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Checking the Integrity of Government*

*Regulation-inside-Government and Institutions of Accountability in the Field of Public Corruption:
the American Model and the most recent Reforms in the Spanish State of Autonomies*

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«Regulation within government is seldom pure and never simple».

HOOD, C., ET AL., *Regulation inside Government. Waste-watchers, Quality Police and Sleaze-Buster*, Oxford, Oxford University Press, 1999, p. 17.

«Audit is not an end in itself but an indispensable part of a regulatory system».

INTERNATIONAL ORGANIZATION OF SUPREME AUDIT INSTITUTION, Lima Declaration, I, Section 1.

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1.- Introduction. The administration of public integrity.

The control of public integrity and the fight against corruption have unfolded in the form of two different but complementary strategies: repression and prevention. The former has emerged in the form of the penal instrument which, although necessary, has also proven insufficient¹ in dealing with the complexity of modern risk societies. In this paper we shall focus on the idea of prevention, understood to be a more articulated strategy that involves the deployment of a series of techniques and institutions for administrative control as part of the so-called “regulatory State”².

The creation and implementation of an anti-corruption policy that can cater for the two aforementioned aspects has now been configured in the form of an obligation by the States that signed the United Nations Convention Against Corruption (UNCAC), drafted in New York on October 31, 2003, and which states that «the *prevention and eradication* of corruption is a responsibility of all States and they must cooperate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, if their efforts in this area are to be effective»³. According to the Convention, the main objectives to be pursued are: «to promote and strengthen measures to prevent and combat corruption more efficiently and effectively [and] to promote integrity, accountability and proper management of public affairs and public property»⁴.

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¹ Vid. SAVONA, E.U., “Oltre il diritto penale. Note in materia di lotta alla corruzione” in *Politica del diritto*, no. 4, 1995, p. 562.

² Vid. MAJONE, G., “The Rise of the Regulatory State in Europe” in *West European Politics*, vol. 17, 3, 1994, pp. 77-101; LA SPINA, A., MAJONE, G., *Lo Stato regolatore*, Il Mulino, Bologna, 2001; LAUGHLIN, M., SCOTT, C., “The Regulatory State”, in DUNLEAVY ET AL. (Eds.), *Developments in British Politics 5*, Macmillan, London, 1997, pp. 205-219; MORAN, M., “The Rise of the Regulatory State in Britain, in *Political Studies*, vol. 54, 1, pp. 19-34.

³ Preamble of the United Nations Convention Against Corruption (UNCAC).

⁴ Art. 1 UNCAC.



European authorities, and especially those on the continent, have typically taken a fundamentally penal response to the problems of *maladministration*. In addition to this, for many years (and in certain cases, even today) the political class has maintained a “Rousseauian tendency” of considering that those who have been elected, and in whom public confidence has been deposited, are exempt from any controls other than those of the electorate. On the other hand, the guarantee of public and governmental interests in the political sphere involves the creation of a system of standards to regulate and control elections, election campaigns, the requisites and interests of candidates and elected parties, etc. In other words, democracy does not end with electoral mechanisms, but rather requires mechanisms to ensure pluralism, institutional check and balance, and the control and prevention of abuse. For such a purpose – to secure accountable government – modern democracies have created a series of “institutions of constraint”: the auditor general, Ombudsman institutions, human rights commissions, independent electoral commissions, media boards, anti-corruption agencies, etc.

The central idea is that the ethics of the public sector should be administrated. Indeed, in this area there is a need for supervisory activity (for example, regarding the declarations of politicians and federal employees), for interpretation and consultancy (regarding the dispositions contained in codes of conduct or ethical dilemmas) and for education and awareness that cannot be provided by courts and judges, but is the responsibility of regulatory administrative structures⁵.

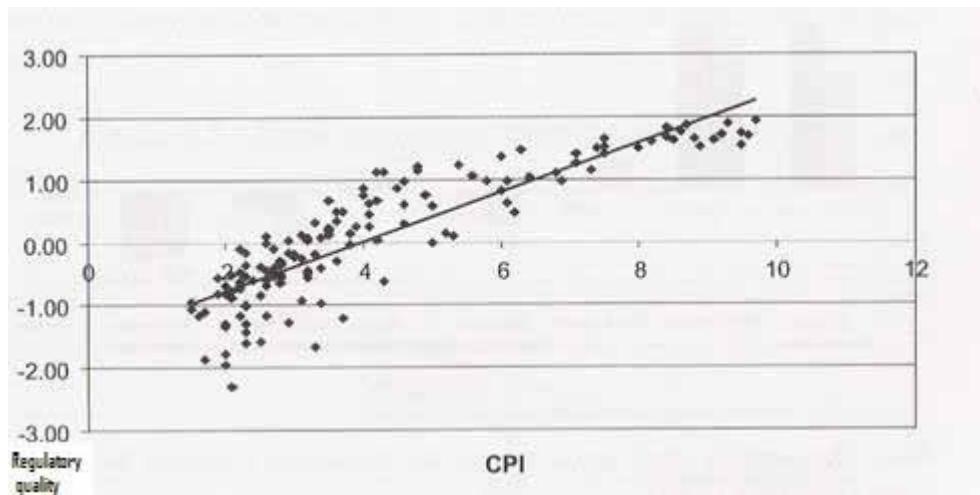
2.- Regulation inside the State: mechanisms of horizontal accountability.

