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RULE OF LAW,
LEGAL CERTAINTY,
TRANSPARENCY
AND THE RESPONSIBLE ECONOMIC STATE

Author: Ramón Tamames



In collaboration with:



REAL ACADEMIA
DE CIENCIAS MORALES
Y POLÍTICAS

RULE OF LAW, LEGAL CERTAINTY, TRANSPARENCY AND THE RESPONSIBLE ECONOMIC STATE

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PROLOGUE

With this volume, the prologue to which I have been asked to write, the Royal Academy of Moral and Political Sciences is helping to disseminate a new work by our fellow Academician Ramón Tamames, entitled *Rule of Law, Legal Certainty, Transparency and the Responsible Economic State* and published by the Agbar Foundation as part of its work promoting studies on Spain's legal realities.

In making this study part of its body of cultural work, the Royal Academy, which I have the honour to preside, looks to partner with a company of great importance, one which provides in our country the public service of distributing water—to more than a thousand towns and cities—and which thus plays a crucial role in the life of its citizens.

Of course, as with so many other cases, the normal carrying out of this work calls for a scenario in which the rule of law guarantees legal certainty and transparency, in a market with the highest levels of competition.

In his study, Professor Tamames highlights how, under the rule of law, legislation issued by the legislature establishes limits on the power of the executive. In this way, the power of the state, in any of its forms of public administration, must be subordinate to specific and explicit regulations, in an environment of coexistence in which the public always has recourse to demanding enforcement of its rights before the judiciary. It can therefore be said that the rule of law cannot exist without popular sovereignty or a separation of powers.

Within this context of a sovereign rule of law, this publication clearly sets out its constituent elements, which we highlight below:

- The government as a whole and its civil servants are publicly answerable before the law.
- Laws must be clear, public, stable and fair, to protect fundamental rights, such as citizens' security and respect for their property.
- The process by means of which laws are approved and applied must be accessible to all, with transparency, justice, efficacy (doing things) and efficiency (doing them well).
- Access to justice must be guaranteed, with judicial bodies boasting well-defined powers and jurisdiction, impartiality and ethics, and with sufficient resources to diligently meet the basic needs of the communities they serve.

In short, the rule of law is the antithesis of oligarchy. It is government of the people, the immense majority, with respect for all, especially its minorities. This is something whose origins date back to the *Ius Romanorum*, as indicated in the three epigrammatic phrases of Ulpian's Digest: *Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere* (The precepts of law are these: to live honestly, to injure no one, [and] to give to each his own).

In the final chapter of his report for the Agbar Foundation, Professor Tammes preaches the virtues of the responsible economic state, which should be responsible in two ways:

- Ensuring that it is serious enough to comply with its regulatory and supervisory mission, always taking into account the efforts of the participating public.
- Reinforcing the unalienable right of making the managers of the *res publica* subject to possible penalties, so that they are always aware that they may be held answerable for any inefficacy or inefficiency, abuse of power, corruption or negligence in their duties.

To sum up, according to this report, the economic Leviathan should give way to a new and promising responsible economic state, which can be based on nothing less than a new social contract between the freely-chosen authorities and a general public that demands its rights to improve public management. This, in the midst of a constellation of government agencies, each with a duty to provide the wisest possible, impartial advice in each sector.

To conclude, I would associate the contents of this prologue with the notion that, since 1857, for more than a century and a half, the motto of this Royal Academy of Moral and Political Sciences—*verum, justum, pulcrum*—has been perfectly consistent with all the above ideas. In other words, under the rule of law, truth, justice and order must prevail.

Marcelino Oreja

President of the Spanish Royal Academy
of Moral and Political Sciences

FIRST PART OF THE DIALOGUE ON THE MEANING OF THIS REPORT

– *So, what is the central thesis of this Report? If it has one, that is.*

How could it not have one? There would be no point to it if it didn't.

– *So what is it, in just a few words?*

It's really quite simple: we are living in a so-called 'advanced' democracy, and we're also told that we enjoy the rule of law with legal certainty and transparency ...

– *Do you really think we enjoy all of that?*

Potentially, yes. *De facto*, there may be some doubts...

– *So...*

So what it says is that, in addition to the rule of law, in full force and fully complete, we need a 'responsible economic state', as explained in this Report in some detail. And, honestly, if we do not achieve it, the welfare state itself will suffer and the even rule of law itself will, in many aspects, be in peril...

– *So how do we achieve this fit of law and economics?*

Within a true framework of economic certainty, with the required ratios and indicators and with a remit far beyond the current goals of simply monitoring public deficit and debt rates. Because it is also important to prevent abuse, excess, waste and corruption.

To this end, it will be necessary to accurately delimit the areas of activity of the so-called 'economic authorities' and their actual carrying out, so that we do not get to a point in which circumstances have become so difficult that there is nothing that can practically be done about them.

– *And how can this utopia be achieved?*

With an entire programme to be formulated, supervised and enforced: demarcation of the truly necessary public services; no overlapping between different government agencies; the measurement of unit costs in healthcare, education, etc.; priority given to economies of scale over market frag-

mentation and partitioning; public administration audited on a month-by-month basis in its key elements, and in the most effective way possible in the control of handling the public purse; assessment of the efficiency of institutions; evaluation of the impact of public investments in terms of economic and social return...

– And that would be the responsible economic state?

That and more. But starting with all of that.

– I still see it as something of a utopia...

Don't be so sure: the mess we're in now means that we have no option but to change a lot of things. This utopia can, with the right amount of effort, be attained, particularly when the difficulties of the situation provide advance notice of how truly necessary it is. You can see this for yourself when you read the Report in its entirety. I'll be waiting for you at the end, to clarify its ideas a bit more ...

– So there'll be a second dialogue...

Indeed. If that's alright with you...

CHAPTER 1

THE RULE OF LAW

1. THE ORIGIN OF AN IDEA: THE RECHTSSTAAT

A state governed by the rule of law is a state governed by a system of laws and institutions organised around a Constitution that has been freely drawn up by the citizens of the state themselves. This situation contrasts with what takes place under dictatorships, where autocracy forms the basis for all types of actions and a legal framework respected by all is lacking.

Under the rule of law, Acts passed by the legislature establish limits on executive power, such that the power of the state is subordinate to a concrete and explicit set of rules and regulations, within a context of peaceful coexistence in which citizens always have recourse to demand the respect of their rights before the judiciary.

The term 'rule of law' has its origin in the German doctrine of the *Rechtsstaat*; the first author to use this expression being Robert von Mohl in his book *German Policy Science According to the Principles of the Constitutional State*.¹

However, most German authors place the origin of the concept in the writings of Immanuel Kant, among them his 1795 essay on perpetual peace, which we shall discuss later.² In the English-speaking world, the equivalent term is the *rule of law*, meaning a nation state that is governed by a set of laws above all else.

It is clear that the concept of rule of law is easily and frequently attacked as regards its force and validity, with its limitations and errors being highlighted, while it is simultaneously accused of an idealism that clashes with the inequities and inadequacies of the real world. Therefore, the concept at hand—it is claimed—may end up becoming a cover or alibi for all sorts of injustices.

But it is difficult to offer society an alternative to the rule of law that is as worthy of widespread and long-standing consensus as the legal system

1 *Die deutsche Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates* Tübinga, 1833.

2 It is clear that, as discussed in Chapter 2, there are precedents in Roman law, in the works of Ulpian.

that has its roots in Roman law (in the *pacta sunt servanda*)³ and in the theories of the great jurist Ulpian. What must be done then with the rule of law is to subject it to continuous observation, improving and strengthening it, but always within the framework of the sovereignty of the people.

2. THE THEORETICAL CONCEPT OF SOVEREIGNTY AS THE BASIS OF THE MODERN STATE

Indeed, there can be no rule of law without *sovereignty of the people*. A concept whose origin we must inevitably delve back into the beginnings of the modern age to find, with a first reference to Jean Bodin (1530-1596), for whom the power of the sovereign, and therefore sovereignty itself, was 'to make laws for subjects, drawing from the absolute power of kings anointed by God'. A pronouncement that favours absolutism and which facilitated the transition from the previous feudal order to the formation of nation states.⁴

Later, Thomas Hobbes (1588-1679) argued that all states should be endowed with an omnipotent authority capable of making laws and enforcing them. This, faced with the absence of a divine anointment of kings, would make it necessary to seek out a *pact of subjugation* with subjects towards their sovereign, as a trade-off involving the loss of people's freedom in exchange for the alleged security provided by a *pantocrator*, who would prevent the calamitous effects of war and disorder, a typical result of a hostile state between men, as reflected in the famous aphorism *homo homini lupus*. The result was that only with the authority of the *Leviathan* would it be possible to ensure peace and security; a message that the last student of Hobbes, Trevor Roper, conclusively characterised in the following terms: 'the axiom, fear; the method, logic; the conclusion, despotism'.⁵

After Bodin and Hobbes, John Locke (1632-1704) was the first theoretician before Montesquieu to outline the separation of legislative, judicial and executive powers, in a state whose primary mission would be to protect the individual rights of citizens through a parliament elected by the people, with the capacity to enact laws that must be respected by both the king and citizens.

