *Memory of the XII Ibero-American Congress of Constitutional Law*, Bogotá, Ibero-American Institute of Constitutional Law-Externado University of Colombia, 2016.

themselves among us, despite the fact that they are scarce and isolated, especially in the painful Venezuelan affair that does not yield to the validity of the law and reproduces and strengthens a constitutional, demagogic and mafia authoritarianism, they do a lot of damage to the legitimacy of the democratic and republican institutions and sustainable human and social development.

In this order of things, the collapse of the credibility of our political regimes in the region, allows us to find that in the case of Colombia, half of the nationals do not believe in the institutions, that only one in five people identifies with a party or political movement and that one in three people believes that voting is useless.[34]

V. Constitution and legal reforms

1. As we saw earlier, in the original version of the 1991 Constitution, the old Colombian institutions of the so-called fiscal control headed by the Comptroller General of the Republic (CGR) and the so-called Public Ministry, which is a kind of of non-criminal administrative and disciplinary authority, entrusting it to the Attorney General's Office (PGR), endowing them with unusual and strong powers of investigation and sanction, including over elected officials, that is, mayors, governors, senators, representatives to the Chamber, deputies, councilors and against individuals responsible for managing public resources such as directors and administrators of companies that promote and provide health services, as in the well-known case of the cooperative EPS SALUDCOOP.

In recent years we have found serious objections from the perspective of constitutional doctrine and Administrative Law to the functions of the two control entities, since they have been dedicated to examining the conduct of public servants and individuals who manage public resources. based on punitive readings of the principles of the public function and the so-called Single Disciplinary Code without substantiating them in the existence of devices typifying behaviors, which constitutes a path of authoritarianism and administrative persecution of political opponents as occurred in the case of Gustavo Petro Urrego in the Office of the Attorney General of the Nation, or in the case of the directors of SALUDCOOP in the Office of the Comptroller General of the Republic. In the same way, in Colombia, the exorbitant powers of the presidential superintendencies of Industry and

[34] "Los Peligros de la Indignación", *Revista Semana*, núm. 1870, March 3, 2018.

Commerce, Finance, Health, Public Services are questioned, which have generated true economic, financial, human capital disasters and a possible political and property persecution of the adversaries or dissidents of the regime.

Indeed, a good part of the sanctions imposed on public officials for disciplinary reasons are made by framing them in abstract principles with constructions lacking typification and precision in a kind of co-government by different concepts and opinions on public policies, in clear deterioration of their scientific legitimacy. and closer to the personal politics of the Attorney General and the Comptroller General. And a good part of the sanctions of fiscal control are based on accounting speculations and unfounded projections on the management of public resources or on the consequences of the management of private resources on the rights of the public or of consumers under the figures of the power of inspection, control, surveillance, intervention, and liquidation sheltered under the judicial powers that may exceptionally be exercised by the entities called superintendencies.

New organs and judicial bodies were also created, especially endowed with resources, and specialized functions in the prosecution of crimes related to the corruption of public servants and state agents, including judges, prosecutors, and lawyers, such as the now defunct Disciplinary Jurisdictional Chamber of the Council. Superior of the Judiciary and the Attorney General of the Nation (FGN).

In 1991 it was also established, as we have stated above, the creation of vigorous and very effective procedures such as the citizen action for loss of investiture and the indirect criminal jurisdiction of the same high judicial corporation on the highest national public servants.

There are other innovative institutions among us that have not been properly put into operation, such as summonses and hearings before the investigation and instruction commissions of the chambers of the Congress of the Republic introduced in article 137 of the Constitution, which can ask questions of any natural person. Or legal on matters of interest to those committees.[35]

[35] Article 137. Any permanent commission may summon any natural or legal person so that in a special session they render oral or written statements, which may be required under oath, on the facts directly related to the investigations carried out by the commission.

If those who have been summoned excuse themselves from attending and the commission insists on calling them, the Constitutional Court, after hearing them, will decide on the matter within a period of ten days, under strict confidentiality. The reluctance of those cited to appear or to render the required statements will be sanctioned by the commission with the penalty indicated by the regulations in force for cases of contempt of the authorities.

Likewise, the functions of inspection, surveillance and control of the presidential superintendencies were strengthened, and they were endowed with administrative and exceptionally jurisdictional sanctioning powers developed especially in cases of free economic competition, and ethical behavior in the financial and public services sectors. There are several doctrinal and dogmatic objections to these functions, since delicate interferences from the executive power are filtered into them and because the judicial function exceptionally granted to those servants of the executive power is distorted.

The main institutions introduced to the Colombian constitutional order in this fight against corruption were put into full operation and gave very important fruits and significant results, highly profitable with data such as that of more than one thousand five hundred sanctioned mayors, hundreds of convicted congressmen, thousands of councilors and prosecuted and convicted deputies. The seriousness of this situation is that a large part of it was imposed based on the doctrine of open and incomplete disciplinary types and is reduced to the discretionary expansion of the substantial assumptions of the sanctioning devices to sanction political opponents as I have just summarized above.

Similarly, in the development of its powers, several thousand individuals and hundreds of legal entities dedicated to the illicit appropriation of public resources have also been affected, and in a certain way with its results, Colombia ceased to be at the gates of the abyss, because it came to be considered as a failed state in which all forms of criminal corruption were combined, beginning with that generated by groups of powerful drug traffickers infiltrated in society in general and in politics in particular.[36]

The quantitative balances in this first quarter of centuries of constitutional life in this fight arranged by the designs of the National Constituent Assembly, are very favorable to the public entities created and reformed by the Political Charter, but also in these years the citizen perception and the figures of possible damage to public property are once again cata-

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If, in the development of the investigation, the intervention of other authorities is required, for its improvement, or for the prosecution of possible criminal offenders, they will be exhorted for what is pertinent".

[36] In a kind of balance on this matter, it is possible to point out in this sense that thanks to the constitutional institutions and its legal developments, Colombia is the country that can show the most positive results in the fight against corruption of its public servants and their class. politics and against drug trafficking and its effects on political activity and public and private finances. In any case, impunity covers some sensitive segments of the economy and of national and local politics.

strophic and pessimistic as expressed by the General Comptroller of the Republic.[37]

It is also true that there is a perception of the existence of clienteles and clientelist commitments with senators and with representatives to the chamber in the two control bodies and of the magistrates of the courts in the Attorney General's Office, however public agents they are. who participate in the election of the three main actors in the drama of the fight against corruption and crime in Colombia.

2. During the twenty-seven years of life of the 1991 Constitution, the so-called control bodies such as the Office of the Comptroller General of the Republic (CGR) and the Office of the Attorney General of the Nation (PGN) as well as the judicial bodies such as the Office of the Attorney General of the Nation (FGN) have produced major results in the fight against corruption in hundreds of cases decided against public servants and individuals who administer official resources or those affected by public service, such as mayors, governors, councilors and deputies, and managers or presidents of public entities on the one hand and senators and representatives on the other. To a large extent, these successful actions in cases of fighting corruption have been the product of the actions of the authorities in charge of the direction of the Office of the Comptroller General of the Republic and the Office of the Attorney General of the Nation with the collaboration of the citizen oversight office In a kind of balance on this matter, it is possible to point out in this sense that thanks to the constitutional institutions and its legal developments, Colombia is the country that can show the most positive results in the fight against corruption of its public servants and their class. Politics and against drug trafficking and its effects on political activity and public and private finances. In any case, impunity covers some sensitive segments of the economy and of national and local politics and the their participation in specialized complaints.

In the same way we find in recent years new forms of administrative and political corruption with the configuration of cartels and practices of looting public resources disguised as attention to social rights to health such as the payment of expensive treatments for AIDS patients. or hemophilia and rehabilitation of people with disability problems, among others, and in the subsidy and attention programs for children's food. There are notable

[37] We deal with several of those reforms throughout this paper, especially those related to political corruption, paramilitarism and crimes against humanity in the life of our society and party discipline, especially those related to the effects of criminal proceedings in the so-called Empty Chair.

cases of corruption with the payment of commissions for the award of public works and the creation of dirty flows of resources to benefit political representatives who are nourished by resources from public or official companies and to ensure governability in the different sectors of governments and state administrations.

VI. A recent perspective of Colombia

1. As noted in the study published by the group of lawyers of the political campaign of the so-called Colombia Humana, in the year 2000, several of the senators of the left-wing caucus in the Congress of the Republic, headed by the current candidate President of that group, Gustavo Petro Urrego, held a debate on the parliamentary assistance allegedly prohibited by article 136, number 4. of the Political Constitution of 1991 and found that they had allegedly been revived "clandestinely" by the government of conservative President Andrés Pastrana Arango amid the ideas of seeking peace with the FARC from 1998 to 2004 and the creation of the demilitarized zone, being its finance minister the current President of the Republic Juan Manuel Santos.

2. In the investigation, they found from the list of beneficiary congressmen, dozens of them who distinguished themselves with secret codes to ensure the delivery of hundreds of billions of pesos from the public treasury through quotas that were established in exchange for their favorable vote. to government policies, which in their opinion would configure what they have understood as one of the greatest acts of corruption in Colombia and they identified the names of the main beneficiaries of said practice and denounced that the public entity that distributed the aid was the then Minister of tax authorities. Many of them ended up linked to a new party that would serve as the structure for the election and re-election of Álvaro Uribe Vélez and the election and re-election of Juan Manuel Santos called the National Unity Party. Most of them joined the so-called tables of national unity or were part of another new party linked to the two governments of President Santos called Cambio Radical.

The Colombian press echoed these complaints and the debates but apparently did not delve into it since the investigation was archived by the Attorney General of the Nation on one side, while the investigation by the Comptroller General of the Republic was extinguished. and the press did not mention them again.

3. At the end of the debate in the Congress of the Republic, the geographical locations of the hundreds of projects indicated by the congress-

men were shown, and they were called "indicative quotas" that were financed with public resources and that were mostly the construction of small sanitary works, which were never actually built and were in areas under paramilitary control.

From there came another investigation on the articulation between the Colombian political class and the paramilitary drug trafficker who intended to win local and departmental elections and take over public administrations to control all appointments and appropriate official resources to finance their national and personal enrichment project.

This investigation showed that the financing mechanism of paramilitarism with public resources was based on a strong alliance between local political mafias and the most important national political actors in the heart of the Colombian political establishment.

In said study, it is argued that many of those congressmen had become rich with cheap land that the peasants sold after each paramilitary massacre and that they later bought to deliver to their bosses and to sell so that part of the profits would go to other paramilitary bosses and part to the pockets of the politicians of their regions.

Thus, the business of cheap land resold at high prices was established thanks to the paramilitary terror of many local politicians, powerful businessmen and some high-ranking public dignitaries. According to the aforementioned study, the mechanism of rent capture thanks to terror explains why the largest displacement in the world of millions of people evicted from their lands and towns and led to poverty and misery as victims of violence in the cities of the country.[38]

In addition, during the first decade of the 21st century, several debates were held to demonstrate the links of the local political class with drug-trafficking paramilitaries, without major consequences in the face of the massacres and their perpetrators.[39] The Supreme Court of Justice at the time recognized them as successful judicial processes and expanded the investigation to the entire country and dozens of senators and local politicians went to jail, but not their bosses. Those were no longer Pastranistas, they had become Uribistas like most of the national and local political class.

The castes began to fall into prison and continued their partners in the development of politics to the point that many of them had to put their trusted men and women in their place in what was called politics in a

[38] López Hernández, Claudia, *op. cit.*

[39] Serrano, Alfredo, *La multinacional del crimen*, vol. II, *La tenebrosa oficina de Envigado*, Bogotá, Random House Mondadori-Debate, 2010.

foreign body, that is to say, the relatives of the person sentenced by the Supreme Court of Colombian Justice.

The debates and judicial processes of the Supreme Court of Justice effectively demonstrated that local power in Colombia, where the majority of the electorate is located, was built on the basis of a strong alliance between the local political class and paramilitary drug traffickers and that this was linked to Colombian central power.

On the other hand, in 2010, the same senators and representatives carried out the report on the contracting of public resources in Bogotá, revealing the so-called Cartel or "Recruitment Carousel" and with their own names they showed how a series of construction conglomerates operated. converted into large contractors of the State and other large foreign companies today committed to the crime of corruption. From these investigations, the mayor of the city of Bogotá, his brother and several dozen councilors and contractors were sentenced to several dozen years in prison.

It was concluded that the large contractors were pyramids financed with the treasury and that they could only grow and sustain themselves with the payment of large bribes that left financial gaps in the projects they built and that could only be filled with new larger contracts that in turn they were only obtained with larger payments of bribes and so on. Several conglomerates fell into the hands of justice like a house of cards and as they were not beneficiaries of the most important public works, the others also fell for the same reason.

In the aforementioned study, it is claimed that what was discovered in Bogotá served to persecute only one of the groups of contractors and not to investigate and punish the other large criminal consortiums also denounced and despite showing that they operated as companies with bribes. Today they warn that the Attorney General's Office not only negotiated the indictment versions but also the silence of other public actors of corruption.

The aforementioned former senators who have changed parties according to the changes of presidents, have been the intermediaries and figureheads of the bribes paid by other groups of contractors and their recipients have also been congressmen and officials from the government environment to achieve the extension of contracts. delivered under corrupt formulas by finger with the richest groups in Colombia, which in his opinion shows that the coalition between local political mafias and the establishment is present unceremoniously.

In the aforementioned study it is affirmed that the political power of Colombia functions as an alliance between the establishment, a closed and hereditary circle of owners of the economy, the media and the central State,

with the local political mafias linked to drug trafficking and paramilitarism and that that alliance allows its governability.

In his opinion, without it they could not win elections, since the establishment does not exercise any leadership over the citizenry, it is not legitimate, and since the local political class is an expert in obtaining votes by buying them since one and the other configure political power. of the country, and its cost is that the alliance is only maintained if the theft of the public treasury is allowed, since corruption is its cement.

The contractors became owners of politics and the press and the agents of traditional politics will be sacrificed one by one in their political aspirations in a kind of relentless demolition of the new barons of national politics, reaching the point of infiltrating servers of the National General Attorney's Office and the General Attorney's Office.

VII. Conclusions

The Political Constitution of 1991 introduced a very important series of normative dispositions that deal with the discipline of the official conduct of public servants and the fiscal control of the management and disposition of public resources, in any case directly related to the struggle against administrative and political corruption.

In the Colombian State, many other tools have been adopted in accordance with the Anti-Corruption Statute to advance in the prevention and fight against corruption, such as the Anti-Procedures Decree Law of 2011, the Law of Transparency and Access to National Public Information issued in 2014, the Anti-Smuggling Law of 2015, the Statutory Law of Citizen Participation of 2015, the Regulatory Decree of the General Law of Archives also of 2015, the so-called Anti-Bribery Law of 2016, the decree that regulates the category of people exposed politically 2016 of , the decree that regulates the appointment process by meritocracy of the members of the National Citizen Commission to Fight Corruption 2016, and the decree that reforms the appointment for fixed periods of four years of some superintendents of 2016.

By way of conclusions related to the current situation of the institutional fight against corruption in Colombia, we find that corruption as a social phenomenon of economic and political importance has been radically transformed and has achieved and allowed the incorporation of sophisticated tools and resources from the point of view of technical point of view, as well as from the point of view of the regulations and the doctrine of

criminal law, which make it more efficient, effective and in some cases more forceful but in any case insufficient to defeat it in a significant way.

As we have seen, the so-called Single Disciplinary Code was also issued through Law 734 of 2002, which serves to investigate and punish public servants from a disciplinary and correctional point of view with functions contrary to the Inter-American Convention on Human Rights and which has been applied for political and ideological purposes as in the case of the Mayor of Bogotá Gustavo Petro Urrego among many others.

As we have seen throughout this work, Colombian institutions have now been endowed with very important rules, procedures, and vigorous, innovative and powerful organisms in the fight against political, administrative, financial and private corruption like never before in life. and its constitutional and legal institutions are examined with great interest by the democratic regimes of Latin America as an example of the commitment of the legal regime and of the main political actors and the current constitutional system to overcome the serious defects created by corruption and mafias and cartels of politicians and common criminals to appropriate public resources and political institutions that they bleed and squeeze in favor of their private coffers.

Given the permanent challenges of the different actors of corruption and the relative successes of the methodologies used in the Colombian State against their criminal actions, it has been necessary to constantly innovate with efficient institutions and go beyond certain traditional procedural guarantees that have produced good results but that were insufficient and that have failed in some cases for several years, since the practices of corruption, as we said, have permeated the political regime from the highest structures of power, beginning with the office of the Presidency of the Republic and the main departments of the national administration, which has been intensely replicated at the territorial level.

Edgardo Maya Villazón responsible for overseeing the fiscal management of public resources, even after four years of important service as Comptroller General of the Republic, eight years as head of the Attorney General's Office, and eight years as magistrate responsible for monitoring and sanctioning the disciplinary conduct of prosecutors, judges and magistrates of the judiciary, warns that the evil of corruption has spread so much that:

> Corruption in Colombia can no longer be seen from the point of view that it is a conjunctural fact, but that it is a phenomenon that is in the structure not only of the State but of society in all its immensity and is causing great

> damage to the opinion. I, as comptroller and with my experience as attorney general for eight years and as a magistrate for another eight, have seen that the film repeats itself, but every day the dimension is greater" and that "...the strongest party in Colombia is the hiring party…

We agree with the current Comptroller General of the Republic that the costs of political campaigns have led the country to finance them with public resources of corrupt origin and from there arises the strongest party that exists in Colombia today, which is the party of the contractors, since they are the ones who end up financing these campaigns, since the money invested is "recovered" later.

In our country there are specific cases of mega corruption such as the higher costs of the Cartagena Reficar Refinery, which was contracted for 3,960 million pesos and cost 8,000 million, and the La Línea tunnel, which is contracted for 600,000 million pesos, and until today it has an investment of 2 billion pesos, and it is estimated that one billion more is missing to finish it.

Other acts of corruption of great dimensions are also denounced in the so-called Ruta del Sol in several of its sections. In the same way, other processes of notable corruption are denounced in Colombia in different lines of spending and distribution of public resources, especially in health, in school meals, in education, in general infrastructure, also at the departmental and municipal level.

Many of the opinion makers in our country maintain that in Colombia there are high levels of hopelessness during the electoral political process, which can lead to a massive reaction from society and that some illegitimate actors can capitalize on it. However, corruption is not attributable solely to the public sector and only its agents; they do not act alone and need the assistance of private sector agents in various expressions of co-authorship, complicity or cover-up. In any case, it is possible that it becomes entrenched in social groups as a serious addictive pathology that seems insurmountable.

In Colombia, in addition to the important institutions that were incorporated into the Constitution in 1991 and that we have just mentioned, very effective citizen oversight bodies have been developed and have proven that the control bodies by themselves do not put an end to corruption. These began as a legal development from the Comptroller General of the Republic during the administration of Carlos Ossa Escobar and has been one of the great national political transformations based on participatory fiscal control and citizen participation.

In addition, only with the construction of public policies based on citizen control, with specialized citizen oversight and with the promotion of public complaints supporting the comptrollers, the Prosecutor's Office and the Attorney General's Office have achieved very important actions of persecution and punishment of the corrupt.

In summary, it is possible that a great national agreement against corruption is needed as a result of a State policy as the greatest political commitment to combat it in all the indispensable legal forms within the framework of the rule of law and republican democracy, since corruption Today it has dimensions unimaginable in 1991, but said agreement must be celebrated outside the circle of power and its hegemonic bloc, which today carries the greatest discredit in national history.

In my opinion, I do not believe that the State is in danger due to the modifications and new forms of corruption, and I do not believe that we are on the verge of the abyss if corruption is not eliminated, least of all when we have carried out such a task of institutional adjustment and have managed to discover a good part of newly minted corrupt practices.

Corruption does not destroy the State but rather allows other corrupt actors to displace the actors of the regime and so on, as has been the history of humanity since the State existed. Nor is Colombian society destroyed by the cases of hemophilia, health, infrastructure, school feeding, Land and Land Management Plans, construction licenses, the environment, education, since What the scandals generate due to the acts of corruption discovered is the discredit of society and its leaders and can cause the substitution of elites and the blocs in power and the social backwardness that causes so much pain.

At certain moments in the history of the corruption of peoples, such as the one we are experiencing in Latin America today, we can say that corruption operates as a pathological addiction without control and produces subjects dependent on the risks it entails and the perverse benefits it satisfies.

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.
>
> Alejandro NIETO GARCÍA[1]

SUMMARY: I. *The law against corruption*. II. *Corruption and constitutional law: conceptual framework*. III. *The legal regime of corruption: a regulatory feast that does not address the causes*. IV. *For when is the regulation of pressure and interest groups?* V. *Corruption and multilevel government: european union, autonomous communities and local entities*. VI. *Conclusive reflections*.

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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.

CONSTITUTION AND CORRUPTION AUTHORS WHO OUTLINE NATURE

Alejandro MALDONADO*

SUMMARY: I. *Introduction*. II. *Right to Power*. III. *Right of Power.* IV. *Right Before Power*. V. *Control of Power*. VI. *Transparency and Control Development Legislation*. VII. *International Commission Against Impunity in Guatemala*. VIII. *Conclusions*.

I. INTRODUCTION

Invoking quality jurists, no one better than Lenio Luiz Streck, who expresses with just vehemence the anguish over the perversion of the political system sunk in the traps of greed, both to accumulate large ill-gotten goods and to strengthen more power on top of the power that already you have He refers to social inequality, but his words would also point to decomposition:

> jurists (...) cannot continue to behave like that subject who is on the edge of Vesuvius about to erupt. The lavas (of the social crisis) will cover everyone, and instead of building barriers to prevent them from covering their houses and the city, they remain impassive, trying to straighten a Van Gogh painting on the wall.[1]

Or, put in the beautiful words of the Mexican storyteller Eraclio Zepeda —and nothing better than poetry to talk to us about the things of the world— "when the floodwaters knock down the houses and the river overflows, destroying everything, it means that many years ago days it began to rain in the moun-

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[1] Streck, Lenio Luiz, "Medios de acceso del ciudadano a la jurisdicción constitucional", *La protección constitucional del ciudadano*, Buenos Aires, Konrad Adenauer Stiftung, 1999.

tains, although we did not realize it". [Lenio Luiz Streck: Means of citizen access to constitutional jurisdiction. The Constitutional Protection of the Citizen, Konrad Adenauer-Stiftung, Buenos Aires, Argentina].

Corruption in power is an evil that is too old, as is the result of a brilliant soap opera dialogue between Marco Antonio and Herod (quoted at the end of this essay) even when efforts are made to curb that perverse link.

Society qualifies, generally with good sense, the degree that corruption reaches in each system or government and demands harsh measures to combat it. The checks and balances of the constitution and ordinary laws have advanced, although unfortunately lagging behind the cunning to maintain it.

The national sphere has transcended, and thus international agreements have been concluded (for example, the Inter-American Convention against Corruption) that openly address the matter and have provided for collective measures to deal with it.

Lately, the popular action has been notable for its courage going out to the squares in protest against the signs of public corruption and this has meant a more convincing response from the control bodies, especially the judicial ones. Of course, severity or rigor cannot alternate with exhibitionism, much less with the glorification of the operators, since compliance is nothing more than a duty and obligation that rectitude itself imposes on justice.

External social controllers work with unknown efficiency, particularly due to the speed and ubiquity of social networks, which, to a certain extent, are the ones that draw the agenda of traditional journalistic media.

In this chapter on Guatemala, to which I modestly contribute, a very general mention will be made of the legislative framework that develops the constitutional and conventional precepts of probity and its necessary transparency. In particular, I will refer to the "International Commission against Impunity in Guatemala" (CICIG), originated by agreement between the Government of Guatemala and the United Nations Organization.

The invitation from the UNAM Legal Research Institute invites us to address the case from the perspective of the Constitution, which is the center of the legal-political panorama of a State in its internal performance and its links with the world.Diego Valadés —as he usually doe— can synthesize in a few words the content of voluminous branches of the legal world. In the topic that we are addressing, in two lines he offers us the necessary capitulation to locate the stages in which the sinuous decomposition can creep within the fundamental fabric of the State and the ways that he foresees

and activates to control that scourge. This schematic of yours covers it all: the Constitution regulates four forms of relationship with power: the right to power, the right to power, the right to power and the control of power.

II. Right to Power

The Political Constitution of the Republic of Guatemala (CPRG) contains regulations for access to public power, common to republican political systems, some of a general nature, and others of a specific type depending on the nature of the position. The supreme regulation is developed by derived legislation, both of constitutional hierarchy only modifiable by an aggravated procedure, and by ordinary or common. Added to this is the meticulous and endless task of regulatory regulations.

One of the first precautions to be taken is to avoid circumventing qualifications and qualifying formalities when accessing public power. In the form of election or appointment of certain officials, the personal requirements are established (includes the prohibitions) and the formalities and solemnities.

In usual terms, three paths open for access to power and public service: a) by popular election; b) by appointment; and c) by contract. The obvious assumption of the regulation points to efficiency for the satisfaction and benefit of the sovereign, intimately including the probity of the exercise. The positions can be management or leadership, administrative collaboration, technical advice and even control. As everywhere, some hold a mandate of political inspiration and others are contributors to the heavy burden of the administrative exercise in all imaginable areas. In matters of government and service, the philosophical predicate that nothing human is foreign is made clear. However, the breadth of the panorama that can be seen from the angle of power is conditioned by another republican principle: the governed can do what is not legally prohibited and the ruler. Only what is allowed.

The opening clause to the public service is outlined in the Constitution, both regarding the right to access and in the parameters of the supreme order of its exercise:

> Article 136. Duties and political rights:
> b) Elect and be elected
> d) Opt for public office
> e) Participate in political activities

Located in these first two ways of entering the public function (the electoral route and the appointment route) there are important development laws that detail the respective systems.

1. *Access to Power by Electoral Means*

The electoral option contains, in the first line, the personal requirements of the candidates that the supreme law prescribes as qualifying conditions for the corresponding positions. In this way, the deputies to the Congress of the Republic, the deputies to the Central American Parliament, the president and vice president of the Republic, and the mayors and councilors of the municipalities only have access through direct popular election. There is the exceptional provision of access to the presidency and vice-presidency of the Republic, which does not go to popular suffrage when the vacancy of the holder occurs (death, resignation, order of imprisonment) during the exercise of his mandate.

In the case of direct popular election, the Constitution orders its regulation by a law of supreme hierarchy, issued by the constituent assembly itself, in this case the Electoral and Political Parties Law. The control body is the Supreme Electoral Tribunal, whose regular and alternate magistrates are appointed by the Congress of the Republic, choosing them from a list proposed by a nominating commission.

Pursuant to this law of constitutional rank, there has been a virtual monopoly of political parties as the only public law entities empowered to propose the registration of candidates for president and vice president of the Republic, deputies to the Congress of the Republic and deputies to the Central American Parliament.

In relation to non-elective forms of appointment, laws and regulations have also been promulgated that try to accommodate the characteristic statements of each type of position with the qualities of suitable individuals according to the nature of the service required.

Access by electoral means, as explained above, in Guatemala is required at the proposal of one or several coalition political parties, for the positions of President and Vice President of the Republic, and of deputies to the Congress of the Republic and deputies to the Central American Parliament. It is not possible to launch independent candidacies, even though this does not mean that the candidate must affiliate with the party entity. Thus, the terms of the corresponding Constitutional Law regulating party

organization and the formulas for nominating and proclaiming candidacies become of great importance.

The Electoral and Political Parties Law, issued by the National Constituent Assembly itself, has undergone several reforms in the sense of providing the electoral authority with greater control capacity and opening a little more the participation of the affiliated bases that make up the corresponding parties. Political parties.

The history of the monopoly of political parties as exclusive nominators of candidacies for the legislative and executive bodies has faced its vicissitudes, most of them simulating a more apparent than effective democratization. From the 1965 Constitution, which, for a much smaller population, required parties to accredit at least fifty thousand members, to the current regulation (1986) which, even when the population has doubled, requires a proportionally much smaller membership. Some analysis of this quantitative reversal explains that, when, due to the demand for a stronger support of registered members, only four political parties (ideologically differentiated) functioned, when the possibility of more organizations (which reached a little more than seventy Pygmies) was opened, the power economic was always decisive to promote the candidacies of its greatest convenience. It is assumed that the multiparty system was a factor in the erosion of the traditional parties that made up the main ideological currents of the time. Likewise, the parties that achieved the favor of the media, generally in concert with the leaders of their business affinities, also had more deployment capacity.

These issues sought to find some control with regulations on political party financing, caps on campaign spending, and access to media advertising.

The Constitutional Court —endowed with the power of binding opinion for any reform to the laws of constitutional hierarchy— from its early days ruled on reform projects to the Electoral and Political Parties Law. The question was to purge two aspects of coherence and legitimacy that repressed attempts to mock constitutional precautions. One, that it would facilitate the publicity of the parties in the contest. Another, to establish controls on their financing and expenses, including the dimension of electoral propaganda.

Located in the constitutional provisions of access to positions of power, presumably purifying conditions were established for circumstances that can be foreseen as risks to incur acts of corruption. For this purpose, the Constitution determines reasons or impediments for the exercise of access to the Congress of the Republic, as provided in article 164:

> Prohibitions and compatibilities.
>
> a) …
>
> b) Contractors of works or public companies that are financed with funds from the State or the municipality, their guarantors and those who, as a result of such works or companies, have pending claims of their own interest.
>
> c) Relatives of the President of the Republic and those of the Vice President within the fourth degree of consanguinity or second degree of affinity.
>
> d) Those who, having been sentenced in a final judgement, have not resolved their responsibilities.
>
> e) Those who represent the interests of companies or individuals that operate public services.
>
> If at the time of his election or later, the elected is included in any of the prohibitions contained in this article, his position will be declared vacant.

It is curious, and it is a matter that at the moment has not provoked any discussion, that these qualifying requirements to opt for the Congress of the Republic have not been established for those who assume the Presidency or the Vice Presidency of the Republic. Nor were they established for candidates for popularly elected municipal positions, but they do appear in the respective Municipal Code.

The popular elective route of access to power also regulated the duration and cost of political campaigns. The first, setting times for the start or start of the contest. Regarding the cost, setting spending ceilings and the transparency of financing. There were those who thought that the determination of a period of public opening of the political-electoral offer, that is to say of the acts of proclamation of the candidacies and their advertising promotion and contact with the electorate, was not exactly the best possibility of offer of the optants, tied by a lever similar to those of races at the racetrack. Although territorially the country is not very large and its population is a little more than 16 million, it is necessary for the candidates (and also for the voters) to display their political skills as long as they need. Otherwise, they leave many advantages to public officials who make themselves known for their state activities. In addition, the media can, if they want and it is not strange, keep the favorites of their advertising financiers on stage.

Regarding controlled and healthy financing, the fines are severe and strong in terms of repressing expenses that exceed a cost ceiling of the contest. Regarding the origin of the contributions, it has led to criminal prosecution for having discovered contributions of anonymous origin or suspected of money laundering.

The regulation of transparency and solvency contained in the Electoral and Political Parties Law, which safeguard the electoral process, in particular the provisions that try to prevent obscure financing, is not the only wall that is put up, because there are also regulations that prequalify the subject aspiring to positions (common provisions for electoral entry or by appointment) Thus, in the stage of access to power, the system establishes precautions to prevent it to subjects whose activities or trades are presumed incompatible with the management of government affairs.

Continuing with the popular electoral system as a way of entering leadership positions in the central government and in the municipalities, it was regulated by a law of constitutional hierarchy, in force since January 14, 1986. Relatively early, it was proposed in the Congress of the Republic the need to introduce reforms to said regulations, especially in terms of financing and publicity of partisan promotions of candidacies. In this regard, it is interesting to quote some fragments of the binding opinion of the Constitutional Court (of July 31, 1990, File 90-90) and that are related to the problem of corruption attached to the misuse of public power.

Two aspects dominated this initiative to reform the electoral law that emerged within the Congress of the Republic. The first, public financing of political parties; the second, the cost of political advertising for electoral purposes.

Some indicative paragraphs of the position of the court of constitutionality control are transcribed from the opinion of the aforementioned Court, which is relatively extensive.

> …There could be no constitutional violation in a regulation that fully intends to introduce corrective measures in electoral procedures, in which the interference of economic factors propitiated by strong pressure groups, which could eventually favor parties committed to financial investment.
>
> … It should be noted that such corrective measures only cover part of the problem, as long as other advantageous forms of electoral competition are not corrected (and this is a matter of the legal evolution of this new Electoral Law that is taking shape), such as advancing campaigns so far in advance that only those with the greatest resources can have a continued presence, that of using public goods significantly and intentionally for personal promotions that later lead to candidacies, and the risk of excessive power that can be transferred to social communication companies that can Influencing the proportion of the public image of candidates and parties through supposed information that is apparently unaccounted for, with which they can arbitrarily favor some and ignore others.

> The problems raised have been resolved in other systems (...) through two basic elements: the financing of political parties during the electoral stage and the regulation of the use of the media. As for the financial aspect, in two main ways: a restrictive one, prohibiting the unilateral use of State resources or trying to prevent the influx of foreign aid; and another positive, recognizing the so-called political debt or arranging the financing of political parties, in the aspect of advertising, facilitating the access of the parties to the official media (Citation of the systems adopted by several Latin American countries was included).

Over time, reforms were approved to the Electoral and Political Parties Constitutional Law, which substantially addressed, in terms of its relationship with corruption, the point of private financing, to which an attempt was made to put limits not only on the amount but also on the transparency of the people. Or contributing companies. The purification process that awoke in the country, after the public demonstrations that occupied the great central square for weeks with the assistance of civic sectors of all social levels, motivated the Supreme Electoral Tribunal to carry out stronger inspections and impose severe sanctions, which even to the cancellation of the registration of political parties of the greatest notability for their previous capacity for mobilization and conquest of positions of popular election.

Dramatic it turned out that the President of the Republic himself, Mr. Jimmy Morales Cabrera, was the object of an alleged investigation by the Public Ministry and the International Commission against Impunity in Guatemala for a case of alleged illicit financing of his political party, during the process election to attain office. The complexity of the matter resulted from having been the Secretary General of the political party that nominated him, from where, as the sole representative, he was charged, by legal presumption, with responsibility for the entity's financial operations.

The ruler enjoying the pre-trial privilege, they asked the Congress of the Republic to lift it, in order to be able to investigate the high dignitary regarding the evidence found by the Supreme Electoral Tribunal. The matter was known by the legislative body (09-11-2017) in the environment of strong pressure, as usually happens now, from press commentators and, even more intense, from social networks. The result was 104 denying the lifting of immunity and 25 granting it. A final resolution required 105 votes, so that for just one, the case could be reconsidered again in the legislative body.

2. *Cases of Access to Power by Electoral Means*

Congress of the Republic

Article 157. Legislative power and composition of Congress.

Legislative power corresponds to the Congress of the Republic, made up of deputies elected directly by the people by universal and secret suffrage (...)

Presidency and Vice Presidency of the Republic

Article 184. Election of the President and Vice President of the Republic.

The President and Vice President of the Republic shall be elected by the people for a non-renewable period of four years, through universal and secret suffrage.

Municipial Corporations

Article 254. Municipial Government. The municipal government will be exercised by a Council which is made up of the mayor, trustees and councilors, directly elected by universal and secret suffrage for a period of four years, and may be re-elected.

3. *Access to Power by Administrative Means*

The Political Constitution established some conditions for cases that it presumed incompatible for the performance of the positions. Thus, for certain appointments, it established incompatibility brakes. For the case:

> Article 197. Prohibitions to be Minister of State
>
> a) Relatives of the President or Vice President of the Republic, as well as those of another Minister of State, within the fourth degree of consanguinity and second degree of affinity.
>
> b) Those who, having been sentenced in a trial of accounts, have not resolved their responsibilities.

> c) The contractors of works or companies that are financed with funds from the State, from its decentralized, autonomous and semi-autonomous entities or from the municipality, their guarantors and those who have pending claims from said businesses.
>
> d) Those who represent or defend the interests of individuals or legal entities that operate public services;
>
> In no case can the ministers act as representatives of individual or legal persons, nor manage private businesses in any way.

In general, for the appointment to high-level positions, the regulations established by the Law of the Executive Branch and other regulatory laws of each administrative unit are followed. With regard to support staff, parameters are set in the civil service legislation. Likewise, quality requirements have recently been introduced in terms of accrediting professional titles and experiences that justify entry into the bureaucratic system through temporary contracts, which, when they have been reiterated for some time, the Constitutional Court has recognized. as permanent places and not simply temporary.

If any novelty can be pointed out regarding the condition of public service in the country, it is found in the fact that the 1985 Constitution contains a section of regulations for State Workers, who are recognized the rights of association, unionization and strike. The result has been that the union organizations of public servants have acquired more power than private unionism, and, as usually happens in this condition, there have been allegations of corruption in some union leadership, even when, despite the years, nothing has been proven.

As a general principle, the path established in the civil service law (article 108 of the Constitution) or in the specific laws of decentralized or autonomous State entities was established as the access route to the public service.

> Article 207. Requirements to be a magistrate or judge.
>
> … Magistrates and judges must be Guatemalans of origin, of recognized honorability …
>
> Article 209. Appointment of judges and auxiliary personnel.
>
> … The judicial career is established. Income, promotions and promotions will be made through opposition.

Regarding minor and first instance judges, it was regulated that their appointment would be through the judicial career system, a general condition in republican-democratic systems. The question consisted of the operability of the regulatory law, which, progressively, has been reaching its

goals. It is important to note that the salary incentive for the recruitment and training of judges has been convenient in terms of obtaining their permanence and professional quality.

4. *Access to Power Through Nomination Comissions*

The first time that high-ranking officials were appointed in Guatemala through the system of nomination commissions happened during the de facto military government installed in March 1982. At that time, the Executive tried to appoint the magistrates of the Supreme Electoral Tribunal, proposed by the Plenary of the Supreme Court of Justice. The appointment of illustrious personalities, with a wide record of civility and independent character, ensured reliability to the system, which was later incorporated in the drafting of the Constitution, now in force, for the integration of other collegiate bodies and appointment of the Attorney General of the Republic and of the Comptroller General of Accounts. The experience has varied towards distrust, on the part of some sectors, of the effectiveness of the system.

To the constituents, the aforementioned procedure of the nomination commissions seemed an adequate mechanism to guarantee the independence of the functions, which was also established for the appointment of the Comptroller General of Accounts (Art. 233) and the Attorney General of the Republic (Art. 251). Likewise, the magistrates of the Supreme Electoral Tribunal would be appointed in this way, in accordance with the law of constitutional hierarchy that regulates it.

Thus, the system of nomination commissions for very important positions acquired constitutional rank as guarantors of the impartiality of the high-ranking officials who were responsible for the administration of justice, the impartiality of the electoral processes, the auditing of accounts, and the accusation in Criminal matters. Over time there were expressions of displeasure, supposing that de facto powers could influence the appointments via approaches of outside interests and the sponsorship of the costs of election campaigns in the respective professional associations. Trying to attenuate factors that wear down the neutrality of the nominating commissions, laws such as Decree 16-2005 were issued, which established some restrictions to avoid nepotism of the commissioners and Decree 19-2009 regulating its principles of transparency, professional excellence, objectivity and publicity of the selection process.

In the 61st session of April 10, 1985, only one deputy of the Constituent Assembly doubted the proposed system, saying among other arguments:

> In the draft of the Drafting Commission of the Constituent Assembly, a system of election based on a nominating committee formed by deans of the Faculties of Law of the country's universities, the president of the Bar Association and a member appointed by the Supreme Court of Justice.- In accordance with the reality of the country, a proposal of that Nature is partitioned but not depoliticized, it assumes a certain corporatist character and does not guarantee a system of broad consultation. (...) Delegating to a committee of such a small proportion the proposal of the individuals of an entire State agency is extremely risky given the very small portion of popular sovereignty that it could represent.