We could say that the phenomenon of political corruption is the manifestation of regulatory failure (in a broad sense). Indeed, one the one hand, it could be considered that regulatory quality depends on a set of factors that determine the forms and principles that are inspired by a country's internal standards or regulations. Similarly, regulatory quality reflects the set of characteristics that are defined by the State's own institutions and, even though the two concepts are not the same, it can be observed that low quality institutions tend to produce low quality standards and regulations. On the other hand, public corruption is generated where there are organisational dysfunctions, and in economic sectors in which enormous amounts of capital are moved and/or public authorities intervene directly. It is on the basis of these considerations that we understand the concept of the *maladministration/bad regulation* relation, which has been detected by academics of law⁶, of political science and by economists. The

⁵ This is one of the structures that Mattarella defines as “organización administrativa de la honestidad”, vid. MATTARELLA, B.G., *Le regole dell'onestà. Etica, politica, amministrazione*, Il Mulino, Bologna, 2007, p. 71.

⁶ In this sense, Rivero Ortega states: «the prevention of corruption is going to be, to a major extent, a question of Administrative Law, a question of judicial-administrative institutions », vid. RIVERO

latter, in quantifying the qualitative characteristics of regulation on a global scale, have brought into consideration the indicator of regulatory quality⁷ which is a broad representation of each country's domestic regulation. The values of this index have been related to those contained in the Corruption Perception Index (CPI) produced by Transparency International, and the results clearly show that, on a global scale, good regulatory levels (regulatory quality) are associated to low levels of corruption (high CPI levels)⁸:



However, there is a need to delimit the concept of regulation in order to situate controls and techniques to guarantee public integrity in the sphere of "regulation inside government", as we seek to explain in this study. Theorists of the "regulatory state"⁹ consider that the contemporary period is characterised by the actions of public powers through the use of authority, rules and standard-setting, while they have noted a decline in the state-entrepreneur or the direct provider of services. For this reason, scientific analysis literature commonly features analyses of the regulation of business, and especially the regulation of privatized utilities. This regulation (or self-regulation) of economic sectors by public administrations (frequently specialised agencies) or private subjects represents, however, only a partial view of

ORTEGA, R., *Instituciones administrativas, desarrollo y control de la corrupción. El caso colombiano*, UIM, 2006, p. 24-25.

⁷ KAUFMANN, D., KRAAY, A., MASTRUZZI, M., *Governance matters III: governance indicators for 1996-2002*, The World Bank, Washington DC, 2004.

⁸ To reaffirm the relation, observe that the data presents a minimal degree of dispersion around the line of a general tendency. Vid. ARNONE, M., ILIOPULOS, E., *La corruzione costa*, Vita e Pensiero, Milano, 2005, p. 115.

⁹ MAJONE, G., "The Rise of the Regulatory State...", op. cit.; LAUGHLIN, M., SCOTT, C., "The Regulatory State...", op. cit., MORAN, M., "The Rise of the Regulatory State...", op. cit.



the regulatory phenomenon¹⁰. And although public corruption is prospering thanks to regulatory dysfunctions between the public sphere and private sectors, in this study we wish to focus on a less known (but no less widespread or important) aspect of regulation, that which is aimed at the interior of the structures themselves, and towards politicians and governmental bureaucrats. But, before moving on to that issue, we should make it clear that this study's approach does not assume public corruption to merely be an internal problem of administration, or that the best perspective for study is that which is limited to an analysis of public authorities or federal employees; quite the contrary, the thesis we defend is that corruption is a negative externality of the “dangerous liaisons” between the public and private spheres, which requires the creation of public policies to reduce the phenomenon, and that the components of this policy should include, among others, regulation, either in its dimension of regulating economic and/or social sectors, or in its reflexive dimension (inside government).

This latter conception, relative to the processes of inside regulation in the public sector, has received very little study. Academics that have highlighted the relevance of the phenomenon state that «the word regulation is not generally used to denote the various ways in which public organizations are shaped by rules and standards emanating from arm's-length authorities»¹¹. The reflexive regulation performed by these organisations fully forms part of their function of control (accountability)¹² and is of constitutional value¹³. The issues at stake are related to the nucleus of democratic theory, where a central concern is how to ensure that those in power remain faithful to the mandate given to them by the electorate and ensure that they keep within the rules of the game¹⁴. In modern democracies, the government's control is exerted through two types of mechanism: the former are “vertical accountability” mechanisms, in which “the people” directly elect or punish their representatives; the second concerns, however, “horizontal accountability” mechanisms that are aimed at the supervision and control of public positions through the creation of an institutional set-up in which institutions control each other. These mechanisms do not end with the traditional principle of the separation of powers, given that in modern states there is an abundance of “institutions of accountability

¹⁰ On the improvement and effectiveness of accountability after the privatisation processes, vid. HODGE, G.A., COGHILL, K., “Accountability in the Privatized State”, in *Governance*, Vol. 20, Issue 4, October 2007, pp. 675-702.

¹¹ HOOD, C. ET AL., *Regulation Inside Government. Waste Watchers, Quality Police, and Sleaze-busters*, Oxford University Press, Oxford, 1999, p. 4.