The English Revolution of 1688 against the absolutism of the Stuart dynasty moved precisely in that direction. This resulted in a series of Acts (the *Bill*

3 Adolfo Menéndez Menéndez, 'El Derecho', ABC, 10.IV.2013.

4 Jean Bodin, *Six Books of the Commonwealth*, arranged and translated by M.J. Tooley, Basil Blackwell, New York, 1995. Also, Roger Chauviré, *Jean Bodin, auteur de la République*, La Flèche, Besnier, Paris, 1914.

5 The Economist, *Britain's first modern philosopher*, article commenting on Noel Malcolm's book, *Thomas Hobbes: Leviathan*, Oxford University Press, London, 2012.

of Rights, the *Habeas Corpus Act*, the *Act of Settlement*) to ensure the inviolability of citizen's fundamental rights and the subordination of the king to the parliament as the representative of the people.

Subsequently, the final declaration of sovereignty of the people was achieved through the two great revolutions of the last third of the eighteenth century: the United States Declaration of Independence and the French Revolution, with Jean-Jacques Rousseau (1712-1778) arising as one of the great inspirations for these changes, which can be summarised in two of Rousseau's famous statements.

The first of these is, 'Man was born free, and he is everywhere in chains'⁶, highlighting a need to reform society, a need which he clarified in his second statement, 'Man is naturally good, and properly educated may transform the environment in which he lives'⁷. These are propositions that paved the theoretical path towards a modern democracy that acknowledges the authority of reason, thereby uniting citizens around a common law and within a single body politic, all bound by a *social contract*.

In this new context, sovereignty was incorporated into the concept of *general will*,⁸ an idea that Rousseau was able to express in his most famous motto: 'Liberty, Equality, and Fraternity', which years later the French Revolution would claim for itself; the same revolution that would draw up the *Declaration of the Rights of Man and Citizen* (1789), inspired by the U.S. Constitution of 1787 that preceded it, the drafters of which, in turn, were influenced by the French declaration when in 1791 they enacted the *Bill of Rights* that introduced the first ten amendments to the Constitution of 1787.⁹

Moving now from political theory to actual practice, we must consider the significance of the idea of a sovereign people in the decisive *push for democracy* found in the U.S. *Declaration of Independence* of 1776, which conclusively established that 'Sovereignty is one, indivisible, inalienable, and imprescriptible: it belongs to the nation: no section of the people nor any individual can attribute to himself the exercise thereof'. However, in the clash between aspirations and reality, the truth is that when the War of Independence ended in 1783, the picture was more complicated: the Thir-

6 Jean-Jacques Rousseau, *Contrato social*, Spanish version, España Calpe (translation by Fernando de los Ríos, 1st edition in 1921), 2nd edition, Madrid, 1972.

7 Jean-Jacques Rousseau, *Emilio*, EDAF, 8th edition, Madrid, 1982.

8 John W. Chapman, *Rousseau, Totalitarian or Liberal?* New York, 1956, Fredrick C. Green, *Rousseau and the Idea of Progress*, Oxford University Press, 1950; Frederick C. Green, *Jean Jacques Rousseau: A Critical Study of His Life and Writings*, Cambridge University Press, 1955.

9 Jan Sammer, *Passport to Liberty*, Penguin, New York, 1992.

teen States of the American Confederation had their own militias, imposed customs tariffs among themselves, and all traded abroad as best suited them. They acted, in fact, as thirteen separate nations.

In response, Madison, Hamilton and other Founding Fathers did not hesitate to make a call to forge a single nation. And thus, the Philadelphia Convention of 1787, with great pragmatism, drafted the text by which the states would definitively enter into a federation, granting a strong measure of initial sovereignty to a new centralised power, in an imaginative and rapid process that gave rise to the Constitution of 1787. For George Washington this turned out to be 'a true miracle: in its preparation, consensus, and even in its enactment'; a text that influenced all subsequent constitutional processes and laid a solid foundation for the rule of law, in particular, on the basis of the first ten amendments mentioned above, which were introduced in 1791. However, it is also true that this set of precepts only came to be regarded internationally with Kant's vision of the imaginable future state and global sovereignty, as we shall now see.

3. KANT'S CATEGORICAL IMPERATIVE ON THE COSMOPOLITAN STATE

Indeed, the most significant intellectual contribution to the legal organisation of rights and global obligations was made, at the very beginning of the modern era, by Immanuel Kant in his essay 'Toward Perpetual Peace. A philosophical sketch' published in 1795, only eight years after the U.S. Constitution and only four years after the Bill of Rights introduced the first ten Amendments to it.¹⁰

More specifically, Kant formulated his idea of a *cosmopolitan world* state as a large international regulator for the prevention of wars, with the categorical imperative of definitively ensuring peace, which would make the universal project of the rule of law possible.

And what, for Kant, was the force that would hold together the pieces of this

10 Immanuel Kant, 'La paz perpetua', second section, preface. I have used the translation of J. Abellán, Tecnos, Madrid, 1985. In keeping with the Latin phrase *nihil novum sub sole*, it should be remembered that, at the times of Kant, debates on a possible world government were numerous and intense, with radical arguments being put forward by cosmopolitan authors such as Anarcharsis Cloots (Jean Baptiste Cloots, Baron du Val-de-Grâce, 1755-1794), who turned to the theory of the social contract to propose the abolition of the system of sovereign states in favour of a universal republic. Quoted by P. Kleingeld and E. Brown, 2006, 'Cosmopolitanism' in *The Stanford Encyclopaedia of Philosophy*, Edward N. Zalta (ed.), 2006, <http://plato.stanford.edu/archives/Fall2006/entries/cosmopolitanism/> >. On the subject, Antonio Truyol Serra, 'La Guerra y la Paz en Rousseau y Kant', *Journal of Political Studies*, Madrid, 8 (new era), March-April 1979, p. 47 to 62. Also, Teresa Barrio Traspaderne, '¿Hacia la paz perpetua? Repercusiones en política internacional de las ideas kantianas', carranlososjospoderen.blogspot.com, Dec. 2011

cosmopolitan or global state based on Law? 'The desire for trade, which cannot coexist alongside war'. This is in keeping with the ideas of what, in modern times, we call *economic integration*. That is, with a conception of the rule of law that was certainly utopian for that era, Kant in fact predicted that the state would renounce war in order to ensure the flow of trade with other states, now undeniably uninterrupted, as it is the source of prosperity. And he based this claim on a philosophical foundation, of ancient origins (which we shall specifically examine in Chapter 5 of this Report when we compare a range of philosophers and economists), that serves to link the rule of law with the *responsible economic state*.

In relation to Kant's utopian project, mentioned above, it should be remembered that, as Victor Hugo predicted, a 'utopia is the truth of tomorrow'; to the extent that Alphonse de Lamartine opined that 'utopias are but premature truths'.¹¹ The utopian and the rational are also related to the figure of Sigmund Freud, who, in his book *The Future of an Illusion*¹² stated that 'all the terrors, suffering and cruelties of life will disappear when the vision of the radiant city becomes a reality, together with the promises of science. Elements that may make it possible to restore a degree of harmony, to place man in a place of serenity', something which—politically—the rule of law entails.

We should also consider the words of Nicolas Berdyaev¹³: 'when the harrowing problems of malnourishment, poverty, and physical pain are resolved, we shall be closer to solving the existential problem'. In other words, the happiness proposed during the times of the Enlightenment and the first two great revolutions may only be approached via changes in the structure of the state, in the legal and in the economic, in order to guarantee economic and social rights and opportunities.

4. THE RULE OF LAW IN RELATION TO ABSOLUTISM AND DESPOTISM

Moving on from reflections on the sovereignty of the people from the standpoint of Kant's categorical imperative, it would be fitting to provide an exposition of concurring elements in the idea of the rule of law, which may be summarised as follows:

11 Jean Servier, *L'Utopie*, Presses Universitaires de France, Paris, 1979. We should also quote Cervantes, through Don Quixote's speech to the goat-herders, in which Martín de Riquer dutifully detected its antecedents, and in relation to which Miguel de Unamuno insisted, very expressively, that such a 'vision of the past is what pushes the conquest of the Future.' From Ramón Tamames' article, 'La condición económica de Don Quijote y Sancho en la sociedad española del siglo de oro', published in *Información Comercial Española*, June 2005.

12 In his *Complete Works*, Spanish version, Biblioteca Nueva, Madrid, 1967-1968.

13 On Nicolas Berdyaev, 'Le Sens de la création. Un essai de justification de l'homme' (1916), translation by Lucienne Cain, Desclée de Brouwer, 1955. Also, 'Le Sens de L'Histoire. Essai d'une philosophie de la destinée humaine', Aubier-Montaigne, 1948.