The current recomposition of the system, produced by the massive reaction in the public square and the agility and free access to the media, could be enervating the manipulation of the application system. Always with the reservation that the emotional and easy nature of the complaint does not invert the terms of preponderance and will only produce a change of factors of media power committed to another side of the quadrant.

5. *Supreme Court of Justice and Court of Appeals*

> Article 215. Elección de la Corte Suprema de Justicia.
> … They will be elected by the Congress of the Republic for a period of five years, from a list of twenty-six candidates proposed by a nomination commission made up of a representative of the Rectors of the country's universities, who chairs it, the Deans of the Faculties of Law or Legal and Social Sciences of each University of the country, an equivalent number of representatives elected by the General Assembly of the College of Lawyers and Notaries of Guatemala and an equal number of representatives elected by the magistrates of the Court of Appeals and other courts to which Article 217 of this Constitution refers. … The election of candidates requires the vote of at least two thirds of the members of the Commission.

In a similar way, with a logical change, it was established for the designation of the magistrates of the Court of Appeals (Art. 218).

6. *Comptroller General of Accounts*

> Article 233. … The Congress of the Republic will make the election (of the Comptroller General of Accounts) from a list of six candidates proposed by a nomination commission made up of representatives of the rectors of the country's universities, who chairs it, the deans of the faculties that include the Public Accounting and Auditing career of each university in the country and an equivalent number of representatives elected by the general assembly of the College of Economists, Public Accountants and Auditors and Business Administrators. For the election of candidates, the vote of at least two thirds of the members of said commission will be required.

7. *Attorney General of the Republic*

> Article 251. Public Ministry.- … The Head of the Public Ministry shall be the Attorney General of the Republic ... shall be appointed by the President of the Republic from a list of six candidates proposed by a nominating commission made up of the President of the Supreme Court of Justice, who chairs it, the deans of the Faculties of Law or Legal and Social Sciences of the country's universities, the President of the Board of Directors of the College of Lawyers and Notaries of Guatemala and the President of the Court of Honor of said college.

8. *Other Systems of Access to Power*

A. *Court of Constitutionality*

The 1985 Political Constitution established a permanent Constitutional Court. Previously, with the 1965 Constitution, the control of constitutionality had been created by eventually integrating the court, made up of magistrates from the ordinary justice system. The new configuration picked up the essential nature of legal-political control that constitutes the agenda of this kind of jurisdiction. In this way, the Political Constitution, in its article 269, provided:

> The Constitutional Court is made up of five regular magistrates, each of whom will have their respective alternate. ... The magistrates will hold office for five years and will be appointed in the following manner:
>
> a) A magistrate for the plenary session of the Supreme Court of Justice

b) A magistrate for the plenary session of the Congress of the Republic
c) A magistrate for the President of the Republic in the Council of Ministers
d) A magistrate from the Higher University Council of the University of San Carlos de Guatemala, and
e) A magistrate for the Assembly of the Bar Association.

Its structure has been discussed by some commentators who, probably, have not paid the greatest attention to the nature of the cases that the Court must hear and resolve, which, as Francisco Tomás y Valiente affirmed, with his irrefutable logic, are political matters:

> It must be said, without fear of words, that the problems formulated before the Constitutional Court are raised in legal terms, but they hide —or they don't even hide: they contain— problems of political substance. ... Whoever does not understand this as a paradox, as a legal challenge, does not understand anything about the reality of the constitutional courts. For this reason, when I am asked many times if the Court is politicized, I always answer the same thing: depending on what you understand as such. If by politicization of the Constitutional Court is meant link, dependency, or influence on it by political parties or other State bodies, obviously not, emphatically not, rabidly not; but naturally, if what we understand is that the Court deals with problems whose core, whose ultimate content, whose nucleus is a problem of the model, is a problem of the limits of the State, is a problem of a political nature, obviously yes.[2]

Difficult and transcendent the function of the constitutional courts, which currently operate throughout the world, it is not possible to unify in a common scheme the form of their integration. Each nation has its own, according to its founding structure. Edmundo Vásquez Martínez (+) of singular moral and legal solvency, commented regarding the Guatemalan system:

> What is well defined and regulated in the Constitution must not be unnecessarily complicated ... Each appointing body must comply within those frameworks and must not be hidden the political-legal nature of the Constitutional Court, especially since it is in charge of controlling "political acts", that is, those whose purpose is the organization and subsistence of the State as such.[3]

[2] Tomas y Valiente, Francisco, Complete Works, Madrid, CEPC, 1997, vol. V, p. 4251.
[3] La Hora Jounal, October 2, 2000.

The Court has functioned since the installation of the constitutional regime (1986) with six successive magistracies. During that time it has had its lights and shadows, resolving issues of high political significance and strong social tension. Its decisions have been fulfilled and, to a great extent, it has been a restorer of the constitutional order when it has been threatened. There are no known complaints of acts of corruption attributable to their decisions, although some (very few) have been questioned for their political profile, a situation that is common to constitutional courts.

B. *Human Rights Attorney*

The aforementioned Guatemalan Constitution of 1985 instituted, also for the first time in America, a Human Rights Ombudsman (*Ombusman*), with an indirect election system that had to be based on a list of three candidates, as provided in article 273:

> Human Rights Commission and Commission Attorney. The Congress of the Republic will designate a Human Rights Commission formed by a deputy for each political party represented in the corresponding period. This commission will propose to Congress three candidates for the election of a Procurator, who must meet the qualities of the magistrates of the Supreme Court of Justice and will enjoy the same immunities and prerogatives of the deputies to Congress. The law shall regulate the powers of the Commission and the Human Rights Ombudsman referred to in this article.

It would be understood that this prequalified way to decide the election of the Attorney tends to an indirect way of appointment, which reduces the partisan link by putting a filter on it that results in the fact that in the respective Commission, each minority party (which are several) has the same vote. than the majority (which are less). Presumably, the Human Rights Ombudsman, who, among his attributions, has to supervise the operations of the Law of Access to Public Information, can be a good watchdog of the transparency and solvency of the government.

C. *Monetary Board*

The Monetary Board, on which the Banco de Guatemala depends, is made up of eight members, of which four are appointed by the President of the Republic, and the others by different entities. Those appointed by

the Chief Executive are: the Chairman of the Board, who is also Chairman of the Bank, and the Ministers of Public Finance, Economy, and Agriculture, Livestock and Food. The rest: one by the Congress of the Republic, one by trade, industry and agriculture trade associations; one by election of the presidents of the boards of directors or boards of directors of national private banks; and one elected by the Superior Council of the University of San Carlos.

This form of integration takes care that there is no hegemony of the government in the decisions and appointments of the system and neither that there could be by the private sector. Hence, to date, no complaint has been made of acts of political or economic corruption in the institution.

The Political Constitution was reformed in 1993, being notable that they introduced in the regulation of the Monetary Board the prohibition of "authorizing the Bank of Guatemala to grant direct or indirect financing, guarantee or endorsement to the State, to its decentralized or autonomous entities or to the non-banking private entities," Likewise, it prohibited the Bank of Guatemala from acquiring the securities issued or traded in the primary market by the indicated entities. An exception was regulated: the financing that can be granted in the event of catastrophes or public disasters, "as long as it is approved by two thirds of the total number of deputies that make up Congress, at the request of the President of the Republic". This novelty was the object of strong questioning, pointing out as a practical delegation in favor of the private economic sector. The defenders of the amendment estimated that the measure was taken to avoid currency devaluations that a careless debt policy could bring to the country.

III. Right of Power

Public power is open to eligible citizens according to the qualities and procedures determined in the Constitution and the laws that develop it.

Once the formal requirements for access have been fulfilled, the conditions for the exercise of the public function follow. In legal and political doctrine, the solid and creative synthesis formulated by Ignacio Burgoa in his magisterial (now classic) *"Derecho Constitucional Mexicano"*, regarding the principles of legality and responsibility that limit the powers of the direction and administration of the State.

It is often said that the organs of power can only do what is constitutionally and legally permitted. Hence, they cannot deal with what is forbidden to them either. In simple terms, the principle of legality works.

As is typical of constitutional systems, the supreme text determines the scope of functions and powers of the respective organs of power, powers that are made explicit in the vast repertoire of constitutional and ordinary laws and are detailed in the corresponding regulatory and administrative work.

Having various meanings, corruption in public policy points to the perverse exercise of power to obtain material wealth from the people's assets and to gain a foothold in positions, directly or indirectly, for illegal and immoral gain. This risk, whose persistence and extension would deeply damage society and the effectiveness of the State, is the cause of the issuance of regulatory norms that guarantee the solvency of servers, sanction offenders or prevent the reinstatement of the incompetent. This forms a complex, extensive and difficult agenda.

In this section of the right to power (that is, once the conditional stage of his access to command has been overcome) the first constitutional norm and then the prolix legal development, determine the scope and scope of competence of each of the subjects invested with authority, by which it is known what and how it should make use of its mandate. It is here, in possession of the position, that laws and regulations controlling the correct use of entrusted responsibility have also been issued.

It is understood, of course, that the great majority of public servants carry out their tasks with integrity and honesty, and that, with or without controlling laws, they act in accordance with the ethics to which they are committed. Notwithstanding this, at the level of the Constitution, institutions have been established whose purpose is to prevent and, where appropriate, violations of the rules of conduct established by the constitutional system.

Sorted, let's say, the form of control of access to power, the Constitution (and the laws that develop its mandates) contain regulations equally vigilant of the activity of public servants, both those of popular election and those who have entered by appointment or contract .

In general terms, common to all public servants, factors that guarantee their impartiality and their loyalty to the country are conditioned or stated, as follows:

> Article 154. Public Function
>
> (pf 2º) Public officials and employees are at the service of the State and not of any political party.
>
> (pf 3º) The public function may not be exercised without previously taking an oath of fidelity to the Constitution.

The highest-ranking norms cited, as is usual in constitutional regimes, recognize the right of individuals to access power and, at the same time, that of citizens to obtain from them the highest ethical quality of their exercise.

One of the guarantees of the rule of law and democratic representation is located in the classic principle of the separation of powers, in which one does not depend on another, even when certain links of harmonious and coordinated operation have been established. On the other hand, certain crossed controls that limit excesses that, due to hegemony, could lead to diversion. Here it is appropriate to remember the classic, and oft-repeated apothegm, that power corrupts and, when it is absolute, it corrupts absolutely. The fundamental law establishes it as follows:

> Article 141. Sovereignty.
>
> Sovereignty resides in the people who delegate it, for its exercise, in the Legislative, Executive and Judicial organisms. Subordination between them is prohibited.

1. *Legislative Agency*

The Guatemalan system of operation of the Legislative Organism contains some nuances of parliamentarism, such as its possibility of interpellation of the ministers of State and that of their defenestration in the circumstances provided for in the Constitution. In return, the presidential capacity to veto laws. The system corresponds to the form of moderation of power via its interaction and mutual moderation, which modern theory promoted from classics such as Montesquieu. In addition, judicial power appears as another of the key elements of checks and balances that in itself would be enough to stop the signs of ethical decomposition of the public service (The theoreticians could not imagine that the organs of power would establish the link of party politics, as a transversal axis that would link them).

Certain norms of the Constitution are transcribed as a reference of the legislative body and some of its capacities for its exercise:

The aforementioned article 157 of the Political Constitution attributes legislative power to the Congress of the Republic. This could be indicated as its main function, which combines both political and legal controls. The veto, essentially of a political order insofar as it can be decided by the President of the Republic based on his own assessment of inconvenience for public interests, and the declaration of unconstitutionality, which the re-

spective Court can declare in a sentence requested by any citizen with the sole the professional help of three lawyers. It thus turns out that the legislative power is controlled by bodies other than the parliamentarian himself.

For the performance of their political-legislative powers, the deputies have the quality and guarantees that the Constitution and its regulatory law recognize, among these the possibility of temporarily accessing other positions in the Administration. Likewise, the normal shielding of the characteristic exercise of the elected representatives, as established in the following articles:

> Article 160. Authorization for deputies to hold another office. Deputies may hold the position of minister or official of the State or of any other decentralized or autonomous entity. In these cases, permission must be granted for the duration of their executive duties. …
>
> Article 161. Deputies' Prerogatives.
>
> a) The deputies are representatives of the people and dignitaries of the Nation; As a guarantee for the exercise of their functions, they will enjoy, from the day they are declared elected, the following prerogatives: Personal immunity from arrest and prosecution …
>
> b) Irresponsibility for his opinions, for his initiative and for the way of dealing with public business, in the performance of his position
>
> All State dependencies have the obligation to keep the deputies the considerations derived from their high investiture. These prerogatives do not authorize arbitrariness, excessive personal initiative ... Only Congress will be competent to judge whether there has been arbitrariness or excess and to impose the pertinent disciplinary sanctions.

In the Guatemalan constitutional system, it was traditional for the deputies themselves to hear and resolve complaints for alleged or real crimes attributed to one of their members. This situation changed with the reforms to the Constitution, by which jurisdiction was transferred to the Supreme Court of Justice. On the other hand, it is up to Congress to hear the so-called "preliminary trial" urging against senior officials of other agencies and State entities.

> Article 165. Powers of Congress.
>
> h) Declare whether or not there is room for the formation of a case against the President and Vice President of the Republic, President and Magistrates of the Supreme Court of Justice, the Supreme Electoral Tribunal and the Constitutional Court, Ministers, Vice Ministers of State when they are in charge of the Office, Secretaries of the Presidency of the Republic, Under-

secretaries who replace them, Human Rights Ombudsman, Attorney General and Attorney General of the Nation.

The provisions in the Political Constitution regarding the powers of the Congress of the Republic are those of an organization of this nature, contained especially in articles 165, 170 and 171, which is not the case to reproduce because they are obvious in any semi-parliamentary system.

In the analysis of the tasks that fit into the chapter on the Right of Power, that is to say, what can or should be done from the summits of the government, parliamentary interpellation as a control mechanism, and consequent tool against corruption, will be seen in the last: IV. Control of power.

Article 170. Specific powers of Congress

b) Appoint and remove its administrative staff.

This simple constitutional provision, totally typical of a State agency, is susceptible to misuse when there are no specific civil service regulations, such as qualification of positions, pertinent salaries and income, promotion, benefits and discipline systems.

Article 171. Other powers of Congress

b) Approve, modify or disapprove… the State Income and Expenditure Budget.

c) Decree ordinary and extraordinary taxes according to the needs of the State and determine the bases of their collection.

The task of the State has one of its greatest expressions in the regulation of income and expenditure policies, insofar as valuable development goals can be achieved through them, or, on the contrary, in the wrong way, lead to the ruinous and inefficient state, incapable of reaching minimum levels of lasting equity for the generality of its inhabitants.

2. *Executive Body*

In the Guatemalan case, to begin with the first magistracy, which symbolizes the unity of the State and its internal and international representativeness, the constitutional regulation seems simple in terms of qualitative requirements. The maximum text has:

Article: 182. Presidency of the Republic and integration of the Executive Branch.

> … The President of the Republic is the Head of State of Guatemala and exercises the functions of the Executive Body by mandate of the people. ... he will always act with the Ministers, in Council or separately with one or more of them, he is the General Commander of the Army, represents national unity and must ensure the interests of the entire population of the Republic. ... He, together with the Vice President, the ministers, the vice ministers and other dependent officials make up the Executive Branch and are prohibited from favoring any political party.
>
> Article 185. Requirements to apply for the positions of President or Vice President of the Republic.
>
> Guatemalans of origin who are practicing citizens and over forty years of age may opt for the position of President or Vice President of the Republic.

Regarding the Ministers of State, the Constitution provides for a series of objections to their access, which are related to precautions regarding

> Article 194. Minister functions
>
> i) Ensure strict compliance with the laws, administrative probity and the correct investment of public funds in the businesses entrusted to their charge.

As is often the case, constitutional prescriptions must be developed in ordinary legislation. In Guatemala's presidential system, the functions of the head of state are or should be supervised by the revenue and expenditure comptrollers (specifically the Comptroller General of Accounts of the Nation), whose head is appointed by a nomination commission system, with which was intended to reduce partisan influence and direct presidential appointment.

The prohibitions to access the government cabinet can be explained as a precaution due to family ties, business, insolvencies that presume personal interests beyond those of the service. Of course, not everything fits as provided by the fundamental law, since the family bond does not necessarily imply a concert for the misuse of power. However, nepotism has been frowned upon as corruption, being that, in effect (and this is a purely anecdotal fact), the close relatives of the men in command, republican or monarchist, are prejudiced by social rumors that, if before they were destructive, now in the age of social networks they are fatal

3. *Judicial Body*

> Article: 203. Independence of the Judicial Body.

Justice is administered in accordance with the Constitution and the laws of the Republic.

Magistrates and judges are independent in the exercise of their functions and are only subject to the Constitution of the Republic and the laws. Those who attempt against the independence of the Judicial Body, in addition to imposing the penalties established by the Penal Code, will be disqualified from holding any public office.

Article: 207. Requirements to be a magistrate or judge.

… Magistrates and judges must be Guatemalans of origin, of recognized honorability …

Article: 209. Appointment of judges and auxiliary personnel.

… The judicial career is established. Income, promotions and promotions will be made through opposition.

4. *Control and Supervision Regime*

Article 232. General Comptroller of Accounts.- … It is a decentralized technical institution with supervisory functions of income, expenses and, in general, of all tax interests of State agencies, municipalities, decentralized and autonomous entities, as well as any person who receives funds from the State or who makes collections. public.

Public works contractors and any other person who, by delegation of the State, invests or manages public funds are also subject to this control.

Article 233. … The Congress of the Republic will make the election (of the Comptroller General of Accounts) from a list of six candidates proposed by a nomination commission made up of representatives of the rectors of the country's universities, who chairs it, the deans of the faculties that include the Public Accounting and Auditing career of each university in the country and an equivalent number of representatives elected by the general assembly of the College of Economists, Public Accountants and Auditors and Business Administrators. For the election of candidates, the vote of at least two thirds of the members of said commission will be required.

5. *Attorney General's Office*

Article: 252. Attorney General's Office … One of his responsibilities is the advisory and consultancy function of state bodies and entities. (...) exercises the representation of the State ...

IV. Right Before Power

In this section, the law could be located as a condition of power that is, in turn, its positive generator. Power and right, symbiosis of reality, as Alexis Carrel locates it: "the material and the spiritual are linked in the human, in such an indissoluble and certain way, as in the statue the marble and form".

Law before power or power before law have their semantic expression in the formula: Rule of Law.

Many times we incur in the scholastic effort of definitions (which reminds me of an author who noted that no physicist bothered to look for an exact definition of electricity instead of verifying its effects) even when the relationship between power and right is evident and sensitive to the reality of time and place.

Going over the theories and definitions, the Rule of Law is taking the profiles that each sovereignty, in its circumstances, will be articulating according to its political culture and the form of citizen expression. Some components, such as the rule of law, the distribution of powers of power, the legality of administrators' actions, and the free exercise of the fundamental rights of the human person, define a Rule of Law.

If it must be understood that the authority of the State cannot intervene in the social and family life of the individual, without previously having a constitutional legal norm that authorizes it, we know that we live in a Rule of Law. If the human person is the repository of an internal jurisdiction that corresponds to his nature, honest and honest, and retains the basic decision to think and act as he pleases without offending or injuring another, it is because there is a rule of law that protects his existence. Individual and associated as she wants.

In theory, it is not necessary that each act of life (thinking and acting) of the individuals that make up the population should be specifically authorized, since it will only be limited by what has been rationally prohibited. On the other hand, that Power, that is, the governing class, can only act for what has been expressly authorized. This is the common and current formula, although it can be misleading as the positive law could be contaminated with oppressive and arbitrary rules. For this possibility, the constitutional system has foreseen not only its supremacy over ordinary laws, but also instituted an independent control body. And it does not stop there, it also recognizes the supremacy of the international conventionality of human rights, being part of the universal declarations and of the bodies in charge of its protection.

In short: power can be controlled by the law generated by that same power: Constitutional State of Law.

V. Control of Power

The law is not only a protection system for the human personality so that it can do its will without offending others. It is also the framework of action of the public power so that it respects and guarantees the framework of action that has been expressly recognized. This is where the boundaries that the supreme law and the ordinary laws demarcate work. The Political Constitution deals with this, the correct exercise of government. It surrounds power with a multitude of controls, both direct and delegated to the legislation that develops it, including international conventionality. In a very brief way we will refer to norms of supreme hierarchy and then to the delegated legislative and finally to a specific conventional one, the agreement between the United Nations Organization and the Guatemalan government for the establishment of an International Commission against Impunity in Guatemala (CICIG).

We have noted some preventive constitutional provisions that, due to the activities, links or kinship ties of a person, are presumed to be at high risk of incurring acts of corruption in the exercise of public office. Now some repressors of the fact.

The rule that orders the legality of detention, arrest or prison centers is protected by providing: "The authority and its agents, who violate the provisions ... will be personally responsible" (Art. 10) Similarly, with respect to the prison system, it is recognized: "the infraction of any of the established norms ... entitles the detainee to claim compensation from the State for the damage caused" (Art. 19) With respect to to this condition and regarding minor offenders and their special treatment, article 21 prescribes: "Officials, public employees or other persons who give or execute orders against … in addition to the sanctions imposed by law, shall be immediately removed from office and disqualified from holding any public office or job". The above cases cited by the frequency of public corruption in the prison system. Next, some precepts of the supreme rank.

> Article 154. Public function, subject to the law. Officials are holders of authority, legally responsible for their official conduct, subject to the law and never superior to it.
>
> Officials and employees are at the service of the State and not of any political party.

The consequences of the exercise of public service, when it causes damage to individuals (without indicating whether due to intent or negligence), imply solidarity of the State in its reparation:

> Article 155. Responsibility for violation of the law. When a dignitary, official or worker of the State, in the exercise of his position, breaks the law to the detriment of individuals, the State or the state institution he serves, will be jointly and severally liable for the damages caused.
>
> The civil liability of public officials and employees may be deducted as long as the statute of limitations has not expired, the term of which shall be twenty years.
>
> Criminal responsibility is extinguished, in this case, by the passage of twice the time indicated in the law for the prescription of the sentence.
>
> Article 156. Non-compulsory illegal orders
>
> No public official or employee, civil or military, is obliged to carry out orders that are manifestly illegal or that imply the commission of a crime.

1. *Electoral Political Regime*

223.- … Once the call for elections has been made, the President of the Republic, officials of the Executive Branch, mayors and municipal officials are prohibited from making propaganda regarding the works and activities carried out.

2. *Financial Regime*

> Article 237. General Budget of Income and Expenditures of the State. … Confidential expenses or any expense that should not be verified or that is not subject to control may not be included. This provision is applicable to the budgets of any body, institution, company or decentralized or autonomous entity.

Society qualifies, generally wisely, the degree reached in each system or government. The checks and balances of the constitution and ordinary laws have advanced, trying to counteract it. In Guatemala, one of those reinforcements that penetrated corruption networks was the operation of the International Commission Against Impunity in Guatemala (CICIG) while, with its counterpart, the Public Ministry, it was endowed with the necessary invulnerability to investigate and denounce criminal structures within the

organs of power. The viability of the country's agreement with the Secretary General of the United Nations Organization was made possible by the opinion of the Constitutional Court of May 8, 2007 (Advisory Opinion 791-2007).

VI. Transparency and Control Development Legislation

> There are so many laws, that no one is sure not to be hanged
>
> Napoleón

The precepts of the Constitution (and in the Guatemalan case, of the laws with constitutional rank) are developed by ordinary laws, like the common legal-political systems. So, in terms of prevention and control regulations against the misuse of public power, diverted towards corruption as direct or indirect personal gain, the State has issued a multitude of laws and regulations for its prevention and punishment. The count of these anti-corruption provisions is as numerous as the tricks that are instituted or invented to circumvent them. Evil is old but its progressiveness has been alarming.

The first of these regulations was the Probity Law (Legislative Decree 1707 of May 2, 1931), repealed by the substitution of another law of the same title (Presidential Decree 204 of January 14, 1955). The Law on Integrity and Responsibilities of Public Officials and Employees (Legislative Decree 89-2002 of February 1, 2002) currently governs. With this law, coexists a large number of laws, regulations and provisions that regulate the public function, both of its direct operators and of the people who approach it for a contractual relationship with economic value. This regulation is so numerous, complex and dispersed, that the quoted Napoleonic aphorism is not an exaggeration:

— Access to information law
— Law of extinction of domain
— Organic law of the budget
— Law of approval of the state budget (Locks)

VII. International Commission Against Impunity in Guatemala

In relation to the "International Commission against Impunity in Guatemala" (CICIG), the signing by the Guatemalan government and the United Nations Organization (UN) of an agreement of January 7, 2004 establishing an Investigation Commission of Illegal Bodies and Clandestine Security Apparatuses in Guatemala (CICIACS).

The President of the Republic, prior to submitting the aforementioned agreement to the Congress of the Republic for its information and ratification or non-ratification, deemed it necessary to request an advisory opinion from the Constitutional Court, asking twenty questions. The Court made a pronouncement on August 5, 2004, acquitting the twenty-question questionnaire. In a vote of the five holders, the Court issued the opinion finding several points of the Agreement that they considered incompatible with the Political Constitution of the Republic. The full text can be seen at: Advisory Opinion 1250-2004

> Taking into account the objections of the Constitutional Court, the Guatemalan government negotiated another agreement with the United Nations Organization, signed on March 6 to December 12, 2006, establishing the "International Commission against Impunity in Guatemala" (CICIG).
>
> On this occasion, the Congress of the Republic was the body that went to the Constitutional Court requesting an Advisory Opinion for which it formulated three questions:
>
> 1st. Is the content of the Agreement constitutional ...?
>
> 2a. Does the Public Ministry maintain its independence and autonomy ... in relation to the provisions of the Political Constitution of the Republic and its organic law?
>
> 3rd. Is a majority of two thirds of the total number of deputies that make up the Congress of the Republic necessary for the approval of the Agreement establishing the CICIG ...

The Court, with the unanimous vote of its five titular magistrates, issued its opinion on May 8, 2007, answering the first two questions in the affirmative and specifying that the absolute majority of its deputies was sufficient for approval by the Congress of the Republic and not the aggravated vote of at least two thirds.

In relation to the first question, the Court studied the parameters of the Constitution that recognize its supremacy and, based on this premise, it re-

viewed the Agreement signed by the Executive with the General Secretariat of the United Nations Organization, "whose comprehensive Reading".

VIII. Conclusions

Any Constitution will be valid and effective, even in critical and convulsive periods, to the extent that it enjoys social adherence. The constitutional sentiment to ensure that the law is respected and complied with is deeper than its own technical perfection; this is nothing more than a problem of intelligent judges. But conviction is a matter of culture and civility.

There are many factors that besiege and attack the Constitution to break or corrupt it. The inconsistencies and falsehoods of its own custodians endanger constitutionality. It is dismantled by the triviality in its management as much as the advantage or the innocence in its invocation. It is offended by those who presume it to be sectarian and servile to their interests, and it is weakened by the impatient ones who attribute social shortcomings and inequities to it.

The usual thing is to presume that it is the public power that must be watched to constrain being-in and with-the-Constitution. This is obvious and its strict control should not be neglected due to the exorbitant tendency of power.

Goran Therborn, a professor of political science at the University of Stockholm, warns of the danger of the collapse of the State because of the overload of benefits that the inhabitants expect from governments, particularly compromised by the system of partisan competition and pressure groups. Paralyzation that would come to be precipitated by the insufficiency of the state apparatus both in its real capacity to intervene and dispose of resources and by the inevitable imperfections of leadership. Thus, the discrepancy between what is claimed and what is feasible would tend to make ungovernable systems increasingly ungovernable. The danger lies in the fundamentalism that could arise, proposing ruptures that, deep down, worsen the problem. Constitutionalism has the quality of not covering up the crisis and of opening the channel to discuss it. On the other hand, radicalisms, even if they had analgesic effects, always, because they are temporary and superficial, would lead to the destruction of the very basis of social solidarity.

Care should be taken when pointing things out. Jiménez deParga clarifies it well, knowing how to distinguish between corruption in *democracy* and, as some would like, corruption in democracy. The problem with this infrac-

tion of social ethics is that in addition to the legal sanction that can achieve it, there must also be a social punishment, since, as the cited author says, the former may arrive late and the latter, contempt, is nuanced when a society rewards economic "success" regardless of the means to achieve it.

Conspires against the moral essence of constitutionalism the possibility of politicizing justice or pretending to execute it by paper trials. Although the sentence depends on what its etymology implies: *feeling*, we must not forget that the process is technical, equal and impartial. In political matters, which is the kernel, as Tomás y Valiente tells him, of constitutional justice, rulings must be clearly legal. Seriously affects the majesty of justice who wants to make the magistracy tribune and the toga, flag. On the other hand, those who, profane and outside the law, face legality, set themselves up as unofficial arbiters, forcing cowardly people like Pilate to fail without reason and without conscience.

<In the series "Roma" produced by HBO and directed by Jonathan Stamp, dialogues between statesmen of different personal ethics are recorded. In the first Mark Antony, assisted by the freedman Posca, agrees with Herod.>

Herod: *I was told that Roman knights don't ask for bribes. One should offer bribes as gifts. Is it so?*
Mark Antony: *Yes, that's how it is. I'm afraid we are the worst hypocrites.*
Herod: *I offer you a gift then, help me to take the throne of Judea, make my enemies yours, and I will offer you an important gift.*
Posca: *How important would the gift be?*
Herod: *How important does it need to be?*
Posca: *9,100 kilos of gold.*
Herod: *Done.*
Mark Antony: *We should have ordered more. You must ensure, of course, that you keep the Jews at bay.*
Herod: *They will do as I say or suffer the consequences.*
Mark Antony: *Congratulations; Herod, you have the full support of Rome.*
Herod: *A question. Our friends Octavio and Lepidus, do you also speak for them?*
Mark Antony: *Yes. We speak one voice.*
Herod: *So, then they won't come asking for gifts for themselves?*
Mark Antony: *No, your gift is for all of us.*
Herod: *Good. How beautiful to have such trust between friends. (Herod leaves)*
Mark Antony: (To Posca) *This is what I call a good morning at work.*

In a later episode, Marco Antonio, Lepidus and Octavio (adoptive son of Julius Caesar) meet in order to agree on the distribution of imperial power among the three of them, assigning themselves their corresponding political-territorial space. Octavio already knew of Antony's agreement with Herod, by telling the frustrated Posca who wanted a part of the bribe. Octavio is supposed to honestly claim the principle that all income enters the Treasury, under the supervision of a priest.

An example of the legislative prolixity in its attempt to curb crime (including corruption) is found in the constant modifications to the Penal Code or issuing specific laws, citing the most recent: Law to Prevent and Repress the Financing of Terrorism (58-2005), Approval of the Agreement on Cooperation for the Suppression of Illicit Maritime and Air Trafficking of Narcotic Drugs and Psychotropic Substances in the Caribbean Area (64-2005), Law of the Directorate of Civil Intelligence (71-2005), Approval of the Convention of the United Nations against Corruption (91-2005), Law against Organized Crime (21-2006), Law of the Penitentiary Regime (33-2006), Law of Registration of Stolen or Stolen Mobile Telephone Terminals (09-2007), Decree approving the Agreement between the United Nations Organization and the Government of Guatemala regarding the establishment of the International Commission against Impunity in Guatemala (CICIG) (35-2007), Reform the Law for the Protection of Procedural Subjects and Persons Linked to the Administration of Criminal Justice (22-2008), Law Regulating the Extradition Procedure (28-2008), Reform of the Penal Code that typifies the crime of Financial Panic (64- 2008), Law against Sexual Exploitation and Trafficking in Persons (09-2009), Weapons and Ammunition Law (15-2009), Law to Strengthen Criminal Prosecution, Law against Organized Crime (17-2009), Law on Criminal Jurisdiction in Higher Risk Process (21-2009), Domain Extinction Law (55-2010), Law to Combat the Production and Marketing of Counterfeit Medicines (28-2011), Law to Strengthen the Tax System, Combat Fraud and Smuggling (04-2012) and still.

ANTI-CORRUPTION DISCIPLINE IN ITALY. BETWEEN POLICIES OF PREVENTION AND REPRESSION

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SUMMARY: I. *Introduction: the double side of the fight against corruption*. II. *Anti-corruption institutions from a diachronic perspective*. III. *Corruption prevention measures: from representation to prevention*. IV. *The network of anti-corruption programs*. V. *Administrative transparency, a pillar of the anti-corruption system*. VI. *Regulatory framework regarding labor disqualification and incompatibilities and codes of conducts*. VII. *The repression of corruption*. VIII. *Conclusions*.

I. INTRODUCTION: THE DOUBLE SIDE OF THE FIGHT AGAINST CORRUPTION

For a long time, the prevention of corruption has been situated on the margins of the elaboration of strategies and policies for the fight against corruption. Traditionally, the Italian legal system has dealt with the issue of corruption only under the repressive function: for a long time, the instrument of criminal repression, promoted by the Judicial Authority and the Police

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Forces has been used exclusively to fight corruption. Historically, intervention policies, instead of having a global vision aimed at preventing corruption, have responded to a logic of emergency and reactive action, consistent with the idea of corruption as a "bureaucratic-branched" phenomenon of an occasional nature and involving only public officials who do not occupy high positions.[1] Previously, corruption, which was not systematic at the time, was limited to cases of illicit contract between the public administration and a private individual: a contract that was developed according to numerous forms typified in the criminal code and that was intended for the sale of an act of the public official (or the person in charge of the public service) in favor of the individual. Therefore, the fight against corruption ended with the repression of the synallagmatic act and fraud, in which there was a submission of the individual against the coercion of the official.[2]

The increased awareness of the changing behavior of corruption, with increasingly frequent, systematic acts that involved the different levels of institutions up to the highest political and administrative spheres, gave rise to the creation of a preventive strategy with rules of administrative law, which was added to the criminal sanctions that already existed. As can be seen in daily life through the news and information that are transmitted, corruption in Italy has long exceeded the limit of vigilance, since the same sectors of public life have been involved in corrupt acts, thus transcending the eminently criminal dimension of the phenomenon.[3]

With Law 190/2012 (known as *Legge Severino*), a preventive function is established, together with criminal intervention, through a set of administrative law regulations capable of attacking corruption from the initial planning phase to the final phase of execution.

The knowledge that has been acquired about the systematic nature of corruption, a phenomenon that can endanger the impartiality and proper development of public administrations and its legitimacy, has led to rethinking the entire administrative mechanism through a logic, that is above all, for prevention and valorization of the guidelines that come from international and supranational sources. Starting in 1997, there are numerous international normative acts that have fed one of the most important *corpus*

[1] Cingari, Francesco, *Possibilità e limiti del diritto penale nel contrasto alla corruzione*, in Palazzo, Francesco (Ed.), *Corruzione pubblica. Repressione penale e prevenzione amministrativa*, Florence, Firenze University Press, 2011, p. 13.

[2] Flick, Giovanni Maria, *Governance e prevenzione della corruzione: dal pubblico al privato o viceversa?*, *Cassazione penale*, No. 9, 2015, p. 2982.

[3] Spangher, Giorgio, *Il "contrasto" alla corruzione nell'orizzonte della politica criminale*, *Percorsi costituzionali*, 2012, p. 43.

of political-criminal normative.[4] The OECD (Organization for Economic Cooperation and Development) Convention of 1997, the UN Convention against corruption of 2003, the two Conventions, criminal in 1998 and civil in 1999, against corruption of the European Council and, in general, the anti-corruption policy promoted by the European Union, has progressively insisted on the need for States to develop administrative prevention policies to coordinate harmoniously with the instrument of criminal repression.

Specifically, in addition to intervening through criminal repression, Law 190 has reinforced the coordination of anti-corruption policies at the central, regional, and local levels, and has promoted prevention activities by introducing the obligation for all public institutions to adopt anti-corruption programs. Higher integrity standards have been established for elected public officials, and to ensure transparency of public spending and access to information. Codes of conduct have been drawn up, measures for the protection of public officials who report illegal acts, and the regulatory framework relating to conflicts of interest, incompatibility and disqualification from positions have also been strengthened. For this purpose, Law 190, in art. 1, section 49, has delegated to the Government the task of elaborating one or more legislative decrees aimed at modifying the discipline of attribution of managerial positions and high positions of administrative responsibility in public administrations and in private law institutions subject to public control, as well as , the activity of production of goods and services in favor of public administrations or management of public services, in addition to modifying the discipline related to the incompatibility of the aforementioned positions and the development of elected public positions or the ownership of private interests that may have conflict with the impartial exercise of assigned public functions. All oft he above, obviously, has the objective of obtaining a greater guarantee of impartiality and proper development of administrative activity.

Always bearing in mind this strategic vision of prevention, the rules on transparency that have represented one of the fundamental pillars of the recent reforms are evident: the new discipline of civic access aims to mark a true "ideological" turning point in relations between individuals and the public administration.[5]

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[4] Manacorda, Stefano, *Normativa internazionale e scelte politico-criminali di contrasto alla corruzione: il "piano inclinato" della riforma*, *Riciclaggio e corruzione: prevenzione e controllo tra fonti interne e internazionali*, Milan, Giuffrè, 2013, p. 172.

[5] Massaro, Antonella and Sinisi, Martina (Eds.), *Trasparenza nella p.a. e norme anticorruzione: dalla prevenzione alla repressione*, Rome, Roma Tre Press, 2017.

Finally, the latest legislative interventions have dealt, to a considerable extent, with the public contracting sector, which, historically, has also been subject to a high risk of corrupt conduct: in particular, we refer to the new Code established by the Decree Law n. 50 of April 18, 2016, subsequently modified by Decree Law no. 56, of April 19, 2017 (known as "*correcttivo al Códice*"). As we know, corruption has been particularly widespread in the public contracting sector and has been present in each of its phases, from the granting to the final moment of its execution. The seriousness of this phenomenon, together with international requests, have led the legislator to suppress the Authority for the surveillance of public contracts and attribute the relative functions to another new Authority, defined as the National Anti-Corruption Authority, thus providing semantic evidence to the recognized systematicity of the phenomenon.[6]

II. Anti-corruption institutions from a diachronic perspective

The introduction of the first competent figure to carry out the anti-corruption functions appears in Law 3/2003, which established the High Anti-Corruption Commissioner, a figure directly dependent on the Presidency of the Council. It was an institution endowed with relatively weak powers: it could order investigations to verify the "existence, cause and factors" of the corruption phenomenon and illicit acts, it could carry out analyzes and studies on the suitability and consistency of the regulatory framework, and on eventual administrative measures aimed at dealing with corruption and other illicit acts, and could also supervise the procedures from which fiscal losses or damages could be derived, such as those related to public contracts.[7] But, nevertheless, the High Commissioner was not the holder of regulatory or sanctioning functions, only, he could present complaints about relevant illicit behaviors before the judicial authorities and before the Auditors Court. This institution proved to be inadequate to combat corruption effectively since it was endowed with very incisive powers.[8]

[6] Racca, Gabriela Margherita, *Dall'Autorità sui contratti pubblici all'autorità nazionale anticorruzione: il cambiamento del sistema*, *Diritto Amministrativo*, No. 2-3, p. 346.

[7] Cristina, Fabio Di, *L'Autorità nazionale anticorruzione nel diritto pubblico dell'economia*, *Il diritto dell'economia*, No. 29, 2016, p. 501.

[8] Giuffrè, Felice, *Le autorità indipendenti nel panorama evolutivo dello stato di diritto: il caso dell'Autorità nazionale anticorruzione*, in Nicotra, Ida (Ed.), *L'Autorità nazionale anticorruzione. Tra prevenzione e attività regolatoria*, Turin, Giappichelli, 2016, p. 26.