¹² HARDEN, I., “Regulating Government”, in *The Political Quarterly*, Vol. 66, Issue 4, October 1995, pp. 299-306.

¹³ Vid. SCOTT, C., “Accountability in the Regulatory State”, in *Journal of Law and Society*, Vol. 27, Issue 1, March 2000, pp. 38-60.

¹⁴ On this subject, vid. MULGAN, R., *Holding power to account: accountability in modern democracies*, Palgrave Macmillan, Basingstoke, 2003.

and/or institutions of constraint” – in parallel to but different to company and market regulators – that reflexively perform different functions; ensuring “economic accountability”, consolidating “accountability for rights” or guaranteeing the integrity of the public sector. There is therefore a “regulatory State within the State”.

On the following pages we will focus on a description of some experiences of regulation by means of horizontal mechanisms that guarantee the integrity of the government. We shall first examine American regulation as, due its long established tradition, it describes a consolidated model. We shall then analyse the horizontal mechanisms that were recently introduced by Spain on a state administration level and shall finally comment on the project to instate an “anti-corruption agency” in Catalonia.

3.- The American experience of regulating integrity of Government.

In order to understand the importance of the ethical regulations in the USA, it is important to consider the country's extensive normative and institutional experience of the issue. Generally speaking, this experience describes the normative evolution and history of public ethics. Indeed, in the USA «special attention has always been paid to public ethics, which stem directly from the inherent ideas of the founding fathers that the human being as “an atom of self-interest” and for that reason, rather than believing in him, it is preferable to instate an order to control him »¹⁵. This special interest in ethical issues is even reflected in the Constitution. Indeed, corruption, along with treason, is the only crime to be expressly mentioned in the text of the 1787 constitution, whereby: «The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanours»¹⁶. Moreover, James Madison, in a famous page of *The Federalist*, states that horizontal control mechanisms are necessary but not sufficient to guarantee control of governors, and therefore additional precautionary measures should be adopted: «If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind *the necessity of auxiliary precautions*»¹⁷.

¹⁵ PERTICI, A., *Il conflitto di interessi*, Giappichelli, Turin, 2002, p. 20.

¹⁶ Constitution of the United States of America de 1787, art. II, 4th section.

¹⁷ MADISON, J., *The Federalist. The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, no. 51, Wednesday, February 6, 1788.

3.1.- Origins and development of regulations of ethics until Watergate.

The ethical regulation of the government is the result of the events and the normative reactions to the same that led to the Ethics in Government Act of 1978. We shall present a brief overview of the relevant events in American history as far as Watergate. One of the earliest examples of public corruption may be that in the State of Georgia, when in 1794, the legislative powers authorised the sale of land at a price way below the market value. It has to be said that in the early 1800s there was a grey area between public interests and private affairs, due to the practice of contracting federal employees to represent the interests of private parties before the administration. Those were times of undefined and unregulated ethical obligations. Corrupt behaviour increased when the Government started supplying Union Forces with weapons during the Civil War. The first response, contained in a law passed by Congress in 1864, was a prohibition on all federal employees or government employees from receiving any kind of compensation from services provided to citizens in relation to the Government. But the Grant Administration, elected in 1868, was especially corrupt. In whatever case, from the late 19th century to the early 20th century, according to historians, most political activities were discredited by the phenomenon of political corruption¹⁸. Another source of corruption arose out of the First World War: that of private companies that supplied the government with weapons. The judiciary also reacted in 1917 in the form of a law that prohibited federal employees from accepting payment coming from any non-governmental sources. Also, federal employees, once they had left government, were forbidden from becoming representatives of companies working for the latter. In 1920 President Harding was involved in several scandals related with the oil industry, as a result of which the Secretary of the Interior was sent to prison; nevertheless, corruption under Harding was met with very little legislative response. When some years later the idea arose of a New Deal, the government started extending its tentacles towards broad jurisdictions that it had never or hardly ever touched upon before¹⁹. The Great Depression of the 1930s affected the prosperity of businesses, and the Franklin D. Roosevelt government, with widespread public support, started laying the foundations of business regulation. At the same time, there was a rapid increase in the amount of money the government put into its new social security system and programs to reconvert the economy. When the country became involved in the Second World War, federal costs increased rapidly to unprecedented levels and the country once again found itself in a situation in which business leaders took charge of the management of the war. And like before, many of these leaders stayed loyal to their businesses, and hence continued receiving compensation, while playing the role of 'dollar-a-year-men' or working as government advisors without receiving any kind of compensation. However, since the First World War there had been an increased

¹⁸ vid. SIMON, D., *Elite Deviance* (7th edn), Allyn and Bacon, Boston, 2002, pp. 195-229.