- The various agencies of the state must assume their respective roles, with clear separations and interrelationships between them, forming a harmonious whole.
- These agencies must act autonomously, and their decisions cannot be overturned except by following constitutionally agreed guidelines.
- Power must be institutionalised and not attached to individuals. That is, it should fall to legal and political institutions that operate on the basis of the actions of persons who lawfully hold these posts.

According to the Rule of Law Index from the so-called *World Justice Project*¹⁴, a state that operates according to the rule of law is one in which four basic principles are respected:

- The government as a whole and its officials are publicly accountable before the law.
- The laws are clear, public, stable, and fair, and protect fundamental rights, such as the safety of citizens and respect for property.
- The process by which laws are adopted and applied must be accessible to all, displaying transparency, fairness, efficacy (doing things) and efficiency (doing them well).
- Access to justice should be guaranteed through juridical bodies with well-defined competences, that are also independent, ethical and sufficient in number; and no less importantly, endowed with sufficient resources to respond rapidly to the basic needs of the communities they serve.

In any case, it should be clear that in the dialectic of ideas and facts, the consecration of the rule of law in the terms that we have attempted to describe here, was undertaken in explicit opposition to the absolutist state, regardless of the fact that the latter, in eighteenth century Europe, had already entered the phase known as *enlightened despotism*; a political concept that emerged from the framework of the (at that time, still) absolute monarchies of the Old Regime, which to a greater or lesser extent took up the philosophical ideas of Encyclopaedism and the Enlightenment, accor-

14 Global independent non-profit organisation. Its work promotes government reform, develops practical programs that support the rule of law, and raises awareness of why this is important for people and communities. It was founded in 2006 and is headquartered in Washington DC.

ding to which political decisions needed to be guided by the forces of reason, together with a new and clearly paternalistic discourse: 'Everything for the people, but without the people'. Thus, the king maintained his almost unlimited power, but accepted the task of overseeing the welfare of his subjects.

The enlightened monarchs implemented in their countries a number of reforms: they centralised government, unified the legislation and institutions throughout the country and modernised the economy by promoting agriculture (*physiocracy*), trade and industry, during the era of the then nascent Industrial Revolution. They also improved the living conditions of the Third Estate, while governments also intervened in the affairs of the Church, even selling off some of its property (confiscation), and even expelling religious orders that were opposed to its principles (as occurred with the Jesuits, due to their manifest tendency to organise their own states within states). Finally, public education, the sciences and the arts were strongly promoted.¹⁵

In the end, the entire rationalist current influenced by the Enlightenment aimed to transform the political system into a stable order for human nature, better suited to the pursuit of happiness; a major impetus that was led by the greatest enlightenment philosophers and writers, such as François Marie Arouet, Voltaire, with all his encyclopaedic wisdom, and by Montesquieu himself, with his *The Spirit of Laws*, a disseminator throughout continental Europe of the previous enlightened ideas of the already mentioned John Locke.¹⁶

The system of enlightened despotism, as a phase of absolute monarchy, declined in the last decades of the eighteenth century. Largely because the ideas adopted by the monarchs influenced by the Enlightenment were also the fuse that ignited the feelings of the classes disfavoured by the crown and the aristocracy, especially the bourgeoisie, who wished to gain greater importance and combat a voracious absolutist system that was a generator of social inequality, in order to move towards what would come to be known as *constitutional* government. And it was in this manner that revolution would bring to an end enlightened despotism, which had itself paved the way for the emergence of the former and was subsequently unable to curb revolutionary tendencies towards the Old Regime.¹⁷

15 In the case of Spain, Richard Herr, *España y la revolución del siglo XVIII*, Aguilar, Madrid, 1962.

16 Despotismo ilustrado, <http://es.wikipedia.org>. For an application of the issue in Spain, Richard Herr, *España y la revolución del siglo XVIII*, Spanish version, Aguilar, Madrid, 1962.

17 Pere Molas Ribalta, *Manual de historia moderna*, Ariel, 1993.

5. SOCIAL AND ENVIRONMENTAL RIGHTS

But the successful implementation of the rule of law, as seen above, also had to evolve against the idea that it was to remain a solely bourgeois creation. And this was achieved by answering a very specific question: What really is democracy? And what is the real nature of the rule of law?¹⁸ 'It is the antithesis of the oligarchy, government by the people, for the vast majority, with respect for all, and especially minorities' was the response. But without a clear demarcation, the concept would result in very different understandings of democracy; in each case, related to the level of development of productive forces and other circumstances.

In principle, the rule of law became associated with bourgeois democracy, which in the strictest sense meant that the socioeconomic system was entirely dominated by the bourgeoisie, based on its full political control, through census suffrage, which prevailed during much of the nineteenth century.¹⁹ With this, the election of legislators and rulers was an opportunity exercised only by those registered in the taxpayer census, i.e. those who paid direct taxes.

This reality was truly ironic, because the taxpayer census did not mean it was the richest people who were paying the bulk of the taxes, but rather, due to the absolute predominance of indirect taxation, it was the poor who contributed the most to the Treasury. In a way, up to 1917, Lenin was not far wrong, in the face of a number of oppressive actions, when he defined the bourgeois state and its government as the *executive committee of the ruling classes*. Much later, the neo-Marxist Nikos Poulantzas was able to foresee that this committee would have to accept a number of changes (social security, trade unions, etc.) in order to avoid a constant open war with the proletariat. This is an area in which Bismarck excelled with his social reforms during the Second Reich (1885), in an attempt to curb the political rise of the proletariat.

In the circumstances mentioned, when one spoke of bourgeois democracy and it was said that the political rights—of assembly, association, expression, religious belief and, above all, suffrage—were purely formal, what was being alluded to was the phase (by then thankfully out-dated) of bourgeois census suffrage, which was conclusively consigned to the ash heap of his-

18 José Ramón Serrano-Piedecabras and Eduardo Demetrio Crespo, 'Del Estado de Derecho al Estado preventivo', *El Cronista del Estado social y democrático de Derecho*, No. 8, November 2009

19 And hence the definition of the state according to Lenin: 'the executive committee of the ruling class', an idea later challenged by the neo-Marxist Poulantzas.

tory by the suffrage that came into effect after the First World War (1914-1918). From that point onwards, in a growing number of countries, citizens came to enjoy formal political rights, and not just access to voting, but also the right to organise political parties and the opportunity to play a part in the transformation of their institutions. They were even able to influence the country's social structure, seeing the fruition of their demands for better wages, employment, working conditions, etc.

During the evolution of this new phase of democracy, the so-called *social rights* emerged: employment, social security, education, unemployment benefits, etc.; and not as a concession, but rather as an irrevocable pact between the ruling and working classes in a global bottom-up process.²⁰

The third phase in the political process would be related to political and social democracy, or advanced democracy; a new era in which it was possible to systematically address the aspiration to redistribute wealth and income. This gave rise to the *welfare state*, and even introduced environmental rights, to be enjoyed by all of society, regardless of social class. All of these are trends which were reflected in the Constitutions of the post-war era, from 1945 onwards, and most particularly in the Basic Law for the Federal Republic of Germany (Article 20), the Italian Constitution (art. 2 and 3) and the Spanish Constitution (art. 9.2); three *cartas magnas* attempting to overcome previous experiences of dictatorial systems that were detrimental to the rule of law (from 1922 to 1944 in the case of Italy, from 1933 to 1945 in the case of Germany, and from 1936 to 1975 in Spain).

Beyond the rule of law, in recent times there have been trends towards dealing with emergencies—starting with terrorism—which have progressively transformed the milieu of full rights into something which Denninger has called the *Preventive State*.²¹ This entails a decrease in freedom, based on the alleged functional logic that it is necessary to *act proactively* to prevent risks; consequently bringing the rule of law into dangerous territory.

This risk becomes greater the more the principle of proportionality (or prohibition of excess) is instilled in the populace, and passes into the domain of a preventive security system, in which consideration of the legal means is no longer decisive, but rather the only matter of importance is achieving the desired end. This issue is, in short, dangerous enough to warrant constant monitoring, as can be appreciated when we look at the patriotic methods of the administration of George W. Bush, which created the *legal*

20 Ramón Tamames, *Fundamentos de estructura económica*, Alianza Universidad, Madrid, 1984.

21 Erhard Denninger, 'Der Präventions-Staat', in KJ, 1988, p. 1 et seq.

limbos of Bagram prison in Afghanistan and Guantánamo in Cuba, and refused to acknowledge the authority of the International Criminal Court.

Once the journey towards the rule of law is complete, we must tackle its content, as regards its functional aspects, on the basis of the concept of public service.

6. PUBLIC SERVICE

The rule of law is closely related to the idea of providing public services, designed to meet the general needs in important areas of activity, attributable to government agencies; a role they are able perform directly, or indirectly through a legal framework of concessions.