The functions of the High Commissioner, abolished in 2008, were transferred to the Anti-Corruption and Transparency Service of the Civil Service Department, an office under the Presidency of the Council. This Service was assigned tasks of study and analysis of the phenomenon of corruption and other forms of illicit acts, with the aim of preparing an annual Report that would be transmitted to Parliament and an annual Plan for the transparency of administrative action.

With Decree Law 150/2009, a new institution came to light, the Commission for the Evaluation, Transparency and Integrity of Public Administrations (CIVIT), which was given powers in matters of integrity and transparency. However, such powers were quickly absorbed by the discipline related to the evaluation of performance within public administrations, a central theme of the reform carried out by the Government of the time.[9] Together with the CIVIT, the Presidency of the Council-Department of the public function continued to maintain some powers of the already abolished High Commissioner, thus provoking a two-headed corruption prevention system, weakened by an insufficiently clear distinction between political direction and administrative management.[10]

Law 190/2012 established that the CIVIT was the body in charge of carrying out the functions of the National Anticorruption Authority. The tasks conferred on this Commission were based on collaborative activities with the equivalent foreign organizations and with the competent regional and international organizations, to adopt a National Anti-Corruption Plan, of a consultative nature, and which resulted in the preparation of reports, activities to analyze the causes and factors of corruption, and the identification of interventions that could promote prevention. Also, the Commission carried out surveillance and control activities on the effective application and efficiency of the measures adopted by public administrations and on respect for the rules of transparency of administrative activity. Instead, sanctioning powers were absent. Law 190 maintains that double structure that had characterized the previous phase (2009-2012). In fact, together with the CIVIT, there was the Department of Civil Service of the Presidency of the Council of Ministers, which had functions of coordinating the methods and strategies to fight corruption, based on the guidelines adopted by the Interministerial Committee (established with Decree of the President of the Council of Ministers, on January 16, 2013). Therefore, as of 2012, the

[9] Cristina, Fabio Di, *op. cit.*, p. 502.

[10] Macchia, Marco, *La corruzione e gli strumenti amministrativi a carattere preventivo*, in F. Manganaro, Francesco *et al.*, *Diritto amministrativo e criminalità*, Milan, Giuffrè, 2014.

body is identified to be granted anti-corruption functions, which still appear shared with a government referral structure. In addition, each of the administrations is assigned the figure of the person responsible for the Prevention of Corruption (RPC), chosen by the management body from among the leaders in service.

With Law Decree 90/2014, converted into Law 114/2014, the CIVIT becomes the National Anti-Corruption Authority (ANAC) and also assumes the functions of the Authority for the surveillance of public work, service and supply contracts (AVCP), and those of the Department of the Civil Service in matters of prevention of corruption and promotion of transparency in public administration.

The relationship between the different subjects in charge of developing corruption prevention functions is clarified in the following Law Decree 97/2016, which modified Law Decree 33/2013 and Law 190/2012 itself: ANAC adopts the National Anticorruption Plan (PNA) and "exercises the powers of inspection through requests for news, information, acts, and documents to public administrations". Each one of the administrations has the obligation to send its three-year anti-corruption program (PTPC) to the ANAC before January 31 of each year; and before December 15 of each year, the Corruption Prevention Officer (RPC) of each administration must transmit to the Independent Evaluation Body (OIV) a report on the results of the activity; and the latter (OIV) will have to verify the coherence of the PTPC (triennial anti-corruption programs) with the other programming acts and will notify the ANAC of the status of application of the measures they contain.

The functions of the national anti-corruption authority

Decree Law 101/2013, converted into Law 125/2013, which contains urgent provisions to achieve optimization objectives in public administrations, has attributed to the CIVIT the name of Authority National Anticorruption for the evaluation and transparency of public administrations.[11] Therefore, the National Anti-Corruption Authority replaces the CIVIT, and not only are the functions of evaluating performance transferred to it, but it also —with subsequent legislative interventions— has precise surveil-

[11] Article 5 of law No. 125/2013 establishes that "According to art. 1, paragraph 2 of the law of November 6, 2012 No. 190, the Commission for Evaluation, Transparency, Integrity of Public Administrations takes the name of National Anticorruption and Evaluation and Transparency Authority of Public Administrations *(A.N.A.C.)*".

lance powers in matters of public contracts.[12] Decree Law 40/2014 redefines the name of the Authority, which becomes the current National Anti-Corruption Authority, and transfers to it all the duties and functions that were previously the responsibility of the Authority for the supervision of public employment contracts, service, and supply (art. 19 section 2 of Law Decree 90/2014).

The AVCP (Authority for the surveillance of public work, service and supply contracts) as we know, was introduced by Law 109/1994 (known as "*Legge Merloni*") with the aim of inserting, in the system, an authority that assist the existing control bodies to rigorously predetermine the entire process of assigning public works and choosing the contractors, and consequently, limit the exercise of discretion by the public administration as much as possible.[13]

The legislative powers attributed to the ANAC can be classified in the prevention of corruption in the field of public administrations, of the participating companies, and in control through the application of transparency in all aspects related to management, in addition, of the development of surveillance activity in the field of public contracts, assignments of positions, and in short, of any sector of the public administration that may be fertile ground for the appearance of corruption.[14]

In addition to the powers provided in Law 190 and the related decrees, ANAC has been conferred specific powers of intervention whenever there are serious and proven acts of corruption, whose perpetrators are private businessmen who provide their services to public administrations. These powers can also be translated into the application of a judicial administration.

The Public Contracts Code, established by Law Decree 50/2016 and modified by Law Decree 56/2017 and successive amendments, has a detailed discipline on the functions of the ANAC, which is attributed surveillance functions, of regulation, sanctions, and functions prior to the contentious process, and in addition, it has extraordinary legitimacy to take legal action, as the supreme guarantor of legality in this sector.

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[12] D'Alterio, Elisa, *Regolare, vigilare, punire, giudicare: l'ANAC nella nuova disciplina dei contratti pubblici*, *Giornale di diritto amministrativo*, 2016, p. 500.

[13] Sandulli, Di Maria Alessandra, *Natura ed effetti dei pareri dell'AVCP*, in *federalismi.it*, Rome, 2013, p. 2.

[14] In this sense, compare "Missione", cited by D'Alessandro, Niccolò Maria, *L'Autorità nazionale anticorruzione: spunti di riflessione alla luce delle modifiche al Codice dei Contratti pubblici*, *Nuove Autonomie*, 2018, *www.anticorruzione.it.*

The ANAC has two central functions: to monitor the sector of public contracts and to prevent and combat illegality in public administrations. However, the first mission is essential to achieve the second: the monitoring of public contracts is not an objective, but it is ("also") essential to achieve the purpose of the well-known "anti-corruption" mission.[15]

On the application of Law Decree 50/2016, the legislator has intensified the role of the Authority responsible for surveillance in matters of public contracts, giving it totally new powers that extend, not only, throughout the entire phase of the procedures of public tender, but also reach the stage of execution of the contract. The current functions of the ANAC are, therefore, those that result from the coordination of powers, already in part developed by the previous AVCP, and those new functions attributed by recent regulatory interventions.[16]

Law Decree 97/2016 (known as the Italian version of the *Freedom of Information Act*) has given a new role to the Authority, in terms of transparency, attributing to it the duty to adopt, always in agreement with the Data Protection Guarantor and once the Unified Conference has been heard, guidelines to define the exceptions and limits of the new generalized civic access.

In the public bidding process, ANAC's surveillance function is legally based on art. 213 of the Code, which establishes that the surveillance, control, and regulation of public contracts are the responsibility of the ANAC, which also has a general power of action to prevent and fight against illegality and corruption.

In particular, the surveillance power of the ANAC is understood, on the one hand, in a subjective sense, since the control activity is directed, indifferently, at public and private agents, and, on the other hand, in an objective sense,[17] since surveillance also affects, according to art. 213, sec. 3, letter a), in public contracts excluded, totally or partially, from the scope of application of the *Codice appalti* (Public Bidding Code), in order to concretely verify the legitimacy of such exclusion.

According to a careful doctrine,[18] the surveillance function must be understood as "collaborative surveillance", that is, as a moment of preliminary

[15] D'Alterio, Elisa, *Il nuovo Codice…*", *cit.*, p. 436.

[16] Chimenti, M.L., *Il ruolo dell'Autorità nazionale anticorruzione nel nuovo Codice dei contratti pubblici*, in Nicotra, Ida (Ed.), *op. cit.*, p. 47.

[17] Piperata, Giuseppe, *L'attività di garanzia nel settore dei contratti pubblici*, in F. Mastragostino (Ed.), *Diritto dei contratti pubblici. Assetto e dinamiche evolutive alla luce del nuovo codice, del decreto correttivo 2017 e degli atti attuativi*, Turin, Giappichelli, 2017, p. 40.

[18] Frediani, Emiliano, *Vigilanza collaborativa e funzione "pedagogica" dell'ANAC, federalismi.it*, 2017, p. 6.

evaluation that has the objective of verifying the legitimacy and conformity of all the documents of the public bidding procedure, considering the legal provisions.

According to art. 213, par. 3, letter b), such surveillance acts as an instrument capable of guaranteeing economics in the execution phase of the contract and is aimed at verifying that no damage arises for the public coffers when the contract is perfected.

Surveillance activities include supervision, technical controls of economic-accounting regularity, qualitative controls, controls known as collaborative and inspections.

Recently, the ANAC has issued its own Regulation on the exercise of surveillance activity in matters of public contracts,[19] and provides a broad view of the discipline established in art. 213 of the Code.[20] The Regulation in question contains a specific programming on the surveillance activity of the Authority, which is based on two acts approved by the Council: the programmatic directive that must be approved before January 31 of each year, and the Annual Plan of the inspections. This activity can be carried out ex officio or by appointment, through a process, whose phases and results are already specifically defined in the Regulation.

The regulation activity is related, however, to the adoption of directives or standards, tenders-types, awards-types, contracts-types and other instruments defined as "flexible regulation", and its purpose is to guarantee the promotion of efficiency, the development of quality and assistance to the activity of the contracting entities, being able to facilitate the exchange of information and greater homogeneity in administrative procedures.

There is a final category of activity related to the management of the contentious procedure. For this activity, the ANAC has a specific Arbitration Chamber, with a president and an arbitration council (art. 210). The Council and the President are nominated by the ANAC, which also provides a secretariat structure. The Chamber pays attention to the formation and maintenance of the "Registry of arbitrators for public contracts", draws up the code of ethics for chamber arbitrators and manages the procedures related to the constitution and operation of the arbitral college. This body, therefore, performs the fundamental administrative activities for the

[19] Regulation on the exercise of the supervisory activity of public contracts No. 49/2017.

[20] Canaparo, P., *L'attività di vigilanza dell'Anac sui contratti pubblici: i presupposti e le modalità di esercizio*, in *Appalti e contratti*, 2017 according to which: "… The logic of the new Code leads ANAC to a new vision of the supervision of the Authority, in which the ordinary supervisory activity on compliance with the public contract code is increasingly accompanied by prevention of corruption and illegality".

management of the contentious procedure in matters of public contracts, even if it is not called directly to be part of the litigation. The art. 211, sec. 1, however, establishes that the Authority can issue opinions in the phase prior to litigation. Said rule provides that, whenever there is a request by the contracting entity or other parties, the ANAC may give its opinion on the issues that arise during the development of the public procurement procedure, having a period of 30 days, from the receipt of the request, to issue its opinion. Such opinion is mandatory and binding: "it obliges the parties that have previously agreed to respect everything that is established in the opinion"; however, this opinion can be appealed before the administrative judge. In this last case, the activity of the Authority corresponds to a *quasi*-judicial power, since it can rule on the merits of the litigation, and, in this way, it exercises a true decision-making power.[21]

From this tour of ANAC's functions, it can be seen how the Authority is configured, not only as a subject with duties to prevent corruption, but also as an authority predestined to regularize the entire public procurement system.[22]

III. Corruption prevention measures: from representation to prevention

The regulatory evolution that has led to the current structure of the corruption prevention system also responds to the need to comply with the international obligations promoted by the main international organizations, which have insisted on the importance of adopting conventions related to the fight against corruption to harmonize legal systems and avoid those different legal systems that are potential vehicles for the dissemination of phenomena capable of altering competition in national and international markets.

The response of the Italian legal system has been, initially a response limited to the criminal field, and therefore, a response aimed at repressing corruption.[23]

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[21] D'Alterio, Elisa, *Regolare, vigilare, punire, giudicare…", cit.*, p. 500.

[22] Pajno, Alessandro, *La nuova disciplina dei contratti pubblici tra esigenze di semplificazione, rilancio dell'economia e contrasto alla corruzione*, *Rivista italiana di Diritto Pubblico Comunitario*, 2015, p. 1158.

[23] Clarich, Marcello and Mattarella, Bernardo Giorgio, *La prevenzione della corruzione*, in Mattarella, Bernardo Giorgio and Pelissero, Marco (eds.), *La legge anticorruzione. Prevenzione e repressione della corruzione*, Turin, Giappichelli, 2013, p. 61 and Mattarella, Bernardo Giorgio, *La prevenzione della corruzione: i profili amministrativistici*, in Vecchio, Angela del and Severino,

Law 190/2012, the first organic discipline on the prevention of the risk of corruption in public administration, arises in a European and international context that is aware of the need to adopt effective instruments to combat corruption. As well explained in art. 1, this Law is born

> In compliance with article 6 of the Convention of the United Nations Organization against corruption, adopted by the UN General Assembly, on October 31, 2003, and ratified in accordance with Law no. 116, of August 3, 2009, and with articles 20 and 21 of the Criminal Agreement on corruption, made in Strasbourg on January 27, 1999, and ratified in accordance with Law no. 110, of June 28, 2012.

The new discipline reflects how the focus of the fight against corruption shifts from the field of repression to the field of prevention, already with the conviction that the objective or institutional dimension of corruption deserves the same attention as the subjective dimension, which affects only the behavior of the individual. The legislator of the year 2012 opted for an objective notion of corruption, declining in concept and Anglo-Saxon matrix, of bad administration, including in the discipline other private behaviors of criminal relevance, but to the degree of provoking situations of illegitimacy, and in any case rejected by the legal system.[24] The risk of corrupt acts is a broad phenomenon in which any act that links the administrative function with private interest will converge. The "corrupt" nature of this phenomenon is linked to the result obtained when, within the organizational sphere, the pursuit of the institutional objective of the administration is diverted.[25] The 2013 National Anticorruption Plan and Circular no. 1 of January 25, 2013 of the DPF (Department of Fiscal Policies) refer to these situations, which they have defined as "situations in which —regardless of the criminal relevance— an incorrect operation by the administration is revealed, as a consequence of the use of the assigned functions for private purposes, or, due to the contamination of the ad external administrative action, without taking into account that the action achieves its objective or is simply an attempt.

In this way, anti-corruption regulations have a double face: on the one hand, administrative law, and on the other, criminal law. Law 190 has con-

Paola (eds.), *Il contrasto alla corruzione nel diritto interno e nel diritto internazionale*, Padua, Cedam, 2015, p. 301.

[24] Clarich, Marcello and Mattarella, Bernardo Giorgio, *La prevenzione della…*, *cit.*, p. 61.

[25] Gallone, Giovanni, *La prevenzione amministrativa del rischio-corruzione*, *Il diritto dell'economia*, 2018, p. 352.

firmed the demand for an "integrated" intervention, which includes, on the one hand, the administrative perspective and, on the other, the penal one, in order to pursue the objective of an organic reform capable of combating the complex phenomenon of corruption.

IV. The network of anti-corruption programs

Among the most innovative profiles that connote the discipline elaborated by Law 190, the introduction of an integrated system for planning and programming interventions to fight corruption and the institution of the National Anticorruption Authority stand out.[26]

Planning, a key instrument in the prevention of corruption, is developed on different levels that are situated within a multipolar objective and subjective prevention strategy. The framework, in terms of prevention, is made up of various planning instruments that give rise to a true anti-corruption "network of programs" and multi-level planning.

In this way, a vertical distribution is planned between the national corruption prevention plan, adopted by the ANAC, and the three-year prevention plans carried out by each of the administrations.

At the national level, the National Anticorruption Plan (PNA) is planned, through which a common contrast strategy is defined for all public administrations. The Plan represents a point of reference for the administrations, and from it, they will obtain useful indications to establish their own prevention strategies.

At the decentralized level, each of the administrations has the obligation to prepare three-year programs for the prevention of corruption (PTPC), through which, following the guidelines of the national plan, a prevention strategy is defined *ad hoc*.[27] The objective of these three-year programs is to identify and classify all the potential risks of corrupt acts, establishing the appropriate organizational measures to prevent and combat them. The situations of corruption that are the object of the measures provided for in the anti-corruption programs take into consideration phenomena that do not necessarily assume the characteristics of a criminal offence, but it is enough that the malfunctioning of the administrative apparatus is revealed.[28]

[26] Cantone, Raffaele, *La prevenzione della corruzione e il ruolo dell'ANAC*, in D'Alberti, Marco (ed.), *Combattere la corruzione. Analisi e proposte*, Rome, Rubettino, 2016, p. 28.

[27] *Ibidem*, p. 29.

[28] Mattarella, Bernardo Giorgio, *La prevenzione della corruzione*, *Giornale di diritto amministrativo*, 2013, p. 123.

The adoption of the three-year programs corresponds to the person in charge of the Prevention of Corruption (RPC), each of the administrations has to choose their person in charge among the leaders of the entity. The RPCs have to control the performance of the anti-corruption programs, modifying and updating the measures provided for in them, whenever they are considered not suitable for preventing illicit conduct. The RPCs, which are the main interlocutors of the ANAC, are also responsible for monitoring compliance with anti-corruption provisions and guaranteeing legality in each of the administrations. The provision of this figure of control responds to the requirement to "personalize" the function of anti-corruption planning, thus identifying the relative center of responsibility in a certain natural person. The RPC is also responsible for taking care of every aspect of the planning, from the adoption of the program to the control of its application and the respect of forecasts.[29] It seems, therefore, that this figure constitutes species of that of the person responsible for the procedure established in art. 6 of Law no. 241 of 1990.[30]

According to art. 1, sec. 2 letter b), of Law 190, the following National Anticorruption Plans have been issued so far: the 2013 PNA, prepared according to the directives contained in the Guidelines of the Interministerial Committee and approved by CIVIT Resolution no. 72, on September 11, 2013; the 2015 modification of the PNA, approved by the ANAC (which replaces the CIVIT), with Resolution no. 12, of October 28, 2015; the PNA 2016, approved by the ANAC with Deliberation n. 831, of August 3, 2016 and, the 2017 modification of the PNA, approved by the ANAC with Deliberation no. 1208, of November 22, 2017, and successive modification in 2018 adopted with the Deliberation no. 1074, of November 21, 2018. For the preparation of the PNA 2019, the Authority has established, with orders from the Secretary General, the ANAC internal working group and the working group on the risk assessment and management system.

V. Administrative transparency, a pillar of the anti-corruption system

The anti-corruption strategy as a whole is completed with administrative transparency, which at the beginning was mainly related to access to documents and has now become a generalized control tool over administrative

[29] Gallone, Giovanni, *op. cit.*, 362.
[30] *Idem.*

action for the purpose of prevention and fight against corruption and mismanagement.[31]

Transparency, in fact, considering the formulation contained in art. 1 of Legislative Decree 33/2013,

> contributes to the application of the democratic principle and the constitutional principles of equality, impartiality, proper functioning, responsibility, effectiveness and efficiency in the use of public resources, and integrity and loyalty in the service to the nation. Transparency is a condition for guaranteeing individual and collective freedoms, as well as civil, political and social rights, it also helps the right to have a good administration and contributes to the realization of an open administration that is at the service of the citizen.

Transparency, although it is closely connected to the anti-corruption strategy, is not reduced to this function: it dialogues with the numerous constitutional principles and allows the application, above all, of the democratic principle.[32]

Transparency, understood as a value that must reach the entire legal system, is confirmed in Italy as a rule of procedure and administrative organization thanks to a series of legislative provisions that culminate in Legislative Decree 33/2013 and Legislative Decree 97 /2016. Transparency is proposed, on the one hand, as an objective to publicize the administrative action, and, on the other hand, to prevent the violation of competition rules and avoid illegal and corrupt agreements.[33] The administrations have the obligation to ensure access to information to an indeterminate number of subjects, and to disseminate it through any institutional means, in order to achieve, in this way, the promotion of the right of participation of citizens in decision-making processes of public administrations.

The transparency of administrative activity is considered one of the most important anti-corruption principles, because it allows for the most effective control in modern democracy, or in other words, the generalized

[31] D'Alterio, Elisa, *I controlli "anticorruzione" nelle pubbliche amministrazioni*, *Studi parlamentari e di politica costituzionale*, 2014, p. 9.

[32] Merloni, Francesco, "Trasparenza delle istituzioni e principio democratico", in Merloni, Francesco (ed.), *La trasparenza amministrativa*, Milan, Giuffrè, 2008, pp. 3 et seg.; Carloni, Enrico, "I principi del codice della trasparenza", in Ponti, Benedetto (ed.), *La trasparenza amministrativa dopo il d.lgs.* March 14, 2013, No. 33: *analisi della normativa, impatti organizzativi ed indicazioni operative*, Roma, Maggioli, pp. 29 et seg.; Carloni, Enrico, *Alla luce del sole. Transparenta amministrativa e prevenzione della corruzione. Diritto amministrativo*, 2019, fascicle 3, p. 500.

[33] Manganaro, Francesco, *L'evoluzione del principio di trasparenza amministrativa*, *www.astrid-online.it.*

control of citizens.[34] The relationship between transparency and democratic principle has been evidenced by the Constitutional Court, which has revealed the constitutional basis[35] of the principle of publicity and transparency, and its multiple relationships in the field of participation and generalized control: "the principles of publicity and transparency are not only understood as a consequence of the democratic principle (art. 1 Const.), but are refer to all aspects of public and institutional life, and also, according to art. 97 of the Constitution, to the proper functioning of the administration".[36]

Specifically, Legislative Decree 33/2013 establishes the obligation of publicity for three types of information: those that seek to favor the generalized control of personnel and administrative action (for example, articles 13 to 22), those that are directed to reinforce the accountability of public administrations in their financial management (for example, arts. 26 to 31), and finally, those aimed at simplifying relations between individuals and administrations (arts. 32–34).[37] To such obligations is added the famous civic access (art. 5) that allows citizens to obtain a copy of those documents that the public administrations have not published.

The adoption of Legislative Decree 97/2016, known as the "FOIA Decree (Freedom of Information Act)", marks a new stage in the development of administrative transparency, which begins with Law 241/1990. The provision falls within the scope of the Public Administration Reform, and pursues the dual objective of optimizing the information obligations provided for in Legislative Decree 33/2013, and expanding the variety of means to publicize the administrative action through the recognition, to any person, of the right of "generalized" civic access to the public informative heritage. For this, the model of the Freedom of *Information Act* of American origin,[38]

[34] Colapietro, Carlo, *Trasparenza e democrazia: conoscenza e/è potere*, in Califano, Licia and Colapietro, Carlo (Eds.), *Le nuove frontiere della trasparenza nella dimensione costituzionale*, Editoriale scientifica, Naples, Editoriale scientifica, 2014, pp. 13 et seq.; I. Nicotra, Ida and Mascio, Fabrizio Di, *Le funzioni dell'ANAC tra cultura della trasparenza e prevenzione della corruzione*, in R. Cantone, Rafaelle and Merloni, Francesco (Eds.), *La nuova Autorità nazionale anticorruzione*, Turin, Giappichelli, 2015, pp. 56 et seq.

[35] In general terms, on the constitutional basis of the principle of transparency, compare Donati, Daniele, *Il principio di trasparenza in Costituzione*, in Merloni Francesco (Ed.), *La trasparenza amministrativa…*, *cit.*, pp. 83 et seq.

[36] Constitutional Court, judgment 20/2019.

[37] Cantone, Rafaelle, *op. cit.*, 2016, p. 32.

[38] About the topic compare Marchetti, Andrea, *Il Freedom of Information Act statunitense: l'equilibrio "instabile" di un modello virtuoso di pubblicità e trasparenza amministrativa*, in Califano, Licia and Colapietro, Carlo (Eds.), *op. cit.*, pp. 69 et seg.

and considered the vehicle through which a "third generation" of administrative transparency is consolidated.[39]

Legislative Decree 97/2016 expands the notion and scope of the principle of transparency, defined as "full access to data and documents held by public administrations", and does not only have the objective of "favoring generalized forms of control in the development of institutional functions and in the use of public resources", but also has the purpose of guaranteeing greater protection of the rights of citizens, as well as promoting their participation in the development of the administrative activity. Therefore, the principle of transparency is aimed at guaranteeing rights and promoting the participation of citizens in administrative activity, whose participation is recognized as a "means of explanation of the rights established in article 2 of the Constitution".[40]

The recent reforms that have been carried out show that transparency is presented as an essential core of the legislator's anti-corruption strategy.[41] It is evident that the full application of this principle entails favorable consequences for the containment of risks related to corruption. Transparency helps to limit those gray areas in which corruption can appear, breaking the veil of misinformation that surrounds administrative action. In this way, the visibility of any discrepancy that may arise between the formal-organizational data and the real structure of powers is allowed.[42] Equally important is the "generalized control" of the work carried out by the administrations and that the principle of transparency allows: free access to data, information and documents opens the door to debates in which citizens participate

[39] Colapietro, Carlo, *L'"importazione" del diritto di accesso civico generalizzato nel nostro ordinamento in bilico tra legittime pretese e impossibili (o quasi) imprese*, in Massaro, Antonella and Sinisi, Martina (Eds.), *op. cit.*, pp. 11 and 12.

[40] Council of State, section of regulatory acts, opinion of February 24, 2016, No. 515, point 7.

[41] Law 190/2012 has already identified transparency as a pillar in the fight against corruption, granting a mandate for the adoption of a regulatory reorganization text. Legislative Decree 33/2013 places among its declared purposes the implementation of the principles of "responsibility, effectiveness and efficiency in the use of public resources, integrity and loyalty in the service to the nation" (article 1, paragraph 2).

On transparency as an instrument to fight corruption compare Orofino, Angelo, Profili giuridici della trasparenza amministrativa, Bari, Cacucci, pp. 157 et seg.; Merloni, Francesco and Ponti, Benedetto, "La trasparenza", in Merloni, Francesco and Vandelli, Luciano (eds.), La corruzione amministrativa. Cause, prevenzione e rimedi, Rome, Passigli, 2010, pp. 403 et seg.

[42] Gallone, Giovanni, *op. cit.*, p. 355.

on the objectives and results that should be pursued, thus contributing to a more complete realization of the principle of democracy.[43]

VI. Regulatory framework regarding labor disqualification and incompatibilities and codes of conducts

law 190/2012 has delegated to the Government the function of establishing cases of labor incompatibility and disqualification. With Legislative Decree 39/2013, the Government has developed a regulatory framework that establishes a series of cases in which the individual's condition is an obstacle to holding a position in the public administration. The job disqualification measure, which assumes the logic of the incapacity for elections and political candidacies in the assignment of administrative positions, will be applied in three situations: in case of conviction for crimes against the public administration, regardless of whether the conviction is final or not; in the case of positions awarded to individuals who come from private law entities regulated or financed by public administrations; and in the event that the subject had previously held functions in political bodies. In general, disqualification is not conceived as a permanent exclusion from accessing certain positions, but rather it is a temporary measure. The common ratio in the three cases of disqualification described is, in fact, to establish a period that begins when the impeding condition is verified and ends with the assignment of the position in the public administration. In this way, a "cooling" and neutralization of all those elements that could condition the impartiality of public officials is achieved. In the first case, when there is a conviction that is not final, the application of this period of time has the objective of preventing the image of the position assigned to the person who has been convicted from being damaged, since, if the latter were to continue occupying his position, such an image would be affected. In the second case, when there are conflicting private interests, the "cooling off" period helps to reduce the applicant's ties to the conflicting private interests. And in the third case, when the person has performed functions in public bodies, applying the period of time contributes so that when it ends, the election of the person for the determined position

[43] Marino, I., *Autonomie e democrazia. Profilo dell'evoluzione dell'autonomia e della sua ricaduta sul sistema giuridico*, *Nuove autonomie*, 2007, pp. 197 et seq.; Arena, Gregorio, *Trasparenza amministrativa e democrazia*, in Berti, Giorgio and Candido de Martin, Gian (eds.), *Gli istituti della democrazia amministrativa*, Milan, Giuffrè, 1996, pp. 17 et seq.

is carried out considering their own professional merits and not membership in political bodies.[44] Impartiality is not simply a characteristic of the administrative act, nor a generic characteristic of the entire administrative structure: impartiality must be guaranteed by making a specific reference to administrative positions and their holders.[45]

The incompatibility regime usually reproduces the causes of disqualification, but in terms of incompatibility. However, this has been a necessary action to be able to cover situations that were not foreseen in the scope of disqualification. For example: a) incompatibilities between political positions in State bodies and administrative positions (which exist); b) the incompatibilities that may arise when the functions of the position are performed, including cases of conflicts of interest, by people who are not holders of the position, but who are directly related to it because they are relatives or close people.[46]

The figures of disqualification and incompatibility have a mutually complementary nature in relation to the unitary objective of achieving greater efficiency in guaranteeing the impartiality and proper functioning of the administration. The holders of high administrative positions cannot also accumulate political positions, and the holders of political positions, when their mandates end, cannot be nominated as holders of high positions in administrations, public entities or private entities under public control, if not previously a certain time and space has elapsed.[47]

The position adopted by Legislative Decree 39/2013 is quite innovative, and allows impartiality to be achieved through the introduction of a general and horizontal limitation, which extends to each political body in relation to all the most important administrative offices that are located. within the scope of its territorial sphere of influence, without the need to impose new links or special prohibitions (related to particular categories of politicians —parliamentarians, mayors, ministers— in relation to the specific offices of public administrations).[48]

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[44] Merloni, Francesco, *Il regime delle inconferibilità e incompatibilità nella prospettiva dell'imparzialità dei funzionari pubblici*, *Giornale di diritto amministrativo*, 2013, pp. 808 and 809.

[45] *Ibidem*, p. 807.

[46] Merloni, Francesco, *Nuovi strumenti di garanzia dell'imparzialità delle amministrazioni pubbliche: l'inconferibilità e incompatibilità degli incarichi*, in Mattarella, Bernardo Giorgio and Pelissero, Marco (Eds.), *La legge anticorruzione…*, *cit.*

[47] Cavallo, Maria Barbara, *Incompatibilità e inconferibilità di incarichi*, en Massaro, Antonella and Sinisi, Martina (eds.), *op. cit.*, p. 35.

[48] *Ibidem* p. 38.

The administrative positions that are intended to be protected through the institutions of disability and incompatibility in relation to political positions, are established in the *legge-delega*[49] ((section 50, letter d) and are classified into four categories that the *decreto delegato*[50] specifically specifies (art. 1, letter i), j), k), l)), that is: a) senior administrative positions; b) executive positions (internal and external); c) administrators of public entities; d) administrators of private law entities subject to public control.[51] The positions are established horizontally, that is, they are not based on competencies, but on the nature of the functions that derive from them. In fact, these are positions that, although they are heterogeneous, have the common characteristic of complementing the main activity of the administrative structure, which is required to perform management functions in accordance with the guidelines established by the political bodies.[52]

Surveillance of compliance with the provisions of the decree corresponds, in the first place, to the RPC of the administration that assigns a position or that of the one in which an incompatible position has been held. Secondly, surveillance corresponds to the ANAC, which can carry out inspections and verifications, as well as exercise powers of order (according to art. 1, section 3 of Law 190/2012).

Another instrument for preventing corruption consists of adopting codes of conduct aimed at employees of public administrations: a national Code and the codes of each public administration. The new National Code was issued with Decree of the President of the Republic n. 62, of April 16, 2013. The codes, national and of the administrations, far from assuming a merely deontological or ethical value, have had a certain legal relevance, since they contain numerous important norms related to the disciplinary responsibility of employees. The adoption of codes of conduct responds to the requirement not to reduce exclusively to an ethical dimension, the fulfillment of the duties of diligence, loyalty, impartiality, and good conduct that public officials are obliged to respect.

[49] The *Legge-delega* is an instrument by which Parliament attributes to the Government the power to regulate a matter through legislative decrees.

[50] The *delegato* decree It is the legislative decree issued by the Government based on the power (*delega*) that Parliament has given it.

[51] Cavallo, Maria Barbara, *op. cit.*, p. 38 and 39.

[52] Sirianni, G., *La necessaria distanza tra cariche politiche e cariche amministrative*, *Giornale di diritto amministrativo*, 2013, p. 816.

VII. The repression of corruption

The field of repression of corruption has been deeply influenced by the growing demand to reinforce the repressive structure by international sources. Criminal discipline is the result of the interrelation between international political-criminal options and internal criminal enforcement policies, which have progressively accepted international incrimination instances through the introduction of new typified circumstances, have also accepted the extension of their scope, objective and subjective, and sanctioning responses have been consolidated.[53]

After almost twenty years of judicial investigations of "*Mani pulite*",[54] A deep and organic reform of the regulatory microsystem of corruption/concussion was carried out in order to obtain greater efficiency in the fight against illegality and malpractice in the activity of the public administration. This reform was made possible thanks to Law 190/2012, and the subsequent Anti-Corruption Law of 2015 (Law no. 69/2015), to the reform of the Antimafia Code of 2017 and, finally, to Law 3/2019, known as *Legge Spazzacorrotti*.

The reform initiated with Law 190/2012 does not intervene organically in the matter of crimes against the public administration, although it contains quite significant interventions both in the field of the configuration of the different cases, and in the field of the sanctioning system. Among the most significant novelties, in the field of substantive law, the law introduces some modifications that redefine the normative type, as happens in the case of corruption during the exercise of functions, established in art. 318, which goes from being a minor figure of corruption to an archetype of the crime, for which corruption, according to art. 319, becomes a special case, or rather, it becomes a crime of concussion by induction, unrelated to the old content of art. 317, and becomes inducement to deliver or promise benefits (art. 319 *quater*).[55]

As you can see,[56] The new configuration of the regulatory subsystem of corruption/concussion has three key points: a) the abandonment of the

[53] Manacorda, Stefano, *op. cit.*, p. 178.

[54] *Mani pulite* (Clean hands): famous judicial process of the nineties that exposed a corrupt system in which Italian politicians and businessmen participated in collusion.

[55] Lelo, Paolo, *La legge n. 190 del 2012 e il contrasto alla corruzione*, *Questione giustizia*, No. 1, 2013, p. 122.

[56] Gambardella, Marco, *Le nuove fattispecie di corruzione e concussione*, in Massaro, Antonella and Sinisi, Martina (eds.), *op. cit.*, p. 65.

mercantile model of corruption —on which the distinction between improper corruption (act of legitimate trade, art. 318 PC) and own corruption was based (act contrary to the duties of office, art. 319 cp)— and the reformulation of the crime established in art. 318 cp, replaced by the figure of corruption in the exercise of functions, b) the articulation of the crime of concussion in two large autonomous figures: the authentic concussion (currently only by coercion, it is maintained in art. 317 cp) and the unprecedented crime of improper inducement to deliver or promise benefits (art. 319-quater PC), c) the tightening of the sanctioning system.

Almost three years after the 2012 reform, anti-corruption policies have undergone a new legislative approach, which consolidates on the one hand and modernizes the previous regulatory framework on the other. With Law no. 69, of May 27, 2015 on "Provisions regarding crimes against the public administration, mafia-type associations and false accounting", the Parliament has returned to the criminal discipline of public corruption and related circumstances, toughening the penalties main and those accessory (arts. 32 ter, 32 quinquies and 35 cp).

As a result of important legal cases and serious current events (cases such as Mose, Expo, Mafia-Capitale, etc.),[57] The regulatory frameworks edicts have been increased, raising the maximum penalty for the crime of corruption in the exercise of functions, and increasing the minimum penalty and the maximum penalty for crimes of own corruption, corruption in judicial acts and undue inducement to deliver or promise benefits.[58]

Finally, the last legislative intervention on the matter was carried out with Law 3/2019 (known as Legge Spazzacorrotti), whose ratio lies in the toughening of the sanctioning response, and which continues, under certain profiles and partially, with the reform established by law 69/2015.[59] It is an intervention that has had a great scope, since it affects the general and special part of the criminal code, the prison system, the criminal process, the institute of prescription and the discipline of the responsibility for crime of the entities established with Decree Law 231/2001. The Constitutional Court has already intervened on this discipline, censoring the provision that extended to crimes against the public administration, the preclusions established in art. 4 bis, of the Penitentiary System on the granting of benefits

[57] Mongillo, Vincenzo, *Le riforme in materia di contrasto alla corruzione introdotte dalla legge no. 69, 2015*, *Diritto Penale Contemporaneo*, 2016.

[58] *Cfr.* Cingari, Francesco, *Una prima lettura delle nuove norme penali a contrasto dei fenomeni corruttivi*, *Diritto Penale e Processo*, 2015, pp. 808 et seq.

[59] Gaito, Alfredo and Manna, Adelmo, *L'estate sta finendo*…, *Archivio Penale*, núm. 3, 2018.

and alternative measures to detention. In particular, as can be seen in the Press Office statement (since a sentence has not yet been issued), the lack of a transitory discipline that prevents the application of the new rules to those convicted of a crime committed before entering in force of Law 3/2019, it is considered incompatible with the principle of legality.

VIII. Conclusions

The complex anti-corruption system is articulated in a plurality of normative interventions that have followed one another over time and that have addressed the profiles of the prevention and those of the repression of corruption.

The profile of prevention, which for a long time has been abandoned by part of the political agenda, starting in 2012, begins to occupy a central place in the normative interventions of the legislator. Experience has shown on the one hand that it is insufficient to resort to the instrument of criminal repression to combat corruption, as a consequence of its systematic nature, and, on the other, the difficulty in getting to know this type of situation. And it has also confirmed the need to move from ex post prevention through repression to prevention *ex ante*.[60] On the other hand, investigations and criminal proceedings have been taking shape thanks to the verification of individual facts, and not by facts of the system.[61]

The importance of the role of prevention in the fight against corruption has recently been confirmed. The European Commission, in this regard, has stated that

> in the last twenty years, the strategy to combat corruption in Italy has been developed, to a large extent, on the repressive aspect. The new Anti-Corruption Law, adopted on November 6, 2012, has rebalanced the strategy by reinforcing the preventive aspect and enhancing the responsibility (accountability) of public officials".[62]

As is clear from the title, "Provisions for the prevention and repression of corruption and illegality in the public administration", Prevention

[60] Flick, Giovanni Maria, *op. cit.*, p. 2997.

[61] Mattarella, Bernardo Giorgio, *Recenti tendenze legislative in materia di prevenzione della corruzione*, *Percorsi costituzionali*, 2012, p. 18.

[62] Report from the Commission to the Council and the European Parliament - Union Report on the fight against corruption, February 3 2014.

represents the innovative point of Law 190, through which the traditional approach to corruption and mismanagement based on repression has been overcome. Before this Law, there were also some normative references related to the prevention of corruption, for example, Law 3/2003 had established the High Commissioner for the prevention of corruption, and Legislative Decree 150/2009 attributed functions to combat corruption to the Independent Commission for Evaluation, Integrity and Transparency (CIVIT). Even so, they were specific provisions that did not allow to delineate an organic regulatory system, and they have not established an administrative system either *ad hoc*.[63]

The complexity of this phenomenon calls for a wide range of different legal contrast measures: from codes of conduct for public officials to annulment of contracts concluded as a result of illegal acts, as well as administrative transparency measures or criminal sanctions.[64]

The legislator has recognized that corruption, understood, in a general sense, as maladministration, is a multiform and varied phenomenon, which, however, still follows logics and patterns that are repeated over time, and therefore, for its prevention it is necessary to develop an articulated strategy within a unitary framework.[65] For this reason, the central nucleus of the Italian anti-corruption system is also represented from the moment of its planning. And to this, a large part of the normative structure specified in Law 190/2012 is dedicated. In particular, the central core of the entire system appears in the National Anticorruption Plan, which represents the reference framework for each of the administrations (national, regional and local) to adopt its three-year Anticorruption Program. On the other hand, the new figure of the person responsible for the prevention of corruption is the engine to achieve the application of anti-corruption policies in each of the administrations, he will constantly verify the degree of effectiveness of the established measures, and will propose, whenever necessary, the modifications and eventual updates of the three-year plan, which will be proposed by the person in charge and approved by the political management body.[66]

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[63] Gullo, Nicola, *La politica di contrasto alla corruzione in Italia ed i soggetti responsabili della prevenzione della corruzione*, *Nuove Autonomie*, 2014, p. 523.