¹⁹ Vid. SOLAR CAYÓN, J.I., *Política y derecho en la era del New Deal*, Madrid, Dyckinson, 2002.



awareness of the potential conflict of interests and the War Production Board started inspecting the backgrounds of those people that intended to work for the government but at the same time maintained relationships with their 'former patrons'. Owing to the increased size of the government in the 1930s and 1940s, it became more and more complicated to control its ethics. A greater number of federal employees were employed in a very broad field of activities that more and more frequently overlapped with powerful economic interests. In 1939, Congress passed the Administrative Reorganization Act, which increased the President's control over agencies and employees. In 1945, the Administrative Procedures Act established a legal framework to manage all federal agents' regulatory and rulemaking procedures. The major objectives of this law were to guarantee transparency and justice. The Truman administration was blighted by scandals related with public positions. Widespread traffic of influences was uncovered in the Reconstruction Finance Corporation, and the Internal Revenue Service suffered the worst scandal in its history. Under such circumstances, President Truman attempted to compete for moral leadership by sending his own message to Congress about the ethical standards expected of his federal employees. Considered a document that was well ahead of its time, it advised on a series of ethical conducts for its federal employees, including the need for people working in the President's office, members of Congress and other federal employees to make their financial affairs public²⁰. During the Eisenhower administration, little effort was put into either defining ethical standards in the form of language and regulations, or into preventative strategies to avoid ethical problems²¹.

The advent of the Kennedy administration involved a veritable change of direction in terms of ethical laws, which marked a before and an after in terms of policies for the prevention of risks of corruption and conflicts of interests²². In 1961, he sent a message to Congress²³ demanding new legislation to recode the conflict of interests and other ethical laws and for some of them to be modified in order to bring them into line with the current state of affairs. Kennedy's initiative set off a movement towards a new form of ethical protection: rule dependence and the regulation of ethics. As Roberts and Doss observe: «Rule-driven ethics had a number of advantages over character-focused ethics. Rules could be written down and explained.

²⁰ PRESIDENT HARRY S. TRUMAN, message to Congress, September 27, 1951.

²¹ We only have to mention the introduction of background controls on the candidates to occupy public position commissioned to the FBI by means of Executive Order 10450, *Security Requirements for Government Employees*.

²² Shortly after forming his government, president John F. Kennedy named an *Advisory Panel on Ethics and Conflict of Interest in Government*. The commission presented its report in March 1961. They came to the conclusion that, as one of its authors would later summarise, federal laws for administrating conflicts of interests were «archaic, overlapping, inefficient for achieving their own purposes and an obstacle to government efforts to contract capable persons »

²³ Vid. Message to Congress by President KENNEDY J.F., *Ethical Conduct in Government*, 27 de April de 1961.



Ambiguity was eliminated. Investigatory and adjudicatory procedures could be used to resolve disputes over compliance»²⁴.

After Kennedy, Johnson, through Executive Order 11222 on May 8, 1965, made another step forward in terms of the regulation of ethics and the fight against maladministration. The new laws established the requirement for federal employees to report the details of their personal finances. But it was mostly Order 11222 that added another new dimension to ethics regulation: federal employees not only had to avoid any conflict of interests and abuses of office but also had to *avoid their appearance*. The appearance standard appears in Part 3(c) of Section 201 of the order and states:

- c) It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection (a), which might result in, or create appearance of
 - 1. using public office for private gain;
 - 2. giving preferential treatment to any organization or person;
 - 3. impeding government efficiency or economy;
 - 4. losing complete independence or impartiality of action;
 - 5. making a government decision outside of official channels; or
 - 6. affecting adversely the confidence of the public in the integrity of the Government.

However, the most outstanding regulatory change came about as a result of the Watergate scandal. It occurred during the Richard Nixon administration, and uncovered a case in which the “President’s Men” hid public funds for purposes of bribery both in domestic and international affairs. Watergate led to the creation of a new regulation of public integrity and prevention of corruption inspired by the principle of ‘legitimate suspicion’ (“desconfianza legítima”). It was on the basis of this new ethical infrastructure that the Ethics in Government Act was commissioned in 1978.

3.2. The regulation and institutions of integrity inside government.

The system like America’s, which assumes “checks and balance” to be the central principle of the State²⁵ and which manifests from its origins a concern for taking “auxiliary precautions”, led to a reaction to the scandal during the administration that generated new principles that

²⁴ ROBERTS, R.N., DOSS, M.T. JR., *From Watergate to Whitewater: The Public Integrity War*, Wespot, 1997, p. 49.

²⁵ BALLBÉ, M., MARTÍNEZ, R., *Soberanía dual y constitución integradora. La reciente doctrina federal de la Corte Suprema norteamericana*, Ariel, Barcelona, 2003.



laid the foundations for inside government regulation that typified the new “post-Watergate mentality”²⁶:

1. Legal walls must be built to public interests from contamination by the interests of federal employees.
2. Regulation should consider all possible potentialities of a crisis of public integrity²⁷.
3. The main and most reliable protection of public integrity is regulation by law.
4. New specialised regulators must be instated to administrate this regulation of public ethics.

The public sector is therefore submitted to major regulation²⁸ (vid. Annex) by “ethics offices”, as Mackenzie said: «The post-Watergate mentality has put ethical sentries not only at the gates but also at nearly every door and window of the federal establishment»²⁹.

The laws determined which Offices are responsible for each authority (Senate and House of Representatives; Judiciary; Executive). In relation to the Executive, the competent authority is the Office of Government Ethics (OGE) which works in collaboration with each agencies’ inside federal employees. The Office of Government Ethics (OGE), is a small agency within the executive branch, and was established by the Ethics in Government Act of 1978, title V, in order to provide unity and direct policies dealing with conflicts of interests and behaviour for the executive branch. The OGE was originally associated to the Office of Personnel Management (OPM), but through the Office of Government Ethics Reauthorization Act of 1988 was made an autonomous agency. The organic structure of the OGE, with its headquarters in Washington, is made up of an Office of Director, Office of General Counsel, Office of Monitoring and Compliance, Office of Education, and an Office of Administration. The Director of the OGE is nominated by the President (and confirmed by the Senate) and is in office for 5 years.