In essence, public service aims to make available to every individual, at the lowest possible cost and in conditions that ensure its safety, the use of services to satisfy any general need. This represents the shared basis of the concept of public service, on which a number of theories have been developed and a number of definitions have been proposed, with it being possible to separate such formulations into four major aspects:

- Leon Duguit's theory, which classifies public service as an activity that must be secured, regulated and controlled by governments.
- Gaston Jaze's theory, according to which public service spans all the activities of the Government, in its various manifestations.
- Maurice Hauriou's theory, according to which public service forms an inexcusable part of the activity of Government.
- Theories that give little or no importance to the notion of public service, among which we find the proposal of Henri Berthlemy, for whom the notion of public service is irrelevant, as he considers it to be a mixed bag into which completely unrelated institutions such as 'an appellate court, a charity, a savings bank, a metropolitan railroad, a national printing house, etc.' are bundled together.

Moreover, for a service to be considered a public service, it must be invested with certain essential legal characteristics, without which it becomes denatured; for which reason, with the rule of law an obligation exists to ensure that the general needs are met, because, as Marcel Waline points out: 'Public service is the most energetic form of government intervention, the state's last resort to ensure that a collective need is satisfied when private enterprise, for whatever reason, is insufficient to secure it'.

Public service can be performed according to two different criteria: the organic and the functional, whose opposition was reconciled by the Italian professor Arnaldo de Valles by means of a distinction made between *governmental* and *proprietary public services*. The first may be described as a technical activity for the benefit of the public in order to meet a general need under a particular statutory framework, falling outside the domain of private law; when such activity is recognised by law as a public service and is provided directly by a government agency, or indirectly through private individuals to whom it delegates the execution thereof.

As for proprietary public services, these would be a technical activity to satisfy a general need that is not considered by law to be a public service, and may be performed directly by private individuals as it is not the domain of the government agencies or the state itself.

Furthermore, another essential element related to providing a public service is found in the minimum resources that are required to provide it, which may be grouped into: human resources (a group of people dedicated to performing the tasks necessary for this purpose), material resources (real property, goods, machinery, tools, furniture and essential equipment and financial resources).²²

But aside from these theories and classifications of public services, the real issue lies in their effective administration, that is, the extent to which the service is socially useful. In this sense, it is necessary to determine both the efficacy (whether all that is expected is performed), and efficiency (whether it is done well), which calls for express monitoring of various points:

- *Assessment of the service*, to determine whether or not it really is essential in addressing the true needs of society. And if it is not necessary, an urgent need then arises for its elimination, without further thought, to avoid the wastage of resources painstakingly contributed by taxpayers.
- *Management*. This involves determining what managers the service has, in order to ascertain whether resources are being provided in excess, or, on the contrary, they are insufficient. This leads to an assessment of their functional efficiency, i.e. proposing to do the same things with fewer resources, or undertaking more activities with the same resources, thereby increasing yields.
- *The remuneration* of the directors of public services—directly or through

22 'Teoría del Servicio Público', http://deradmvo.blogspot.com.es/p/blogpage_2192.html.

other agencies, or even through public-sector companies—should be measured, in line with the principle of proportionality. One matter that must undergo serious consideration is the issue of unacceptable salaries, which in many cases, exceed the salary of the President of the Government. It should be a basic principle that no one in the government, whatever their role, should earn more than the highest executive in the land. This would lead to better compensation for the latter or a reduction in the income of those who are currently earning more than him, or a mixture of the two scenarios. It is a theme that we shall examine in greater detail in Chapter 5.

7. CONSTITUTIONAL PRINCIPLES AND POLITICAL REALITIES

Analysing now the rule of law from the Spanish perspective, it will be useful to bear in mind the definition provided in Article 1 of the Spanish Constitution of 1978, where it is referred to as the *Social and Democratic State of Law* (art. 1).

- *Democratic State*. This principle is conceived as emanating from a people who are the sole custodians of national sovereignty, who elect their representatives through universal suffrage, and enjoy collective rights deriving from political association, trade unionism, etc.
- *Rule of Law*. This is based on the principle of legality, according to which institutions are organised in accordance with the principle of separation of powers, and the demarcation for each of them of a series of constitutional rights and freedoms vis-à-vis the citizens, which are binding on all the powers and which, in turn, the powers undertake to guarantee.
- *Social State*. This is a state that guarantees its citizens the actual exercise of their rights in certain areas, such as health, education, sanitation, pensions, environment, etc.

On the basis of the three principles stated, we can now refer to two major factors in the rule of law: legal certainty and transparency. But before we get into this in Chapter 2 of this Report, it will be necessary to highlight that a democratic state and the rule of law may be eroded, and their existence even jeopardized, by a specific series of circumstances such as those that are currently affecting Spain.

This is precisely the issue raised by Professor Santiago Muñoz Machado, pro-

fessor of law at the Complutense University, in his *Report on Spain*,²³ in which he talks about the constitutional crisis gripping the country, despite the fact that the majority of the 'establishment' refuses to acknowledge any such issue. Without doubt, this is because the Spanish people are unaccustomed to remodelling their Constitutions, but rather repeal them in order to start afresh.

Muñoz Machado also highlights the fact that the Constitution of 1978 was enacted after a long dictatorship, and for this reason it has been mythologised, exalted as if it were some sort of sacred text. This has led to it becoming a seemingly untouchable fundamental law, despite public calls for amendments that are considered necessary, in order to strengthen the necessary structural reforms.

But inflexibility is not the only reason for the constitutional crisis. It is also necessary to consider certain uncertainties that entered the Constitution in 1978, pertaining mainly to the decentralisation that led to the creation of the State of Autonomous Communities, which caused a wild overgrowth of government agencies, amid an on-going struggle between the *Administración General del Estado* (Spanish National Government) and the Autonomous Communities. This requires a serious and well-thought-out reform, based on prior studies by legal experts, which is something that has not been carried out, probably because for politicians *things suit them as they are*.

In the scenario we refer to here, with each day that passes, laws declared unconstitutional are approved and implemented, to the indifference of lawmakers and politicians, such that the rights of citizens are being eroded and violated. Thus, we see a need to undertake constitutional reforms or, alternatively, to use existing laws or enact any that may be necessary, in order to ensure that the Constitution is respected²⁴ in its entirety, and as provided in the pronouncements of judges and magistrates.

Solutions? Muñoz Machado proposes a number of these in his aforementioned book, in the 'Epilogue for hardliners, reformers and separatists', which includes a repertoire of actions that do not require major constitutional reforms and which, moreover, at this point, would be no cause for alarm, given the current circumstances.²⁵ In any case:

23 Santiago Muñoz Machado, *Informe sobre España. Repensar el Estado o destruirlo*, Crítica, Madrid, 2012.

24 Ms. Castro, 'Informe sobre España – Santiago Muñoz Machado', <http://www.solodelibros.es/26/11/2012/Informe-sobre-espana-santiago-munoz-machado/>

25 Elisa de la Nuez Sánchez-Cascado, <http://hayderecho.com/2013/04/01/lecturasrecomen-dadas-informe-sobre-espana-de-santiago-munoz-machado>. Also, Fernando Suárez González, 'El Informe sobre España de Muñoz Machado', AM, No. 152, March-April 2013.

Maintaining the status quo will lead the entire constitutional system to des Elisa de la Nuez Sánchez-Cascado, <http://hayderecho.com/2013/04/01/lecturasrecomendadas-informe-sobre-espana-de-santiago-munoz-machado>. Also, Fernando Suárez González, 'El Informe sobre España de Muñoz Machado', AM, No. 152, March-April 2013. truction, a direct result of the refusal to face up to its current sickness. It is reckless to refuse to accept that the division of powers between the State and the Autonomous Communities is highly obscure, inefficient and inadequate; that the general legal system is unmanageable; that the relations between State and regional legislation do not live up to experience and that our inventions in this respect do not work; that it is difficult for citizens to determine the existing regulations; that the proliferation of regulations and the duplication of government agencies are a hindrance to economic development; that it is impossible to efficiently tackle reforms that would make the welfare state more sustainable, and that public bodies were not conceived according to adequate economic and organisational criteria; that public structures and public employees are duplicated without justification; that it is difficult to comply with the laws of the state; that the later has not developed instruments to monitor the implementation of common policies; that the Constitutional Court of Spain cannot act as guarantor for the functioning of a State of Autonomous Communities and stand by while its rulings are breached.

On the other hand—Muñoz Machado also notes—we have the Autonomous Communities, 'they followed the state government model and, in addition to a strong centralised Government, based on the departmentalisation of services, they created an extensive peripheral organisation, whose agencies have taken root in the provinces, without bearing any relationship to the services of the provincial councils'. This has also been compounded by an explosion of public bodies within the Autonomous Communities, the basis and rationale of which are not always easy to explain. To this we must also add public-sector companies, foundations and instrumental bodies of all kinds, with the consequent employment of other personnel in addition to civil servants, and with an operational framework much lighter in controls which therefore opens the door to the possibility of non-application of the Law and corruption.²⁶

26 On the same subject, Ramón Tamames, '32 años de la Constitución española de 1978', *republica.com*, 16 and 22.XII.2010.