[64] Manganaro, Francesco, *La corruzione in Italia*, *Foro Amministrativo (II)*, No. 6, 2014, p. 1863.

[65] Gullo, Nicola, *op. cit.*, p. 524; Vannucci, Alberto, "La corruzione in Italia: cause, dimensioni, effeti", in Mattarella, Bernardo Giorgio and Pelissero, Marco (eds.), La legge anticooruzione…, *cit.*, pp. 25 et seg.

[66] Giupponi, Tomas Francesco, *Il contrasto alla corruzione a cavallo tra due Legislature*, *Quad. Cost.*, 2013, pp. 334 and 335.

The strength of the anti-corruption system is based on the virtuous dynamics between preventive administrative action and the repressive model. In any case, before preventive and repressive intervention, it is essential to promote and spread among citizens a culture of legality and ethics that allows higher "moral costs" than those of illegality, thus ensuring that the latter is perceived as a reprehensible phenomenon capable of arousing social disrepute.[67]

[67] G. Spangher, *Il "contrasto" alla corruzione nell'orizzonte della politica criminale*, *cit.*, pp. 43 and 44.

REFLECTION ON THE PHENOMENON OF CORRUPTION IN MEXICO AND SINGAPORE

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SUMMARY: I. *A general remark*. II. *Corruption in mexico in contemporary times*. III. *Comparative study: singapore's experience in fighting corruption*.

I. A GENERAL REMARK

Corruption is a complex phenomenon on which numerous studies and reflections have been written, which have, as their starting point, varied approaches and points of view, as an example, there are works that place greater emphasis on the actors involved in acts of corruption, that is, they highlight in one way or another the influence and actions of government officials and servants; of public or private, national or international companies; of political parties or candidates; to name a few.[1]

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[1] For example, a work that points to the analysis of judges and members of the judiciary is that of Carbonell, Miguel, "Corrupción judicial e impunidad: el caso de México", in Méndez, Silva Ricardo (coordinator), *Lo que todos sabemos sobre la corrupción y algo más*, Mexico, UNAM, IIJ, 2010, *https://archivos.juridicas.unam.mx/www/bjv/libros/6/2770/4.pdf*.

Other studies highlight the ways in which acts of corruption can be sanctioned, from criminal or administrative matters,[2] alluding to the administrative or criminal types contained in the norm, that is, collusion, embezzlement, bribery, influence peddling, abuse of authority, concealment, improper hiring, obstruction of justice, illicit enrichment, among others. There are also analyses that highlight perceptions of corruption[3] and its effects;[4] others that underline the control mechanisms used to combat it,[5] that within the doctrine can be considered intra-organizational and inter-organizational controls, and those that narrate the mechanisms to face it,[6] to mention a few, without omitting that the possibilities of each of these approaches are associated with some discipline or area of knowledge, thus we have the study of corruption from the political point of view,[7] juridical,

[2] *Cfr*. Díaz Aranda, Enrique, "¿Previene el delito de enriquecimiento ilícito la corrupción?", in Méndez, Silva Ricardo, coordinator, *op. cit.*, *https://archivos.juridicas.unam.mx/www/bjv/libros/6/2770/6.pdf.*

[3] Regarding this type of analysis, the most common is the one carried out by Transparency International called the Corruption Perception Index. In the case of Mexico, out of a total of 180 countries analyzed, Mexico ranks 135th in the Corruption Perceptions Index 2017, while in 2016 it ranked 123rd out of a total of 176 countries. Cf. Transparency International, Corruption Perceptions Index 2017, consulted on May 31st, 2019, available in *https://www.transparency.org/news/feature/corruption_perceptions_index_2017*.

[4] An interesting work is the one presented by Fernando Jiménez Sánchez about political and institutional disaffection in Spain, derived from the citizen's perception of the high rates of corruption, disaffection understood as an attitude that implies a lack of interest and commitment to public affairs and political activity in general, *Cfr*. Jiménez Sánchez, Fernando. "Los efectos de la corrupción sobre la desafección y el cambio político en España", in International Transparency and Integrity Review, Spain, No. 5, September-December 2017, p. 10, available in *https://revistainternacionaltransparencia.org/wp-content/uploads/2017/12/fernando_jimenez.pdf.*

[5] See Valadés, Diego, "Reformar el regimen de gobierno", in Salazar, Pedro *et al.* (coords.), *¿Cómo combatir la corrupción?*, Mexico, UNAM, Institute of Legal Research, 2018, pp. 3-14, *https://archivos.juridicas.unam.mx/www/bjv/libros/9/4315/27.pdf.*

[6] In this regard, see the article by Cárdenas, Jaime "Herramientas para enfrentar la corrupción", in Méndez, Silva Ricardo (coordinator), *op. cit.*, *https://archivos.juridicas.unam.mx/www/bjv/libros/6/2770/5.pdf*. You can also see Guerra Ford, Oscar, "Medios y mecanismos para combatir la corrupción", in Salazar, Pedro *et al.*, coordinators, *op. cit.*, pp. 147-157, *https://archivos.juridicas.unam.mx/www/bjv/libros/9/4315/27.pdf.*

[7] In this regard, the work of Lascoumes, Pierre can be reviewed, *Une démocratie corruptible. Arrangements, favoritisme et conflits d'intérêt*, Paris, La République des idées, 2011. See also the interview about his work in Salle, Gregory and Mucchilli, Laurent, "Une democratie corruptible?, Entretien avec Pierre Lascoumes", *https://www.laurent-mucchielli.org/public/ITV_Pierre_Lascoumes.pdf.* A study from the public administration can be reviewed in Ramió, Matas, Carles, "La Administración Pública del futuro: la administración 2050", in GIGAPP Studies, Doctoral Program in Government and Public Administration, Ortega y Gasset

international,[8] from the perspective of philosophy, psychology, economics, or sociology.

The purpose of the foregoing is to highlight the complexity of the phenomenon called "corruption", already in a previous work[9] We have analyzed the different narratives around it, proposing Diasdoralogy as a means of approach to rationalize the way in which it carries out its study, regardless of the different disciplines, with the aim of understanding its causes, manifestations, and effects.

On the other hand, Agustí Cerrillo points out that "corruption arises from the existence of a conflict of interest"[10] and affirms that it "has unavoidably diffuse contours that do not allow a clear distinction to be established between what is corrupt and non-corrupt", however, he highlights two essential elements that must coincide in a situation in order to be classified as corruption, abuse of power and obtaining benefits, since "the abuse of power translates into taking advantage of a conflict of interest by imposing private interest over the public interest to obtain a benefit".[11]

The truth is that, regardless of the methodology or technique used to advance in the understanding of corruption,[12] we agree that there is no single or complete concept of what is and is not, and for the purposes of this work, we can understand it as a multidimensional and complex phenom-

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University Research Institute, Madrid, WP – 2015-08, *http://prospectiva.eu/dokumentuak/La_Administracion_%20Publica_del_Futuro-La_Administracion_2050-Carles-Ramio.pdf.*

[8] The work of Susan Rose-Ackerman addresses, among other things, the impact and responsibility of transnational corporations in the international economy, as well as the controls that the international community usually imposes to combat them. This article is also an example of the analysis of corruption from the participating subjects, that is, from the analysis of the performance of international economic agents. Rose - Ackerman, Susan, " Corrupción y economía internacional", Alicante, Miguel de Cervantes Virtual Library, 2005, Digital Edition from Isonomy: Journal of Theory and Philosophy of Law, No. 10 (April 1999), pp. 51-82, *http://www.cervantesvirtual.com/obra/corrupcin-y-economa-global-0/* .

[9] Márquez Gómez, Daniel and Camarillo Cruz, Beatriz, *La diasdoralogía como una teoría del fenómeno de la corrupción en México,* Mexico, Institute of Legal Research, UNAM, 2019, p. 174.

[10] Cerrillo I Martínez, Agustí. *El principio de integridad en la contratación pública. Mecanismos para la prevención de los conflictos de intereses y la lucha contra la corrupción.* Spain, 2nd edition, Thomson Reuters Aranzadi, 2018, p. 52.

[11] *Ibidem*, p. 54.

[12] To go deeper into the concept of corruption, see Klitgaard, Robert, *Controlando la corrupción. Una indagación práctica para el gran problema social de fin de siglo*, tran. Emilio M. Sierra Ochoa, Buenos Aires, South American Ed., 1994; Susan Rose-Ackerman, Corruption and Government, United Kingdom, Cambridge University Press, 1999 and Morris Stephen D., *Corrupción y política en el México contemporáneo*, Mexico, Siglo XXI, 1992.

enon, found in both public and private spaces, which encompasses actors individual and collective, national and supranational, in the political, economic, social and cultural spheres, negatively impacting the institutionality and legality of a nation, involving the use of resources from public space for private benefit.

II. Corruption in mexico in contemporary times

In Mexico, the phenomenon of corruption has been addressed, with greater or lesser success, at different times and in different ways. In the recent history of our country, the government of then President Miguel de la Madrid Hurtado is identified with the so-called "moral renewal of society", characterized as: *an effort to return to the sobriety and austerity typical of the republican regime and to subordinate every personal or group interest to the interests of the Nation*,[13] who started an institutional fight against corruption in our country.

The so-called thesis of the moral renewal of society should be headed by the public administration and from there to the whole of society, for which it was stated that "moral renewal is the backbone of the renewal of the entire society";[14] and in that context, various reforms were also carried out to the national legislation and control of the public administration, in accordance with the idea of moral conduct in the public space, as can be seen in the modification to the Fourth Constitutional Title, whose text from 1917 was called "Of the Responsibilities of Public Officials"[15] and after its first reform in 1982, it was called "Of the Responsibilities of Public Servants",[16] the publication of the then new Law of Responsibilities of Public Servants,[17]

[13] *Cfr.* "I Informe de Gobierno del Presidente Constitucional de los Estados Unidos Mexicanos. Miguel de la Madrid Hurtado, 1o. de septiembre de 1983", *Informes Presidenciales*, Mexico, Chamber of Deputies, LXI Legislature, General Directorate of Documentation Services, Information and Analysis, April 2012, p. 12, *http://www.diputados.gob.mx/sedia/sia/re/RE-ISS-09-06-16.pdf.*

[14] *Cfr.* "II informe de Gobierno del Presidente Constitucional de los Estados Unidos Mexicanos. Miguel de la Madrid Hurtado, 1o. de septiembre de 1984", *ibidem*, p. 102.

[15] *Cfr.* Original text of the Political Constitution of the United Mexican States, Official Journal of the Federation, Organ of the Provisional Government of the Mexican Republic, February 5th, 1917. Chamber of Deputies of the Congress of the Union, *http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_orig_05feb1917_ima.pdf.*

[16] Official Journal of the Federation, December 28th, 1982, with this constitutional reform, articles 108 to 114 were modified, which make up precisely the Fourth Title of the Political Constitution of the United Mexican States, *http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_099_28dic82_ima.pdf.*

[17] Published in the Official Journal of the Federation, on December 31st, 1982.

Planning Law,[18] the reforms to the Civil Code,[19] to the Federal Penal Code,[20] the publication of the Federal Law of Parastatal Entities,[21] among others. A debate also arose around the supplementary application of criminal regulations to the matter of responsibilities of public servants, which was resolved positively.[22]

Later, during the six-year term of then President Vicente Fox Quezada, the name was changed from the Secretariat of Comptrollership and Administrative Development to the Secretariat of Public Administration,[23] part of the Federal Law of Responsibilities of Public Servants was abrogated, and the Federal Law of Responsibilities of Civilian Public Servants was issued at the federal level,[24] and the Law of Professional Career Service in the Federal Public Administration was issued. During the government of Enrique Peña Nieto, it must be remembered that even the disappearance of the Ministry of Public Administration was proposed[25] and for several

[18] Published in the Official Journal of the Federation, on January 5th, 1983, it mainly highlights the Seventh Chapter of responsibilities, articles 42 to 44, *http://www.diputados.gob.mx/LeyesBiblio/ref/lplan/LPlan_orig_05ene83_ima.pdf.*

[19] *Cfr.* Reform and addition to articles 1916, 1916 Bis and 2116 of the Civil Code for the Federal District in common matters and for the entire republic in federal matters, Official Journal of the Federation (D.O.F. by its Spanish initials), in relation to moral damage, and reparation, considering also as responsible the State and its officials. Official Journal of the Federation of December 31st, 1982, *http://www.diputados.gob.mx/LeyesBiblio/ref/ccf/CCF_ref27_31dic82_ima.pdf.*

[20] *Cfr*. Official Journal of the Federation of January 5th, 1983, *http://www.diputados.gob.mx/LeyesBiblio/ref/cpf/CPF_ref45_05ene83_ima.pdf.*

[21] Published in the Official Journal of the Federation on May 14th, 1986, *http://www.diputados.gob.mx/LeyesBiblio/ref/lfep/LFEP_orig_14may86_ima.pdf.*

[22] The debate was related to the content of article 45 of the Federal Law of Responsibilities of Public Servants, which established the supplementary nature in favor of adjective and substantive criminal norms in matters of responsibility of public servants. See: Digital Registry: 190265, Instance: Collegiate Circuit Courts, Ninth Period, Subject(s): Administrative, Thesis: I.7o.A. J/12, Source: Judicial Weekly of the Federation and its Gazette. Volume XIII, February 2001, page 1701, Type: Jurisprudence, item: Administrative responsibility of public officials. The provisions of the Federal Code of Criminal Procedures are supplementally applicable.

[23] *Cfr. Decree by which the Law of the Professional Career Service in the Federal Public Administration is issued; the Organic Law of the Federal Public Administration and the Budget, Accounting and Federal Public Expenditure Law are reformed; and the Planning Law is added*, published in the Official Journal of the Federation on April 10th, 2003.

[24] See: Official Journal of the Federation on March 13th, 2002 and its article 47 related to supplementation in favor of civil regulations.

[25] See the Second Transitory article of the reform to the Organic Law of the Federal Public Administration, published in the Official Journal of the Federation on January 2nd, 2013.

years it operated based on a transitory article; one of the main arguments in its disappearance was that it was an unnecessary dependency, since it would promote the formation of an anti-corruption body.[26]

Paradoxically, during one of the Mexican governments with the biggest corruption scandals, and after more than three decades since the start of the so-called moral renewal policy, the issue of combating corruption returned to the legislative agenda, taking shape in the constitutional reform of May 27th of 2015, in addition to the fact that various sectors of society promoted it as a national priority, to the extent that it is currently one of the main lines of action of the Mexican government.

With the modifications to the constitutional text, the name of the Fourth Title was changed to "Of the responsibilities of public servants, individuals linked to serious administrative offenses or acts of corruption, and patrimonial of the State"; From which two major issues stand out, the first is that it is accepted that public servants are not the only ones who can incur or carry out acts of corruption, private individuals are also included; and the second is that it distinguishes between serious and non-serious corrupt conducts in administrative offenses. This reform also entailed the modification of article 73, sections XXIV and XXXIX-V, to empower the Congress of the Union to issue the general laws that establish the bases of the National Anticorruption System and that of administrative responsibilities of public servants, respectively.

In the constitutional reform that is commented, the creation of a "system" was established to combat the old national problem of corruption, in fact, article 113 of the CPEUM establishes the National Anticorruption System as "the instance of coordination between the authorities of all government orders competent in the prevention, detection and punishment of administrative responsibilities and acts of corruption, as well as in the supervision and control of public resources".[27] To carry out the coordination function of this system, a Coordinating Committee is formed,[28] made

[26] *Cfr.* "La SFP ya no existe; es necesario regularizarla: Marván Laborde", *La Jornada*, February 5th, 2015, *https://www.jornada.com.mx/2015/02/05/politica/003n1pol.*

[27] *Cfr.* Political Constitution of the United Mexican States, article 113.

[28] The Coordinating Committee of the National Anticorruption System is made up of the heads of the Superior Audit of the Federation; of the Specialized Prosecutor's Office in the Fight Against Corruption; of the Ministry of Public Administration; by the president of the Federal Court of Administrative Justice; the president of the National Institute of Transparency, Access to Information and Protection of Personal Data (INAI); by a representative from the Council of the Federal Judiciary and another from the Citizen Participation Committee. *Cfr.* CPEUM, article 113, section I.

up of the heads of different entities and dependencies of the federal public administration, of autonomous constitutional bodies and civilian collegiate bodies.[29] From the normative point of view, this Coordinating Committee is at the head of the so-called state anti-corruption systems and designs the policy of the Mexican State in the matter.

In addition, on July 18th, 2016, the General Law of the National Anticorruption System was approved; the General Law of Administrative Responsibilities; the Organic Law of the Federal Court of Administrative Justice and other legal reforms to give effect to the constitutional reform of 2015, among others, those related to the Organic Law of the Attorney General's Office —now the General Prosecution Office— the Organic Law of the Federal Public Administration and the Federal Penal Code.

However, in the states,[30] in accordance with the Executive Secretariat of the National Anticorruption System, a decentralized non-sectorized body, which provides technical support to the Coordinating Committee of the National Anticorruption System,[31] there is significant progress in the approval of local laws on the matter, that is, to harmonize their laws with the constitutional reform of 2015, each of the federal entities must reform 9 laws, including the modifications to their constitutional texts, which gives a total of 288 reforms, additions or the possible issuance of new local legal systems.[32]

[29] The Citizen Participation Committee is created, made up of 5 citizens of recognized prestige in the fight against corruption, accountability and transparency.

[30] With regard to the federal entities, a contradiction to make this system operational does not go unnoticed, since the transitory fourth article of the Decree of constitutional reform for the fight against corruption of May 27th, 2015, established that the Congress of the Union, the state legislatures and the then Legislative Assembly of the Federal District, should issue the laws and carry out the corresponding regulatory adjustments, within 180 days following the entry into force of the general laws (of the National Anticorruption and Administrative Responsibilities System), notwithstanding the foregoing, the decree published on July 18th, 2016 through which, among others, the aforementioned general laws were approved, in its second transitory it was established that the Congress of the Union and the states would have one year as a deadline to make the necessary regulatory adjustments, after which and only pointing it out as an exercise in neatness of legislative technique, a transitory of a general law modifies the content of a transitory contained in a constitutional reform, a situation that reveals part of the little legislative care in certain matters. This academic delicacy might seem insignificant given the size of the complexity to make the anti-corruption reform operational, although this undoubtedly reveals in part what is happening in our country, since there are dramatic cases of violations of national legislation via the figure of "fraud to the law".

[31] *Cfr*. Ley General del Sistema Nacional Anticorrupción, articles 24 and 25, Official Journal of the Federation, July 18th, 2016.

[32] *Cfr*. Executive Secretariat of the National Anticorruption System, "Adecuación al marco normativo de los Sistemas Locales Anticorrupción", figures provided as of April 9th,

According to information from the Executive Secretary, in Mexico, only 2 local regulatory adjustments are pending throughout the country.

As can be seen, since May 2015, the way in which the Coordinating Committee would be integrated was established, however, it is not until February 2019, almost four years later, that it can be said that it was completely integrated, since it is until then that the person in charge of the Specialized Prosecutor's Office in the Fight against Corruption was appointed.[33] In addition to the delay in the formation of the Coordinating Committee, it has not gone unnoticed that the reforms to the Federal Penal Code in the fight against corruption did not come into force immediately, but only after the appointment of the Head of the specialized Prosecutor's Office,[34] that is, almost three years after its legislative approval.

In the states, according to the information provided by the Executive Secretary of the National Anticorruption System, the formation of the operational structure of the local systems presents a very significant advance, since of the 191 instances or positions that must be formed or appointed in the 32 states, only 4 are pending appointment, which represents about 2% at a national level.[35]

Evidently, both the approval of the regulatory adjustments and the start-up of the operating structures in the federal entities constitute a "formal" data that does not necessarily reflect a qualitative change in their start-up, however, for the purposes of this text, it is indicative of the level of progress

2021. The legal systems that have been adapted or issued are: reforms to the local constitution; 2) State anti-corruption law; 3) law of administrative responsibilities; 4) Oversight and accountability law; 5) Organic Law of the Court of Administrative Justice; 6) Organizing Law of the Attorney General's Office; 7) Penal Code; 8) Organic Law of the state public administration; and 9) Domain extinction law, *https://www.sesna.gob.mx/wp-content/uploads/2021/04/Avance_Marco_Normativo_SLA-09Abr2021.pdf.*

[33] *Cfr.* On February 9th, 2019, the Attorney General of the Republic appointed the person in charge of the Specialized Prosecutor's Office in the fight against Corruption. and the head of the Electoral Crimes Prosecutor, *Cfr.* "Gertz Manero designa fiscales contra la Corrupción y Delitos Electorales", Excelsior, *https://www.excelsior.com.mx/nacional/gertz-manero-designa-fiscales-contra-corrupcion-y-delitos-electorales/1295423.*

[34] *Cfr.* First Transitory of the Decree that amends, adds, and repeals various provisions of the Federal Penal Code in Matters of combating corruption, published in the Official Journal of the Federation on July 18th, 2016.

[35] *Cfr*. Executive Secretariat of the National Anticorruption System, "Conformación de la estructura operativa de los Sistemas Locales Anticorrupción", with a cut-off date of April 9th, 2021. The instance or appointment that must be made are: Selection Commission; Citizen Participation Committee, Coordinating Committee; Executive Secretary; Anticorruption Prosecutor and Magistrate of the Court of Administrative Justice, *https://www.sesna.gob.mx/wp-content/uploads/2021/04/Avance_Estructura_Operativa_SLA-09Abr2021.pdf.*

in the implementation of the National Anticorruption System in the country, which presents new challenges due to its size and the number of factors and actors involved.

Having pointed out the foregoing, it should be emphasized that, despite the complexity of the phenomenon of corruption, in our country there is progress in the legislation on the matter, however, and taking into consideration that the constitutional and legal reforms are perfectible, even they are insufficient to achieve a significant advance in their combat. Moreover, the current government comes to power by entrenching itself ideologically in the discourse of combating corruption.

The Mexican reality presents real questions about the way in which the so-called National Anticorruption System will end up being implemented, coupled with the context of the arrival of a new political group to power and the configuration of a political class different from that of previous years, with an ideology and a different way of understanding government action. In this sense, it will suffice to mention that the issue of corruption appeared repeatedly in the official documents of the ruling party: Statutes,[36] Declaration of Principles[37] and Action Program[38] of the Morena political party, as

[36] Statutes. Article 2. MORENA will be organized as a national political party based on the following objectives: … d. The search for the eradication of corruption and the privileges to which public office and political representation have been dominantly associated. Cf. National Electoral Institute, Basic documents, Morena Statute, article 2, *https://www.ine.mx/actores-politicos/partidos-politicos-nacionales/documentos-basicos/*.

[37] Declaration of Principles. …" The members of MORENA will govern our personal and collective conduct under the following ethical principles and human values defended by our organization:

...

6. Our Party recognizes its essence in plurality; MORENA is respectful of the cultural, religious and political diversity within it.

Our individual and collective action is based on principles of honesty, patriotism and recognition of differences to forge a new way of doing public work, away from the vices and corruption of the political practices of the current political, cultural and economic system".

Cfr. ibidem, Declaración de Principios de Morena, principle 6.

[38] MORENA's action program. "To carry out the postulates and achieve the objectives set forth in our declaration of principles, MORENA is a plural, broad and inclusive organization that calls on the people of Mexico to fight peacefully to change the regime of injustice, corruption and authoritarianism that governs Mexico (...) For a republican ethic and against corruption. The public, private and social life of our country lives in deep corruption, the institutions are captured by the de facto powers and impunity prevails for those who commit serious crimes against the majority. We fight against all forms of corruption, the use of public power for personal and group enrichment, against influence peddling and the management of public resources for the benefit of a few. We strive to establish a true sense of public service. For the elimination of the waste of public resources, excessive

in the government program of the current administration called Project of the Nation 2018-2024, which in its general guidelines established as a priority axis what is related to "Legality and eradication of corruption".[39]

In addition, with the publication of the National Development Plan 2019-2024, the principles and priority actions of the current government were outlined, whose main flag has been to end corruption,[40] for which various objectives were established, among others, "classifying corruption as a serious crime, prohibiting direct adjudications, ... eliminating the jurisdiction of senior officials ... oversight mechanisms such as the Ministry of Public Administration (SFP) and the Superior Audit of the Federation (ASF)".[41] In this context, and with a majority in the Congress of the Union of the party in government, some of the objectives set out in the aforementioned National Development Plan have materialized.

In accordance with the foregoing, on April 4th, 2019, article 19, second paragraph of the Political Constitution of the United Mexican States was amended, after which it is considered a serious crime, among others, that of corruption in its aspect of illicit enrichment and abusive exercise of functions,[42] resulting in the imposition of informal preventive detention, a

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salaries, and waste of the high bureaucracy. The waste of the government offends the people. The absence of a democratic regime and impunity cause corruption to multiply. We fight for the exercise of power to be democratic, transparent, and accountable to society. That governments, unions, parties, business organizations, churches, electronic communication media, large companies make the origin and management of their resources transparent and accountable to society". *Cfr. ibidem*, MORENA's program, 2nd line of action.

[39] *Cfr.*National Project 2018-2024, p. 6, *https://contralacorrupcion.mx/trenmaya/assets/plannacion.pdf.*

[40] The references to the fight against corruption in the National Development Plan 2019 -2024 are numerous, for example, the word "corruption" appears 29 times and corrupt(s) or corrupt 6 times; In addition, we find that in the General Axis 1 called "Politics and government", the first section is called "Eradicate corruption, waste and frivolity", in the same way ideas such as "...we are committed, in the first place, to end corruption in the entire public administration, not only monetary corruption but also that which involves simulation and lies", "corruption is the most extreme form of privatization, that is, the transfer of public goods and resources to private individuals ", "eradicating corruption in the public sector is one of the central objectives of the current six-year term".

[41] *Cfr.* National Development Plan 2019-2024, published in the Official Journal of the Federation on July 12nd, 2019.

[42] The Federal Penal Code in article 224, establishes that there is illicit enrichment when the public servant cannot prove the legitimate increase of his patrimony, the legitimate origin of the assets in his name, or of those with respect to which he conducts himself as owner, sanctioning this conduct with the confiscation in favor of the State, of those assets whose origin cannot be proven, in addition to a fine and imprisonment of up to 14 years. On the other hand, article 220 establishes that the crime of abusive exercise of functions is updated

reform that has drawn severe criticism for affecting the principle of presumption of innocence of the accused.

Regarding acquisitions in Mexico, the Organic Law of the Federal Public Administration was modified,[43] and functions were reassigned to the Ministry of Finance and Public Credit, leading to the centralization of the work of planning and conducting the general policy on public contracting, regulated by the Law of Acquisitions, Leases and Services of the Public Sector and the Law of Works Public and Related Services, institutional design that sought to end corruption in public purchases at the federal level.[44]

However, the balance is not positive, because the political declarations and legislative adjustments do not coincide with the facts. Paradoxically, according to information published by the Ministry of Finance and Public Credit, during 2020 the public procurement platform "Compranet",[45] registered a total of 144,901 public contracts in the federal public administration, of which 80.7% (117,042) were carried out by direct award, while

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when the public servant who, in the performance of his employment, position or commission, illegally grants by himself or through an intermediary, contracts, concessions, permits, licenses, authorizations, franchises, exemptions or make purchases or sales or perform any legal act that produces economic benefits, conduct punishable by a fine and up to 12 years in prison.

[43] See article 31, sections XXV – XXVIII, of the Organic Law of the Federal Public Administration, after the reform published in the Official Journal of the Federation on November 30th, 2018.

[44] This was stated in the explanatory memorandum of the Initiative to reform the Organic Law of the Federal Public Administration, presented by Deputy Mario Delgado Carrillo, also signed by legislators from the Parliamentary Group of the Morena political party: "Purchases by the public sector are a potential source of corruption at all scales and at all levels, in such consideration proposes that the Ministry of Finance and Public Credit be given the powers to consolidate purchases of the Federal Public Administration in all markets of goods and services…" and "The dispersion of faculties and authorities directly involved with the exercise of public resources for purchases of goods and services or payment of public works contracts is another source of corruption and that the greater the dispersion, the less capacity for inspection and control…". Cf. "Opinion of the Commission of Governance and Population, with opinion of the Commission of Public Security that contains draft decree by which various articles of the Organic Law of the Federal Public Administration are reformed", Parliamentary Gazette of the Chamber of Deputies, November 13th, 2018, p. 11, *http://gaceta.diputados.gob.mx/PDF/64/2018/nov/20181113-III.pdf.*

[45] The period presented is from January 1st to December 31st, 2020. The total number of contracts registered in Compranet, the public platform for public contracts, during 2020 was 153,059, corresponding to the Federal Public Administration (APF) 144,901, to State Governments (GE) 6,448 and to Municipal Governments (GM) 1,710. Cf. "Datos relevantes de los contratos ingresados a Compranet en 2020", Ministry of Finance and Public Credit, *https://datos.gob.mx/busca/dataset/contratos-ingresados-a-compranet-2020.*

the public bidding procedure represented only 10.8% (15,746) and the contracting by invitation to at least three people represented 5.3% (7,715) of the cases, among the contracting procedures contemplated in the legislation for the acquisition of goods, works and services. In the case of medicines, a complicated and deficient centralization mechanism was used, which ended up giving the United Nations Office for Project Services (UNOPS) the task of purchasing medicines. This has caused a shortage of medicines in the health sector.

On the other hand, among the government programs that have been approved in the fight against corruption is the National Program to Combat Corruption and Impunity, and to Improve Public Management, 2019-2024,[46] which raised five priority objectives, among others, to combat head-on the causes and effects of corruption and combat the levels of administrative impunity in the Federal Government, without its results being clear so far.

In this way and having as its axis a policy of austerity in the exercise of public spending, it began by presidential decree of April 2nd, 2020,[47] a process of extinction of public trusts and with it the disappearance of important programs in science, technology, education, attention to natural disasters, culture, protection of victims and journalists, among others. After the first decree, a second came on November 6th, 2020,[48] with which 18 laws

[46] Decree approving the National Program to Combat Corruption and Impunity, and to Improve Public Management 2019-2024, published in the Official Journal of the Federation on August 30th, 2019. The Units in charge of carrying out this program are the Ministry of Public Administration, the Ministry of Finance and Public Credit and the Coordination of the National Digital Strategy of the Office of the Presidency.

[47] Decree ordering the extinction or termination of public trusts, public mandates and the like, published in the Official Journal of the Federation on April 2nd, 2020, with which "the dependencies and entities of the Public Administration are instructed Federal, to the Office of the Presidency of the Republic, as well as to the Agrarian Courts, ... carry out the processes to extinguish or terminate all public trusts without organic structure, mandates or analogs of a federal nature in which they act as responsible units or constituents. The rights and obligations derived from said instruments will be assumed by the executors of the corresponding expenses charged to their authorized budget…". establishing that the deadline for the coordination of actions to concentrate all federal public resources in the Treasury of the Federation, was April 15th, 2020, that is, fourteen calendar days after its publication.

[48] Decree amending and repealing various provisions of the Law for the Protection of Human Rights Defenders and Journalists; of the Law of International Cooperation for Development; of the Hydrocarbons Law; of the Electricity Industry Law; of the Federal Budget and Treasury Responsibility Law; of the General Law of Civil Protection; of the Organic Law of the National Financing for Agricultural, Rural, Forestry and Fishing Development; of the Science and Technology Law; of the Customs Law; of the Regulatory Law of the Railway Service; of the General Law of Physical Culture and Sports; of the Federal Law of

were reformed and 2 more repealed, to specify the extinction of 109 public trusts.[49] The main justification for the reform was to "eliminate unnecessary expenses, eliminate opacity in its administration and generate savings so that the country effectively allocates public resources to priority actions and programs of the National Development Plan 2019-2024",[50] provoking a wave of criticism from the affected sectors and uncertainty in the way in which certain priority actions and urgent attention will be taken up by the public entities head of the sector.

The truth is that the issue of combating corruption will continue to play a relevant role in the coming years in our country, and although it could be thought that in the legislative sphere it has been sufficiently addressed after the approval of the package of constitutional and legal reforms of 2015 and 2016, respectively, the evidence shows that the Mexican ruling class continues to bet on its regulation,[51] for example with legislative projects on conflicts of interest,[52] and not necessarily to improve the implementation capacity of existing control mechanisms.

Cinematography; of the Federal Rights Law; of the Law of the Mexican Petroleum Fund for Stabilization and Development; of the Law on Biosafety of Genetically Modified Organisms; of the General Law on Climate Change; of the General Law of Victims and repeals the Law that creates the Trust that will administer the Social Support Fund for Former Mexican Migrant Workers, published in the Official Journal of the Federation on November 6th, 2020.

[49] Gazette of the Senate of the Republic No. LXIV/3PPO-36/113367, of October 20th, 2020, Opinion of the United Commissions of Finance and Public Credit and of Legislative Studies, Second, *Microsoft Word - DICTAMEN MINUTA ELIMINACIÓN FIDEICOMISOS FINAL.docx* (*senado.gob.mx*).

[50] *Cfr*. Opinion of the Government and Public Accounts Commission of the Chamber of Deputies with a draft decree amending and repealing various provisions to specify the extinction of various trusts, published in Parliamentary Gazette No. 5621-V, October 1st, 2020, *http://gaceta.diputados.gob.mx/PDF/64/2020/oct/20201001-V.pdf.*

[51] This is demonstrated by the publication on November 5th, 2018, of the Federal Law on Remuneration of Public Servants, which regulates articles 75 and 127 of the Political Constitution of the United Mexican States, however the Supreme Court of Justice of the Nation issued the Declaration of invalidity of some of its articles in the Unconstitutionality Action 105/2018 and its accumulated 108/2018, published in the Official Journal of the Federation on July 19th, 2019, considering that part of its content is contrary to the Constitution. Another example is the Federal Republican Austerity Law, of November 19th, 2019.

[52] On June 2nd, 2020, the parliamentary group of the Morena party in the Transparency and Anticorruption Commission of the Chamber of Deputies, presented the so-called " Nueva Ley Federal de Combate a los Conflictos de Interés", announced from the National Development Plan 2019 – 2024, which is expected to be discussed in committees during 2021. Cf. Virtual Legislative Program in the face of the health emergency generated by the COVID-19 pandemic, Remote Legislative Activities, Minutes, Initiatives and Propos-

There are emblematic cases of corruption with enormous media and political coverage, for example, the case of awarding contracts in several Latin American countries for the benefit of the Brazilian oil company Odebrecht, using corrupt practices and government bribes, and that it has been developing in Mexico for more than a decade with different political actors, involving the former director of the Mexican production company Petróleos Mexicanos, Emilio Lozoya Austin, disqualified from serving as a public servant by the Ministry of Public Administration in 2019, for 10 years,[53] and subsequently arrested in Spain in February 2020,[54] at the request of the Mexican authorities. The Lozoya "tsunami" has involved 17 politicians, including three former presidents, presidential candidates, ministers and deputies from the two PAN and PRI parties",[55] in a procedure that is scandalous for its narrative, and grotesque for the characters, with an uncertain port of arrival due to the way in which documents that are part of the investigations of the Mexican authorities have been leaked.[56]

On the other hand, the so-called case of "The master swindle",[57] is another sample of alleged acts of corruption for an estimated amount of 450

als with Point of Agreement, *PROGRAMA LEGISLATIVO VIRTUAL ANTE LA PANDEMIA COVID-19, Comisión de Transparencia y Anticorrupción / Inicio - Camara de Diputados.*

[53] *Cfr.* Communication from the Ministry of Public Administration of May 22nd, 2019, " Función Pública sanciona a altos mandos de Pemex de la Administración de Peña Nieto", sanction that was imposed for false information in his patrimonial declaration, *Función Pública sanciona a altos mandos de Pemex de la administración de Peña Nieto | Secretaría de la Función Pública | Gobierno | gob.mx (www.gob.mx)* Said sanction was confirmed by the Superior Chamber of the Federal Court of Administrative Justice, Cf. Ministry of Public Administration, Communication No. 014/2020 of February 5th, 2020, "Tribunal confirma validez de sanción impuesta por Función Pública a Emilio Lozoya, ex director general de Pemex", *https://www.gob.mx/sfp/prensa/tribunal-confirma-validez-de-sancion-impuesta-por-funcion-publica-a-emilio-lozoya-ex-director-general-de-pemex?idiom=es.*

[54] *Cfr. "Detenido en España el exdirector de Pemex Emilio Lozoya*, *El País*, February 13th, 2020.

[55] *Cfr. "Un video, maletas llenas de billetes y tres expresidentes*", *El País*, August 22nd, 2020.

[56] The dissemination in different national and international newspapers, of the complaint filed by Emilio Lozoya Austin, against various personalities of the Mexican political life, with date of reception of August 11th, 2020, by the Directorate of Documentation and Analysis of the Office of the Attorney General of the Republic, to say for himself, in the search for "... a criterion of opportunity and/or provide me with an alternative way out in strict adherence to the law regarding the procedures that are against me and against my family…", is a sample of the level of penetration of corruption in the operation of different projects of the Odebrecht company in Mexico, "Esta es la denuncia completa de Emilio Lozoya ante la FGR", *El Universal*, August 19th, 2020, *https://www.eluniversal.com.mx/nacion/esta-es-la-denuncia-completa-de-emilio-lozoya-ante-la-fgr.*

[57] The dissemination in the media of the irregularities detected in the so-called case of "La estafa maestra" was carried out after a journalistic investigation published on Septem-

million dollars,[58] in which public higher education institutions and federal agencies are involved, the most visible character is María del Rosario Robles Berlanga, who was head of the Secretariat of Social Development and the Secretariat of Agrarian, Territorial and Urban Development, during the six-year term President of Enrique Peña Nieto, deprived of his liberty since August 2019 for his probable responsibility in the commission of crimes of corruption and. In this case, the Superior Audit Office of the Federation, after reviewing the 2013 Public Account[59] detected various irregularities that led to the filing of criminal complaints for the alleged participation of former public officials in the simulation of contracts under the Mexican legislation on acquisitions, legislation that establishes the possibility of subcontracting goods or services for a certain percentage, between dependencies of the federal public administration with the states, without the need to opt for the public bidding procedure established in the Constitution.[60] Criminal causes

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ber 4th, 2017 in the news outlet "*Animal Político*", *https://www.animalpolitico.com/estafa-maestra/* and that was later recognized by the *Ortega y Gasset 2018* award, Cf. *"La investigación que debió sacudir a México (pero no lo hizo)*", *El País*, April 24th, 2018.