As well as the central structure, in each executive agency there is a body responsible for the administration of the agency’s ethics programs. The federal employee who runs said body is designated by the person in charge of the agency and acts in accordance with what is

²⁶ MACKENZIE, G.C., *Scandal Proof. Do Ethics Laws Make Government Ethical?*, The Brookings Institution, Washington, D.C., 2002, p. 31.

²⁷ In this sense, for example, «we must define as posing a potential of conflict of interest all financial assets that fall into the penumbra of public responsibilities, not merely those of sufficient magnitude to lead a reasonable person into temptation. In the post-Watergate mentality, all rules quickly become worst-case rules», vid, MACKENZIE, G.C., *Ibidem*.

²⁸ Regulated issues: Education and training; Financial Disclosure; Conflict of Interest; Bribery; Representation of Private Citizens; Outside Employment and Activities; Outside Income; Misuse of Office; Post-Employment Activities; Appearance of Impropriety or Conflict of Interest

²⁹ MACKENZIE, G.C., *Ibidem*, p.32.



established by the Ethics in Government Act and the rules of conduct dictated by the President and in coordination with the OGE. The federal employee is denominated by the Designated Agency Ethics Official (DAEO). The DAEO has a number of roles: maintaining relations with the OGE, revising financial disclosure statements; responsibility for educational initiatives on ethics; control of sanctioning procedures and the execution of sanctions. To undertake these roles, the DAEO may, if necessary, name one, or more, deputy designated ethics official. The existence of the DAEO, which acts under the direction, supervision and support of the OGE, conforms a decentralised structure for the regulation of integrity.

3.3.- Beyond regulation inside government: the system of anticorruption laws.

The anti-corruption system that has been constructed over the course of the history of the United States undoubtedly represents the most sophisticated setup that any judiciary has ever developed to prevent and fight against all forms of corruption. An understanding of this system in Europe (at a time when the phenomenon of globalisation is also being translated into an “Americanisation of law”³⁰) is especially important. For this purpose, we have synthetically reconstructed the history of American political and administrative corruption and the legal measures implanted to fight against it and moralise public life, from which we can extract three fundamental ideas: (a) the first is the ‘macro’ approach to the problem of corruption, i.e. legislation is not only concerned with penal sanctions for the most extreme cases of corruption such as bribery and embezzlement, but also articulates a global system to prevent it that includes (a.1.) corrupt practices in international relations through the Foreign Corrupt Practice Act of 1977, a genuine law against global corruption that was used as the model for the OECD Convention; (a.2.) “organised corruption” through the Racketeer Influenced and Corrupt Organizations Act of 1970 whose dual civil/criminal system actually means, according to Mann, the raising of the Administrative State owing to the protagonism of administrative agencies; and (a.3.) the regulation of risk behaviours represented by conflicts of interests. (b) The second idea is that said regulation is the result of a long evolution over 140 years; the initial regulation of such conflicts consisted of a small number of laws that go back to the Civil War, while today, as a result of the Ethics in Government Act of 1978 produced after the Watergate scandal, it consists of an elaborate system of prohibitions, remedies and procedures to prevent conflicts of interests from being a source of corruption. This law has two main characteristics. On the one hand, it implements ethical watchdogs not only at the entrance, but also at each and every door and window of the federal system. On the other, it regulates “dangerous liaisons” between the State and the Market by preventing conflicts of

³⁰ On this subject, recently, vid. BALLBÉ, M., “El futuro del derecho administrativo en la globalización: entre americanización y europeización”, in Revista de Administración Pública, no. 174, 2007, pp. 215-276.



interests. (c) The third core idea refers to the red line that unites standards for corruption and public ethics with national security. At first it was Executive Order 10450 by Eisenhower on security requirements for Government employees that, in the Cold War climate, assigned background controls of the FBI. Today, after September 11th, the PATRIOT ACT of 2001 grants government agencies exorbitant power for control and vigilance, in relation to connections between corruption, money laundering, information technology and terrorism. No other order has ever unleashed such a battle against corruption in the form of such severe and articulated measures.

4.- The guarantee of public integrity in recent legal reforms in Spain. The Code of Good Government.

On February 18, 2005, the Spanish Council of Ministers adopted, by agreement, a Program for actions for Good Government, the intention being to provide administrations not only with materials and legal resources, but also with the values and mechanisms to ensure their compliance, in order to achieve the ultimate general objective of providing society with instruments with which citizens can control their public authorities³¹. In this sense, the then Minister for Public Administrations, Jordi Sevilla, stated that the legal reform made a priority of good governance issues, which would be translated into «the regulation of the ethical functioning of the government itself». In other words, into an inside-government regulation, aimed at the members of the Government and Senior Officials of the State General Administration, which specifically includes: 1. A Code for the ethical and behavioural principles to which their actions should be adjusted; and 2. A law to regulate conflicts of interests. The Spanish Code also responds to the need to prepare the “auxiliary precautions” we observed in the American system and that inspired that country’s regulations of government. The agreement by which the code was effectively accepted states that the same seeks to confront «a wide range of demands that include not only compliance with legal or regulatory standards, but also with *additional guarantees*, which configure an agreement between public authorities and citizens in relation to principles on which the institutions at the core of Spanish democracy will operate ».