But although the above is certainly of serious concern, it could be worse, in the sense highlighted by Belén Barreiro, who has incisively coined the term broken consensus in reference to a series of highly indicative facts and circumstance.

The economic crisis is profoundly transforming the thinking of many Spaniards. After decades of stability in citizens' views regarding the basic rules of our political and economic system, the impoverishment of the country is destroying the foundations of support for democracy and the market economy. At least five consensus have been broken:

Seamless support for democracy. Traditionally, the Spanish have believed, almost unanimously, that democracy, with its flaws, was the best form of government.

In December 2009, a study by the Centre for Sociological Research (CIS) placed support for the democratic system at 85 per cent. MyWord Observatory data for the SER radio station reveal that, currently, democracy is viewed as the best possible system by 61 per cent, representing a drop of 24 percentage points

Majority support for the market economy. In the run-up to the economic crisis, the Spanish favoured the capitalist system. A study by the Pew Research Institute in 2007 revealed that 67 per cent claimed that most people were better off in a market economy. Support for capitalism was higher in Spain than in Germany or France. The economic crisis has turned this data on its head: in 2012, support for the market economy had fallen 20 percentage points, to stand at 47 per cent.

The need for political parties. In Spain, criticism of the parties has always been accompanied by the conviction that without them there could be no democracy. In a 2007 CIS study, this was the opinion of 75 per cent of citizens. This consensus, however, has also been broken: according to the Observatory, 57 per cent now believe that 'democracy without political parties could work through social platforms that people would elect to manage public affairs'. It is noteworthy that the percentage that hold this opinion has increased to 70 per cent among young people aged between 25 and 34 years: the generation that is too old to continue to imagine a better

future and which, nonetheless, also fails to manage to live normally in the present.

The European lifeline. Since the beginning of democracy, the Spanish have shown great enthusiasm for the European project. The economic crisis has broken the consensus on Europe. The Eurobarometer in the spring of 2007 showed that 65 per cent of the Spanish stated that they trusted the European Union. Today, 72 per cent are suspicious. In this case, Spain is no exception: if before the recession 57 per cent of citizens of the EU-27 trusted the EU, now an exactly similar percentage no longer trust it.

The two-party system became progressively more entrenched during the first 30 years of democracy, until the 2008 elections, in which the PP and the PSOE obtained 84 per cent of the votes and 92 per cent of the seats. This trend was broken in the last general election, for the first time in many years, the two major parties did not increase their combined share of votes (the figures were 73 per cent of the votes and 85 per cent of the seats). Polls show a similar evolution in public attitudes. In 2007, according to the CIS, 78 per cent of the Spanish believed that our country had enough parties to vote for in the elections. The latest Observatory data reveals that 87 per cent believe a system with more parties of smaller size to be better than one in which there are two major parties. In addition, voting intention polls for this term point to the possible obsolescence of the two-party system. If in 2011 the two major parties obtained 52 per cent of the votes, they now account for only 33 per cent according to the January barometer of the CIS, and 22 per cent according to the latest study by Metroscopia.²⁷

In summary, it would be correct to say that the foundations of democracy and a series of reservations in relation to the rule of law are being questioned in modern day Spain, as a result of the systematic non-application of the Constitution, including many cases in which judicial rulings, even those of the Constitutional Court, are not enforced. This is compounded by a number of very disturbing *broken consensuses in citizens'* political attitudes.

All of this relates to two essential features of the rule of law—legal certainty and transparency—which we shall study in Chapter 2 of this Report.

27 Belén Barreiro, 'Consensos rotos', *El País*, 22.IV.2013.3

CHAPTER 2

LEGAL CERTAINTY AND TRANSPARENCY

1. THE GENERAL PRINCIPLES OF LEGAL CERTAINTY

The Digest, that great compendium and summary of Roman Law, includes a definition by Ulpian (mentioned above) that states *Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*. Starting with the first of these three precepts, it is apparent that the Romans summarised their idea of law in *honeste vivere* (living honestly), highlighting the individual as the basic subject of law, and attaching enormous importance to the concept of good faith as the basis for coexistence and legal relations of any kind.

The second principle, *alterum non laedere* (not injuring the other), constitutes the basis of the principle of liability and of the duty to compensate in cases of expropriation, and would later become the guiding principle behind the bases for public interest, fair pricing and its actual payment.

Ulpian's third maxim is also clear: *suum cuique tribuere* (give to each his due): it gives legitimate justification to the existence of the state and the judiciary, in that those responsible for resolving legal disputes 'must give each his due', as part of their unavoidable obligation to settle disputes.

These *tria iuris praecepta* provide the universal founding elements of the basic, pre-normative structure of the law and are therefore regarded as the 'root principle of law' and its very substrate. As the great litigator Jaime Guasp put it, legal certainty is the very basis of social peace, which as a good *per se*, must prevail over individual injustice, in that it is a common good and a precondition for progress and justice.²⁸

These days, legal certainty is a universally recognised principle, understood and based on the certainty of law, in terms of both its promulgation and application, as it provides a complete guarantee of everything being clear: what is prohibited, regulated and permitted by the public authorities, in terms of one's relationship with others and their relationship with one.

In the above sense, the state, as the epitome of the public authorities and the leading regulator of relations in society, not only establishes (or ought to establish) the legal provisions to be followed, but also has, in the broadest possible

²⁸ Jaime Guasp Delgado, *Derecho*, Gráficas Hergon, Madrid, 1971.

sense, the duty to create a general atmosphere of legal certainty in all areas where it exercises political, judicial and legislative power, as a guarantee given to each individual that their person, assets and rights shall not be harmed under any circumstances. With the imperative safeguard that, if such a thing were to happen, the authorities would dispense due redress for the harm caused.

To sum up, legal certainty is the certainty that, in law, any legal situation can only be modified by due process, following proper legal channels, previously established on constitutional bases.

In Spain

Legal certainty, as an underlying principle of the exercise of power and as the very basis of the rule of law, is laid down in regulations that link the authorities with the public, both positively and negatively.

In the specific case of Spain, this finds form in a range of legally-binding rules and regulations, backed by Article 9 of the country's 1978 Constitution, which reads as follows:

1. Citizens and public authorities are bound by the Constitution and all other legal provisions.
2. It is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life.
3. The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal enactments, the non-retroactivity of punitive measures that are unfavourable to or restrict individual rights, the certainty that the rule of law will prevail, the accountability of the public authorities, and the prohibition against arbitrary action on the part of the latter.

It is in this last section of Article 9, Section 3, that establishes the principles that can be regarded as the bases of the rule of law in Spain, stemming from the necessary legal certainty:

- *The principle of legality* means any act by the public authorities must be in accordance with the law, and may not contravene any legal provision. This applies to the country's government and all other governmental and

administrative levels. This legality is safeguarded by the courts of law and the Constitutional Court.

- *The hierarchy of legal provisions* means that no legal provision may be modified by another of a lower rank. So, a change to an Act requires a subsequent Act, and to change a Decree you need a subsequent Decree. An Act cannot be amended or repealed by means of a Decree, and a Decree cannot be modified by a Ministerial Order.

- *Non-retroactivity* makes it impossible to publish a regulation that is applicable to those who were previously entitled to a supposedly more favourable situation. Laws, unless they improve those previously in force, may not apply to situations prior their promulgation or formal announcement.

- *Legal certainty* means that any member of the public has the right for their specific circumstances to be placed on record: to register their birth, marriage, etc. in the Civil Registry, to register for the census, to record their properties in the Property Register, to validate their dealings before commissioners for oaths (normally notaries public), etc. And, above all, it means that regulations cannot be changed without proper cause and that the authorities' decisions can under no circumstances be arbitrary.

- *The accountability of prohibition against arbitrary action on the part of the public authorities* means that the latter are answerable for their actions and can therefore commit offences and have an obligation to compensate the affected parties when they have not acted lawfully.²⁹

Along the same lines as its Article 9, Article 103.1 of the 1978 Constitution states that:

The public administration serves the general interest with objectivity and acts in accordance with the principles of efficiency, hierarchy, decentralisation, deconcentration and coordination, being fully subject to justice and the law.

It is thus clear that, in the cause of legal certainty, the idea of objectivity, alongside those of efficiency and lawfulness, lead to a series of principles for the action of the public authorities, ones which, based on the Constitution, have been implemented in a series of specific regulations:

²⁹ Ramón Tamames and Laura Tamames, 'Introducción a la Constitución española', *Alianza Editorial*, Madrid, 2003

- The preamble to Law 4/1999, of 13 January (reforming Law 30/1992, of 26 November, on the legal regime for government agencies and common administrative procedures), highlights the precept for the actions of government agencies 'stemming from the principle of legal certainty' embodied in Article 3.1.II of Law 30/1992. A second principle is that 'equally, they (government agencies) must in their actions respect the principles of good faith and legitimate expectations'.