[58] *Cfr.* "Qué es lo que en México llaman la Estafa Maestra, la investigación que revela la "pérdida" de US$450 millones de dinero público", *BBC News Mundo*, May 17th, 2018, *https://www.bbc.com/mundo/noticias-america-latina-44035664.*

[59] The then Superior Auditor of the Federation, Juan Manuel Portal on February 18th, 2015, presented the 2013 Public Account review report, which, among others, established that the legal framework provides that the acquisition and contracting processes that carried out between public entities can be carried out directly, that is, without public bidding and subcontracting goods or services up to a certain percentage (49%); however, "in multiple cases, it has been evident that the contracting institutions act as mere commission agents, which, with their intervention, allow direct awards to third parties, which are carried out outside the legal provisions...", after which and as a result, "the most frequent case refers to public universities, whose essential purposes are teaching and research, and not the provision of services, whether acquisitions, public works, consultancies, or even hiring of labor for third parties". The truth is that "the ASF has repeatedly observed in the review of the last three public accounts... Subcontracting for 100% of what was ordered by the contractor that is improperly carried out without observing the provisions regarding public tenders", mainly contrary to what is established in article 4 of the Regulations of the Law of Acquisitions, Leases and Services of the Public Sector. Cf. Superior Audit of the Federation, General Public Account Report for 2013, p. 71 et seq., *https://www.asf.gob.mx/uploads/55_Informes_de_auditoria/Informe_General_CP_2013.pdf.*

[60] The Law of Acquisitions, Leases and Services of the Public Sector in article 1, paragraph six (after the reform of August 11th, 2020), contemplates its application in the execution of public contracts between dependencies at the different levels of government (federal or state) or between dependencies of the same level, "when the dependency or entity obliged to deliver the good or provide the service, does not have the capacity to do it by itself and hires a third party to carry it out". In addition to the foregoing, the Procurement Law in article 41, section X, exempts from the public bidding procedure, among other cases, in the

are currently ongoing[61] against different former officials, however, there is a lack of accurate information regarding the destination of the resources involved, the existence or not of the contracting companies and the goods and services actually provided.

Finally, another issue linked to corruption is drug trafficking, which in recent years has represented one of the most serious structural problems Mexico faces. During the government of former President Felipe Calderón Hinojosa, from 2006 to 2012, the so-called "war" against drug trafficking and organized crime was declared, resulting in unprecedented levels of violence in recent years in the country. In this context, on October 15th, 2020, Salvador Cienfuegos Zepeda, former Secretary of National Defense during the government of Enrique Peña Nieto, was arrested in the United States, accused by the United States Anti-Drug Agency (DEA)[62] of four charges for activities linked to drug trafficking during his tenure as secretary. After the arrest, the charges were dismissed by the North American authorities, and after the Mexican diplomatic intervention, he was transferred to Mexico and the case was taken up by the Attorney General of the Republic, an instance that was determined in January 2021, the non-exercise of the criminal action in favor of the retired general.[63] Due to the high position of

cases of "consulting services, advisory services, studies or investigations, ... among which public and private institutions of higher education and public research centers will be included".

[61] The Federal Court of Fiscal and Administrative Justice ratified a resolution of the Superior Audit of the Federation of January 11th, 2019, confirming the compensatory responsibility for the damage caused to the federal public treasury for an amount greater than 33 million pesos, against former officials of the then Secretary of Social Development (now Secretary of Welfare), of the Autonomous University of the State of Morelos and a contractor company, Cf. "TFJA ratifica resolución contra empresa involucrada en caso de la Estafa Maestra", El Economista, March 10th, 2021.

[62] *Cfr.* "Información sobre el caso del general retirado Salvador Cienfuegos Zepeda", Statement from the Ministry of Foreign Affairs, January 15th, 2021, through which the 751-page constant case file was disseminated, *https://www.gob.mx/sre/prensa/informacion-sobre-el-caso-del-general-retirado-salvador-cienfuegos-zepeda.*

[63] The Office of the Attorney General of the Republic, through a statement, reported the non-exercise of criminal action in favor of General Salvador Cienfuegos Zepeda, concluding that "he never had any encounter with the members of the criminal organization investigated by the US authorities; and he did not maintain any communication with them, nor did he carry out acts tending to protect, or help said individuals. Nor was any evidence found that he had used any equipment or electronic means, or that he had issued any order to favor the criminal group indicated in this case", and neither, "there was any data or symptom of obtaining illegal income or increasing his heritage out of the ordinary, according to their perceptions in the public service", *Cfr.* Communiqué FGR 013/21. *FGR Informa*, January 14th, 2021, *https://www.gob.mx/fgr/prensa/comunicado-fgr-013-21-fgr-informa.*

the former official involved, due to the facts that are indicated and because it is a procedure that began in the United States without the knowledge of the Mexican government, it is an enormously complex matter that reveals the institutional circumstance of current Mexico.

Indeed, in the sphere of the Executive Power emphasis is repeatedly placed on the discourse of combating corruption, without this necessarily translating into articulated and planned actions in government action, and de facto leaving out of the implementation progress of anti-corruption policies, the institutional scaffolding created expressly, such as the National Anticorruption System, with which the vicissitudes in anti-corruption measures could lead to high costs. It is a fact that the implementation of a national system like the one that has been designed in Mexico is still under construction, coupled with the complexity that this phenomenon that afflicts our society entails.

III. Comparative study: singapore's experience in fighting corruption

1. *Context*

Between the II and III centuries, the first antecedents of Pu Long Chuo Island (the island of the end or island at the end of the peninsula) appear. Also known as Temasek or "City of the sea". In 1320 the Chinese arrived on the island and named it "Luang-ya-men" or the Strait of Dragon's teeth.[64] In the XIII century, Prince Parameswara arrived on the island, who, based on the legend that attributes Sri Tri Buana or Sang Nila Utama having seen a wild animal similar to a lion, baptized the island as: Singapura or "City of the Lions" or "City of the Lion".[65] In 1390 the Parameswara ruled the island. Subsequently, Singapore was transformed into a great commercial port, the Portuguese arrived in 1509 and in 1613 Portuguese pirates burned down the port.

In the 17th century the Dutch took control of the ports of Singapore. Thomas Stamford Raffles, representative of the East India Company, arrived on the Island on January 29th, 1819, helped the brother of the Sultan of Johore, Tengku Long Hussein, to return to Singapore and on Febru-

[64] Lee, Edwin, Singapore. The Unexpected Nation, Singapore, Institute of Southeast Asian Studies; 2008, p. 1.

[65] Malay Annals (Sejarah Melayu).

ary 6th, 1819 signed a treaty with the Johore sultanate and local chieftain Temenggong Abdul Rahman to build a trading post in the area, creating modern Singapore.

Thomas Stamford Raffles left Commander William Farquhar, "Singapore's first resident", in charge of the port. Farquhar ruled from February 7th, 1819 to May 1st, 1823, and to increase revenue he sold licenses for gambling businesses and allowed the sale of opium.[66] Initially, Raffles saw Singapore as a trading post for opium in the region and determined that the East India Company would protect the opium trade and offer it in all its facilities. In addition, a 5% commission was assigned for each opium license. Paradoxically, Farquhar's idea was to use gambling revenue and opium to finance the police, which is why he was the founder of the first police force in Singapore.[67]

Raffles fired Farquhar on May 1st, 1823, replacing him with John Crawfurd, an efficient and prudent administrator, who again, paradoxically, licensed cockfighting.[68] In 1832 Singapore was the center of government for the English possessions in Malaya.[69] During colonial times, corruption grew in Singapore, because the corrupt were not detected nor punished. In 1871 it was determined that corruption was illegal. However, nothing concrete was done.[70] In 1889 Governor Cecil Clementi Smith banned secret societies, driving them underground.[71]

In December 1937, the first anti-corruption legislation was introduced through the Prevention of Corruption Ordinance (POCO), a short 12-section document with a limited scope, corruption was not a serious offense and officials had limited investigative powers.[72] The POCO was revised in 1946, making corrupt offenses attachable, giving police officers broader powers to combat corruption. However, this legislation did not consider the

[66] Biblioasia, Farquhar & Raffles. The Untold History, *http://www.nlb.gov.sg/biblioasia/2019/01/21/farquhar-raffles-the-untold-story/*. It is important to mention that opium was the main source of income for Singapore from 1824 to 1910.

[67] *Idem.*

[68] *Idem.*

[69] Gilardi, Mauro, Singapur: *¿qué democracia? Influencias externas y valores asiáticos en el proceso de formación de un modelo democrático*, tran. Audry Hawes Mayayo, Babelcube, 2017.

[70] Singapore Government, CPIB, Our Heritage, 1871, *https://www.cpib.gov.sg/about-cpib/our-heritage*, consulted May 1st, 2021.

[71] Ajuariaguerra Escudero, Miguel Ángel, *La planificación estratégica en los procesos de conformación de las ciudades globales: los casos de Singapur y Dubai, Anexos a la tesis doctoral*, p. 30, *http://oa.upm.es/33940/13/MIGUEL_ANGEL_AJURIAGUERRA_ESCUDERO_Anexo1.pdf.*

[72] Singapore Government, CPIB, Our Heritage, *cit.*, 1937.

fact that the Anti-Corruption Branch (ACB) was inefficient, due to the low number of police officers and scarce resources.[73]

In October 1951, 1,800 pounds of opium were seized for $400,000 on Punggol beach and three police detectives were among the criminals. A special team from the ACB was appointed to investigate the case. Some high-ranking police officers were found to be involved in the crime, however, only one Assistant Superintendent was fired and another officer removed. The remaining officers were not prosecuted or convicted. As a result, in April 1952, the government assembled a Special Investigations Team to review the deficiencies in the investigation surrounding the opium case.[74]

The ACB's failure to curb corruption led to the ACB's demise. The government created the Corrupt Practices Investigation Bureau in September 1952, under the Attorney General. In 1952, the CPIB was a team of only 13 officers, who lasted only a short time in their commission, had limited capacities to carry out investigations, and a social stigma was generated for investigating other police officers. Thus, what prevented the investigation of the corruption of officials responsible for enforcing the law.[75]

On November 21st, 1954, Harry Lee (Lee Kuan Yew), a lawyer educated at Cambridge and Harvard, founded the People's Action Party (PAP). The party won the 1959 elections, when Lee Kuan Yew led the PAP and was sworn in in June 1959, his supporters wore white uniforms symbolizing the purity and incorruptibility of its members. Lee Kuan Yew vowed to end corrupt practices in Singapore. The government was prepared to tighten existing legislation and to modernize the CPIB as an agency dedicated exclusively to the investigation of corrupt practices and the preparation of evidence for prosecution. That year, the CPIB was transferred to the Ministry of the Interior.[76]

2. *Intervention Against Corruption: The Prevention of Corruption Act*

The Prevention of Corruption Act (PCA), introduced by then Minister of Internal Affairs Ong Pang Boon, was enacted on June 17th, 1960, incorporated significant provisions to eliminate the deficiencies of the POCO

[73] *Ibidem*, 1946.
[74] *Ibidem*, 1951.
[75] *Ibidem*, 1952.
[76] *Ibidem*, 1959.

and to empower the CPIB to carry out their research and homework. The PCA has been reviewed several times to ensure its relevance and effectiveness, and forms one of the key pillars in Singapore's fight against corruption.[77]

The PCA of 1960 (chapter 241 of the Singapore Statutes)[78] prescribes that the Corrupt Practices Investigation Bureau (CPIB) will be headed by a director and three main departments: i) Investigations, ii) Operations and iii) Corporate Affairs.

A. *Department of Investigations*

Obligation	*Integrated by:*
Executes the main function of the Office investigating offenses related to the Prevention of Corruption Law.	Integrated by: 1. Special Investigations Branch (Public). 2. Special Investigations Branch (Private). They focus on corruption cases in the public and private sectors. 3. Financial Investigations Branch. Conducts investigations on money laundering and transnational corruption. 4. General Investigations Branch. Investigates day-to-day corruption cases. 5. Research Training Unit. It is responsible for planning the curriculum and conducting specialized courses in corruption investigation. 6. Research Policies Unit. Conducts analysis on trends in corruption and development of investigation policies to find hidden deficiencies in the organization in corruption investigations. It is responsible for the Anti-Corruption Expertise (ACE) workshops and training workshops for officials and counterparts. 7. Special Interviews Section.

[77] *Ibidem*, 1960.

[78] Prevention of Corruption Act (Chapter 241, Original Enactment: Ordinance 39 of 1960), Revised Edition 1993 (March 15th 1993). An Act to provide for the more effectual prevention of corruption [June 17th 1960] [29/2002 wef 30/01/2003].

B. *Departament of Operations*

Obligation	*Integrated by:*
Carry out research support activities.	Integrated by: 1. Administration and Operations Support Division. Participates in various field operations, such as assisting in the arrest and escort of accused persons and assisting in the seizure and examination of documents, in the use of specialized investigative tools such as polygraph tests and computer forensics to assist the Investigations Department. 2. Intelligence Division. Gathers and collects information to support the investigations of the Investigations Department.

C. *Corporate Affairs Department*

Obligation	*Integrated by:*
Deals with human resources, administration and finance issues.	Integrated by: 1. People Management and Development Division. Designs, reviews and implements human resource strategies. In addition, they are tasked with developing and building capabilities to meet CPIB operational requirements and to manage staff administration and operations. 2. Finance and Administration Division. It is responsible for the financial, procurement and asset affairs of the Office and provides various administrative services and support. Its role also includes taking care of infrastructure and facility development projects, as well as facilitating office maintenance.

Obligation	*Integrated by:*
	3. Planning, Policy and Corporate Relations Division. It is responsible for the strategic planning, organization development and organizational excellence of the Office. In addition, this division conducts policy reviews and coordinates anti-corruption policy positions. At the international level, it leads the Office's participation in different international forums and plans the Office's international relations policies. As a public front for the Office, this division drives public education and anti-corruption outreach efforts and handles the agency's corporate relations matters. 4. Information Technology Division. Incorporates and leverages IT technology into Office operations to support its functions.

The CPIB defines corruption as: *Corruption is receiving, requesting or giving any gratuity to induce a person to do a favor with a corrupt intention*.[79] As noted, "give or ask" is the concrete action and, what is important, as a psychological element, is the corrupt "intention".

3. *Regulatory Framework for the Fight Against Corruption in Singapore*

In its "Preliminary" part I of the PCA (the Prevention of Corruption Act), numerals 1 and 2, it is highlighted how that Law should be cited, its interpretation, where it is defined what is meant by "agent", "Official of the CPIB", "director", "gratification", "investment funds", "members", "principal", "public body", "scheme", "service" and "special investigator".

Numeral II "Appointment and personnel matters", numerals 3 to 4, regulates the appointments of the director and officers of the Corrupt Practices Investigation Office, who are considered public servants; your retirement plan is established; the effects of bankruptcy and conviction on the benefit plan; and the scheme of investment funds.

Part III "Offenses and Penalties", numerals 5 to 14, mentions the punishment for corruption, thus typifying:

[79] Singapore Government, CPIB, Definition of Corruption, *https://www.cpib.gov.sg/about-corruption/definition-of-corruption.*

> 5. Any person who by himself or by or together with any other person: (a) corruptly solicits or receives, or agrees to receive for himself or any other person; or (b) corruptly assigns, promises or offers to any person, whether for the benefit of that person or another person, any gratuity as an inducement or reward for, or otherwise on account of -(i) any person to do or not do anything with respect to any matter or transaction, actual or proposed; or (ii) any member, officer or officer of a public body who does or prohibits doing anything with respect to any matter or transaction, actual or proposed, in which such public body is concerned, shall be guilty of an offense and liable upon conviction to a fine not exceeding $100,000 or to imprisonment for a term not exceeding 5 years or both.

In addition, it contains the "punishment for corrupt transactions with agents", it also highlights aggravated penalties for public procurement cases; highlights the presumption of corruption in certain cases, also, in the case of accepting a gratuity despite not having the purpose of carrying out an act of corruption; corrupt bid withdrawal; bribing a member of parliament; bribing a member of a public body; economic sanctions additional to other penalties, and the recovery as civil debt of sums of money or bonuses when they have been granted in contravention of the law.

Section IV "Powers of arrest and investigation", numerals 15 to 22, highlights that the director or any special investigator may, without a court order, arrest any person who has been involved in any crime under this Law or against which a reasonable complaint has been made or credible information has been received or there is a reasonable suspicion that there has been interest. In this part, it is also allowed that the director and officers of the CPIB can use weapons; provisions are established on guarantees and bonds; investigative powers; special investigative powers; investigations authorized by the prosecution; the powers of the prosecution to authorize investigations into bank books; the powers of prosecutors to obtain information; and the powers of search and capture.

In part V "Evidence", numerals 23 to 25, the issue of inadmissible evidence stands out, by prescribing that in civil or criminal trials evidence will not be admitted to demonstrate that any gratification is customary in any profession, trade, profession or vocation; the evidence of resources or pecuniary assets; and the evidence of complicity.

Part VI "Miscellaneous", numerals 26 to 37, regulates the following aspects: "obstruction of search", "legal obligation to provide information", false statements, information, etc., "encouragement of crimes", "attempt" (attempt?), "conspiracy", "the offenses to be arrested"; "Proceedings that

will be initiated with the consent of the prosecutor"; "the jurisdiction of the District Court to try crimes under this law"; "examination of criminals"; "informant protection", and "responsibility of Singaporeans for offenses committed outside of Singapore".

However, contrary to popular belief, corruption in Singapore has not been eliminated, corruption continues. In 1986, the then Minister of National Development, Teh Cheang Wan, was implicated in a case of bribing of a total of $1 million from two private companies for helping them retain and purchase state-owned land for private development.[80] In 1994 the CPIB investigated the case of then Deputy Chief Executive (Operations) of the Public Utilities Board (PUB) Choy Hon Tim, for criminal conspiracy and for accepting bribes totaling approximately $13.85 million.[81]

In 2009, the CPIB expanded its framework of action to other types of corrupt practices, called acceptable "industrial practices", as is the case of renowned chefs accepting bonuses in exchange for using products from preferred suppliers, or car workshops bribed vehicle inspectors to allow illegally modified vehicles to pass inspections.[82]

Currently, Singapore's success in fighting corruption is said to rest on four main pillars: i) effective laws with two key pieces of legislation to combat corruption: the Prevention of Corruption Act (PCA) and the Anti-Corruption, Drug Trafficking and Other Serious Offenses Act (Forfeiture of Benefits) (CDSA); ii) judiciary independent of political interference that imposes stiff fines and jails criminals; iii) an efficient public service that executes the law, with a Code of Conduct that establishes high standards of behavior based on the principles of integrity, incorruptibility and transparency. The CPIB is mandated to conduct procedural reviews for government agencies that may have work procedures susceptible to corrupt practices; and iv) the support of a strong political will and leadership, which built an "incorruptible and meritocratic government" and "a culture of zero tolerance against corruption".[83]

However, the costs of these measures could be considered excessive by democratic standards, as Lin Hongxuan and Jorge Bayona point out: Singapore also has problems, particularly regarding the lack of press freedom, the legislation criminalizing homosexuality, lack of limits on detention, as well

[80] Singapore Government, CPIB, Our Heritage, *cit.*, 1986.

[81] *Ibidem*, 1994.

[82] *Ibidem*, 2009.

[83] Singapore Government, CPIB, Singapore's Corruption Control Framework, *https://www.cpib.gov.sg/about-corruption/corruption-control-framework*.

as precisely the mandatory death penalty for drug-related crimes. These are all reasons why Singapore could, and should, be criticized.[84]

Thus, Lee Kuan Yew is attributed the phrase: "If we had not intervened in people's lives, in who your neighbor is, how you live, what noise you make, when you spit or what language you use, we would not be where we are".[85] The foregoing seems to lead to the conclusion that the fight against corruption requires an authoritarian regulatory framework, in which human rights are sacrificed. However, the experience of Denmark, Norway, Sweden and Iceland shows that freedoms can be guaranteed and corruption combated at the same time.

As noted, the Singapore experience leaves us with the following lessons: i) adequate laws are required to deal with corruption; ii) those laws must be operated by a competent and incorruptible police force; iii) the jurisdictional bodies must sympathize with and support this struggle; iv) there must be a political will at the highest level of government to support this struggle. However, there are hidden negatives, the experience of Singapore shows us that the fight against corruption is at the cost of sacrificing freedoms. Nonetheless, the experience of our country —Mexico— at the present time shows that anti-corruption discourse can be used rhetorically to promote an authoritarian agenda. Thus, a general conclusion from these experiences in Mexico and Singapore is the need to confront corruption with the ethical-moral and legal tools of the State, without sacrificing human rights.

[84] Hongxuan, Lin and Bayona, Jorge, "La historia falsa en tiempos de la post-verdad: el caso de Singapur", *Revista Asia-América Latina*, Argentina, Year 2, Vol. 1, No. 4. Argentina, December 2017, p. 151.

[85] Salvá, Ana, "Las dos caras del éxito de Singapur. La ciudad Estado combina riqueza y un severo control de libertades en su 50º aniversario", *El País*, Singapore, August 10th, 2015, *https://elpais.com/internacional/2015/08/09/actualidad/1439155558_848900.html*.

CORRUPTION IN PERU AND ITS CONFRONTATION IN A CONSTITUTIONAL KEY

Ernesto BLUME FORTINI*

SUMMARY: I. *Introduction*. II. *The problem of corruption in Peru*. III. *The legal instruments to face the phenomenon*. IV. *Our proposal to face it constitutionally*. V. *Conclusive Remarks*.

I. INTRODUCTION

Before addressing the topic to which we dedicate this work, "Corruption in Peru and its Confrontation in a Constitutional Key", we must express our deep gratitude to the UNAM Institute of Legal Research, as well as to the doctrinaires Mr. Diego Valadés and Mr. Antonio María Hernández, for the kind invitation they extended to us to participate in the work "The Constitution and the Fight Against Corruption", which, with undoubted success, they have promoted the idea of providing a comparative examination of the problem and the existing legal instruments in Argentina, Brazil, Chile, Colombia, Spain, France, Guatemala, Italy, Mexico, Peru and Venezuela, in the fight against corruption, due to the widespread incidence of the phenomenon.

Having stated the foregoing and as an introduction to the subject that brings us together today, it is worth mentioning, in line with what we have argued on other occasions, that, as occurs with the vast majority of coun-

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tries in the world, Peru presents a history in which Corruption has marked and, by the way, continues to mark its pernicious presence. That is to say, a future, from its republican foundation produced in 1821 to the present 21st century, punctuated by acts of corruption in all spheres of its society, with special emphasis on what refers to the management, administration and disposal of public coffers; this, without considering that corruption was fatally present in the colonial stage.

However, in the last decade of the last century, during the second government of former President Alberto Fujimori (1995-2000), who is currently serving a 25-year prison sentence for committing the crimes of aggravated homicide, serious injuries and aggravated kidnapping, the country was stupefied on television, in an unprecedented way, the degree that this phenomenon had reached, when the famous "vladivideos" were revealed, recorded in the room of the National Intelligence Service, SIN, by the then presidential adviser Vladimiro Montesinos Torres, today also imprisoned for various crimes; videos in which the degree of decomposition existing in politicians, military officers of the highest rank, authorities and owners of the media was clearly seen, who were seen selling their conscience for money, which was received in cash and in voluminous piles of banknotes, with impudence and without any hesitation.

Thus, Peruvian society verified, it would be said directly and with their own eyes, the degree of existing decomposition and how the typical crimes of corruption, such as extortion, improper collection, collusion, embezzlement, and bribery among others, were perpetrated without hesitation by characters from the most diverse and high spheres of Peruvian society.

In this regard, as the Peruvian historian Alfonso W. Quiroz correctly maintains, unfortunately today absent due to his early departure, the 1990s in Peru was an "infamous decade", in which the level of corruption "...definitely it surpassed that of all other governments in modern history and would be comparable perhaps only to the colonial period, when corrupt mechanisms were inherent in the system of power and wealth generation".[1]

The described situation triggered diverse and explainable reactions, since it was a public and evident verification, which produced indignation in all sectors of Peruvian society, which demanded urgent and effective measures to put an end to the phenomenon promptly and effectively and prevent it from remained, increased and before its combat were more difficult.

[1] Quiroz, Alfonso W., "Historia de la corrupción en el Perú", Lima, Institute of Peruvian Studies, 2016, p. 432.

This indignation, in turn, caused multidimensional effects such as, to name a few: it sharpened the population's sensitivity to everything that could mean corruption to some extent, which we could categorize as a hypersensitivity of the social group; a special zeal of the press, especially investigative and denunciatory journalism, which focused its actions on denouncing any act that had any hint of corruption; a refinement and a sharpening of a kind of attitude of collective suspicion, of distrust in all orders, especially in the field of the exercise of public function, either by popular representation or by appointment or another modality of entry to the performance of the same; a kind of collective summons of civil society and the media to the political class, questioning their actions, to the point that new uncoverings were raised, multiple processes were opened at the level of the Public Ministry and the Judicial Power and machinery was set in motion to prosecute and punish those accused of acts of corruption; a draconian attitude of the prosecutors and judges in charge of investigating, prosecuting, sentencing and punishing the accused, who relativized the constitutional guarantees, preferring the deprivation of liberty, even before the formalization of the complaint, the prosecution of the accused, the sentence and conviction of criminal responsibility; the existence of a media trial by large sectors of society, which, as a result of the scandals uncovered by the press, condemned against a simple complaint; merciless public pressure on the authorities, resorting to questioning the prosecutors and judges commissioned by sectarian sectors of society, who claimed the absolute heritage of the truth, despite the rights of those denounced and respect for autonomy and independence of authority; and, finally, a grotesque use of the issue of the fight against corruption as a banner for various opportunist, sectarian and manipulative social actors, extremist ideological politicians, parametric press and civil society organizations, among Others.

In parallel, a change began to take place at the infra-constitutional normative level that translated into a series of modifications and innovations in the regulatory provisions of the public sector, of the exercise of the public function, of the contracting carried out by the State, of the control and monitoring of public management, of criminal offenses, of the management of funds held by state institutions, of significant economic movements carried out by individuals and their monitoring, among many other measures that tended to facilitate detection, complaint, prosecution and punishment for acts related to corruption. That is to say, a change at the infra-constitutional normative level that led to an over-regulation elaborated as a reaction to what had been experienced, but in many cases lacking constitutional basis.

In this essay, following the guidelines outlined by the promoters of the work, we will address the problem of corruption in Peru, stopping at the problems of origin of the Republic, at the trigger produced by the phenomenon of corruption since the decade of the nineties of the last century, in what came after, in the reactions and dimensions of the response of the social group and in the current panorama; to then review the main existing legal instruments to face and overcome the phenomenon, reviewing the current constitutional and infra-constitutional framework, as well as supranational regulations; and lead to our proposal for confrontation in a constitutional key, stopping at the need to turn our gaze to the principles and values that inspire the national constituent, towards a revaluation of the human person and their rights and, from them, confront the scourge, postulating the adequacy of the infra-constitutional regulations to the Fundamental Charter of the Republic, the rethinking of the role of the press and of the other social actors of the State; to, finally, record our conclusive findings on the need to legitimize the fight against corruption by constitutionalizing it in all orders.

II. The problem of corruption in Peru

The comparative examination of the problem of the fight against existing corruption in Argentina, Brazil, Chile, Colombia, Spain, France, Guatemala, Italy, Mexico, Peru and Venezuela, which this book intends as its first objective, in what concerns us is specifically circumscribed to the exposition of the Peruvian case, in the idea of presenting an overview of what is the situation of the country in this matter, without further pretense of offering the reader a diagnosis that allows him to properly carry out the comparative analysis with the other countries that have been chosen as the object of study. Therefore, we do not intend to carry out such an analysis, but only present the situation, leaving the reader the task of comparing and contrasting it with its reality and that of other countries.

That said, we believe that in order to understand what is happening in Peru today regarding the issue of corruption, as well as the characteristics of the phenomenon, its edges, dimensions, complexities and other aspects, it is necessary to refer to the original problems of our Republic, because what is happening to us today is deeply linked to our past and, we would say more, is largely a consequence of it, so it will deserve our immediate approach, noting that once this has been done, as we have advanced in the introduction, We will refer to the factors that caused the multidimensional explosion in the issue of corruption that we are experiencing today, to un-

derstand the responses that were given in Peruvian society and offer the current panorama of corruption in Peru.

Having specified the aforementioned, we proceed accordingly.

1. *The Origin Problems of the Republic*

Peru, made independent by General Don José de San Martín on July 28, 1821, presents problems from its republican origin, which typify it, in our opinion, as a Nation-State in formation, which has adopted the form of a Constitutional State, but that it is not yet consolidated as such, due to a series of factors, among which we can highlight the lack of awareness and a collective commitment of what this means; the absence of a true constitutional sentiment; the crisis of values and principles; the precarious institutionalism; the lack of a mature, serious and responsible political class; the lack of solidarity and commitment in the media regarding the social responsibility that corresponds to them; and the existence of a non-committed community, without adequate training in principles and values, and highly manipulable.

To understand this reality, it is necessary to take into account that the National States in Latin America emerged within a *sui generis* and atypical context, characterized by the existence of a series of elements and forces that simultaneously provoked centrifugal and centripetal energies; so it can be affirmed that the American emancipation did not really correspond to a unanimous, coherent movement, desired by all those involved and consciously accepted; Rather, it was to a certain extent a phenomenon imposed by circumstances, at the base of which was a tangled and complex social fabric, impregnated with contradictory interests, forces and positions.

Peru was not only no stranger to this context, but these contradictions were more emphasized in it, as recognized by the famous Peruvian historian Jorge Basadre when he maintains that

> Due to the greater rooting of the colonial tradition, due to the abundance of civil servants, nobles and prosperous merchants within the current regime, due to the exceptional conditions that Viceroy Abascal knew how to deploy, Peru was not only the country least moved by the liberating commotion but the champion of colonial resistance. Argentine, Chilean and Colombian interventions were necessary to free Peru.[2]

[2] Basadre, Jorge, "Perú: Problema y Posibilidad", Fourth Edition, Lima, Publishers Technical Consortium, 1978, p. 19.

It is certainly a weak, hesitant start and without popular conviction, which allows us to understand the reason for its subsequent course and its current situation, which presented, among others, the following characteristics:

a) It arose as a consequence of the emancipation process and in circumstances in which it had not concluded on the military level; It is relevant to highlight that its territory was not totally liberated, that its population remained partially subjugated and that its jurisdiction could not be fully exercised, so that, from the beginning, it presented the unavoidable need for a military power that, due to the circumstances, appeared as more important than the civil power itself (perhaps here is the germ of that fatal pendulum between democracy and dictatorship that has been marking its republican life, except in the last twenty-six years);
b) It was predetermined by the theory inspired by foreign models, but without comparison with reality, which was totally different and distant from them;
c) It presented an incipient organization, which forced the centralization of power to control a situation that required action on several fronts (structuring of the state apparatus; formulation of the new legal order; design of action policies without having a diagnosis of the reality of the country and, even less, with an inventory of existing means and possibilities to face the needs of that hour; obtaining means for war; etc.);
d) It lacked a political elite with government experience, which caused improvisations and the adoption of circumstantial measures, without any projection, in the framework of confrontations between the existing caudillos and those who represented spheres of power; voids within which characters belonging to the clergy and the military forces assumed a leading power, despite the industrial bourgeoisie and the lower town; and
e) It administered a society in imbalance, due to the rupture of the colonial pact; imbalance that led to fights and internal clashes.

There is, then, since that early dawn as the Nation State, a divorce between society and the formal State, despite the fact that they were elements whose assembly and harmony were consubstantial for their real existence; divorce that became more palpable if one takes into account that being a disjointed society, without a true national conscience, with groups that had

different and even conflicting interests and, even, with ethnic groups in open conflict, an attempt was made to impose an imported law, a copy of the liberal models of Western Europe, neither tested nor consulted with the Peruvian people. Peru was born to independence in this contradiction, lacking the necessary elements to generate an integrating decision; therefore, absent a national integration requirement.

In reality, it was a birth as a formal Nation State rather than a real one, since in practice Peruvian society did not change in its essence,[3] but, on the contrary, as Basadre affirms, it showed "colonial survivals"[4] and "precolonial survivals".[5]

Within the "colonial survivals", due to the lack of continuity, energy, and integrity of the emancipatory impulse, caused by the lack of coherence and vision of its representatives, as well as by the factors that have been mentioned, the general bases of social life. Moreover, following the same historian,

> The division of castes continued; Although some Spaniards withdrew to Europe, their Peruvian children were, along with the offspring of the purely Creole nobility, the most important elements in the life of the salons; the family regimen continued without alteration; the Indians continued to be "the vile clay with which the social building is made"; the blacks continued as people attached to the old mansions and the great coastal estates. The clergy preserved the role of owner of the spiritual life of the wealthy classes as well as of the popular classes, also having privileges and privileges; although the missionary zeal in the Amazon region and the pageantry of the convents greatly diminished.[6]

The political organisms were replaced by others, but basically analogous: "the President replaced the Viceroy, the Supreme Court the Courts and the Municipalities the Cabildos. Lima and the coast maintained their primacy over the rest of the country. The voluminous file, the long processing, the bureaucratic delay".[7] It remained, and even increased, "employment, the search for honors and sinecures".[8]

In this same aspect, it is curious to observe how even the colonial legislation was maintained for more than three decades, until 1852, despite the

[3] *Ibidem*, p. 20.
[4] *Idem*.
[5] *Ibidem*, p. 23.
[6] *Ibidem*, p. 21.
[7] *Idem*.
[8] *Idem*.

various Constitutions that were dictated; agriculture not only remained in the same state but worsened due to lack of labor; mining entered a process of frank decline due to the elimination of the mitas, the absence of qualified human support, and the destruction of the Pasco mines; the tax and contribution regime remained intact; education did not undergo significant changes; and, to a certain extent, accentuated its deficiencies; and the regime of economic feudalism was not touched.

Regarding the "pre-colonial survivals",[9] the ayllu and the community (which still survives), the indigenous religiosity, as well as a series of traditions and customs typical of the time before the colony did not suffer any alteration.

However, said social topography showed several elements that were a contribution of emancipation, which we summarize below: the formation of a powerful army; the birth of an urban movement; the migration of a good number of English and North Americans; the importation of foreign ideologies, especially from France; the opening, at least at the level of official recognition, to all freedoms, except for the freedom of belief; the adoption of the system of separation of powers; and the tendency to imitate European life.

The army, due to the leading role it played in independence itself, as well as the role it played since the beginning of the Republic, through its commanding officers, became the fundamental element in achieving that libertarian feat, giving a militaristic fate to it. Indeed, the military were the ones who carried out the actions for freedom and the proclamation of independence and the military were the ones who, directly or indirectly, were in the leadership of the country from its beginnings, to the point that history records, apart from the events of the independence struggle, three periods of marked military presence since the Republic was founded in the 19th century: a first period, between 1827 and 1841, whose main protagonists were Santa Cruz and Gamarra; a second period, between 1841 and 1861, characterized by the predominance of Castile and its rivalry with Vivanco; and a third period, between 1862 and 1868, in which the military power began to weaken.

For Basadre, the militarism of the country's dawn was born of three causes: the first, as a recognition of the people in the face of the victories obtained, before which they tried to pay "a national debt of triumph";[10] the second, as a lesson after the defeat, which left the awareness of the need to

[9] *Ibidem*, p. 23.
[10] *Ibidem*, p. 106.

strengthen military power to prevent history from repeating itself; and the third, as a lifeline in situations of indecision or political and social crisis, where the army was "the only materially strong institution and, furthermore, the best organized class in moments of collective weakness".[11]

Alongside militarism, the social structure was made up of the nobility, the church, the middle classes, and the popular classes (within the latter, the indigenous and blacks), with respect to which we must specify:

1. The Peruvian nobility, arising from the conquest, to which the descendants of the conquerors, the officials and aristocrats who came from Spain and the families of commercial and bourgeois origin that had gained positions, were gradually incorporated, was weakened and under the formula of the new rich, but had not lost hierarchy. He had no political power, although he maintained social power.
2. The church, despite having survived almost without alterations to the founding of the Republic and maintained its full validity in the new order, "did not mean a differentiation in the authentic structure of the country"[12] and entered a certain relaxation; however, it did have some level of influence at the family and public levels.
3. The middle classes were divided between a plutocratic minority sector, which could be called the upper layer, and a large mass, which could be called the lower layer, which did not have access to trade or industry and constituted, according to Basadre himself, "a village mass, enough, abandoned, ignorant; an unstable political history to the point of comics".[13]
4. The natives did not experience any change. They continued in the same condition of marginalization, pauperism, abandonment and exploitation in which they found themselves before, with the aggravating circumstance that they were totally forgotten and exploited; so much so that the comparative analysis between the colonial legislation and that of the first years of the Republic shows that in the Colony, at least at the normative level, there were provisions that showed some concern for this sector.
5. Black people continued to be victims of slavery until 1854 and had no greater interest or participation in independence. What's more, they continued to work as peons and servants, at the service of the large landowners.

[11] *Idem*.
[12] *Ibidem*, p. 111.
[13] *Ibidem*, p. 115.

In conclusion, the beginning of the Republic shows us an alien landscape to the gestation of a decision for internal integration and, even less, of concrete actions to even undertake the path to adopt it, due in large part to the problems that have been outlined. and others whose detail escapes the purposes that convene us today, as well as a series of revealing variables of the existence since that time of a germ of violence in the very structure of Peruvian society.

Regarding this conclusion, it is pertinent to quote the words of Enrique Bernales, who, when analyzing the cultural factors of the Peruvian political crisis, in line with what was said by John Lynch, maintains that

> the formation of the Republic and the foundation of the independent State, they did not mean a substantive change in the pattern of existing social relations. The absence from the beginning, of a ruling class that definitively opted for democracy, of a liberating, democratic and efficient State, negatively marked the course of the newly founded State. There was a lack of those who assumed the task of building the unity of the Nation and from that solid base, progressing in the specificity of the Peruvian political system and institutions, which could be the cause of the scarce representation of the State. Only a small part of society feels convergent with him; another part sees it as something distant and even hostile, while a third part, perhaps the largest of the three, is indifferent and alien to the political model of the State.[14]

To this early dawn it should be added that the phenomenon of corruption had already been embedded in Peruvian society since colonial times, especially at the level of state administration, to the point that, following Alfonso Quiroz, one could speak of cycles of colonial corruption. During the mature Peruvian viceroyalty, which he considers to have been six and describes as follows: (i) an extremely high level of corruption from at least the second half of the 17th century to the early 18th century, (ii) a temporary but slight drop from the decade from 1720 to 1740, (iii) a marked increase from the 1750s to the 1770s, (iv) a brief but significant drop in the 1780s and 1790s, (v) a slight increase in the first decade of the 19th century, and (vi) a sharp rise in the decade before independence";[15] an author who also maintains that the most usual forms of corruption in this plane consisted of illegal and undue profits of the viceroy, the governors, of the magistrates

[14] Bernales, Enrique, "Crisis y Partidos Políticos", AA. VV., *Del Golpe de Estado a la Nueva Constitución. Serie de Lecturas sobre Temas Constitucionales*, Lima, *Comisión Andina de Juristas*, 1993, No. 09, p. 20.

[15] *Ibidem*, p. 100.

and the hearers, among others; in the use of administrative insufficiencies as a tool to obtain perks and favors to delay the collection of debts in favor of the State, as well as the supervision and maintenance of mines; and smuggling, among others.[16]

As is logical to suppose, the independence of Peru did not mean the end of corruption. On the contrary, the corruption continued but adapting to the new situations and realities that the Republic brought; process that has been studied with special care by the aforementioned historian Alfonso W. Quiroz and to whom we turn to make a brief review of the development of the phenomenon, pointing out that from the beginning there was what he calls "the undermined foundations of the early Republic, 1821- 1859", with the patriotic looting, the shady foreign loans, the caudillo patronage circles, the scourge of the guano regime, the debt consolidation scandals, the manumission compensation and the undaunted venality;[17] to cause "the winding road to disaster, 1860-1883", with the monopolistic guano businesses, the infamous Dreyfus contract, the avalanche of public works, the road to bankruptcy, the ignominy of war and the exacerbated losses;[18] reaching "modernization and those who took advantage of it 1884-1930",[19] with the hiring of the support of the military, the Grace contract, the legacy of the Caliph, the stage of Leguía and the civilistas with the scandals produced in the so-called Oncenio de Leguía, the inept sanctions and the legacies produced; passing to the stage of "the venal dictators and secret pacts of the period 1931-1962",[20] with the moralizing attempts of Sánchez Cerro and his populism against APRA, the restoration with Benavides, the politics of war without principles, the tightrope transition, the reward of General Odría, the thesis of forgiveness and forgetfulness and the reforms proposals; to arrive at "the assaults on democracy 1963-1989", with the broken promises of Belaunde, the smuggling scandal, the military revolution, the benign negligence, the media of Alán García, the frustrated trial and the persistence of patterns of corruption;[21] and lead to the infamous decade of the nineties to which we will refer later under the heading of the trigger produced in that decade.