4.1.- Law 5/2006 for the regulation of conflicts of interests.

³¹ Vid. Programa de actuaciones para el Buen Gobierno, p. 7, in http://www.map.es/iniciativas/mejora_de_la_administracion_general_del_estado/funcion_publica/codigo_buen_gobierno/codigo_pdf/document_es/Codigo_Buen_Gobierno.pdf



While in the United States the regulation of conflicts of interest has, since the 19th century, been dealt with by extensive legal measures and just as extensive a doctrinal tradition³², and is considered a form of public corruption, in Europe the concept of the conflict of interests has taken much longer to form part of regulations or of the academic study of public law³³.

The equivalent remedies in Spanish legislation could be found in regulations concerning incompatibilities, but it was through the reform introduced by Law 5/2006, as part of the actions of the Program for Good Government, that Spain finally had its own regulation in an advanced capitalist society in which as well as a tool against gross forms of corruption, the prevention of conflicts of interests was also considered to be a policy for good governance and combating all forms and variables of public corruption³⁴. The preamble to the new law establishes that:

«The objective of the Law is to establish the obligations that concern the members of the Government and senior officials of General Administration in the prevention of situations that could originate from a conflict of interests. It therefore is not a mere reproduction of the regulations of incompatibilities as has been conceived up until now, but the *constitution of a new system* in relation to the activities of senior officials in which in addition to the perfection of the former dealing with incompatibilities *new demands and precautions are introduced to guarantee that situations do not arise that create a risk of situations arising that put at risk the objectivity impartiality and independence of senior officials*».

The law establishes that before candidates to occupy senior positions can take up their roles, they must appear before a commission of the Congress of Deputies that will examine them and establish whether they might present signs of a conflict of interests (art. 2). This is defined in art. 4 under the following terms: «there is a conflict of interests when senior officials intervene in decisions related to affairs in which there is a confluence of the interests of their public position with their own private interests, or those of direct relatives, or shared interests with third parties». The law consecrates the principle of exclusive dedication of the senior official to their public position, restricting all types of activity that could perturb the exercise of their functions; thus, all senior officials are forbidden to receive any payment or assistance through participation in the governing bodies or administrative councils of companies using public capital (art. 9) and compatibility with private activities is delimited (art. 10). The Law

³² CANY, *Conflict of Interest and Federal Service*, Cambridge, Harvard University Press, 1960, p. 3 ss.; PERKINS, R., "The New Federal Conflict-of-Interest Law", in *Harvard Law Review*, 76, 1963, pp. 1113-1169; MANNING, "The Purity Potlatch: Conflict of Interest and Moral Escalation", in *Federal Bar Journal XXIV*, num. 3, 1964, pp. 243-249.

³³ MENY, Y., *La Corruption de la République*, Paris, Fayard, 1992, p. 60.

³⁴ On the regulation of conflicts of interests as the luxury item of modern societies, vid. GARCÍA MEXÍA, P., *Los Conflictos de Intereses y la Corrupción Contemporánea*, Navarra, Aranzadi, 2001, p. 76-77.



reinforces the control of patrimonial interests, as established in art. 6, people in such positions [...] may not, either themselves or in conjunction with their spouse, whatever the system of matrimonial finance, or any person they live with in an analogously affective relation, and also any other members of the family unit, have any more than a 10% direct or indirect share in companies that have agreements or contracts, of any nature, with the state, regional or local public sector, or be subcontracted by said companies or that receives subsidies from the State General Administration. In the case of limited companies whose subscribed share capital is greater than 600,000 euros, said prohibition will affect shares of patrimony that despite not reaching said percentage suppose a position in the company's share capital that could relevantly condition their actions. Should such a person being named [...], possess a share under the aforementioned terms, that person must dissociate him or herself within a period of six months. Said share and posterior transfer must be declared in the *Registros de Actividades y de Bienes y Derechos Patrimoniales*, and the resource of blind trust shall be used as a formula for the management of the financial shares of senior officials. Art. 7 regulates the obligations of inhibition and abstention and art. 8 establishes a post-employment regulation for a period of two years, which involves an obligation to declare all activities before they can be initiated.

The management of this regulation of the integrity of senior officials is the task of the *Oficina de Conflictos de Intereses* that is organically associated to the *Ministerio de Administraciones Públicas* and which enjoys full functional autonomy in the exercise of its competences (art. 15)

4.2.- The Catalonian Anti-Fraud Office.