- Additionally, said reform incorporated into the relations between different government agencies another principle, one imported from European Community law: that of 'institutional loyalty' (Article 4 of Law 30/1992), predicated for collaboration and cooperation between them and which appears to be a reflection of the idea of good faith.

With regard to the principle of good faith in administrative law, according to Blanquer,³⁰ the public authorities cannot disappoint citizens' legitimate expectations, with the consequent legally enforceable legitimacy that the citizen places his or her trust in the authorities and the latter in the citizen, as Sainz Moreno rightly adds.³¹ Such expectations are based on external, objective, unmistakable indications, above and beyond non objectifiable intentions. In this regard, reference can be made to the doctrine of the Supreme Court (SC) and the Constitutional Court (CC) which can be summarised in the rulings (R) set forth below:

- The public has a threshold in its trust that the stability of the legal order and market situations is justified by reasons of public interest (CCR 38/1997, of 27 February).

- When changes in regulations arise, every attempt should be made, wherever possible, to ensure the compatibility of the public and private interests at stake by means of predictability. So, if the conduct of the public authorities is surprising, unexpected and not adapted into line with currently applicable conditions by means of transitional provisions (SCR of 24 May 1988, Art. 4203), there is complete entitlement for demanding redress for any unjustified economic harm that may arise (CCR 197/1992, of 19 November and CCR 205/1992, of 26 November).³²

30 D. Blanquer Criado, *Introducción al Derecho Administrativo*, Tirant: Lo Blanch, Valencia, 1998.

31 F. Sainz Moreno, 'Seguridad Jurídica', in *Enciclopedia Jurídica Civitas*, Volume IV, Civitas, Madrid, 1995

32 Juan José González Fernández, 'Una aproximación a los principios de seguridad jurídica', April 2005, *Noticias Jurídicas*.

Criticisms of the configuration of the Constitutional Court and the Higher Council of the Judiciary

Previously, we have examined (albeit briefly) the regulations currently applicable in Spain on legal certainty. However, as important as the regulations themselves is the way in which the bodies enforcing them work: here, we refer to the country's Constitutional Court (CC) and the Higher Council of the Judiciary, whose Chairman is, in turn, that of the Higher Council of the Judiciary.

As far as the CC is concerned, it is undeniably the case that its judges require a broad-based majority to be chosen: nevertheless, this does not imply a castiron guarantee of the independence of those chosen for such an important responsibility. This is because the current selection process in Spain involves negotiations between political parties that are not subject to public scrutiny. And, what is more, above and beyond any other criteria, it could well be that a party based quota system and the loyalty of the chosen to the choosers prevail, rather than any legal ability and likely future independence on the part of the judges.

A second intended guarantee to ensure the CC's neutrality is a one-term only tenure. There is an age limit and a specific term of office, aimed at ensuring the continuity of the Court's work and with the idea that this period marks the culmination of a judge's career. However, this also provides no guarantee, given the way they are chosen and the people who choose them. So it is that a judge can be tainted with bias throughout his or her term.³³

With regard to the CC, constitutional law experts are searching for a formula to make it both *be* and *appear* impartial. For example, Agustín Ruiz Robledo (professor of Constitutional Law at the University of Granada), suggests that what is important is to 'respect the referee' appointed. Something that could not occur in our case, as it would appear that the politicians who choose the judges have adopted the ideas of Clausewitz, and think that 'the Constitutional court is the continuation of politics by other means', as war was for the famous Prussian general.

Given this, the system could work far better if the country's political parties acted out of constitutional loyalty, ensuring that they chose the Court's members by consensus and resorting to the CC only in cases in which there were compelling arguments in support of the unconstitutionality of a

33 Francisco Sosa Wagner, 'Política y Tribunal Constitucional', *El Mundo*, 24.VII.2013.

regulation, rather than simply to defend their interests after being defeated in the elections or in a parliamentary vote.

One technical proposal for resolving the current situation would be to amend the CC Act so that judges' term of office automatically expires nine years after their investiture and that the resulting vacancy is immediately filled. In this way, given that they will leave office for a variety of reasons over the course of time, the fact that the choices are made one by one will allow for the quota system to be abandoned in practice.³⁴

Also with regard to the CC, of great merit is the view held by Professor Andrés Ollero, a member of the Court itself, in which he notes with concern that:

Today's allergy to the truth, fed by the fear that its lucky owners may bang their heads against it, has made natural law into a mere pet. We defend human rights as fundamental component of our own dignity, but refuse to admit that they may be based on an ethical reality as objective and rationally understandable as physics.

...To defend the rule of law and ignore natural rights, depicted as the invention of priests, always ready to take power, is like wanting to suck and blow at the same time ... If nothing is true and nothing a lie, it is logical to find a politicised Constitutional Court in which all reasoning is excluded, devoured by the vote, and whose judges must be seen as lawyers representing a side. They would have no choice but to appear as Marx depicted the legal profession in general: as phoneyes, who offer as their reasoning only the requirements of the power that appointed them.³⁵

Moving on to the subject of the Higher Council of the Judiciary (HCJ), again with regard to its configuration, Bonifacio de la Cuadra, member of the 1977 parliament that drew up the Constitution, criticises it, emphasising that it was created in the 1978 Constitution 'to remove governance of the judges from the hands of the executive power ... [following the example of] Italy's High Council for the Magistrature. [Nevertheless], it is probably the Spanish Constitutional institution that has seen the worst outcome, although responsibility for its failure should not be attributed

34 Agustín Ruiz Robledo, 'El complejo de Clausewitz', *El País*, 25.VII.2013.

35 Andrés Ollero Tassara, 'El eclipse del Derecho', *ABC*, 16.VIII.2013.

to those who drew up the Constitution (as in so many other parts of the “Law of Laws”) but instead to those who implement it... And, from then on, the PSOE and PP have, without even discussing the legal qualification of candidates, been dividing the HCJ as follows: nine for the PSOE, nine for the PP, one for the PNV and one for CiU’.³⁶

Internationally

In today’s globalised world, large-scale economic and financial movements are of increasing importance. In this regard, reference should be made to international legal certainty, which is vital for optimal development of investment between countries. It is with just this aim in mind that various attempts have been made to create the required guarantees of legal compliance by means of multilateral conventions that include effective undertakings in this regard.

Particular note should be taken of the negotiations carried out to mutually guarantee (between recipient and lender countries) investments made by more advanced countries in emerging and developing ones, through the planned Multilateral Agreement on Investment (MAI) negotiations on which were embarked upon by OECD members in May 1995 in the aim of reaching a conclusion in May 1997. A goal that was, for the reasons we shall see below, impossible to achieve.

The reason for holding these negotiations within the framework of the OECD was because, at the time, its members generated the majority of foreign direct investment (FDI): 85% of outgoing and 65% of incoming, with an order of magnitude of 400 billion dollars in 1997, a flow which subsequently grew much faster than the trade in goods or services (1.4 trillion dollars in 2001 and more than two trillion in the second decade of the 21st century).

There was another significant reason for these negotiations: OECD members believed that FDI offered great advantages, and so it was important for everyone, and particularly developing countries, to promote a high degree of liberalisation in these capital flows. In this regard, OECD member can boast years of experience in analysing and debating such matters.

In short, the purpose of the MAI was to promote a level playing field for international investors, with rules designed to eliminate any possible judicial distortions of more or less doubtful legality. All this was in the aim of a

36 Bonifacio de la Cuadra, ‘Ruiz-Gallardón liquida el Poder Judicial’, *El País*, 17/VIII.2013.

more efficient allocation of resources at an international level. This being the case, the intention with the MAI was to:

- Introduce strengthened discipline over movements of persons specialising in financial matters.
- Prevent the operation of monopolies and activate privatisation measures.
- Update and modernise investment protection tools.
- Improve conflict resolution procedures by means of international arbitration.
- Put an end to national measures that still discriminate between foreign investors.

However, despite these good intentions, as of today (2013), the MAI has still not been signed, due to the opposition shown by developing countries since the very beginning. This was due to the fact that, at the time, nobody in the Third World liked the fact that negotiations were carried out within the OECD, which was regarded as a 'country club' of rich North Atlantic countries with only seven new members: three Central European (Poland, the Czech Republic and Hungary) and but four from the rest of the world (Mexico, Argentina, Chile and Hong Kong).

There was a generalised call from developing countries that the MAI negotiations take place within the World Trade Organisation,³⁷ or at least that said Organisation play a greater role in the final wording of any possible agreement. The North/South confrontation on this issue led to the postponement sine die of the conventions in the autumn of 1998, although industrialised countries still look hopefully at the MAI and would be happy at its return.

Since then, there has been a large number of cases of legal uncertainty, in countries such as Russia, a number in Africa and a great number in Latin America, particularly Cuba, Nicaragua, Venezuela, Ecuador and Argentina, which have seen episodes of unexpected nationalisations without compensation, etc. On the other hand, China, Mexico, Colombia and Brazil have made repeated statements in favour of real legal certainty at a worldwide level.