[16] *Idem.*
[17] *Ibidem*, pp. 107-156.
[18] *Ibidem*, pp. 157-196.
[19] *Ibidem*, pp. 197-258.
[20] *Ibidem*, pp. 259-314.
[21] *Ibidem*, pp. 315-363.

2. *The detonator produced in the 90s*

As we have pointed out above, sharing with Alfonso Quiroz, "corruption in Peru was not something sporadic, but, rather, a systemic element, rooted in the central structures of society",[22] but what happened in the nineties of the last century exceeded all expectations and merited the label of infamous decade pointed out by the same author. Indeed, an infamous decade because, as Mario Vargas Llosa maintains, referring specifically to what happened after the self-coup carried out by engineer Alberto Fujimori, then Constitutional President of the Republic, on April 5, 1992, the dictatorship that emerged from himself, promoted corruption

> in a scientific, institutional way, organizing the Judiciary and the tax collection system with that design, as a very powerful instrument of coercion, which silenced criticism, kept the citizen on tenterhooks and forced him to serve to the regime, and at the same time that it fleeced right and left, it disguised the robberies and dispossession with a veneer of legality.[23]

Infamous decade because corruption permeated the entire social fabric: there was corruption in the management of public affairs, in the administration of justice, in practically all institutions, in the National Parliament, in the control body, in the armed institutes, in the mass media and, in general, in all the strata that make up the national social group. Corruption then acquired a more generalized dimension and increased considerably in size. This situation allowed the refinement of mechanisms typical of neofascism, using all the tools that power gives in all its aspects to debase some, persecute, and destroy opponents, implement a policy that minimized and relativized opponents.

Curiously, this level of corruption did not show its true face in the first years of the Fujimorato, in which the achievements, such as the defeat of terrorism with the capture of its maximum leader Abimael Guzmán, the sincerity and the reorganization of the national economy putting an end to the hyperinflation of the years of the first government of former President Alán García Pérez, the reintegration of the country into the international economic community and the implementation of a constitutional economic regime that highly promotes private investment as the main generator of

[22] *Ibidem*, p. 31.

[23] Cited in Markuz Delgado, Jane and Tanaka, Martín, *Lecciones del final del fujimorismo*, Lima, Institute of Peruvian Studies, 2001, p. 30.

wealth and respect for rules of the free market, established in the 1993 Constitution promoted by Fujimori as a condition for the return to democracy, meant high popular approval.

An infamous decade because corruption became so novel that it revealed the banality of many characters, many of them from the upper echelons of society.

Now, in line with what was stated by Jane Markuz Delgado and Martín Tanaka and paraphrasing them, we can affirm that

> Like many of his dictatorial predecessors, Fujimori remained in power by restricting the fundamental rights of citizens to the maximum. His administration faced numerous accusations of human rights violations and abuses of power both within Peru and abroad; until his downfall, he was able to counter them successfully by invoking the Legislative Branch, making gratuitous "democratic" gestures, or silencing his critics through threats, sanctions, or exile. Fujimori was able to maintain his balance on this diplomatic tightrope until the end of the decade, when his flagrant acts of corruption and illegal activities —especially those of his close adviser, the unofficial head of the SIN, Vladimiro Montesinos— tipped the delicate balance. of its legitimacy, causing it to collapse.[24]

3. *The reactions and the dimensions of the response*

As we have advanced in the introduction of this academic work, the situation described above, added to the fact that the country was stupefied through television, in an unprecedented way, the degree that this phenomenon had reached, when the famous " vladivideos", recorded in the room of the National Intelligence Service, SIN, by then-presidential adviser Vladimiro Montesinos Torres, triggered various and understandable reactions in all sectors of Peruvian society, since it was a public and evident finding that It produced great indignation throughout Peruvian society, which demanded the adoption of urgent and effective measures to end corruption promptly and effectively and with all that it meant.

We emphasize that in the visualization of the "vladivideos" the Peruvian society verified, with its own eyes, the degree of existing decomposition and as the typical crimes of corruption, such as concussion, improper collection, collusion, embezzlement, embezzlement and bribery, among oth-

[24] *Ibidem*, p. 12.

ers, were perpetrated with total impudence and without any hesitation by characters from the most diverse and high spheres of Peruvian society.

The natural indignation produced by the exhibition of the "vladivideos" caused multidimensional effects throughout the national social collective, that is, in the various sectors that comprise it and in various areas that comprise it; effects that we have already mentioned in the aforementioned introduction but that in this part we consider necessary to reiterate, among others:

1. It sharpened the population's sensitivity to everything that to some extent could mean corruption, which we could categorize as a hypersensitivity of the social group, which clouded many, leading them to a prejudiced attitude, lacking in objectivity, imbued with a spirit of intolerance and pregnant with an exacerbated desire to do "justice" without stopping to analyze in depth the peculiarity of each case and regardless of whether, in truth, those investigated were innocent or guilty. That is, a kind of blind vendetta in which the end justified the means. Obviously, in this climate of hypersensitivity, the fundamental rights of those involved became the last consideration that had to be considered.
2. It provoked a special zeal from the press, especially in investigative and denunciatory journalism, which focused its actions on the dissemination of the cases that were being discovered and that presented some hint of corruption, in a kind of competition between the media for the greater "uncovering", often abdicating certain rules governing journalistic activity, such as the verification of sources, the requirement to detect minimal elements of corroboration, respect for the right of those reported to hear their version of the facts and consideration of the rights of those involved, such as the right to a good reputation and image or the right to the presumption of innocence, among others;
3. It caused the refinement and sharpening of a kind of attitude of collective suspicion, of distrust in all orders, of a priori estimation that everyone was prone to crime, of devaluation of the person in general as a subject that makes up society, especially in the scope of the exercise of the public function, either by popular representation or by appointment or another modality of entry to the performance of the same, and in the sphere of private activity linked to public contracting; one could say a schizophrenic and even psychotic attitude in which the value of the human person was totally ignored;

4. It promoted a kind of collective summoning of civil society and the media to the political class, deteriorating its image and ignoring the recognition and guarantee of the exercise of political rights, and questioning its actions, to the point that new uncoverings were raised, multiple processes were opened at the level of the Public Ministry and the Judicial Power and a machinery was set in motion to persecute and punish the characters who were political actors and were accused of acts of corruption; all this without weighing the enormous damage that was being caused to Peruvian society by discrediting political activity, despite the fact that it is vital for the development of an authentic democracy; especially if what is intended is to consolidate a Constitutional State in Peru;
5. It inspired a draconian attitude of the prosecutors and judges in charge of investigating, prosecuting, sentencing and punishing the defendants, who relativized the constitutional guarantees, abdicating their constitutional and legal function, preferring the deprivation of liberty, even before the formalization of the complaint, the prosecution of the accused, the sentence and conviction of criminal responsibility, revealing a prisoner spirit and alien to the constitutional and conventional principles and values that should guide their actions;
6. It gave rise to the existence of a media and popular trial, irresponsibly encouraged by some sectors of the press, in which they were "condemned" in the face of the simple complaint, creating in the social imaginary the idea that the people who appeared to be involved were already guilty despite the fact that in many cases it was only simple speculation and a formal investigation had not even been initiated against them by the competent authority;
7. It encouraged merciless public pressure against prosecutors and judges, as well as against any authority in charge of the investigations that clamored for sanctions, encouraged by various media, opinion leaders, political figures, and civil society organizations, who did not hesitate to resort to prohibited methods. so that they pronounce themselves in the sense that they intended by sectarian sectors of society, which claimed the heritage, attributing the heritage of truth and despite the rights of those denounced and respect for the autonomy and independence of the authority; and finally;
8. It promoted a grotesque use of the issue of the fight against corruption as a banner for various opportunist, sectarian and manipulative social actors, extremist ideological politicians, parametric press and civil society organizations, among others.

In parallel, as we have also anticipated in the introduction, a change began to take place at the infra-constitutional normative level that translated into a series of modifications and innovations in the general material and procedural provisions of a penal nature and, in particular, in the norms regulations of the public sector, the exercise of the public function, the contracting carried out by the State, the control and monitoring of public management, criminal offenses, the management of funds held by state institutions, the Significant economic movements carried out by individuals and their monitoring, among many other measures that tended to facilitate the detection, denunciation, prosecution and punishment of acts related to corruption. That is to say, a change at the infra-constitutional normative level that led to an over-regulation elaborated as a reaction to what had been experienced, but in many cases lacking constitutional basis.

At this point it is necessary to emphasize that, as will be seen later, Peru, contrary to the constitutional and conventional regulations for the defense, protection and guarantee of human rights, as well as the jurisprudence of its Constitutional Court adopted in the facts the debatable theory of the expansion of criminal law, which under a simply punitive inspiration sacrifices the fundamental rights of those under investigation, under the underlying argument that the end justifies the means.

4. *The current landscape*

It is due to continue to make a description of the current landscape of Peru in regard to the phenomenon of corruption and its fight. In this regard, it is necessary to state, first of all, that in the time elapsed between 1995 (the year of the re-election of former President Alberto Fujimori) and so far this year 2021 of the 21st century, which is the year of the bicentennial of national independence, since next July 28, 2021, will be the two hundredth anniversary of our republican foundation, the country has lived in democracy and the various problems that have arisen in national life have been resolved following the constitutional thread, having passed practically twenty-six years of constitutional regularity, which is unprecedented in Peruvian history; years in which nine presidents have unusually succeeded each other and not six as it should have been, since the presidential term in Peru is five years. Namely: Alberto Fujimori (July 28, 1995 - November 21, 2000), Valentín Paniagua Corazao (November 22, 2000 – July 28, 2001), Alejandro Toledo Manrique (July 28, 2001 – July 28, 2006), Alan García Pérez (July 28, 2006 – July 28, 2011), Ollanta Humala Tasso (July 28,

2011 – July 28, 2016), Pedro Pablo Kuczynski Godard (July 28, 2016 – July 23, March 2018), Martín Vizcarra Cornejo (March 23, 2018 – November 9, 2020), Manuel Merino de Lama (November 10, 2020 – November 15, 2020) and Francisco Sagasti Hochhauser (November 17, 2020 to the date); It must mean that from 2016 to date there have been four presidents, due to a series of political events that it is not appropriate to address now, but, the most redeemable, within the constitutional framework.

Regarding the phenomenon of corruption, the situation has not abated. On the contrary, the scandals and uncoverings have continued in an ascending succession, within which the case of the Brazilian company Odebrecht stands out, in whose periphery many others appear, among which we can mention some only for illustrative purposes, such as the following: Case Lima Electric Train – Section I, Presidential Campaigns Case, White Collars of the Port Case, Chincheros Airport Case, South Interoceanic Case, No Revocation Case, Susana Villarán Re-election Case, Consulting Company Linked to PPK Case, South Peruvian Gas Pipeline Case Case of Costa Verde – Callao Section, Case of the Construction Club and Case of the Cusco Bypass Route.

These scandals and others have motivated investigations and judicial processes, having to date ex-president Fujimori sentenced and serving jail time, ex-president Toledo with an international arrest warrant, ex-president Ollanta Humala with a restricted appearance order after having been imprisoned with a preventive detention order for several months, former president Pedro Pablo Kuczynski with a preventive home detention order and former presidents Martín Vizcarra and Manuel Merino with ongoing tax investigations.

In this context, the hypersensitivity of the social group, the special zeal of the press for investigation and denunciation, the refinement and sharpening of a sort of attitude of collective suspicion and mistrust at all levels, the collective placement of civil society and the media to the political class, the draconian and anti-guarantee attitude of the prosecutors and judges in charge of investigating, prosecuting, sentencing and punishing those denounced, the media and popular trial, public pressure, the use of the theme of the fight against Corruption as a flag and hyper punitive regulation have been maintained when not increased, contrary to, we reiterate, the constitutional and conventional regulations for the defense, protection and guarantee of human rights, as well as the jurisprudence of the Constitutional Court.

Regarding the latter, it is worth mentioning that the Constitutional Court has recognized that the fight against corruption must be a consti-

tutionalized fight, insofar as it must always respect the human person and their fundamental rights. He has specified that although there is an attitude of distrust and suspicion in society for the acts of corruption that are known day by day, which devalues the human being by considering him "prone to crime", especially those who exercise public function or position , this attitude is unconstitutional and harmful because it deviates from the logic of the constituent that places the person above all, being his defense and respect for his dignity the supreme goal of society and the State. Thus, it has been pointed out in the Ollanta Humala-Nadine Heredia case, resolved in File No. 4780-2017-PHC and 0502-2018-PHC/TC (Joined), of which we were rapporteurs in our capacity as members of said Constitutional Collegiate; case of which we will account later.

III. The legal instruments to face the phenomenon

As we have stated when starting the treatment of the matter that concerns us today, we must now address the issue of existing legal instruments in Peru to deal with the phenomenon of corruption, reviewing the current constitutional and legal framework, as well as the regulations existing supranational, so we proceed below in that thematic order.

1. *The current constitutional and legal framework*

Regarding the constitutional framework itself, we specify that the current Political Constitution of Peru, which dates from 1993, does not contain any rule that expressly enshrines the word "corruption" or the phrases "fight against corruption", "fight against corruption" or similar. However, the Constitutional Court, as the supreme interpreter of the Constitution, has developed an important line of jurisprudence related to the fight against corruption; line in which, among other aspects, it has recognized the importance and imperative need to confront the phenomenon, has established that there are constitutional mechanisms to do so and has recognized the existence at the constitutional level of a "principle of proscription of corruption", the one that little by little has been profiling.

On the other hand, it has established that the fight against corruption must be a constitutionalized fight, in the understanding that its legitimacy involves placing the human person and their fundamental rights, such as

due process, the presumption of innocence, honor, defense, good reputation or respect for their dignity, above any other objective of the State. That is to say, that the firmness and determination of the State in combating corruption cannot in any way avoid the scrupulous respect for the fundamental rights of the human person, which is prior to and superior to the State itself. This, at the risk of delegitimizing it.

Now, and in relation to the jurisprudence of the Constitutional Court, we point out that in the third part of this work, which contains our proposal to confront corruption in a constitutional key, we will refer to some of its most important sentences in order with the jurisprudential line before pointed out.

Regarding the legal framework that includes the respective infraconstitutional regulations, we note that since the year 2000, at the beginning of this millennium, the Peruvian criminal justice system has undergone important modifications, among which is the implementation of the new Criminal Procedure Code, which has implied a significant change, since it has gone from the inquisitorial model established in the old Code of Criminal Procedures to an accusatory model, in which both the role and the powers of the Public Prosecutor's Office have been strengthened in terms of ownership of criminal action public, to the promotion and direction of the criminal investigation, the complaint, the promotion of the process and the accusation itself, conferring a series of powers that include the preliminary investigation and the possibility of obtaining restrictive measures for the investigated before the formulation of the complaint, which includes even the deprivation of liberty and has been left to the Power Judiciary, from the point of view of a guaranteeing role, the task of the trial itself, in addition, by the way, to pronounce against the requirements formulated by the parties, both by the Public Ministry and by the accused or third parties.

Now, although the new model has sought to put the emphasis on the human being, since this has as guiding lines the respect for the principle of equality, the right of defense, the plurality of instance, the no *reformatio en peius*, the presumption of innocence, judicial impartiality, among others, subsequently a series of legal provisions have been issued that have been assuming an essentially persecutory and punitive character, invoking the banner of the fight against corruption and despite constitutional guarantees, which have not been exempt from criticism for their questionable constitutionality, such as those that regulate the "conviction of the acquitted", in which the person acquitted in the first instance and convicted in the second instance does not have an effective remedy that enables the review of his sentence; the application of "pretrial detention", which has received many questions and pronouncements by the Constitutional Court; the "early ter-

mination", which can lead to the acceptance of the charges by a desperate innocent person, without further evidence; among others.[25]

It is in terms of the fight against corruption that the so-called "Integrity and Fight Against Corruption Policy" has been implemented for several years, giving rise to a lush subconstitutional legislation, a marked overregulation of questionable constitutionality, a hardening, and a prioritization of punitive mechanisms, which collide in many cases with the humanistic and guarantees philosophy that inspires the Peruvian constituent legislator. It is reflected in said legislation, according to some scholars, the logic of dealing with this phenomenon under the premise of the end justifies the means, making the system increasingly draconian and more severe, but without considering the constitutional norms that guarantee, for above all, the recognition, protection, guardianship and rescue of fundamental rights.

Having made these clarifications, we must point out that, among others, at the legal and infralegal level, the following regulations have been issued:

1. Law 27806, of July 13, 2002, called the Law of Transparency and Access to Public Information, on transparency of State acts and the fundamental right of access to public information.
2. Law 27815, dated August 12, 2002, which approved the Code of Ethics for the Public Function, establishing the principles, duties and ethical prohibitions that apply to public servants.
3. Legislative Decree 957, dated July 29, 2004, which approved the new Code of Criminal Procedure, which, as we mentioned earlier, introduced a new model for the application of criminal justice, of an accusatory nature.
4. Law 29976, dated January 4, 2013, which created the High-Level Anticorruption Commission, which aims to articulate efforts, coordinate actions and propose short, medium and long-term policies aimed at preventing and combating corruption in the country.
5. Law 30077, dated August 20, 2013, Law Against Organized Crime, which establishes the rules and procedures related to the investigation, prosecution and punishment of crimes committed by criminal organizations; which extends its application to crimes against the Public Administration, in the modalities of concussion, improper collection, simple and aggravated collusion, fraudulent and negligent embezzlement, own passive bribery, passive international brib-

[25] Vásquez Arana, César, *El sistema acusatorio y las inconstitucionalidades del nuevo Código Procesal Penal*, *Lex*, *Revista de la Facultad de Derecho y Ciencia Política de la Universidad Alas Peruana*, Lima, Year XII, núm. 14, pp. 189 et seg.

ery, improper passive bribery, specific passive bribery, passive corruption judicial assistants, generic active bribery, transnational active bribery, specific active bribery, incompatible negotiation or improper use of office, influence peddling and illicit enrichment; defining as a criminal organization any group of three or more people who share various tasks or functions, whatever its structure and scope of action, which, with a stable character or for an indefinite period of time, is created, exists or functions, unequivocally and directly, in a concerted and coordinated manner, with the purpose of committing one or more serious crimes. Allowing, in addition, the use of special investigation techniques, including the interception of communications.

6. Law 30111, dated November 26, 2013, which incorporates the penalty of a fine as an accessory in the crimes of concussion, simple and aggravated collusion, fraudulent and negligent embezzlement, embezzlement of use, embezzlement, own passive bribery, passive international bribery , improper passive bribery, passive corruption of judicial assistants, generic active bribery, transnational active bribery, specific active bribery, incompatible negotiation or improper use of office, influence peddling and illicit enrichment.
7. Law 30214, dated June 29, 2014, which grants the category of extraprocedural institutional expertise with specific probative weight to the control reports of the Comptroller General of the Republic.
8. Law 30424, of April 21, 2016, which regulates the administrative responsibility of legal persons for the crime of active transnational bribery, modified by Legislative Decree 1352, dated January 7, 2017, which expanded the administrative responsibility of legal persons in other crimes related to corruption.
9. Law 30304, of February 28, 2015, which prohibits the suspension of the execution of the sentence in the crimes of simple and aggravated collusion, and fraudulent and negligent embezzlement committed by public officials and servants.
10. Legislative Decree 1243, dated October 22, 2016, which modifies the Criminal Code and the Criminal Enforcement Code, establishing and extending the duration of the main disqualification sentence, and incorporating perpetual disqualification for crimes committed against Public administration; in addition to creating the Single Registry of Disabled Convicted.
11. Legislative Decree 1279, dated December 28, 2016, which establishes the duty of all people to register family ties with the National Reg-

istry of Identification and Civil Status to facilitate the fight against corruption.
12. Legislative Decree 1291, dated December 29, 2016, Legislative Decree that approves tools for the fight against corruption in the Interior Sector.
13. Legislative Decree 1295, dated December 30, 2016, on the disqualification for the exercise of public function and impediments of sanctioned servants.
14. Legislative Decree 1307, dated December 30, 2016, on effective measures in the prosecution and punishment of crimes of corruption of officials and organized crime.
15. Legislative Decree 1327, of January 6, 2017, on protection measures for whistleblowers of acts of corruption.
16. Legislative Decree 1353, dated January 7, 2017, Legislative Decree that creates the National Authority for Transparency and Access to Public Information.
17. Law 30737, of March 12, 2018, on ensuring the immediate payment of civil compensation in favor of the Peruvian State in cases of corruption and related crimes.
18. Emergency Decree 020-2019, dated December 5, 2019, which provided for the mandatory submission of the sworn declaration of interests by civil servants, those who perform public functions and others, regardless of the labor or contractual regime in which they are in public administration entities.

Having made the mention of the regulations detailed above, it is necessary to emphasize that the Peruvian penal system has been hardening, typifying new criminal figures, increasing some penalties, empowering the Public Ministry, and minimizing, if not ignoring, the protection and guarantee of fundamental rights.

2. *The supranational regulation*

Regarding the supranational regulations on corruption, there are two main international treaties that Peru has concluded, in addition to a series of other legal instruments, resolutions, reports, recommendations or international working documents that deal with specific issues on said phenomenon.

The aforementioned two main international treaties concluded by Peru in the fight against corruption are the following:

1. The Inter-American Convention against Corruption, called CICC, which was approved by Legislative Resolution 26757, of March 5, 1997 and ratified by Supreme Decree 012-97-RE, dated March 21, 1997; Article II of which establishes that its purposes are to promote and strengthen the development, by each of the States Parties, of the necessary mechanisms to prevent, detect, punish, and eradicate corruption; as well as to promote, facilitate and regulate cooperation between the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate acts of corruption in the exercise of public functions and acts of corruption specifically related to such exercise. To this end, it regulates a series of topics, such as preventive measures aimed at creating, maintaining and strengthening standards of conduct for the correct performance of public functions, mechanisms to enforce compliance with said standards of conduct, among others (article III); the scope of application of the Convention (article IV); the adoption of the necessary measures by each State to exercise its jurisdiction over the crimes it has established based on the Convention (article V); the types of acts of corruption (article VI); the adoption of internal legislative measures (article VII); the regulation of the figure of international bribery (article VIII); among others.
2. The United Nations Convention against Corruption, called UNCAC, which was approved by Legislative Resolution 28357, dated October 6, 2004, and ratified by Supreme Decree 075-2004-RE, dated October 19, 2004, the whose purpose is to promote and strengthen measures to prevent and combat corruption more effectively and efficiently; promote, facilitate and support international cooperation and technical assistance in preventing and combating corruption, including asset recovery; and promote integrity, accountability and proper management of public affairs and property.

   This treaty regulates a series of very important aspects in the fight against corruption. Its article 3, for example, contemplates its scope of application, which includes the prevention, investigation and prosecution of corruption and the preventive seizure, seizure, confiscation, and restitution of the proceeds of crimes established in accordance with it. Its article 5 regulates the policies and practices of prevention of corruption, establishing the obligation of each State party to formulate and apply or maintain in force coordinated and effective policies against corruption that promote the participation of

> society and reflect the principles of the rule of law. the law, proper management of public affairs and public goods, integrity, transparency, and accountability.

It is also interesting to highlight article 30, numeral 4, of this Convention, which literally indicates:

> In the case of crimes established in accordance with this Convention, each State Party shall adopt appropriate measures, in accordance with its domestic law and taking due account of the rights of the defense, with a view to ensuring that, when imposing conditions in relation to the decision to grant release pending trial or appeal, bearing in mind the need to ensure the appearance of the accused in any subsequent criminal proceedings.

In other words, when people are judged internally for crimes of corruption, their rights to defense must be duly considered. Later, in numeral 6 of the same article, this Convention also refers to the presumption of innocence, expressly stating that:

> Each State Party shall consider establishing, to the extent consistent with the fundamental principles of its legal system, procedures under which a public official charged with an offense established in accordance with this Convention may, when appropriate, be dismissed, suspended, or reassigned by the corresponding authority, bearing in mind respect for the principle of presumption of innocence.

These two main treaties are part of domestic law in accordance with the provisions of article 55 of the Political Constitution of Peru.

For the rest, as we pointed out in the previous paragraph, there are many other legal instruments, resolutions, reports, recommendations, or international working documents that deal with specific issues regarding this phenomenon, such as:

1. The Convention to Combat Bribery of Foreign Public Officials in International Business Transactions;
2. United Nations Resolution 51/59, dated December 16, 1996, which approved the International Code of Conduct for public office holders and recommended that Member States be guided by it in their fight against corruption;
3. The United Nations Convention against Transnational Organized Crime, approved by Resolution 55/25, of November 15, 2000, which contains some provisions related to corruption;

4. Resolution 55/188, of December 20, 2000, on "Prevention of corrupt practices and illicit transfer of funds and fight against them and repatriation of those funds to their countries of origin"; and
5. The "Declaration of Lima on the Basic Lines of Auditing", from the end of 1998.

From the supranational regulations referred to above, it is observed that the States have the inescapable obligation to fight, fight and defeat corruption, for which purpose a series of instruments oriented to the detection of the phenomenon and its confrontation are consecrated, with respect to which it would be necessary to delimit that everything dealt with in it must be developed in a framework of full respect for the fundamental rights of those who are investigated, prosecuted and convicted of crimes of corruption, since no matter how rigorous a regulation may be in situations arising from acts of corruption this should not deviate from the value of the human person, from respect for their rights, from their recognition and guarantee, and from a righteous action legitimized by its conventionality and its constitutionality with respect to each State.

IV. Our proposal to face it constitutionally

1. *The return to constitutional principles and values*

What has been discussed so far translates that the battle against corruption that Peru has been waging on various fronts is fueled by abundant legislation, both national and supranational, which for many is excessive, but runs the risk of losing its legitimacy, due to its mismatches with the recognition, guarantee and protection of the fundamental rights established by the Supreme Law of the Republic; situation that our Constitutional Court has hinted at in the judgment issued in the Ollanta Humala-Nadine Heredia Case, File No. 4780-2017-PHC/TC and 0502-2018-PHC/TC (joined), on whose grounds 124, 125, 126 and 127 has literally expressed the following:

> It is important to state that, because of the current social situation of mistrust of authority as a result of recent cases of corruption, the country as a whole has been living in an attitude of collective suspicion that has ended up placing the person in general who exercises a public function or position in particular as a subject considered in his own right "prone to crime". In other words, a totally unconstitutional, prejudiced and harmful attitude has been implanted,

which abdicates the logic of the Peruvian Constituent Legislator, who has opted for a system that considers the human person as the supreme goal of society and the State, which is prior and superior to the State and holder of a series of rights that are inherent to it, called, beyond the academic digressions that the doctrine collects, human rights, fundamental rights, rights of the person or constitutional rights; among which are the right to honor and good reputation, the right to defense and respect for their dignity, and the right to the presumption of innocence until their guilt has been judicially proven, by means of a firm and definitive sentence.

This attitude totally contradicts the clear mandate contained in article 1 of the Constitution, which to the letter prescribes that: "The defense of the human person and respect for his dignity are the supreme goal of society and the State". This precept shows the logic and philosophy of the Constituent Legislator, who, in rescue of the human person value, establishes the constitutional obligation for everyone, society as a whole and each one of its members, as well as the State itself as a national entity and a set of organs and institutions that integrate it within its structure, to defend the human person, and by the way all his rights, and to respect his dignity, as a human being who is the center of the political, social, and economic organization of the country. It then contains an inescapable mandate and that, in addition, contains the concept of solidarity, which is essential in the Constitutional State.

Along the same lines, article 2 of the Constitution enumerates a set of rights, which in what concerns the case, it is interesting to highlight, in addition to the right to human dignity, the rights to honor, good reputation, privacy and personal freedom and security. And, among these last fundamental rights, that of not being forced to do what the law does not command or prevented from doing what it does not prohibit; that of enjoying personal freedom; that of not being imprisoned for debts, except food; not to be prosecuted or sentenced for an act or omission that at the time it was committed was not previously qualified in the law, expressly and unequivocally, as a punishable offense or sanctioned with a penalty not provided for in the law; and that of being considered innocent until his responsibility has been judicially declared; provided for in article 2, subsections 7 and 24, sections a), b), c) and d) of the Political Constitution of Peru.

With regard specifically to the State and more especially to the ordinary judiciary, respect for such rights must be the pivot of all its actions, especially when acting in the field of criminal justice, in which the following principles prevail: respect and defense of fundamental rights; the presumption of innocence in favor of the investigated; doubt favors the accused; the burden of proof corresponds to the Public Ministry as the head of the public criminal action; and the clear, precise and indubitable criminal classification of the act attributed as punishable. Thus, it is necessary to constitutionalize the full exercise of the criminal judiciary, within the framework of its autonomy and

> independence, to guarantee maximum probity, suitability, impartiality, honesty and courage, and, in addition, compliance with the principles of reasonableness, weighting, proportionality and interdiction of the arbitrariness that the Constitutional Court has developed in its jurisprudence, as the supreme interpreter of the Constitution, of the law and, in general, of all positive law. (Foundations 124-127).

Note the review of the aforementioned foundations that the Constitutional Court of Peru reveals with all clarity and forcefulness:

1. The existence of a situation of mistrust and an attitude of collective suspicion because of recent cases of corruption.
2. The pejorative conceptualization that the person in general and who exercises a public function or position in particular is a subject prone to crime.
3. The implantation of a totally unconstitutional, prejudiced and harmful attitude with respect to the human person, which abdicates the humanist logic of the Peruvian constituent legislator.
4. The contradiction, violation and disregard of the clear mandate contained in article 1 of the Political Constitution of Peru, which in its first part stipulates that "The defense of the human person and respect for their dignity are the supreme goal of society and of the state".
5. Failure to comply with the constitutional obligation for all, which includes society as a whole and each of its members, as well as the State itself, both as a national entity and as a set of bodies and institutions that comprise it, to defend the person and of course all their rights, respecting their dignity and their character of being the center and reason for being of the political, social and economic organization of the country.
6. The forgetting of the concept of solidarity, which is inherent in the very essence of the Constitutional State and which radiates an obligation for all with regard to the defense of the human person and respect for their dignity as well as their rights.

7. The reminder to the State and especially to the judiciary, that they owe the utmost respect to such rights, as the axis of all their actions; especially in the field of criminal justice, so that the following principles prevail:

   a) Respect for and defense of fundamental rights;
   b) The presumption of innocence in favor of the investigated;
   c) Doubt in favor of the accused;
   d) The burden of proof for the Public Ministry as head of the public criminal action; and
   e) The clear, precise and indubitable criminal classification of the act attributed as punishable.
   f) The claim of the need to constitutionalize the full exercise of the criminal judiciary, within the framework of its autonomy and independence, to guarantee the maximum probity, suitability, impartiality, honesty and courage.

It is, then, as the Constitutional Court points out, to battle with the phenomenon of corruption without abdicating the value of the human person advocated by the Peruvian Constitutional State as the highest of all. To imbue in criminal proceedings the guarantee of full respect for fundamental rights in each procedural act and in all instances of the process, since the fight against corruption cannot become an excuse to relativize the validity of the fundamental rights of the person, in a kind of justification to put aside all the measures conducive to always protecting those rights, no matter how serious and despicable the crimes that are imputed may be.

It is clear, therefore, that a confrontation with the phenomenon of corruption in a constitutional key is necessary. That is, adjusting it to the constitutional canons and patterns, as well as the constitutional telos, which implies looking back at the essential values and principles that constitute the foundation and base of the National Constitution.

For the rest, also regarding the phenomenon of corruption, the Constitutional Court has established the following:

In the first place, that corruption is in itself "a social phenomenon that cannot be avoided", and that it is found "inside and outside the administration of the State itself", so that in the anti-corruption policy it must be established " the link between the State and civil society, to the extent that the defense of the constitutional 'program' requires comprehensive action". (foundation 53 of Judgment 0009-2007-PI/TC and joined)

Secondly, that the constitutional order "requires combating all forms of corruption", for which purpose "the constituent has established mecha-

nisms of parliamentary political control (articles 97 and 98 of the Constitution), ordinary judicial control (article 139 ° of the Constitution), constitutional legal control (article 200 of the Constitution), administrative control, among others" (ground 54 of Judgment 0009-2007-PI/TC and joined).

Thirdly, that the process of fighting corruption, both that linked to the state apparatus and those that exist in other areas,

> compels the classic powers of the State, to which the Constitutional Court is added in the fulfillment of the duty of the concentrated and diffuse constitutional jurisdiction, take concrete constitutional measures in order to strengthen democratic institutions, thereby avoiding a direct attack against the social and democratic State of Law, as well as against the integral development of the country (foundation 55 of Judgment 0009-2007-PI/TC and joined).

Fourth, that the Constitutional Court "also has to establish itself in a position of defense and support of the same, which allows the consolidation of a normative project to overcome any form of crisis of social and political coexistence, of the different interests of public importance, which enable its responsible management and the reestablishment of a social ethic" (ground 56 of Judgment 0009-2007-PI/TC and accumulated).

Fifth, that the aforementioned regulatory project acquires its own legal dimension in the constitutional principles of transparency and publicity, as well as cooperation between the State and the different social agents, in "the fulfillment of the constitutional duty to respect, fulfill and defend the Constitution and the legal system of the Nation (article 44 of the Constitution)", to enable the creation and consolidation of "a fundamental ethical environment that strongly rejects social tolerance with respect to all possible forms of corruption and irregularity in the management of public interests" (foundation 57 of Judgment 0009-2007-PI/TC and accumulated).

Sixth, that the following four principles and values of the democratic order must be guaranteed: "the public's right to information, the constitutional principle of publicity, the constitutional principle of transparency, and the constitutional principle of the prohibition of corruption" (foundation 58 of the Judgment 0009-2007-PI/TC and accumulated).

2. *The revaluation of the human person and their rights*

It is urgent to achieve a real and effective fight against corruption, that attacks its very foundations, which undoubtedly have germinated in many due to the educational deficiencies produced from an early age, that the task

of revaluing the person be addressed and to society itself, insofar as the former constitutes the reason for the existence of the State and the very core of the conception that inspires it.

This implies undertaking a great national crusade to rescue the value of the human person, through joint action and solidarity of all social sectors, which must assume a patriotic commitment to put all their efforts into what we could call a process of revaluing the human person, through educational campaigns at all levels to disseminate, explain and make the entire population aware of the constitutional principles and values, in the line of sowing an individual and collective identification with them, which allows ensuring in each member of the social group a respectful attitude towards them and a defender of fundamental rights.

Thus, the logic that currently reigns, characterized, as has been anticipated, by a sort of pejorative conceptualization of all members of Peruvian society, which makes us unscrupulous and prone to crime, will be modified, to establish a conception that is not only humanistic , but also principled and respectful of others, as well as their rights, which constitutes an incentive for the most honest and qualified people to participate in public life and in the various tasks required by the Constitutional State, in all its dimensions.

We could say, revalue and not devalue the human person, applying a constitutional logic that respects the aforementioned rights.

3. *The adaptation of the regulation of the Constitution*

The pejorative conceptualization of the human person to which we have made reference in the previous paragraphs has become, for approximately twenty-five years, in an infraconstitutional overregulation, which starts from the erroneous premise of considering the members of Peruvian society as people who are always predisposed to crime, to the point that in matters of State contracting, for example, the bidder who has won the award in a selection process has to sign a so-called "non-bribery agreement", by virtue of which he undertakes not to commit criminal offenses in the execution of the contract or, in the same field of public contracting, the impediment that the relatives of various public officials have, such as the spouse, cohabitant or relatives up to the fourth degree of consanguinity and second of affinity, to be a participant, bidder or contractor in the contracting processes with the State.

This collective attitude has surpassed the spectrum of Criminal Law towards other areas of sanctioning Law, to the point that today mechanisms

such as the polygraph are used in the private sector so that the employer can have confidence in his worke;[26] while in the public sector mechanisms have been overregulated to combat any irregular conduct with the full force of the law (sanctioning procedures for complaints,[27] post audit procedures,[28] disciplinary procedures, internal control procedures[29] and external,[30] simultaneous control procedures, tax presumptions,[31] virtual and physical claims

[26] Constitutional Court of Peru, Judgment 273-2010-PA/TC, March 18th, 2014.

[27] Article 235 of Law 27444, Law of General Administrative Procedure. Entities in the exercise of their sanctioning power will adhere to the following provisions: 1. The sanctioning procedure is always initiated ex officio, either on its own initiative or because of a superior order, motivated request from other bodies or entities or by complaint.

[28] Numeral 1.16 of article III of the Preliminary Title of Law 27444. The processing of administrative procedures will be based on the application of subsequent auditing; reserving the administrative authority, the right to verify the veracity of the information presented, compliance with the substantive regulations and apply the pertinent sanctions in case the information presented is not truthful.

[29] Article 7 of Law 27785, Organic Law of the National Control System and the Comptroller General of the Republic. Internal control includes the prior, simultaneous and subsequent verification actions carried out by the entity subject to control, with the aim that the management of its resources, goods and operations is carried out correctly and efficiently. Its exercise is prior, simultaneous, and subsequent …

[30] *Idem*. External control is understood as the set of policies, standards, methods, and technical procedures that the Comptroller General or another body of the System commissioned or designated by it is responsible for applying, for the purpose of supervising, monitoring and verify the management, collection and use of State resources and assets. It is carried out fundamentally through selective and subsequent control actions.

[31] Article 65 of the Single Ordered Text of the Tax Code. The Tax Administration may make the determination based, among others, on the following presumptions: 1. Presumption of sales or income due to omissions in the sales register or income book, or failing that, in the affidavits, when no present and/or said record and/or book is not displayed. 2. Presumption of sales or income due to omissions in the purchase register, or failing that, in the sworn declarations, when said register is not presented and/or displayed. 3. Presumption of income omitted from taxable sales, services, or operations, due to the difference between the amounts registered or declared by the taxpayer and those estimated by the Tax Administration by direct control. 4. Presumed sales or purchases omitted due to the difference between registered goods and inventories. 5. Presumption of omitted sales or income due to undeclared or unregistered assets. 6. Presumption of omitted sales or income due to differences in accounts opened in Companies of the Financial System. 7. Presumption of omitted sales or income when there is no relationship between the inputs used, production obtained, inventories, sales and provision of services. 8. Presumption of sales or income in case of omissions. 9. Presumption of omitted sales or income due to the existence of negative balances in the flow of income and cash outflows and/or bank accounts. 10. Presumption of Net Income and/or omitted sales through the application of economic tax coefficients. 11. Presumption of omitted income and/or omitted taxable operations in the exploitation of slot machine games. 12. Presumption of remuneration for failure to declare and/or register one or more workers. 3. Others provided for by special laws. The application of the presumptions will be

book,[32] face-to-face complaints and reports,[33] online[34] and telephonic,[35] etc.).

Such regulations affect, among others, the fundamental rights to honor, good reputation, respect for their dignity, the presumption of innocence and also the right to contract for lawful purposes; and reveals the idea that the legislator has had many times when exercising his legislative powers, since by regulating various topics, he has forgotten the humanistic principles that inspire our Fundamental Charter.

This dislocation between what happens with the Constitution, which advocates respect for and defense of the human person, as an ontological project that is prior to and superior to the State itself, around which the entire legal system must revolve, and the infra-constitutional norms, which they ignore the values, principles and goods that the Constitution protects and that contemplate a philosophy of distrust in the human being, since they always see him with an inclination to commit crimes, as if this were the rule and not the exception, he must be overcome in his integrity, articulating the infraconstitutional regulations to the Supreme Charter of the Republic.