Within the Spanish state, the autonomous communities are also paying more and more attention to the development of control mechanisms aimed at affirming the principle of the good administration of public authorities. In this sense, it is interesting to highlight Law 4/2006 on transparency and good practice issues by the Galician Public Administration. But even more suggestive, in the framework of our study, is project for a law created by the *Oficina Antifraude de Catalunya* (OAC). The project designs an independent regulatory authority whose institutional mission is to preserve the transparency and integrity of the administrations and personnel at the service of the Catalan public sector. Therefore, from the structural point of view, unlike the state's Office of Conflicts of Interests, which is a mere organ that has been granted autonomy, the OAC is an entity of public law that is jurisdictional in nature and associated to the Catalan parliament, whose Director is elected by Parliament on proposal of the Government. From a functional perspective, this is no organisation that merely manages incompatibilities and conflicts of interests, for the OAC is also configured as a watchdog for Catalan public integrity and is the body that prevents and evaluates areas at risk of corruption



(in the broadest sense). The extensive role can be induced from the OAC's functions, which are:

1. To investigate or inspect possible cases of the fraudulent use or destination of public funds, along with conducts contrary to integrity in administrative actions and in the area of relations between public administrations and private parties;
2. To prevent and warn of behaviours by the Administration's personnel and senior officers that do result or could result in the irregular use or destination of public funds or any other illicit exploitation that involves a conflict of interests or consists of the private use of information that these possess as a result of their functions and in the abuse of the exercising of said functions;
3. To cooperate with the competent authority to determine administrative infractions and also with the Judicial Authority or Fiscal Minister in the determination of relevant penal conducts;
4. To collaborate, by request of the competent organ or institution, in the initial or continued training of personnel working in the Catalan public sector in relation to the fight against fraud, corruption and any other illicit activity that is against general interests.
5. To advise on and formulate proposals and recommendations for the organs of the Administration, Catalan Government and Catalan Parliament in issues relating to their authority.
6. To examine the actions of local administrations in relation to their competences and, if required, to urge the local administration to, in exercising its functions for inside control of its economic, financial and budget management, investigate or inspect, through its corresponding bodies, possible cases of the irregular use or destination of public funds, and also conducts that contravene honesty, and to inform the OAC of the results.

In any case the operational field of the OAC is the Catalan public sector, which is made up of the Generalitat's Administration, local entities, public universities and all bodies and organs that depend on it. Additionally, in order to comply with its functions, the OAC's sphere of influence can include actual people and private entities and companies that receive services or works contracts from entities forming part of the public sector.

Such extensive competences of this new institution of control could lead to the risk of abuse by the OAC itself in relation to the competences of the other organs and institutions that deploy horizontal mechanisms of governmental control. This situation is not ignored by the Catalan legislation, which in art. 3.4 of the law establishes that the functions of the OAC are

understood without detriment to those exercised by the Generalitat's General Intervention, the *Síndic de Greuges* (Ombudsman), the *Sindicatura de Cuentas* (Public Audit Office), the *Tribunal de Cuentas* (Court of Accounts) and other equivalent institutions both on a regional and local level. Similarly, the OAC may not perform the inherent functions of the judicial authorities, the judicial police or the *Ministerio Fiscal*. Despite this regulation of self-constraint it is more than probable that the OAC's activities could lead to conflicts of competence with the aforementioned authorities.

5.- Conclusions.

The regulation of government integrity, in its reflexive dimension, is associated to the no less important phenomenon of business regulation: «First, regulation inside government is a surprisingly large enterprise, measured in quantitative terms. Second, it appears to have been increasing in formality, complexity, intensity, and specialization over the last two decades. Third, there is considerable variety in the closeness of the regulators to those they oversee, and this affects, in particular, the relative formality of regulatory processes»³⁵. In this area, Anglo Saxon institutional experience of the field is far more extensive and has been the subject of much greater study than the models in continental Europe. However, European authorities (such as Spain) are implanting a series of regulations of public integrity. As for the future, it is important to remember that «mapping the various regulators is only the beginning. The next task is to construct order from the chaos»³⁶.

ANNEX:

COMPILED OF FEDERAL ETHICS LAWS prepared by the Office of Government Ethics (OGE) – USA.

I. CONFLICTS OF INTEREST

18 U.S.C. § 201. Bribery of public officials and witnesses;

18 U.S.C. § 202. Definitions

18 U.S.C. § 203. Compensation to Members of Congress, officers, and others in matters affecting the Government

18 U.S.C. § 204. Practice in United States Court of Federal Claims or the United States Court of Appeals for the Federal Circuit by Members of Congress

18 U.S.C. § 205. Activities of officers and employees in claims against and other matters affecting the Government

18 U.S.C. § 206. Exemption of retired officers of the uniformed services

³⁵ HOOD, C. ET AL., *Regulation Inside...*, op. cit., p. 3.

³⁶ KAYE, R., "Regulating Parliament: the regulatory state within Westminster", in Discussion Paper no:13, June 2003, CARR, LSE, p. 14.



- 18 U.S.C. § 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches**
- 18 U.S.C. § 208. Acts affecting a personal financial interest**
- 18 U.S.C. § 209. Salary of Government officials and employees payable only by United States**
- 18 U.S.C. § 210. Offer to procure appointive public office**
- 18 U.S.C. § 211. Acceptance or solicitation to obtain appointive public office**
- 18 U.S.C. § 216. Penalties and injunctions**
- 18 U.S.C. § 219. Officers and employees acting as agents of foreign principals**

II. ETHICS IN GOVERNMENT ACT OF 1978

A. Public Financial Disclosure Requirements

- 5 U.S.C. app. § 101. Persons required to file**
- 5 U.S.C. app. § 102. Contents of reports**
- 5 U.S.C. app. § 103. Filing of reports**
- 5 U.S.C. app. § 104. Failure to file or filing false reports**
- 5 U.S.C. app. § 105. Custody of and public access to reports**
- 5 U.S.C. app. § 106. Review of reports**
- 5 U.S.C. app. § 107. Confidential reports and other additional requirements**
- 5 U.S.C. app. § 108. Authority of Comptroller General**
- 5 U.S.C. app. § 109. Definitions**
- 5 U.S.C. app. § 110. Notice of actions taken to comply with ethics agreements**
- 5 U.S.C. app. § 111. Administration of provisions**