37 *The Economist*, 'The sinking of the MAI', 14.III.1998. Also: Guy de Jonquières, 'Axe over hopes for MAI accord', *The Financial Times*, 25.III.1998, and Carlos Sánchez, in *El Mundo*, 25.VI.1998.

The case of taxes on bank deposits

However, it is clear that a lack of legal certainty need not occur only in emerging or developing countries. It can also exist in more advanced ones and even supranational organisations. One such case is that of bank deposits in the Eurozone, whose integrity has been severely eroded with the bailout organised by the Eurogroup for Cyprus in March 2013. This was based on a tax, or more exactly an expropriatory levy, on deposits of more than 100,000 euros. Such resources were to be used, it was said, to recapitalise banks that were in danger of bankruptcy.

In light of this unexpected and counterproductive decision, Sharon Bowles, Chair of the European Parliament's Economic and Monetary Affairs Committee (ECON), and one of the most influential people in EU banking and financial regulation, screamed blue murder:

'I couldn't believe my eyes. Where was the Commission? They are supposed to defend the single market. It was something completely premeditated and, bearing in mind people's perception and the markets and realpolitik, a very ignorant position', said Ms Bowles, after warning that, with the Cyprus bailout, the Europeans' confidence in bank deposits would be hard hit.

They (the European Council) believe that (establishing a tax on deposits) is valid and they will, in extremis, use it again. But I think that it is something very dangerous for the stability of European banks.

I don't see how we're going to manage our banks in Europe if people think that their deposits, whatever their size, can be penalised. Then we'd all end up in a German bank...

According to Ms Bowles, what is at stake is the Banking Union itself, the projects started by the 27 EU governments together with the European Commission and the ECB to correct some of the most serious errors committed in starting up the single currency.³⁸ Thus it is that we have a truly appalling situation for legal certainty at the very heart of the financial system, with no future guarantee that the case of Cyprus is an exception. With some justification, it could be said that its banking system, which was highly speculative and with a large amount of Russian money being laundered, allowed for such an operation, one that would be unacceptable in other countries

38 Miquel Roig, 'Si se ponen en duda los depósitos, acabaremos todos en un banco alemán', *Expansión*, 8.IV.2013

and circumstances. Nevertheless, concern about this issue is clear, in many circles, as highlighted by Jaime Puig Ribera in the following terms:

There is, today, palpable concern amongst savers about the security of their bank deposits. These worries are greater than those that might exist in other European countries, as Spanish families have traditionally been keener on such deposits, to the point that they have fifty per cent of their financial assets invested there, whilst the average for European families is one third.

In the short term, there is no reason whatsoever to worry about deposits, which are not at risk. However, it is quite another thing to ask oneself, as an investor, if it makes sense to hold on to deposits that are remunerated at a rate lower than inflation, or if, once savers have visualised the counterparty risks, they should perhaps seek alternatives from amongst the so-called 'disintermediated' financial assets, ones that do not form part of the balance sheet of any financial institution.³⁹

Having examined such a serious case of lack of legal certainty within the EU, which lays claim to being the universal paradigm of legal certainty, we shall now turn to the greatest danger to legal security in the rule of law: corruption.

Retroactivity in renewable energies

In addition to the case of bank deposits as part of the Eurozone bailout policy, there is an even more recent example of the lack of legal certainty in Spain. This is that of renewable energies, whose tariff scheme was revised in July 2013 with swingeing cuts in wind and solar power returns, returns that were previously regarded as fixed and indefinite. More specifically, with photovoltaic energy, this uncertainty may, due to changes to legal precepts laid down in 2007, cause hardship to 55,000 businesses and self-employed, who made investments that are now extremely unlikely to give a return.⁴⁰

In this regard, The Economist highlighted the fact that 'the changes have infuriated everyone. They are retroactive—affecting current operations as well as new ones—so there will be a deluge of lawsuits challenging

39 Jaime Puig Ribera, 'La seguridad de los depósitos', *Dinero. La Vanguardia*, 28.IV.2013.

40 Miguel Angel Martínez-Aroca, President of Anpier, 'Sin seguridad jurídica, no habrá recuperación... nunca', *ABC*, 19.V.2013

their legality. Some firms will face problems servicing their debts and the government is in talks with banks to forestall bankruptcies' ⁴¹.

2. CORRUPTION VERSUS THE RULE OF LAW: THE NEED FOR REGENERATIONISM

This is the second most serious problem for Spaniards, according to pollsters Centre for Sociological Research (CIS). Corruption reached this second place for the first time in March 2013, with a score of 40%, beaten only by unemployment, which is the chief worry of millions of people.

An alarming situation

The Higher Council of the Judiciary has quantified the cases of corruption in Spain, which have reached a hitherto unseen number. This is due, to a great extent, to the great work carried out by the press, who have investigated numerous cases that would otherwise have gone unpunished. The figures and the situation are impressive:

Spain's courts have heard a total of 1,661 criminal cases involving political and economic corruption: abuse of authority, bribery, embezzlement, influence peddling, fraud or misuse of funds, amongst others. The report, which does not include special cases being heard by the Supreme Court, does not specify how many of these cases involve politicians.

Neither does it include the average time spent on the pre-trial phase of proceedings, although it does state that delays in processing the cases are influenced by the tardiness of the Spanish Tax Agency and police units in responding to requests by judges for reports and actions.

The Autonomous Community with the greatest number of corruption related cases is Andalucía, with 541, followed by the Community of Valencia, Madrid and the Canary Islands.

The judges' governing body estimates that 798 courts require strengthening due to the backlog of work caused by the pre-trial stage of complex cases. In its opinion, there is a need for 64 backup judges, 18 more court clerks and a further 150 civil servants.⁴²

41 'Renewable energy in Spain. The cost del sol', *The Economist*, 20.VII.2013.

42 María Peral, 'Los juzgados tramitan 1.661 causas por delitos vinculados a la corrupción', *El Mundo*, 26.IV.2013.

What is more, as Lucía Etxebarria notes, corruption ‘at the top’ is the very worst kind. She provides a clear explanation of why this is:

Corruptio optimi, pessima. A classic axiom: corruption of the best is the worst of all kinds. The ‘best’ would be those of whom most is expected, in that the social system confers upon them institutional, charismatic or traditional authority. The ‘best’ have shown us that they are the worst. Worse still are those who are not outraged when this happens: the news caused no outrage in Marbella. They’re used to it, of course.

What is most serious is not the corruption exists, although that is serious enough. The worst of it is that it is not punished severely enough. It’s no wonder that a member of the PP’s national executive has threatened to ‘have the heads’ of those calling for him to do what he ought. The elites ignore the fact that the masses do not hate, they just call for action. They hate minorities, because conquering rights causes joy, whilst losing privileges causes resentment.⁴³

On the fringes of corruption is the serious problem of the flight of Spanish capital to tax havens and the resulting tax evasion. This has taken on massive relevance after the tax amnesty decreed in 2012. In this regard, as Casimiro García Abadillo notes:

Reliable sources estimate that Spanish money (including all manner of financial asset accounts) deposited in Swiss institutions reached 100 billion euros in 2012 (10% Spanish). The majority of this money was in all probability not declared to the tax authorities. Although a large amount of this has been regularised, the majority remains in Swiss banks ‘for security reasons’, which have been accentuated after the crisis in Cyprus, a source notes. The ‘extraordinary regularisation’ or tax amnesty organised by the government led to the emergence of 40 billion euros of ‘black’ money.

As the President of the *Audiencia Nacional* (National High Court) himself admits, in addition to the rogatory commission sent to Switzerland (regarding hidden sums not revealed by virtue of the amnesty), there are 18 others underway seeking information from tax havens such as the Cayman Islands,

43 Lucía Etxebarria, ‘La corrupción por los ¿mejores?’, *Magazine. La Vanguardia*, 28.IV. 2013.

Jersey, etc. Unlike Switzerland (at least recently), these redoubts have no interest cooperating with the Spanish legal system. Their reputation is built upon the ability to resist requests from courts investigating their clients' dealings.

According to financial sources, after the tax amnesty, and following the deluge of supplementary tax returns currently being filed, there will still be some 30 billion euros undeclared, which have fled in search of safer hiding places. The fight against tax evasion must be one of the government's top priorities. In a country with more than six million unemployed and the economic recovery retreating until 2016, we can simply not allow a handful of evaders to thumb their nose at those who, despite everything, continue to comply with their duties.⁴⁴

A media firestorm

The corruption currently under investigation (as seen above) and that which can be insinuated from activities such as the PER (Andalucía's Rural Employment Plan) and the different subsidies that are so frequently found in client companies riddled with corruption arising from this unjustifiable aid, is the cause of great public indignation, which features a complex mixture of disappointment, rage and anguish. There is disappointment at the generalised failure of the system due, amongst other things, to the way that almost all political parties have been infected with this plague, as can be appreciated from television and radio reports, newspaper headlines and social network timelines. There is a constant trickle of cases in government agencies, and also in businesses and associations, including the world of sport. The latter is a hot topic, into which Javier Tebas, the President of Spain's National Professional Football League has weighed, in the following conversation, part of which is transcribed below:

Q. You have stated that your priority is the fight against match fixing. Is this such a serious problem in Spanish football?