4. *The role of the press and social actors*

Our reality currently shows us that there is a criminal process in which responsibilities are determined against offenders, officials and/or public or private servants, for allegedly having incurred in acts of corruption (within which all guarantees of due process must be respected). , and alongside this there is a "media trial" that is promoted by the media and in which the guilt of the person who is still on trial is often presumed and he is burned at

considered for the purposes of the taxes that constitute the National Tax System and will be subject to the application of the fines established in the Table of Tax Offenses and Penalties.

[32] Article 150 of Law 29571 (Consumer Defense Protection Code). Commercial establishments must have a claim book, in physical or virtual form. The regulation establishes the conditions, the assumptions, and the other specifications for the fulfillment of the obligation indicated in this article.

[33] Submitting a form to *Super Intendencia Nacional de Aduanas y de Administración Tributaria, http://www.sunat.gob.pe/defensoriacontrib/denuncias/formulario/FormatoDenuncias.pdf.*

[34] National Complaints Attention System (SINAD in Spanish) of the Comptroller General of the Republic, *//appscgr.contraloria.gob.pe/sinad,* SUNAT Office for Ethical Strengthening and Fight against Corruption, *http://www.sunat.gob.pe/institucional/plananticorrupcion/denuncias.html.*

[35] Ministry of the Interior: Line 1818, Ministry of Women, and vulnerable populations: *aló transparencia* 0800-17474.

the stake without the possibility of defending himself; accusations are made without evidence and thereby irreparably damage the image, honor and good reputation of people; public opinion is conditioned; and, what is even worse, the administration of justice is indirectly pressured so that in certain cases it resolves in a certain sense. Journalists are the new judges of the 21st century. It seems that the press has become a special judiciary, with its own rules, of a single instance and of unquestionable rulings.

This situation, then, seriously reflects the ethical crisis that the press has been suffering in relation to what is supposed to be the serious development of the right to information through the media.

Today, any fact that over time may presumably lead to an incorrect exercise of public functions is immediately accused of "corruption" and displayed by the media on the front page in those terms, without considering that the way of presenting the information ends up subjecting an official or public servant to public ridicule —who may be correctly exercising their functions—, since it presents and directs the news towards the worst of interpretations for the sole fact of giving a "supposed scoop" (sensationalism), behind which, due to the haste that the publication evidences for not having concluded with the journalistic investigation —as it would have been to confirm the validity of the representation with the association involved—, only the economic purpose of the total sale of the print run is identified.

This ethical crisis, which shows an overwhelming and implacable press with any hint of irregularity, becomes at the same time, one of the compelling reasons why the "honest" citizen has lost interest in participating in public management and for which the "honest" public servant maintains the culture of secrecy, since both feel that working for the State means lacking mechanisms to defend their privacy, their honor and good reputation.

V. Conclusive Remarks

The fight against corruption that is taking place in Peru must, as a matter of urgency, adapt its actions to the principles, values, rights, and precepts contained in the Constitution. To achieve this, along with initiating a solidarity campaign of awareness and the creation of a true constitutional sentiment, which revalues the human being and the entire society, it is urgent to constitutionalize said struggle, which will legitimize it. The abundant punitive legislation created as a result of the "infamous decade" must be adapted to the constitutional regulations and demand a more serious and responsible attitude from the press, which does not overwhelm the rights of the people,

such as the rights of defense, honor, good reputation, the presumption of innocence and respect for the dignity.

Progress has been made, there is no doubt, denouncing, prosecuting and convicting many public and private figures who committed criminal offenses, but many innocent people have also been harmed, who were convicted by "media trials". This is not compatible with an authentic Constitutional State. It is a priority to constitutionalize the fight against corruption.

DEMOCRACY, CORRUPTION AND TRANSPARENCY

Allan R. Brewer-Carías*

One of the most important topics of the functioning of the States in the contemporary world is that of corruption, which is corroding them, as a phenomenon that originates, among many other factors, from the lack of transparency in their conduct, and which is directly affecting the very operation of democratic regimes, whose foundations are affected by it. Therefore, these notes aim to analyze precisely the issue of corruption and transparency in the general framework of constitutional democracy.

And to try to manage the same ideas, we understand by "corruption" the action or effect of corrupting, that is, "causing a body or organic substance to decompose, so that it smells bad or cannot be used". That is to say, corruption is "to deprave" or "to spoil something"; synonymous with decomposition, rottenness or putrefaction;[1] a process that not only occurs with organic substances but also with the institutions themselves, in particular with the institutions of the State, and with democracy itself, which can also be depraved, decomposed and corrupted.

As for "transparency", we understand by it, the characteristic of a body when "it allows light to pass through and allows what is behind to be seen through its mass;" synonymous with the lucid, sharp, clean or diaphanous;

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[1] According to the *Diccionario de la Lengua Española*, of the Royal Spanish Academy, the term "corromper" (to corrupt) is related to the idea of altering, disrupting the shape of something, spoiling, depraving, damaging, bribing the judge, or any person, with gifts or otherwise, defining corruption as the action or effect of corrupting or becoming corrupted.

the opposite of the closed, mysterious or inexplicable, which is what feeds dark ends, and prevents corruption from being detected. In other words, transparency is an expression of what is open and accessible, of what can be known and rationalized, which is what allows the sensation of tranquility and serenity to develop, contrary to the feeling of anguish and disturbance caused by what is mysterious and unknown.[2]

For this reason, when referring to transparency in the State Administration, more than eighty years ago, Judge Louis Brandeis of the Supreme Court of the United States synthesized it in the well-known phrase that "sunlight is the best disinfectant",[3] along the same lines as the representation of the Public Administration as the "glass house" (*la maison de verre*),[4] in the sense that it must be visible and affordable, where freedom of information and the citizen's right of access to information public are privileged, contrary to opacity and secrecy.[5]

And by "democracy," in order to be clear in a common notion and not unnecessarily complicate ourselves with incomplete definitions, we understand that it is, as specified in the Inter-American Democratic Charter, the political regime where it is guaranteed: (i) that the power of the State is organized according to a system of separation and independence of powers; (ii) that access to power and its exercise be carried out subject to the rule of law, (iii) through periodic, free, fair elections based on universal and secret suffrage, as an expression of the sovereignty of the people, (iv) carried out in a plural regime of political parties and organizations; (v) where human rights and fundamental freedoms are respected and protected, in particular, social rights, and freedom of expression and of the press (Art. 3); where it is also guaranteed: (vi) the transparency of government activities; (vii) the probity and responsibility of the government in public management; (viii) and the constitutional subordination of all State institutions to the legally constituted civil authority; that is, finally, (ix) where respect for the rule of

[2] See Rodríguez-Arana, Xaime, "La transparencia en la Administración Pública", *Revista Vasca de Administración Pública*, Oñati, No. 42, 1995, p. 452.

[3] See Brandeis, Louis, "What publicity can do?", *Harper's Weekly*, December 20th, 1913.

[4] In the sense of what was said by the President of Costa Rica, Luis Guillermo Solís Rivera, "I want the Government – starting with the Presidential Office itself – to function as a great showcase or "glass house," which allows the citizen to examine and scrutinize the performance of those of us who administer the State," in Forums, "Una casa de cristal". Extract from the speech of the President of the Republic, Luis Guillermo Solís Rivera, La Nación, San José, May 9th, 2014, *https://www.nacion.com/opinion/foros/una-casa-de-cristal/6XAPU3J2PBDMDAGOMX26R2GWKA/story/*.

[5] See Rodríguez-Arana, Xaime, *op. cit.*, p. 452.

law by the government and by all entities and sectors of society is guaranteed (Art. 4).

That is democracy, and the important thing about conceiving it according to these nine elements and components, which are nothing more than expressions of old and new political rights of citizens, is that, with them, as a whole and ultimately, what is seeks to ensure the possibility that the exercise of political power is subject to effective controls, both by citizens and by the organs of the State itself.

That is what democracy is about, the exercise of power on behalf of citizens through elected representatives, and the right of those both to control and to demand that said exercise be controlled, which not only imposes the need for a functioning system of separation of powers, but that citizens can participate in the exercise of control.

This democracy, thus defined, as a political regime to ensure control over the exercise of power, must be based on transparency, which only exists when the citizen's right of access to administrative information is guaranteed and, furthermore, the right of access to Justice to be able to exercise, claim and defend their rights, and in particular, to be able to demand judicial control over government management, which is only possible if it is done before autonomous and independent judges.

In this sense, transparency can be considered the most powerful antidote against corruption, so that it can be said that when there is corruption it is due to a lack of transparency, and because, ultimately, there is no real democracy. This, therefore, does not materialize only if the Constitutions of the States are formally full of principled statements and qualifications about it, and less, if they are contradicted by the political practice of the government.

The deficiencies of democracy and the absence of transparency are, therefore, the main cause of corruption, generating a vicious circle, as Patricia Moreira, Director of Transparency International, has highlighted in the latest International Report issued this month, in the sense that "when democratic institutions undermine corruption, these, weak, are less capable of controlling it"[6] in the two aspects in which it occurs, both as administrative corruption, as institutional or political corruption.

[6] *See* "How Corruption Weakens Democracy", *Transparency International Survey*, January 29, 2019. In the same document, Delia Ferreira Rubio, head of Transparency International, is quoted: "Our research makes a clear link between having a healthy democracy and successfully fighting public sector corruption. Corruption is much more likely to flourish where democratic foundations are weak and, as we have seen in many countries, where undemocratic and populist politicians can use it to their advantage", *https://www.transparency.org/news/feature/cpi_2018_global_analysis.*

The first, administrative corruption, which is undoubtedly the one that most attracts the attention of opinion, is the one that derives from the flawed management of public goods and resources and, in general, the one that derives from the flawed management of the thing. public, particularly when officials, due to lack of controls and transparency, dispose of said resources at the service of their own interests or of individuals who illicitly enrich themselves at the expense of the State.

The second, political or institutional corruption, which is more serious, since it is generally the main cause of the previous one, is the one that results from the dismantling of democracy, and from the perversion of the functioning of State institutions, putting them, not at the service of the citizens, but rather at the service of personal political biases or projects of the rulers, or of the bureaucracy itself, diverting the functions of the State, and turning citizen rights into vain illusions.

As summarized by a former rector of one of the prestigious Venezuelan private universities, José Ignacio Moreno León, today, corruption is not only a problem of the Administration, but has:

> affected the structures of the States, harming their efficiency and credibility; it has affected, above all, the Judiciary with serious damage to the rule of law; it has penetrated the armed and police forces, weakening their role as guarantors of national security and peace; it has appeared in the legislative power, sowing doubts in the objectivity and efficiency of the law-making process; it has influenced the electoral power; it has seriously damaged democratic institutions; and finally, it has affected the state control entities, promoting impunity for crimes against public affairs and the loss of transparency in public management.[7]

Whoever profits from public affairs corrupts, but whoever disrupts the institutional functioning of the State for personal benefit or that of a group or party also corrupts; whoever allows stealing from within the Administration corrupts, but whoever perverts democracy to destroy it also corrupts. That is to say, corrupt, is the one who, in his management of public affairs, enriches himself illegitimately and allows or encourages others to enrich themselves illegitimately; but it is also corrupt who undermines the institutions of the State to put them at their service and obtain ends other than those for which they were conceived.

In both cases, those who thus act under the protection of power, when leaving the government have in common that they will never be able to say

[7] See Moreno León, José Ignacio, "La corrupción en América Latina: amenaza a la gobernabilidad democrática", *Pizarrón Latinoamericano*, Caracas, Year VII, vol. 9, p. 19.

that they left it in the same way as they entered; They will never be able to say how Sancho Panza did at the end of his governorship of the Barataria island - in the fine and figurative pen of Cervantes-, that he had been born naked, that he was naked, that he had entered the government naked of money and that he also left it, this being the best proof, he said, that he had "governed like an angel".[8]

To govern like an angel, in the sight of all, that is, with transparency, and not immersed in the darkness of the secrets of the bureaucracy; enter the government without money and leave the same as entered; and render accounts of the public management carried out in such a way that its results can be verified, seem to be the essential eternal rules of a government management, "quite the other way around", as Sancho Panza also warned at the time, "of how they usually come out the governors of other islands", which unfortunately continues to happen today in so many parts of the world.

Contrary to ruling like angels, in these times it seems that getting rich in power is the tragic desideratum of so many, as is the abusive exercise of power by misusing it, with the consequent perversion of the institutions of the State and the control mechanisms,[9] and very particularly the depravity of the Judiciary, which is the greatest of all political corruptions, since it ends up guaranteeing impunity.

The subject, of course, is nothing new, and although it is true that today it affects all the States of the contemporary world, and is present in all countries, it had already led Simón Bolívar in 1824 to decree the death penalty that should be applied —he said— "irremissibly" to officials who take part in fraud against public finances, "either intervening as principal, or knowing the fraud and not revealing it".[10]

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[8] Sancho Panza said: "I was born naked, I find myself naked; I neither lose nor win; I want to say that I entered this government without a penny, and without it I leave", adding, regarding the rendering of accounts that was asked of him that "when more than going out naked, how do I go out, no other sign is needed to imply I have ruled like an angel. See Cervantes Saavedra, Miguel de, *Don Quijote de la Mancha*, Chapter LIII, "Del fatigado fin y remate que tuvo el gobierno de Sancho Panza", *http://www.cervantesvirtual.com/obra-visor/el-ingenioso-hidalgo-don-quijote-de-la-mancha--0/html/fef04e52-82b1-11df-acc7-002185ce6064_19.html.*

[9] For example, José Ignacio Moreno León, former rector of the Metropolitan University of Caracas, Venezuela, defined corruption as "abusive conduct, in relation to the patterns and legal norms of behavior with respect to a public function or a resource to achieve, in irregularly an unjustified benefit"; or as "conduct that transgresses social norms, undertaken by a person or by a group of people". See Moreno León, José Ignacio, *op. cit.*, pp. 11 et seg.

[10] See the text of the Decree of March 18, 1824, issued by Simón Bolívar, *Liberador Presidente*, in Lima, Peru, in Alva Castro, Luis, *Bolívar en la Libertad*, Lima, Victor Raul Haya de la Torre Institute, 2003, pp. 67 and 68, *http://www.comunidadandina.org/bda/docs/CAN-CA-0001.pdf.* Then, through the decree of January 12, 1825, Bolívar also established the death pen-

If these types of measures were applied in our times, without a doubt our countries would already be decimated, without civil servants or Administration, because we well know that today corruption is, as the president of the World Bank recognized a few years ago, a problem in "every one of the countries in the world",[11] coming to qualify the phenomenon as the "number one public enemy" of the developed world,[12] but that in the developing world already has the characteristics and effects of a pandemic.[13]

Therefore, what is really new about the phenomenon is that it now has a global character,[14] as "an evil phenomenon that occurs in all countries, large and small, rich and poor", even though "with especially devastating effects in the developing world", affecting "infinitely the poorest", as recognized by the Secretary General of the United Nations in 2003, the approval of the United Nations Convention on Corruption, "because it diverts the funds intended for development, undermines the ability of governments to offer basic services, fuels inequality and injustice and discourages investment and aid foreign".[15]

Hence, even, the also "transnational" nature of corruption, in the sense that "it is no longer an isolated evil, circumscribed to certain countries or regions of the planet", but now it is also linked to other "criminal activities

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alty both for officials who committed acts of corruption in the government and for judges who allowed impunity. *See* in "Documento 10062 Decreto del Libertador" issued in Lima on January 12, 1825, by means of which it establishes the measures aimed at the eradication of the squandering of national funds, practiced by some public officials, in: *http://www.archivodellibertador.gob.ve/escritos/buscador/spip.php?article8279.* Also see in *https://cavb.blogspot.com/2012/06/decretada-pena-de-muerte-para.html.*

[11] That said by the President of the World Bank, Jim Yong Kim. Meers, Jelter, "World Bank Will Track own Funds as "Corruption is Everywhere", Organized Crime and Corruption Reporting Project, April 20, 2018, *https://www.occrp.org/en/27-ccwatch/cc-watch-briefs/7980-world-bank-will-track-own-funds-as-corruption-is-everywhere.*

[12] The President of the World Bank himself, Jim Yong Kim also said this. Press release. "Corruption is "Public Enemy Number One" in Developing Countries, says World Bank Group president", December 19, 2013, *http://www.worldbank.org/en/news/press-release/2013/12/19/corruption-developing-countries-world-bank-group-president-kim.*

[13] For this reason, the president of the World Bank in 2013, when referring to the pernicious effects of corruption in developing countries, stated that "every dollar that a corrupt official or a corrupt businessperson puts in their pockets is a dollar stolen from a woman in labor who needs medical assistance; to a girl or boy who deserves an education; or to communities that need water, streets and schools …", *Idem.*

[14] Estimates from the International Monetary Fund in 2016 indicate that corruption in the public sector cost the global economy that year more than US$1.5 trillion (that is, 1,500 millions of million dollars: US$1,500,000,000,000). See Meers, Jelter, *op. cit.*

[15] See Annan, Kofi A., "Foreword", United Nations Office on Drugs and Crime, *Convención de las Naciones Unidas contra la Corrupción*, New York, United Nations, 2004, p. 3.

such as drug trafficking, money laundering, and other perverse acts, generally related to criminal organizations with branches in several countries".[16]

It is not surprising, therefore, that corruption has caused so many recent scandals, which in so many countries have come to destabilize governments and democratic institutions, to the point that in our Latin America we can say that we have a record of accused heads of state and persecuted for corruption.

Corruption, therefore, as the Secretary General of the United Nations also warned, as soon as the aforementioned United Nations Convention on Corruption was signed in 2003:

> It is an insidious plague that has a wide spectrum of corrosive consequences for society. It undermines democracy and the rule of law, gives rise to human rights violations, distorts markets, undermines quality of life and allows organized crime, terrorism and other threats to human security to flourish.[17]

That was also what was expressed last year (2018) by the President of Peru, Martín Vizcaya (appointed as a result of the resignation of the previous president precisely for facts linked to acts of corruption), referring to "systemic corruption" as "the new threat to democratic governance in the region", noting that "corruption and impunity are two sides of the same coin" that form "a disastrous combination that threatens governance", to which he concluded by stating that transparency was "one of the most powerful and effective antidotes against the expansion of the corruption system, in addition to being a fundamental pillar of his government".[18]

And precisely because of the global and transnational nature of the phenomenon of corruption in the contemporary world, it is impossible for us, in a forum like this, not to refer to the most notorious recent cases of global corruption on the continent, both administrative corruption and of political corruption, which have undermined the very foundations of our democracies.

In relation to administrative corruption, it is impossible not to mention the largest transnational corruption operation that has been set up politi-

[16] See Moreno León, José Ignacio, *op. cit.*, p. 19.

[17] See Annan, Kofi A., *op. cit.*, p. iii.

[18] See what was declared by Martín Vizcarra, former president of Peru, in the review "Cumbre de las Américas es una respuesta contra la corrupción, afirma Vizcarra", April 13, 2018, *http://www.viiicumbreperu.org/cumbre-de-las-americas-es-una-respuesta-contra-la-corrupcion-afirma-vizcarra/*.

cally in our countries, such as the one carried out by the Brazilian company Odebrecht, in the shadow of the very State of its headquarters, and of many other states.

Seen globally, the phenomenon can only be explained because it obeyed a well-defined global public policy, conducted by the government of a State, using a private company, and through it, using governments; which allows us to think that in said company, in addition to the technical management necessary for the design and execution of public works in materially all Latin American countries, it has also come to structure another kind of specific "management", destined to plan the payment of commissions and dole out bulk money to public officials and candidates for public office in every conceivable election to secure construction contracts. Only in this way can the global scale of the phenomenon be understood.

In other words, there is no other way to explain the magnitude of this "company" of administrative corruption, if not understood as a planned policy that was developed around the activities of said construction company, even within the framework of international "cooperation" agreements, as was the one signed between Venezuela and Brazil,[19] that allowed in my country to formally ignore all the laws on bidding and selection of contractors, in addition to having contributed to the financing of political campaigns.

In Venezuela, and we refer to the case —with all regret— because it is our country, the institutional corruption that affects it is of such a nature, that despite the administrative corruption scandals that have materially involved all the countries of the Continent, taking the highest officials with them into the darkness of the dungeons or tombs, however, in Venezuela, a country that has the tragic record of occupying the first place in the corruption perception index in the entire American Continent,[20] the issue Odebrecht paradoxically is not even mentioned;[21] the situation of im-

[19] See Manzano, Jean, "Las obras pendientes de Odebrecht en Venezuela," *El Estímulo*, March 27th, 2018, *http://elestimulo.com/elinteres/infografia-las-obras-pendientes-de-odebrecht-en-venezuela/*.

[20] See information from Transparency International, *https://www.transparency.org/news/pressrelease/el_indice_de_percepcion_de_la_corrupcion_2017_muestra_una_fuerte_presencia.*

[21] Only a group of Magistrates who had been appointed to the Supreme Court, and who, persecuted in the country, are in exile, have been the ones who have referred to the case of corruption caused by Odebrecht, coming to issue a condemnatory opinion against the president of the Republic. See the report: "TSJ en el exilio ordena 18 años y tres meses de prisión para Maduro por corrupción. La sentencia del Tribunal Supremo en el exilio indica que el gobernante Nicolás Maduro deberá cumplir su condena en la cárcel de Ramo Verde. Además, le obliga a resarcir al país por 35.000 millones de dólares", *Diario Las Américas*, Au-

punity is such that it would seem that said company had never worked in Venezuela,[22] when the evidence is in sight, in the largest iron and concrete cemetery composed of monumental works, all unfinished,[23] but certainly paid,[24] that today can be seen throughout the national territory.

In any case, the globalization of the phenomenon of administrative corruption, a product of institutional corruption and the collapse of democracy, evidenced, among others, by the Odebrecht case, was what captured the attention of our continent when in 2018 it was held in Lima the *Octava Cumbre de las Américas*, whose central theme was, precisely, the "Democratic governance against corruption",[25] recognizing that "prevention and combat" against it is the key piece "for the strengthening of democracy and the rule of law in our countries".

There, the Heads of State recognized that: "Corruption weakens democratic governance, citizen trust in institutions, and has a negative impact on the effective enjoyment of human rights and the sustainable development of the populations of our hemisphere, as well as in other regions of the world".

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gust 15, 2018, *https://www.diariolasamericas.com/america-latina/tsj-el-exilio-ordena-18-anos-y-tres-meses-prision-maduro-corrupcion-n4160164*.

[22] See González, Jorge, *Odebrecht. La historia completa: los secretos de un escándalo de corrupción que desestabilizó a América Latina*, and Duran, Francisco, *Odebrecht. La empresa que capturaba gobiernos*, Kindel edition, *https://www.amazon.com.mx/Odebrecht-empresa-que-capturaba-gobiernosebook/dp/B07KF9C2BN*. It is not surprising, therefore, the decision of the Administrative Court of Cundinamarca, in Colombia, adopted in December 2018, condemning the company to a multi-million dollar fine (800,000 dollars), disqualifying the company for 10 years from contracting with public entities in Colombia. See the information in "Odebrecht es inhabilitada en Colombia y la multan con $251 millones", tvnNoticias, December 13, 2018, *https://www.tvn-2.com/mundo/suramerica/Odebrecht-inhabilitada-Colombia-multan-millones_0_5190231014.html*.

[23] See, for example, Suárez, Enrique, "Maduro: Obras inconclusas de Odebrecht en Venezuela serán terminadas", *El Impulso*, March 26, 2018, *http://www.elimpulso.com/featured/maduro-obras-inconclusas-odebrecht-venezuela-seran-terminadas*.

[24] See Oré, Diego, "Lista de las obras inconclusas de Odebrecht en Venezuela", *La Razón*, in *https://www.larazon.net/2017/06/lista-las-obras-inconclusas-odebrecht-venezuela/*.

[25] See *Redacción EC*, "Cumbre de las Américas: países suscriben Compromiso de Lima", El Comercio, April 14th, 2018, *https://elcomercio.pe/politica/cumbre-americas-paises-compromiso-lima-noticia-512110*. In 2018, in the same line of action, the Heads of State and Government meeting at the 30th Assembly of the African Union in Addis Ababa, Ethiopia launched a new campaign with a single and important purpose, which was to fight corruption through of the African Continent. See Kaninka, Samuel, "The African Union kicks off 2018 with an anti-corruption campaign", Transparency Intitution, June 26, 2018, *https://voices.transparency.org/the-african-union-kicks-off-2018-with-an-anti-corruption-campaign-b4c233eab262*; and at *http://www.viiicumbreperu.org/compromiso-de-lima-gobernabilidad-democratica-frente-a-la-corrupcion/*.

In this global scenario, therefore, it is not surprising that, during 2018, presidential candidates such as Luis Manuel López Obrador in Mexico, had focused their campaign speech on the purpose of "eradicating corruption and impunity," to that "there be transparency" —he said—,[26] adding in his speech, however, an affirmation that in my opinion is totally wrong, considering that corruption was supposedly the "result of the "neoliberal" political regime", even stating that: "the hallmark of neoliberalism is corruption",[27] and that in neoliberal regimes corruption is "the main function of political power".[28]

These statements, which initially appeared as referring to the heat of an electoral campaign in the specific context of the Mexican political process at the time, however, in April 2019 President López Obrador himself took it upon himself to generalize them, when he made reference to the unfortunate death of the president. Alan García from Peru, linking him to the Odebrecht case[29] and again linking corruption with liberalism.

With this we think that the president of Mexico took the wrong point when conceptualizing the phenomenon of corruption in the world, since in my opinion it can in no way be considered as the product of a specific government economic policy, and even less, of any "neoliberal" policy, understood as the one that advocates the development of the economy based on the free play of its market forces, product of the exercise of economic freedom, without interference or determining participation of the State.

Administrative corruption —and today the former candidate already in power, very possibly must already be realizing it—, is the result of institutional or political corruption, which corrodes the States, as a result of the malfunctioning of democracy when the control mechanisms are erased, turning what should be the "glass house" into an iron barracks, where transparency is replaced by opacity.

Attributing the phenomenon of corruption in a simplistic way to certain economic policies such as neoliberal policies could erroneously state, in

[26] See the various speeches by Andrés Manuel López Obrador in 2018, *https://www.google.com/search?q=lopez+obrador+discurso+zocalo&rlz=1C1CHBD_enUS787US787&oq=lopez+obrados+discursos+&aqs=chrome.3.69i57j0l5.11798j0j8&sourceid=chrome&ie=UTF-8.*

[27] See "Este es el discurso íntegro de López Obrador al tomar posesión", *Expansión*, December 1st, 2018, *https://adnpolitico.com/presidencia/2018/12/01/este-es-el-discurso-integro-de-lopez-obrador-al-tomar-posesion.* Similarly, in *https://www.lapagina.com.sv/internacionales/el-neoliberalismo-es-la-corrupcion-andres-manuel-lopez-obrador-al-asumir-como-presidente-de-mexico/.*

[28] *Idem.*

[29] See the news report "López Obrador toma el suicidio de Alan García para criticar corrupción y toma-el-suicidio-de-alan-garcia-para-criticar-corrupcion-y-neoliberalismo".

contrast, that a statist economic policy based on State intervention in the economy as regulator and owner of the means of production, would then be the best antidote against corruption and impunity.

This would be nothing more than a deductive fallacy, and to prove it, it is enough to remember what happened after 2000, in view of the entire contemporary world, precisely in Venezuela, where the largest and most depraved scheme and public system of corruption was developed that it has flourished throughout the history of the world (ancient, modern or contemporary), due to its magnitude and the bizarre levels of wasted public resources; precisely in a country in which, far from having developed neoliberal policies, what, on the contrary, has been developed during the last 20 years, was a statist, socialist, populist and militarist economic policy, where the State assumed total leadership of the economy , eliminated private initiative and destroyed private production, which materially does not exist today, turning the country's economic system into a totally public economy, led by a bureaucratized, amorphous, inefficient and corrupt mass, and which in twenty years squandered an oil income of more than 850,000 million dollars.[30]

Among those resources squandered by corruption, it is impossible not to mention, for example, what happened to the oil industry, turning the country that several decades ago was the largest oil exporter in the world, and that today continues to have the largest reserves oil companies in the world, in a country that does not even produce to supply local consumption,[31] there is already today a shortage of gasoline for cars. Today there is already a shortage of gasoline for cars. Nor can we fail to mention, for example, the 40,000 million dollars that were supposedly earmarked a few years ago for an electrical emergency plan, which was ignominiously squandered, plunging the country into total darkness, because of the blackout of several days that occurred in March of this year (2019),[32] which today has the country in a situation of electricity rationing.

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[30] See the information from a few years ago, in the report by Bermúdez, Ángel, "Cómo Venezuela pasó de la bonanza petrolera a la emergencia económica", *BBC News*, February 25, 2016, *https://www.bbc.com/mundo/noticias/2016/02/160219_venezuela_bonanza_petroleo_crisis_economica_ab.*

[31] See all the information in Brewer-Carias, Allan R., *Crónica constitucional de una destrucción. Concesión, nacionalización, apertura, constitucionalización, desnacionalización, estatización, entrega y degradación de la industria petrolera*, Caracas, Jurídica Venezolana Editorial, 2018, p. 730.

[32] See Brewer-Carías, Allan R., *Crónica constitucional de una Venezuela en las tinieblas 2018-2019*, Caracas-Panama, Olejnik-EJV Editorial, 2019, *http://allanbrewercarias.com/wpcontent/uploads/2019/04/188.-CRONICA-CONSTITUCIONAL-VZLA-EN-TINIEBLAS-Car%C3%A1tula-e-%C3%ADndice.pdf.*

That statist regime is, on the other hand, the only thing that explains why huge amounts of money, which were disposed of at random, coming from the income derived from the oil boom,[33] ended up openly financing electoral campaigns of presidential candidates and of another type, in almost all the countries of the continent; how far the dirty money traveled in suitcases and briefcases, on official planes, even to these southern lands.[34]

In short, this authoritarian political regime with a statist and centralized economy, a product of the institutional corruption of democracy, is also the only thing that explains, as announced in April 2019), that in a month —a single month— there would have been spent in a single agency of a state bank located in France (of the Development Bank of Venezuela), more than 6 million euros for the payment of cookies, food, and office supplies. This was alerted by the same French authorities.[35]

With this unpunished looting – these are but a few examples – the miracle of having converted one of the countries that twenty years ago was still one of the most prosperous and economically developed on the continent took place; in the most indebted and miserable country in the world,[36] which, as we indicated before, tragically occupies the highest level of corruption on the Continent, and among the most corrupt in the world.[37] And not precisely because of any neoliberal policy.

On the contrary, because of a policy that has led to everything, or almost everything, depending on the State and the actions of its Administration and its officials, which has developed an authoritarian political regime,

[33] It has been calculated in the National Assembly of Venezuela that in recent years the regime squandered between 300,000 and 400,000 million dollars. See the review "Aseguran que régimen de Maduro robó al menos $300 mil millones", *Diario Las Américas*, September 13, 2018, *https://www.diariolasamericas.com/america-latina/aseguran-que-regimen-maduro-robo-al-menos-300-mil-millones-n4162288.*

[34] See Tablante, Carlos and Tarre, Marcos, *El gran saqueo. Quiénes y cómo se robaron el dinero de los venezolanos*, Caracas, *La Hoja del Norte*, 2015.

[35] See in Morales, Maru, "Bandes Francia pagaba 6 millones de euros al mes para galletas e insumos de oficina", *CrónicaUno*, April 3, 2019, *http://cronica.uno/bandes-francia-pagaba-6-millones-de-euros-al-mes-para-galletas-e-insumos-de-oficina/.*

[36] See the review "Venezuela tiene el mayor índice de miseria en el mundo, según Bloomberg", Bloomberg Agency, February 19, 2018, *https://gestion.pe/economia/venezuela-mayor-indice-miseria-mundo-bloomberg-227585.*

[37] See the review "Venezuela, entre los 12 países más corruptos del mundo según Transparencia Internacional. Venezuela es el latinoamericano peor situado, en el puesto 169, al mismo nivel que Irak", *El Nuevo Diario*, February 21, 2018, at *https://www.elnuevodiario.com.ni/internacionales/456471-venezuela-corrupcion-transparencia-internacional/* and *https://www.transparency.org/news/pressrelease/el_indice_de_percepcion_de_la_corrupcion_2017_muestra_una_fuerte_presencia.*

with a perverted and distorted democracy, where no there is control between the powers, and lack of freedoms; where transparency disappeared, turning the Public Administration, for the citizen, into a great venal and blackmail center, before which, in order to receive the most minimal and elementary services, all citizens, starting with those on foot, have to pay in advance and immediately to receive the most basic services,[38] and the most serious, sometimes renouncing the exercise of their freedom in exchange for receiving gifts.

More tragic could not be what happened in Venezuela where, for example, the provision of the most precarious and basic health care services has been subject to the degree of support for the government; reaching the extreme that in the illegitimate presidential reelection of May 2018, the delivery of food and other subsidies to the less favored population, only occurred in exchange for people voting for the government candidate.[39] On this, even, in March 2019, a group of Cuban doctors, among those hired during the last twenty years to work without a medical license in Venezuela in the regime's health care programs in popular areas, came to publicly denounce that they were ordered "only to provide medical services to those who voted for Maduro, and to deny such services to those who did not express support for the government".[40]

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[38] See Brewer-Carías, Allan R., "De la Casa de Cristal a la Barraca de Hierro: el Juez Constitucional Vs. El derecho de acceso a la información administrativa", *Revista de Derecho Público*, Caracas, No. 123, July-September, 2010, pp. 197-206.

[39] See the news report by Wyss, Jim and Weddle, Cody, "Maduro usa el hambre como arma política a cambio de votos", *El Nuevo Herald*, May 16, 2018. The report includes the assessments of Luis Lander who stated that: "in a country where the majority depends on subsidies to survive, the system has become a powerful and pernicious electoral tool," which "is clearly being used to threaten to voters," who fear "that if they don't vote, they could lose their government-subsidized food". Similarly, the assessments of Michael Penfold are collected, when he stated that the perverse mechanism "not only encourages government supporters to go to the polls, he says, but also intimidates opposition voters not to bite the hand that literally feeds", adding that while vote buying is as old as elections themselves, "this new form of clientelism is possibly the most developed and authoritarian in Latin America, and represents a colossal threat to the return of democracy in Venezuela", *https://www.elnuevoherald.com/noticias/mundo/america-latina/venezuela-es/article211236754.html.*

[40] See Casey, Nicholas, "Trading Lifesaving Treatment for Maduro Votes", *The New York Times*, New York, March 17, 2019, pp. 1 and 18. The report includes statements from 16 Cuban doctors, where they expose with all dramatism what happened, that is, "a system of deliberate political manipulation in which their services were used to strengthen the votes of the United Socialist Party of Venezuela (PSUV), often through coercion", using many tactics, "from simple reminders to vote for the government to denying treatment to opposition supporters who have life-threatening illnesses". "Cuban doctors said they were ordered to go door to door in poor neighborhoods to offer medicine and warn residents that access

The causes of corruption, therefore, are very different from what President López Obrador pointed out, and they have to do, we insist, with the malfunction of the control mechanisms established in democratic regimes, because in authoritarian regimes they simply they disappear; that is to say, they have to do, precisely, with the malfunction of the aforementioned essential elements and components of democracy, among which the usual principle stands out, that of the separation of powers, and that of the independence and effective autonomy of the same, and among them, the Judiciary, whose absence and distortion is what leads to impunity; In short, they have to do with the limitations imposed on access to public information and the malfunctioning of systems to demand accountability of public management.[41]

And this was precisely what happened in Venezuela —and we cite our country as an example, so as not to get lost in theories—, a country that was once envied for the stability of its democratic institutions, where there was a total depravity of State institutions,[42] which, once corrupted, denatured the principle of the democratic legitimacy of the representatives of the people; they distorted the electoral system; they neutralized or annihilated the principle of the separation of powers; they submitted the powers of the State to the control of the Executive; they disrupted the principle of

to medical services would be cut off if they did not vote for Maduro or his candidates. Many said they were instructed by their superiors to make the same threats in closed-door consultations with patients seeking treatment for chronic illnesses". See also the report in Spanish of Casey, Nicholas, "Nicolás Maduro usó a médicos cubanos y a los servicios de salud para presionar a los votantes", *The New York Times.es*, March 17, 2019, *https://www.nytimes.com/es/2019/03/17/maduro-voto-medicinas-cuba/*. On the same topic see the news report "Votos a cambio de comida y medicinas, el método electoral de Maduro en 2018", *El Periódico*, March 18, 2019, *https://www.elperiodico.com/es/internacional/20190318/votos-comida-medicinas-metodo-electoral-maduro-7360323*.

[41] For this reason, it was precisely that the Heads of State and Government of the American countries at the aforementioned *Octava Cumbre de las Americas de Lima*, in April 2018, committed to adopting institutional measures to "strengthen the democratic institutions for the prevention and combat of corruption in the Hemisphere", among which are the strengthening of "judicial autonomy and independence in order to promote respect for the rule of law and access to justice, as well as to promote and promote policies of integrity and transparency in the judicial system," the consolidation of "the autonomy and independence of the superior control bodies", and the promotion of "measures that promote transparency and accountability" in all orders related to the management of public resources. See "Cumbre de las Américas: países suscriben Compromiso de Lima", *El Comercio*, April 14, 2018, *https://elcomercio.pe/politica/cumbre-americas-paises-compromiso-lima-noticia-512110*.

[42] See Brewer-Carías, Allan R., *Principios del Estado de derecho. Aproximación histórica*, Miami, EJV International, 2016, *https://www.mdc.edu/catedra/img/Principios%20del%20estado%20de%20derecho%20-%20Brewer%20Carias.pdf*.

political decentralization, centralizing power, and thereby eliminated the very possibility of citizen participation; they eliminated the right of access to information and any possibility for citizens to demand transparency in public management; they eliminated the autonomy of the Judiciary; and they turned the Constitutional Judge[43] into the most perverse instrument of authoritarianism[44] to mold and distort the Constitution. The Constitutional Judge, abandoning his essential role of preserving constitutional supremacy, went on the contrary to ensure impunity for his violations, after touching the regime, globally, in a paradoxical and bizarre "judicial dictatorship[45] to destroy[46] and corrupt democracy".

This process even led the Supreme Court, for example, to close any possibility of transparency, first, in 2010, by denying the citizen's right of access to the most elementary administrative information such as that relating to the remuneration paid to officials, nothing less that of the Office of the Comptroller General of the Republic, considering that in the face of such citizen right that was exercised, the right to privacy or "economic intimacy" of officials was the one that was unusually deprived;[47] and, shortly after, in

[43] See Brewer-Carías, Allan R., *Práctica y distorsión de la justicia constitucional en Venezuela (2008 2012)*, Caracas, Academy of Political and Social Sciences, Metropolitan University-Jurídica Venezolana Editorial, 2012, Justice Collection, No. 3, Access to Justice; *La patología de la justicia constitucional*, Third Edition, Caracas, EJV Editorial, 2015.

[44] See Brewer-Carías, Allan R., *Crónica sobre la "In" Justicia Constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Caracas, EJV-Central University of Venezuela, 2007, Public Law Institute Collection, No. 2; "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009)" *Revista de Administración Pública*, Madrid, No. 180, 2009, pp. 383-418 and in IUSTEL, *Revista General de Derecho Administrativo*, Madrid, No. 21, June 2009.

[45] See about it Brewer-Carías, Allan R., *Dictadura judicial y perversión del Estado de derecho*, Caracas, EJV Editorial, 2016, Estudios Políticos Collection, No. 13.