B. Office of Government Ethics

- 5 U.S.C. app. § 401. Establishment; appointment of Director**
- 5 U.S.C. app. § 402. Authority and functions**
- 5 U.S.C. app. § 403. Administrative provisions**
- 5 U.S.C. app. § 404. Rules and regulations**
- 5 U.S.C. app. § 405. Authorization of appropriations**
- 5 U.S.C. app. § 408. Reports to Congress**

C. Outside Earned Income and Activities

- 5 U.S.C. app. § 501. Outside earned income limitation**
- 5 U.S.C. app. § 502. Limitations on outside employment**
- 5 U.S.C. app. § 503. Administration**
- 5 U.S.C. app. § 504. Civil Penalties**
- 5 U.S.C. app. § 505. Definitions**

III. PROCUREMENT AND CONTRACTING

A. Office of Federal Procurement Policy Act

- 41 U.S.C. § 423. Restrictions on disclosing and obtaining contractor bid or proposal information or source selection information**

B. Interest of Members of Congress

- 41 U.S.C. § 22. Interest of Member of Congress**
- C. Contracts by or with Members of Congress**
- 18 U.S.C. § 431. Contracts by Member of Congress**
- 18 U.S.C. § 432. Officer or employee contracting with Member of Congress**
- 18 U.S.C. § 433. Exemptions with respect to certain contracts**

IV. GIFTS AND TRAVEL

**A. Gifts to Federal employees****5 U.S.C. § 7353. Gifts to Federal employees****B. Gifts to Superiors****5 U.S.C. § 7351. Gifts to superiors****C. Foreign Gifts and Decorations Act****5 U.S.C. § 7342. Receipt and disposition of foreign gifts and decorations****D. Mutual Educational and Cultural Exchange Act****22 U.S.C. § 2458a. Federal employee participation in cultural exchange programs****E. Acceptance of Travel and Related Expenses From Non-Federal Sources****31 U.S.C. § 1353. Acceptance of travel and related expenses from non-Federal sources****F. Acceptance of Contributions, Awards, and Other Payments****5 U.S.C. § 4111. Acceptance of contributions, awards, and other payments****V. EMPLOYMENT****A. Nepotism****5 U.S.C. § 3110. Employment of relatives; restrictions****B. Recommendations for Employment by Members of Congress****5 U.S.C. § 3303. Competitive service; recommendations of Senators or Representatives****C. Dual Pay and Division of Salary or Duties****5 U.S.C. § 5533. Dual pay from more than one position; limitations; exceptions****VI. GOVERNMENT PROPERTY AND INFORMATION****A. Government Property****18 U.S.C. § 641. Public money, property or records****18 U.S.C. § 1719. Franking privilege****18 U.S.C. § 1913. Lobbying with appropriated moneys****31 U.S.C. § 1344. Passenger carrier use****B. Information****18 U.S.C. § 798. Disclosure of classified information****18 U.S.C. § 1905. Disclosure of confidential information generally****50 U.S.C. § 783(a). Offenses; Communication of classified information by Government officer or employee****VII. TAXES IN CERTAIN MATTERS****A. Self-Dealings With Foundations****26 U.S.C. § 4941. Taxes on self-dealing****26 U.S.C. § 4946. Definitions and special rules****B. Sale of Property to Comply With Conflict-of-Interest Requirements****26 U.S.C. § 1043. Sale of property to comply with conflict-of-interest requirements****C. Treatment of Sale of Stock Acquired Pursuant to Exercise of Stock Options to Comply With Conflict-of-Interest Requirements**

**26 U.S.C. § 421. General Rules****VIII. POLITICAL ACTIVITIES****A. Administrative (Hatch Act Reform Amendments of 1993)****5 U.S.C. § 7321. Political participation****5 U.S.C. § 7322. Definitions****5 U.S.C. § 7323. Political activity authorized; prohibitions****5 U.S.C. § 7324. Political activities on duty; prohibition****5 U.S.C. § 7325. Political activity permitted; employees residing in certain municipalities****5 U.S.C. § 7326. Penalties****B. Criminal****18 U.S.C. § 601. Deprivation of employment or other benefit for political contribution****18 U.S.C. § 602. Solicitation of political contributions****18 U.S.C. § 603. Making political contributions****18 U.S.C. § 604. Solicitation from persons on relief****18 U.S.C. § 605. Disclosure of names of persons on relief****18 U.S.C. § 606. Intimidation to secure political contributions****18 U.S.C. § 607. Place of solicitation****18 U.S.C. § 608. Absent uniformed services voters and overseas voters****18 U.S.C. § 609. Use of military authority to influence vote of member of Armed Forces****18 U.S.C. § 610. Coercion of political activity****IX. MISCELLANEOUS STATUTES****5 U.S.C. § 557(d). Ex Parte Communication****18 U.S.C. § 2. Principals****18 U.S.C. § 1001. Statements or entries generally**



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