[46] See Brewer-Carías, Allan R., *Dismantling Democracy. The Chávez Authoritarian Experiment*, New York, Cambridge University Press, 2010; *Estado totalitario y desprecio a la ley. La desconstitucionalización, desjuridificación, desjudicialización y desdemo-cratización de Venezuela*, Second Edition, Foreword by José Ignacio Hernández, Caracas, Public Law Foundation-EJV, 2015; *Authoritarian Government v. The Rule of Law, Lectures and Essays (1999-2015) on the Venezuelan Authoritarian Regime Established in Contempt of the Constitution*, Caracas, Public Law Foundation-EJV, 2014.

[47] The Constitutional Chamber went so far as to argue that in Venezuela "there is no general law that requires that the salaries of government officials be made public, while in other countries, such as the United States of America or Canada, most salaries of high-ranking officials of the federal government are approved and set by law, which implies mandatory advertising. On the other hand, in our legal system, the information on the remuneration of public officials is indicated globally in the budget items that are included annually in the Budget Law, where the amounts assigned to each entity or body of the public administration

2015, to deny the citizen's right to know the country's economic indicators, freeing the Supreme Court from the Central Bank of its obligation to publish them,[48] thus making Venezuela, since 2015, a country in which simply there are no known official economic indicators.[49]

In this unrestrained process that we have just pointed out, developed against the express provisions of the Constitution, it was the Constitutional Judge himself who carried out a continuous *coup d' etat*,[50] in Venezuela, which also occurs when the organs of the State break against the Constitu-

for staff remuneration; or in the Manuals of Positions and Salaries, in which it is not distinguished to which official in particular the remuneration belongs to, since this is information that belongs to the intimate sphere of each individual. On the other hand, the reserved nature of the income tax declaration, or of the declaration of assets that public officials make before the Office of the Comptroller General of the Republic demonstrates that such information is not publicly disclosed data, since it is of information that is contracted to the private sphere or economic intimacy of officials". See the Judgment of the Constitutional Chamber of the Supreme Court of Justice, *Caso Asociación Civil Espacio Público, July 15, 2010, No. 745, http://www.tsj.gov.ve/decisiones/scon/Julio/745-15710-2010-09-1003.html.* See, on that Judgment, Brewer-Carías, Allan R., "De la casa de cristal a la barraca de hierro…", *cit.*

[48] See Judgment No. 935 of August 4, 2015, *Caso Asociación Civil Transparencia Venezuela*, *http://historico.tsj.gob.ve/decisiones/spa/agosto/180378-00935-5815-2015-2015-0732.HTML.* See, on that Judgment, Brewer-Carías, Allan R., "Secrecy and lies as State policy and the end of the obligation of transparency. How the Supreme Court of Justice unconstitutionally freed the Central Bank of Venezuela from fulfilling its legal obligation to inform the country about economic indicators, snatching from citizens their rights to government transparency, access to justice and access to administrative information", August 10, 2015, *http://www.allanbrewercarias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea3/Content/Brewer.%20LO%20SECRETO%20Y%20LA%20MENTIRA%20COMO%20POL%C3%8DTICA%20DE%20ESTADO%20Y%20EL%20FIN%20DE%20LA%20OBLIGACI%C3%93N%20DE%20TRANSPARENCIA.pdf.*

[49] It is enough to consult the prestigious magazine *The Economist*, to verify how on its last page, where the economic indicators of the countries of the world are always published, Venezuela ceased to exist for these purposes. At the end of May 2019, however, for the first time in several years, the Central Bank of Venezuela published some economic indicators, with which the catastrophe that had occurred in the country in recent years was confirmed. *See* the Forbes report, "Banco Central confirma hundimiento de la economía venezolana", *Msn.noticias*, May 29, 2019, *https://www.msn.com/es-mx/noticias/otras/banco-central-confirma-hundimiento-de-la-econom%C3%ADa-venezolana/ar-AAC5k7k.*

[50] See Brewer-Carías, Allan R., *El golpe a la democracia dado por la Sala Constitucional. De cómo la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela impuso un gobierno sin legitimidad democrática, revocó mandatos populares de diputada y alcaldes, impidió el derecho a ser electo, restringió el derecho a manifestar, y eliminó el derecho a la participación política, todo en contra de la Constitución*, Second Edition, Foreword by Francisco Fernández Segado, Caracas, EJV, 2015, Estudios Políticos Collection, No. 8.

tion.[51] And it was in this way that, in Venezuela, the Constitutional Chamber of the Supreme Court of Venezuela, always acting under the control of the Executive Power, even came to arrogate all the power of the State, having assumed, in the midst of the most global institutional corruption, leadership in the process of depredation of the country's democratic institutions, entrenching authoritarianism.

All this increased two years ago, after the victory of the opposition in the parliamentary elections of December 6, 2015, from which the Constitutional Judge assumed the precise mission of preventing popular representation, embodied in the newly elected Assembly National, could come to exercise its constitutional functions.

Until then the authoritarian regime had been used to having total power, which is why it was obvious that its leaders could not tolerate the democratic opposition controlling the National Assembly. For this reason, as of 2016,[52] the regime defined as a strategy that the Supreme Court be the one to annihilate the National Assembly, which it began to execute even before it was installed in January 2016, suspending the proclamation of the elected deputies in a State of the Republic (Amazonas), and thus break the qualified majority that the opposition had achieved in parliament. The Supreme Court, months later, after said deputies were sworn in on July 28, 2016, declared, not only that said swearing-in was invalid, non-existent, and ineffective, but also that all "acts or actions that in the future I dictate the National Assembly" would also be null and void.[53]

This was followed by a successive series of rulings by the Constitutional Judge declaring in "contempt" not the deputies who allegedly failed to comply with a precautionary judicial measure, but the National Assembly *in toto*,[54] as an organization —which has no legal basis whatsoever—, and also

[51] See Valadés, Diego, *Constitución y democracia*, Mexico, UNAM, 2000, p. 35; and "La Constitución y el Poder" in Valadés, Diego and Carbonell, Miguel (Coordinators), *Constitucionalismo Iberoamericano del siglo XXI*, Mexico, Chamber of Deputies-UNAM, Mexico 2000, p. 145.

[52] See Judgment of the Electoral Chamber No. 260 of December 30, 2015, *http://historico.tsj.gob.ve/decisiones/selec/diciembre/184227-260-301215-2015-2015-000146.HTML*. See comments in Brewer-Carías, Allan R., *Dictadura Judicial y perversión del Estado de derecho*, Madrid, Iustel, 2017, pp. 154 et seq.

[53] See Judgment of the Electoral Chamber No. 108 of August 1, 2016, *http://www.tsj.gov.ve/decisiones/scon/marzo/162025-138-17314-2014-14-0205.HTML*. See comments in Brewer-Carias, Allan R., *Dictadura Judicial y perversión…*, *cit.*, pp. 33 et seg.

[54] Beginning with Judgment No. 808 of September 2, 2016. See *http://historico.tsj.gob.ve/decisiones/scon/septiembre/190395-808-2916-2016-16-0831.HTML*. See comments in Brewer-Carias, Allan R., *Dictadura Judicial y perversión…", cit.*, pp. 191 et seg.

nullified all his future actions, which was followed by the decision of the Executive Power to simply take the budget away from the National Assembly, denying it the resources for its operation.[55]

That is to say, through some one hundred judgments issued as of 2016, the Constitutional Chamber annihilated popular representation,[56] and produced a "serious alteration of the democratic order", as a result of the political or institutional corruption of the regime, against which it not only reacted the National Assembly itself,[57] but rather the Secretary General of

[55] See Zavala, Yelesza, "Maduro: Si la AN está fuera de ley yo no puedo depositarle recursos", *Noticiero Digital*, August 2th, 2016, *http://www.noticierodigital.com/forum/viewtopic.php?t=38621*.

[56] Thus, successively, the Constitutional Chamber proceeded (i) to declare the unconstitutionality of all - if all - the laws passed by the National Assembly since it was installed in January 2016; (ii) to subject the legislating function of the National Assembly to obtaining an Approval by the Executive Power; (iii) to eliminate all political control functions of the National Assembly over the government and the Public Administration, and therefore, any hint of parliamentary control of administrative corruption; (iv) to eliminate the possibility of approving votes of censure against ministers; (v) to eliminate the obligation of the President of the Republic to present his Annual Report to the National Assembly, with the Constitutional Chamber itself assuming such function; (vi) to eliminate the legislative function in budget matters, converting the Budget Law into an executive decree to be presented, not before the National Assembly, but before the Constitutional Chamber, with which budgetary discipline was disregarded; (vii) to eliminate even the power of the National Assembly to issue political opinions as a result of its deliberations, annulling all the Agreements that were adopted; (viii) to eliminate the power of the Assembly to review its own acts and to be able to revoke them; and finally (ix) to eliminate parliamentary control over the declaration of states of exception. See the comments on all these sentences in. Brewer-Carías, Allan R., *Dictadura judicial y perversión…, cit.; La consolidación de la tiranía judicial. El Juez Constitucional controlado por el Poder Ejecutivo, asumiendo el poder absoluto*, Caracas-New York, JVI, 2017, Estudios Políticos Collection, No. 15.

[57] Given all this, the National Assembly certainly reacted in May 2016, "Acuerdo exhortando al cumplimiento de la Constitución, y sobre la responsabilidad del Poder Ejecutivo Nacional, del Tribunal Supremo de Justicia y del Consejo Nacional Electoral para la preservación de la paz y ante el cambio democrático en Venezuela", May 10, 2016, *http://www.asambleanacional.gob.ve/uploads/documentos/doc_d75ab-47932d0de48f142a739ce13b8c43a236c9b.pdf*, denouncing precisely the rupture of the constitutional and democratic order in the country, at the hands of the Constitutional Judge and the Executive Power, which, corrupting the institutions of the State, disregarded popular sovereignty. (This Agreement of the National Assembly was specifically analyzed by the very important group of the 22 former Latin American presidents that make up the *Iniciativa Democrática de España y las Américas* (IDEA), in a Declaration dated May 13, 2016, in which they highlighted all the signs of corruption of the rule of law in the country, demanding to the President of Venezuela, to respect "without restrictions the mandate for democratic and constitutional change decided by the majority of the people of Venezuela on December 6, 2015", urging him not to use "the other powers of the State to prevent or hinder actions that constitutionally advances the National Assembly to resolve the serious crisis that afflicts the country", finally denouncing "the partisan political activism of the Supreme Court of Justice", and in general, "the disregard by the

the Organization of American States, Dr. Luis Almagro, who proceeded to request (in May 2016) the convening of the Permanent Council of the Organization to apply to Venezuela precisely the Inter-American Democratic Charter (art. 20).[58]

To this end, he denounced, even though by then it was nothing new,[59] that in the country there was no longer "a clear separation and independence of public powers" giving rise to "one of the clearest cases of cooptation of the Judicial Power by the Executive Power",[60] with a Supreme Court integrated in a manner "completely vitiated both in the appointment procedure and by the political bias of practically all its members".[61] Those were his words.

In this situation, as Secretary General Almagro himself expressed in August 2016, what was seen in Venezuela was simply "the unfortunate end of democracy", that is, "the end of the rule of law", considering —he said— that "no regional or subregional forum could ignore the reality that *today in Venezuela there is no democracy or rule of law*".[62]

National Executive and by the Supreme Court of Justice, of the authority of the National Assembly, a representative body of the Venezuelan people, whose legitimacy derives from the majority expression of the electorate and of popular sovereignty", See IDEA, "Declaración sobre la ruptura del orden constitucional y democrático en Venezuela", May 13, 2016, *http://www.fundacionfaes.org/es/preview/no-ticias/45578*. The legislative Agreement adopted, in any case, was ipso facto suspended in its effects by the Constitutional Judge himself (Judgment No. 478 of May 14, 2016) when deciding a crazy action for constitutional amparo attempted by the State against the State, that is to say, by the lawyer of the Republic (Attorney General of the Republic), against the deputies of the National Assembly, *http://historico.tsj.gob.ve/decisiones/scon/junio/188339-478-146-16-2016-16-0524.HTML*.

[58] See the communication of the Secretary General of the OAS of May 30, 2016 with the *Informe sobre la situación en Venezuela en relación con el cumplimiento de la Carta Democrática Interamericana*, *oas.org/documents/spa/press/OSG-243.es.pdf*.

[59] This, of course, is nothing new, as we already observed in 2002: Brewer-Carías, Allan R., *La crisis de la democracia venezolana. La Carta Democrática Interamericana y los sucesos de abril de 2002*, Caracas, Los Libros de El Nacional, 2002, Ares Collection. See also a summary of the violations of the Democratic Charter until 2012 in Brewer-Carias, Allan R., and Aguiar, Asdrúbal, in *Historia Inconstitucional de Venezuela. 1999-2012*, Caracas, EJV, 2012, pp. 511-534.

[60] See the communication of the Secretary General of the OAS of May 30, 2016 with the *Informe sobre la situación en Venezuela en relación con el cumplimiento de la Carta Democrática Interamericana*, p. 73, *oas.org/documents/spa/press/OSG-243.es.pdf*.

[61] *Ibidem*, p. 127.

[62] See the text of the presentation by Secretary General Luis Almagro before the OAS Permanent Council, June 23, 2016, *http://www.elnacional.com/politica/PresentacindelSecretarioGeneraldelaOEAante_NACFIL20160623_0001.pdf;* and the text of the open letter from Secretary General Luis Almagro to Leopoldo López, *Lapatilla.com*, August 22, 2016, *http://www.lapatilla.com/site/2016/08/22/almagro-a-leopoldo-lopez-tu-injusta-sentencia-marca-un-hito-el-lamentable-final-de-la-democracia-carta/*.

And this was evident, because the global institutional corruption of the Venezuelan State had already had perverse effects in those international forums, particularly in the OAS, through the control of the votes of the States in exchange for the oil bill, particularly before the arrival of the Dr. Almagro to the General Secretariat.

In order not to speculate, it is enough to recall the explanations given in 2014 by the former Foreign Minister of Peru, Luis Gonzalo Posada,[63] touching on one of the most publicized secrets about the operation of the OAS, which, according to what he said then, at that time was that the body that "defended the interests of the Venezuelan regime", referring then to the shameful decision adopted a few days earlier, with the vote of 22 of the 38 countries that expressed themselves, which blindly followed the line of the Venezuelan government, rejecting the invitation that the government of Panama had asked the Venezuelan deputy María Corina Machado to speak about the political situation in the country and about the government's repression against students. That rejection was described by the former foreign minister of Peru as the consummation, in the OAS, of a "chavista coup d'état"; adding that —I quote—:

> Today, Chavismo has demonstrated its immense power within the organization by managing the 17 Caribbean votes through cheap oil, in addition to that of its political partners [at the time] such as Argentina, Brazil, Uruguay, Ecuador and Bolivia. All of them as a whole make an absolute majority of 22 votes against 11 countries, which are not in that line.

From this, the Peruvian foreign minister added, he was "before an institution controlled through oil influence", which had —he said— "the patronage of 3 countries that are apparently committed to democracy, but that at the moment of truth they constitute a center of protection for an authoritarian political model".

He was referring "directly to Brazil, Argentina and Uruguay", adding that this was very serious: "because any substantive issue for the American countries cannot be dealt with if it does not have the approval of Venezuela, who has governed this institution for many years".

All of this was denounced by the Foreign Minister of Peru in 2014, considering that the General Secretary at the time owed "his election to Chavismo", and affirming that the OEA had ended up being "an organiza-

[63] See Cruz, Rodrigo, "Hoy se ha consumado un golpe de estado chavista en la OEA. El ex canciller Luis Gonzales Posada aseveró que el organismo interamericano defiende los intereses del régimen venezolano", *El Comercio*, Lima, March 21, 2014, *http://elcomercio.pe/politica/internacional/hoy-se-ha-consumado-golpe-estado-chavista-oea-noticia-1717550*.

tion formed by a totalitarian regime", constituting it —he added— a "page of darkness that is being written in Latin America" that could not be "kept silent".[64]

This tragic panorama of international institutional corruption, which fortunately began to change as a result of the election of Dr. Luis Almagro as Secretary General of the Organization, at the time, however, had several consequences, among which was, for example, the election of some of the judges of the Inter-American Court of Human Rights in 2012,[65] who in some cases, unfortunately, did not know or did not want to become independent from the blackmail of the authoritarian regime that elected them.

This, in our opinion, occurred in at least one case that we know well, the case of *Allan R. Brewer-Carías vs. Venezuela*, decided in 2014,[66] with the votes of the national judges of Brazil and Uruguay, countries that at that time, in the words of former Foreign Minister Gonzalo Posada (along with Uruguay and Argentina), had become "a center for the protection of a political model authoritarian" of Venezuela; who were joined by the national judge of Colombia, a country that even though Gonzalo Posada did not include him in the protection group of the Venezuelan authoritarian model, had Hugo Chávez as "his new best friend", in the middle of the peace process that he was advancing under his mantle;[67] and in addition, the national judge of Peru, who at the time the sentence was handed down was nothing less than a candidate for the general secretariat of the OAS itself, and who,

[64] *Idem*

[65] At the XLII OEA General Assembly held in Cochabamba, in addition to the distinguished and honorable Judge Eduardo Ferrer Mac-Gregor (Mexico), Sirs. Humberto Sierra Porto (Colombia) and Roberto de Figueiredo Caldas (Brazil) were elected as judges, who were added to the four judges who were in office, who were the honorable and distinguished judges Manuel Ventura Robles (Costa Rica) and Eduardo Vio Grossi (Chile), and Sirs. Diego García Sayán (Peru); and Alberto Pérez Pérez (Uruguay).

[66] *See* the sentence in *http://www.corteidh.or.cr/docs/casos/articulos/seriec_278_esp.pdf.*

[67] Expression used by the then candidate Juan Manuel Santos, and later president of Colombia in relation to the President of Venezuela, See the news report "Santos dice que Chávez es "su nuevo mejor amigo. Asegura además que si bien ninguno de los dos ha sido "santo de la devoción" del otro, él decidió que de llegar a la presidencia debía mejorar las relaciones con su vecino, lo cual comenzó en agosto con el restablecimiento de los lazos diplomáticos", *Revista Semana*, November 7, 2010, *http://www.semana.com/mundo/articulo/santos-dice-chavez-su-nuevo-mejor-amigo/124284-3*. This link continued later, after the death of Chávez. See, for example, the news report "Colombia y Venezuela, de nuevo mejores amigos. Cancilleres y ministros de ambos países evaluaron las cooperaciones en seguridad, energía y comercio", *Revista Semana*, August 2nd, 2013, *http://www.semana.com/nacion/ar-ticulo/colombia-venezuela-nuevo-mejores-amigos/352865-3*.

while judging the States, was in campaign sought votes from the same States to support his candidacy.[68]

The issuance of that sentence also coincided with the exercise of the most open and undue political pressure that Venezuela exerted against the Inter-American Court of Human Rights itself, expressed by the then Foreign Minister, Nicolás Maduro in the text of the denunciation of the American Convention on Human Rights addressed in 2012[69] to the Secretary General of the OEA,[70] where he accused the Inter-American Com-

[68] In other words, the judge who was supposed to judge the States was campaigning to seek their support, beginning with Venezuela and its allies, which led to the issuance of a "Certificate of Withdrawal" by the honorable Judges Eduardo Vio Grossi and Manuel Ventura, expressing "their disagreement" with the misguided decision to allow the judge candidate for the OAS Secretariat to participate in the deliberations of the sentences.

[69] The complaint, formulated by means of communication No. 125 of September 6, 2012, was made in execution, even of the warrants that the Constitutional Chamber had made to the Executive both in 2008 -see the judgment of the Constitutional Chamber No. 1,939 of December 18 of 2008 known as: *Abogados Gustavo Álvarez Arias y otros*, and which should rather have been called the *Estado de Venezuela vs. Corte Interamericana de Derechos Humanos*, because Mr. Álvarez and the others, in reality, but the lawyers of the State (Office of the Attorney General of the Republic In it, the Chamber declared unenforceable in the country the ruling that the First Inter-American Court of Human Rights had issued four months earlier, on August 5, 2008, in the *Apitz Barbera y otros ("Corte Primera de lo Contencioso Administrativo") vs. Venezuela*, in which the Venezuelan State had been condemned for violating the rights to due process of some judges of the First Court of Administrative Litigation, who had been removed from their positions without any judicial guarantees. See Brewer-Carias, Allan R., "La interrelación entre los Tribunales Constitucionales de América Latina y la Corte Interamericana de Derechos Humanos, y la cuestión de la inejecutabilidad de sus decisiones en Venezuela", in Bogdandy, Armin von; Piovesan Flavia and Morales Antoniazzi, Mariela (Coordinators), *Direitos Humanos, Democracia e Integraçao Jurídica na América do Sul*, Lumen Juris, Rio de Janeiro 2010, pp. 661-670; and in Anuario Iberoamericano de Justicia Constitucional, Madrid, No. 13, 2009, pp. 99-136-; as in 2012. See Judgment of the Constitutional Chamber No. 1547 dated October 17, 2011 *Estado Venezolano vs. Corte Interamericana de Derechos Humanos*), in *http://www.tsj.gov.ve/decisiones/scon/Octubre/1547-171011-2011-11-1130.html*, dictated on the occasion of another "unnamed action of control of constitutionality" that was tried again by the lawyers of the State against another sentence of the Inter-American Court of Human Rights, this time the one of September 1, 2011 dictated in the case Leopoldo López vs. State of Venezuela, in which the Inter-American Court of Human Rights had condemned the Venezuelan State for the violation of the right to passive suffrage of former Mayor Mr. Leopoldo López committed by the Comptroller General of the Republic by administratively establishing a "penalty" of disqualification political, against the same, considering that said political right according to the Convention (art. 32.2) could only be restricted, by means of a judicial sentence that imposes a criminal sentence, ordering the revocation of unconventional decisions.

[70] See the text in *http://www.minci.gob.ve/wp-content/uploads/2013/09/Carta-Retiro-CIDH-Firmada-y-sello.pdf*. See, among others, Ayala Corao, Carlos, "Inconstitucionalidad de la denuncia de la Convención Americana sobre Derechos Humanos por Venezuela", *Revista Eu-*

mission and Court of being "kidnapped by a small group of unscrupulous bureaucrats" who had turned the Inter-American System into a "political weapon designed to undermine the stability" of the country, "adopting a line of interfering action in the internal affairs" of the government, and of ignoring, to decide the cases, that it was necessary "to exhaust the internal resources of the State".

And the most serious thing was that in order to substantiate that accusation, the then Chancellor insolently came to refer not only to several decided cases (*the Ríos, Perozo and other cases; Leopoldo López; Usón Ramírez; Raúl Díaz Peña*), but also to a case that was pending decision before the Court, as was precisely the case mentioned above, *Allan R. Brewer-Carías v. Venezuela*.

Regarding that case, in particular, the then Foreign Minister Maduro, in his communication, falsely stated that he himself had been "admitted by the Commission without the complainant —referring to Allan R. Brewer-Carias— having exhausted domestic remedies", which was false, and that the Commission had urged the Venezuelan State to "adopt measures to ensure the independence of the judiciary" that was already degraded, accusing the Commission and the Court of having —we quote— an "irregular behavior unjustifiably favorable Brewer Carias," which —said the then foreign minister— from "the mere admission of the case, underpinned the international smear campaign against Venezuela, accusing it of political persecution.

The message of the elector State of the newly elected judges, against the plaintiff Allan R. Brewer-Carias, against the case before the Court and against the judges themselves, could not be clearer, warning them about the "important" and "serious" which was the Brewer-Carias case, particularly in relation to the issue of the exhaustion of domestic resources.

In this situation, it is not difficult to imagine what happened two years later, when the sentence was issued (No. 277 May 26, 2014) in the aforementioned case *Allan R. Brewer-Carías vs. Venezuela*,[71] in which, with the joint negative vote of the honorable Judges Manuel E. Ventura Robles (Costa

ropea de Derechos Fundamentales, Valencia, Institute of Public Law, No. 20/2º semester 2012; in *Estudios Constitucionales*, Center for Constitutional Studies of Chile, University of Talca, year 10, No. 2, 2012; *Revista Iberoamericana de Derecho Procesal Constitucional*, Ibero-American Institute of Constitutional Procedural Law and Porrúa, Mexico, No. 18, July-December, 2012; *Revista de Derecho Público*, Caracas, No. 131, July-September 2012; *Anuario de Derecho Constitucional Latinoamericano 2013*, Konrad Adenauer Stiftung – Universidad del Rosario, Bogota, 2013, *www.kas.de/uruguay/es/publications/20306/* and *www.juridicas.unam.mx/publica/rev/cont.htm?=dconstla.*

[71] See the sentence in *http://www.corteidh.or.cr/docs/casos/articulos/seriec_278_esp.pdf*. See about this sentence Brewer-Carías, Allan R., *El Caso Allan R. Brewer-Carías vs. Venezuela ante la Corte Interamericana de Derechos Humanos. Estudio del caso y análisis crítico de la errada sentencia de la*

Rica) and Eduardo Ferrer Mac-Gregor Poisot (Mexico), which is the only good thing about the ruling, the Inter-American Court, ignoring their most traditional jurisprudence established since 1987 in the case of *Velásquez Rodríguez v. Honduras*,[72] simply ordered the filing of the file, ignoring that Brewer-Carias had exhausted the only domestic remedy available, which was the request for annulment or criminal protection,[73] denying him his right of access to international justice; and instead protecting a corrupt State,[74] which

Corte Interamericana de Derechos Humanos No. 277 de 26 de mayo de 2014, Caracas, EJV Editors, 2014, Opiniones y Alegatos Jurídicos Collection, No. 14.

[72] See Inter-American Court of Human Rights (IACHR), *Velásquez Rodríguez Vs. Honduras. Preliminary Exceptions. Judgment of June 26, 1987*, Series C, No. 1. In said case, the Court considered the following: "91. The rule of prior exhaustion of domestic remedies in the sphere of international human rights law has certain implications that are present in the Convention. Indeed, according to it, the States Parties are obliged to provide effective judicial remedies to victims of human rights violations (art. 25), remedies that must be substantiated in accordance with the rules of due process of law (art. 8.1), all within the general obligation of the States themselves, to guarantee the free and full exercise of the rights recognized by the Convention to all persons under their jurisdiction (art. 1). Therefore, when certain exceptions to the rule of non-exhaustion of domestic remedies are invoked, such as the ineffectiveness of such remedies or the inexistence of due legal process, not only is it being argued that the aggrieved party is not obliged to file such remedies, rather, the State involved is being indirectly accused of a new violation of the obligations contracted by the Convention. In such circumstances, the issue of domestic remedies is appreciably close to the merits".

Therefore, ultimately, as Professor Héctor Faúndez observed, when I refer to the case *Allan R. Brewer-Carias v. Venezuela*, "Curiously, the judgment of the Inter-American Court, departing from its previous practice, failed to examine this preliminary objection together with the merits of the dispute, in order to determine whether, in fact, the alleged victim had been the object of the arbitrary exercise of public power, without there being effective remedies available to remedy that situation, or without the victim having access to those remedies. As the dissenting judges very well observe, this is the first time in the history of the Court that it does not enter to know the merits of the litigation to decide if a preliminary objection is admissible due to lack of exhaustion of internal remedies". See Faundez Ledesma, Héctor, "El agotamiento de los recursos de la jurisdicción interna y la sentencia de la Corte Interamericana de Derechos Humanos en el caso: Brewer-Carías (Sentencia n° 277, May, 26 2014)", *Revista de Derecho Público*, Caracas, No. 139, 2014, p. 216.

[73] Judges Ferrer Mac Gregor and Ventura Robles, in their Joint Negative Opinion, were clear and emphatic in considering that "In the present case, Mr. Brewer's representatives used the means of challenge provided for in Venezuelan legislation – appeals for absolute annulment – in order to guarantee their fundamental rights in criminal proceedings" (Paragraph 50).

[74] With the favorable vote of Judges Humberto Antonio Sierra Porto (Colombia), President and Speaker; Roberto F. Caldas (Brazil), Diego García-Sayán (Peru) and Alberto Pérez Pérez (Uruguay). See the sentence in *http://www.corteidh.or.cr/docs/casos/articulos/se-riec_278_esp.pdf*. Judge Eduardo Vio Grossi, on July 11, 2012, as soon as the case was presented before the Court, very honorably excused himself from participating in it in accordance with

had also systematically flouted the Court's own decisions. This, in its sentence, however, refrained from judging what was more than proven,[75] which was that in Venezuela there was no autonomous and independent Judicial Power or Public Ministry.[76] In this situation, ordering the victim to go to his country, to lose his freedom, in order to then "go to those resources", as the Court itself had decided countless times, was nothing more than "a formality that makes no sense".[77]

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articles 19.2 of the Statute and 21 of the Rules of Procedure, both of the Inter-American Court, recalling that in the 1980s he had worked as a researcher at the Public Law Institute of the Central University of Venezuela, when Brewer-Carias was its Director, specifying that although this had happened quite some time ago, "I would not want that This fact could cause, if it were to participate in this case in question, some doubt, however minimal, about the impartiality", both his "and very especially that of the Court". The excuse was accepted by the President of the Court on September 7, 2012, after consulting with the other Judges, considering it reasonable to agree to what was requested.

[75] Two months before the sentence was handed down, regarding the situation of the judiciary in Venezuela, completely corrupted due to lack of independence and autonomy, the International Commission of Jurists reported "the lack of independence of justice in Venezuela, beginning with the Public Ministry" that act "without guarantees of independence and impartiality from other public powers and political actors". In *http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/VENEZUELA-Informe-A4-elec.pdf.*

[76] See, among other works, Brewer-Carias, Allan R., "La progresiva y sistemática demolición institucional de la autonomía e independencia del Poder Judicial en Venezuela 1999-2004", *XXX Jornadas J.M Domínguez Escovar, Estado de derecho, Administración de justicia y derechos humanos*, Barquisimeto, Institute of Legal Studies of the Lara State, 2005, pp. 33-174; "La justicia sometida al poder [La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006)]", *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007*, Madrid, Villanueva University Center-Marcial Pons, 2007 pp. 25-57, and *Derecho y democracia. Cuadernos Universitarios*, Órgano de Divulgación Académica, Vicerrectorado Académico, Caracas, Year II, No. 11, September 2007, pp. 122-138. Published in *Crónica sobre la "In" Justicia Constitucional. La Sala Constitucional y el autoritarismo en Venezuela*…, *cit*, pp. 163-193; "Sobre la ausencia de independencia y autonomía judicial en Venezuela, a los doce años de vigencia de la constitución de 1999 (o sobre la interminable transitoriedad que en fraude continuado a la voluntad popular y a las normas de la Constitución, ha impedido la vigencia de la garantía de la estabilidad de los jueces y el funcionamiento efectivo de una "jurisdicción disciplinaria judicial", *Independencia Judicial*, Caracas, Academy of Political and Social Sciences, Acceso a la Justicia org., Fundación de Estudios de Derecho Administrativo (FUNDEA), Universidad Metropolitana (UNIMET), Estado de Derecho Collection, Vol. I, 2012, pp. 9-103; "The government of judges and democracy. The tragic situation of the Venezuelan judiciary", Venezuela. Some Current Legal Issues 2014, Venezuelan National Reports to the 19th International Congress of Comparative Law, International Academy of Comparative Law, Vienna, 20-26 July 2014, Caracas, Academy of Politican and Social Sciences, 2014, pp. 13-42.

[77] See Inter-American Court of Human Rights (IACHR), *Case Velásquez Rodríguez Vs. Honduras. Preliminary Exceptions*. Judgment of June 26, 1987. Series C, No. 1, paragraph 68. As the Inter-American Court itself interpreted it on another occasion, "those remedies that,

That decision, as expressed by the magistrates of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, host country of the Inter-American Court will weigh "like a shadow on the trajectory and jurisprudence of the Inter-American Court",[78] as who writes, personally he will not stop remembering it whenever he can, especially since with it a corrupt State was protected to the core,[79] and justice was denied to the victim, without any legal reason.[80]

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due to the general conditions of the country or even due to the particular circumstances of a given case, turn out to be illusory cannot be considered effective", which occurs "when their uselessness has been demonstrated by practice, because the Judiciary lacks the necessary independence to decide impartially". See IACHR: *Garantías judiciales en estados de emergencia* (arts. 27.2, 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A, No. 9; 24. Likewise, IACHR, Case of Bámaca Velásquez v. Guatemala. Merits. Judgment of November 25, 2000. Series C No. 70; 191; Inter-American Court, *Caso del Tribunal Constitucional vs. Perú*, Merits, Reparations and Costs. Judgment of January 31, 2001. Series C, No. 71, p. 90; IACHR, Case of Bayarri v. Argentina. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 30, 2008. Series C, No. 187, p. 102; IACHR, *Case Reverón Trujillo Vs. Venezuela*. Preliminary Exception, Substantiation, Repairs and Costs. Judgment of June 30, 2009. Series C, No. 198, 61; IACHR, *Case Usón Ramírez Vs. Venezuela.* Preliminary Exceptions, Substantiation, Repairs and Costs. Judgment of November 20, 2009. Series C, No. 207, p. 129; IACHR. *Case Abrill Alosilla y otros Vs. Perú.* Substantiation, Repairs and Costs. Judgment of March 4, 2011. Series C, No. 223, p. 75.

[78] Opinion of Judges Jinesta Lobo, Castillo Víquez, Rueda Leal, Hernández López and Salazar Alvarado, expressed in a separate Note to Judgment No. 2015-11568 of July 31, 2015; sentence, issued in the *habeas corpus* trial in favor of the citizen Dan Dojc, in the extradition process that was followed in Costa Rica at the request of the Venezuelan State, *http://jurisprudencia.poderjudicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_Documento.aspx?param1=Ficha_Sentencia&nValor1=1&nValor2=644651&strTipM=T&strDirSel=directo&_r=1.* See the press release on said sentence in *http://www.nacion.com/sucesos/poder-judicial/Sala-IV-extradicion-cuestiona-Venezuela_0_1504049615.html.*

[79] *Idem.* In the note attached to the communication denouncing the Convention, the then Chancellor was more explicit regarding the political pressure campaign that Venezuela itself was exerting against the Court in relation to this case not yet decided, which precisely caused the withdrawal of Venezuela, where the following was indicated: "*Case Allan Brewer Carías contra Venezuela*. On September 8, 2009, the Commission admitted the petition filed on January 24, 2007 by a group of lawyers, in which it was alleged that the Venezuelan courts were responsible for the "political persecution of the constitutionalist Allan R. Brewer Carías in the context of a judicial proceeding against him for the crime of conspiracy to violently change the Constitution", in the context of the events that occurred between April ll and 13, 2002". / It should be noted that the aforementioned Mr. Brewer Carías was trial continues in Venezuela for his participation in the April 2002 coup d'état, for being the drafter of the decree by which a de facto President was installed, the National Constitution was abolished, the name of the Republic was changed, all the State institutions; all members and representatives of the Public Powers were dismissed, among other elements. / Upon admitting the petition, the IACHR urged the Venezuelan State to "Adopt measures to ensure the inde-

And if there is no justice, as Quevedo wrote centuries ago: "If there is no justice, how difficult it is to be right!".

Fortunately, new winds are blowing in the Inter-American Court, as the previous controlled majority remains in an absolute minority; being the Court now led by its honorable President, Eduardo Ferrer Mac Gregor, who together with the then Judge Manuel Ventura, honorably signed the negative Vote in our case.

All the previous situation of national and institutional political corruption, developed both at the national level and at the global and transnational level that we have wanted to exemplify with the specific case of Venezuela, occurred, not as a consequence of some neoliberal economic policy, nor because of the lack of constitutional, legislative and conventional regulations, since we have all the imaginable ones to be able to implement the necessary control mechanisms over the State Administration to fight against corruption, but also for the degradation of democratic institutions.

In our American Continent there is no country that does not have anti-corruption laws with severe sanctions; that does not have a Comptroller

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pendence of the judiciary" with which he prejudged that said independence did not exist. / On March 7, 2012, the Commission informed the Venezuelan State that the case would be taken to the Court, even though it would not. domestic remedies had been exhausted. This example is more serious, due to the fact that the criminal trial against Allan Brewer could not be carried out in Venezuela, due to the fact that our criminal procedural legislation does not allow the trial to be carried out in the absence of the accused, and it is the case that the accused Brewer Carías fled the country, as it is publicly known, finding himself a fugitive from justice to date". Apart from the fact that I did not participate in any conspiracy, nor did I write any decree, nor did I escape in any way, and that the aforementioned process had been extinguished since December 2007 by an Amnesty Law issued by the President of the Republic through legislative delegation on the events that occurred between April 11 and 13, 2002, which the Venezuelan Foreign Minister did not realize, when he accused the Commission of having prejudged the lack of judicial independence in Venezuela, when he urged the State upon admitting the complaint to adopt the necessary measures "to ensure the independence of the judiciary;" is that the State itself, in this communication addressed to the Inter-American Court in relation to a case pending decision, prejudged the facts that gave rise to the political persecution and blamed the victim for what he was unjustly accused of, violating himself again their right to the presumption of innocence.

[80] The sentence was considered by the honorable Judges Ferrer Mac Gregor and Ventura Robles in their Joint Negative Opinion, as contradictory with: "the jurisprudential line of the Inter-American Court itself in its more than twenty-six years of contentious jurisdiction, since its first resolution on the subject of exhaustion of domestic remedies, as in the *case of Velásquez Rodríguez vs. Honduras*, thus creating a worrying precedent contrary to its own jurisprudence and the right of access to justice in the inter-American system" (paragraph 47). / Considering, furthermore, said judges that the decision was "a setback that affects the inter-American system as a whole", with "negative consequences for the alleged victims in the exercise of the right of access to justice".

General or Court of Accounts to monitor the disposition of money, assets, income and public spending; that it does not have laws on the protection of public assets; or that it does not have laws on transparency and access to information; or that it has not adhered to the international Conventions against Corruption, such as the United Nations Convention of 2003 and the Inter-American Convention of 1996. In other words, in all our countries we have specific regulations to define policies and practices for the prevention of corruption; to create the organs of prevention of the same; to establish mechanisms to ensure accountability; to ensure probity in public contracting to prevent corruption; in short, to ensure transparency, administrative procedures and public information, and the participation of society, in the fight against corruption.

In other words, we cannot ask for more rules or procedures; We must point the other way, and convince ourselves that if a political regime is not established in which the institutions of the State and its Administration really respond to the principles of a democratic regime, subject to controls,[81] as postulated by the Inter-American Democratic Charter, nothing it can be achieved against corruption; a political regime in which effectively "power can limit power",[82] because ultimately, it is only by controlling power that all the fundamental elements and components of democracy can materialize, and among them, administrative transparency in the exercise of government; accountability by the rulers; and access to administrative information and Justice, which must be in charge of autonomous and independent judges who can ensure that there is no impunity.

And all this, in a regime led by political parties that are determined, individually and jointly, to ensure that the control mechanisms work.

If there is no democratic regime, and if there is no such commitment within it, on the contrary, all the constitutional, legal, and conventional norms that may exist will become a dead letter in the fight against corruption, and we will return, Congress after Congress, meeting after meeting, to keep dealing with this same issue repeatedly, as if it were something new, which it is not.

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[81] See on this what is stated in Brewer-Carías, Allan R., *Constitución, Democracia y Control del Poder*, Merida, Centro Iberoamericano de Estudios Provinciales y Locales (CIEPROL), Consejo de Publicaciones, Universidad de Los Andes, Editorial Jurídica Venezolana Editors, 2004.

[82] As stated by Montesquieu, Charles Louis de Secondat, *De l'Espirit des Lois* I, Paris, G. Tunc Editors, 1949, Book XI, Ch. IV, pp. 162 and 163.

THEORETICAL CONSIDERATIONS ON CONSTITUTIONALISM AND CORRUPTION

Diego VALADÉS*

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.

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.

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.

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.

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:

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.

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:

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.

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.

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.

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.

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

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/*.

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

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*.

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.

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]

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[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.*

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.

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

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.

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

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.

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.

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.

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,

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

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.

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):

[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.

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

(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-

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,

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.

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.

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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