A. UEFA and FIFA say there is a 1% incidence. But the fact is that one fixed match out of the 380 of the First and Second Divisions is a serious problem, all the more so if it impacts upon league standings. So it's a priority matter.

Q. So what can be done?

44 Casimiro García-Abadillo, 'Suiza, el paraíso perdido', *El Mundo*, 29.IV.2013.

A. First of all, we need to acknowledge the problem. It's like the Church and child abuse: it's when you acknowledge that you are sick that you start taking the right pills. After that, you have to inform the authorities, the police, the prosecutors' office... the slightest rumour needs to be investigated.

Q. But when you were Vice-President of the League, you didn't do this, did you?

R. I can't comment on this, because I would harm the investigation.⁴⁵

The above allegations by Javier Tebas, became, after a series of specific investigations from July 2013 on, an entire litany of situations summarised below from an interview with the new President of the Football League:

—Aside from the economic situation, is your major concern, as you yourself have stated on occasion, match fixing?

—It worries me almost more than the other issue. Although fixing occurs only in a small minority of cases, what are we selling here, if the outcome is not the result of sporting chance? We are talking about a very serious crime that involves deceiving fans and betters alike. It's of serious concern to me. It was one of the reasons I stood [for League President].

—Why? Why did you feel this way?

—I spent four years denouncing match fixing. It was a fact: matches were being fixed. But I couldn't do anything, legally, about it, because I was Vice-President but had no executive powers. I felt that we in this institution had to do a lot more about it.

—Why was it not being done?

—The League, the Federation, the government... either they didn't believe it or they felt it was very minor problem. I said no, it was a very serious one.

—At what level?

⁴⁵ Amaya Iríbar, Javier Tebas, President of the Professional Football League, 'La crisis del Fútbol español no es solo económica, sino moral', *El País*, 29.IV.2013.

—At a level that needs to be eradicated very urgently, because it is spreading like wildfire.

—What happened in the Racing-Hércules match (3-0) last season?

—I haven't the slightest doubt. The match was 100% fixed.⁴⁶

In response to this and other accounts, the government blames the media for being 'so unfair' in commenting that corruption is not only generalised, but already institutionalised.⁴⁷ However, the belief is now widespread that the political system instituted in La Transición (Spain's transition to democracy after the death of Franco) is deeply corrupted, such that neither government nor opposition appear to have the credibility, strength, or indeed bravery required to turn the situation around.⁴⁸

This is an issue later stressed by Elisa de la Nuez—Spanish State Legal Council, founder of *Iclaves* and publisher of the blog *¿Hay derecho?*, whose viewpoint links transparency with democratic principles:

It is worth remembering that, as transparency is a fundamental value in an advanced democracy, the right of access to public information (above and beyond what is literally acknowledged as such or not in a constitutional text) is a fundamental democratic right. Democracy cannot be restricted to a government procedure and less still to a fouryearly electoral process, as our representatives would appear to prefer. Democracy is also, and above all, a system of rights. More particularly, the right of access to public information allows the public a better understanding of what is happening in their country at a given moment in time.⁴⁹

Regenerationism instead of legal vacuums and over-regulation

Once again with regard to Joaquín Costa's ideas of Regenerationism, and his criticisms of the corruption of the past in the form of oligar-

46 David Álvarez, interview with Javier Tebas, President of the Spanish Football League, *ABC*, 29.VII.2013.

47 Elisa de la Nuez, '¿Creemos al Gobierno?', *El Mundo*, 26.III.2013.

48 Enrique Tierno Galván, 'Costa y el Regeneracionismo, Barna' (the *Vida Europea* collection), Barcelona, 1961. Also cf. Ramón Tamames, *Una idea de España*, Plaza y Janés, Barcelona, 1985. Worthy of particular note is that the idea of Regenerationism lives on, as made clear by Jaime Lamo de Espinosa in his book *Joaquín Costa, tan vivo hoy como hace un siglo*, *Vida Rural*, 1.IV.2013, in which he states, 'Why this book, now? For many reasons. Because 2011

49 Elisa de la Nuez, 'La transparencia, un derecho oculto', *El Mundo*, 19.VII.2013.

chies and caciquismo (local despotism),⁵⁰ it is perhaps worth taking a look at what this movement meant.⁵¹

Regenerationism was an attempt to change the course of the nation in the face of a disaster foretold and that finally occurred in 1898. It was an attempt to regenerate the oligarchy and local despots themselves, with all their corruption and peccadilloes. To change their course towards a state of new greatness: not for imperial purposes, but rather to improve the cultural level of the people, social wellbeing and the real enjoyment of liberty.

The apostle of Regenerationism was Aragon's Joaquín Costa (1846-1911), who was able to summarise it in formulas such as 'Dual key to el Cid's tomb so that he never rides again', to put an end to the jingoism based on a fallacious interpretation of history. Or the even more concise recommendations of 'School and pantry' in the fight to educate and properly feed an ignorant, malnourished population. Whose 'Water Policy' was to develop the foundations for agricultural wealth, based above all on water, to be stored in reservoirs for better distribution during the long summer shortages.

Without ignoring the 'Krausist' Regenerationists and their derivation from the Institución Libre de Enseñanza (Free Teaching Institution), all Regenerationists of any importance were, to a greater or lesser degree, disciples of Costa.

With regard to Regenerationism, Javier Moreno Luzón, Professor of History at the Complutense University of Madrid (UCM), argues that in the Spain of the turn of the 19th and 20th centuries, the word 'regeneration' saturated political discourse:

Its presence was so overwhelming that few historians hesitate to label as 'Regenerationist' the period between the colonial defeats of 1898 and the outbreak of the Great War in 1914. It includes 'Regenerationisms' of different stripes, born or re-forged in the heat of the debacle overseas: Catholics and liberals, Catalan nationalists and promoters of everything Spanish, business people and educators. Pío Baroja, in his 1904 novel *La busca* (The Quest), depicted a cobbler in the slums of Madrid,

50 C. Remírez de Ganuza, 'Críticas al Gobierno en el propio PP: "No hay relato, ni peso, nadie explica nada"', *El Mundo*, 15.IV.2013.

51 Ramón Tamames, *Una idea de España*, Plaza y Janés, Barcelona, 1985.

marked by a defiant sign with the slogan For the regeneration of footwear...

The atmosphere of 1898 was infused with education, and the following years saw an expansion of a morality that linked Spain's Europeanisation with the advancement of science. People such as those associated with the Free Education Institution, who enthusiastically collaborated with regenerative ventures and policies, convinced almost everyone of the crucial importance of an educated society full of internationalised professionals. In thirty years, illiteracy rates were cut by half and science experienced astonishing growth.

In this midst of this era of globalisation and the knowledge-based economy, only competition based on knowledge, and not on a cheap, ignorant and resigned workforce, will get us out of this mess. Regeneration, once more? Yes, but using the head.⁵²

However, the fact is that, rather than a new Regenerationism, what has appeared in Spain in recent years (part of a worldwide trend, it is true, though this is something that should be of little consolation) is a series of legal vacuums, or 'vacuums of impunity', which is something else entirely, as has been seen in the case of the EREs (redundancy schemes) in Andalucía; cash-stuffed envelopes circulating between political parties and large companies, and also between the latter and some trades union, a clear looting of government agencies and other public positions by their very own managers. There are similar cases of spurious donors in the very party of government, by all appearances.

This is a complex problem, to which Spanish Royal Jurisprudence and Legislations Academy member Luis Cazorla Prieto has made incisive reference with regard to over-regulation:

Spain has in recent years suffered a treacherous, insidious ill of incalculable consequences. Politics, in its negative manifestations—the fight to achieve and retain power at any cost, destroying rivals as a means of remaining in power, the activity viewed as a profession providing a permanent livelihood—has entered areas it should never have been admitted to—the judiciary, regulatory bodies, public bodies managing our economic life—and is absent, more often than would be desirable, from

52 Javier Moreno Luzón, 'Otra vez la regeneración', *El País*, 19.VIII.2013.

where it should always be, from the houses of parliament, with the deluge of decrees and laws, oversight deficiencies, etc.

Add to all this the fact that politics has been dominated by a rigidly insulating, in-bred system that favours certain political careers stemming from party youth organisations, and you have a mixture making up the mattress upon which one can find reclining a good number of the irregularities that are poisoning public life and some of the causes of the institutional crisis afflicting us.⁵³

The aforementioned 'vacuums of impunity' are growing ever larger. This is explained by the lack of effective oversight and penalty measures against conduct that enables corruption, given that these mechanisms are (directly or indirectly) in the hands of the political parties themselves. Even more so when the only thing that remains out of their control are the courts, which are slow. And, anyway, the political parties have learned how to bypass convictions that are not in their interests by granting outrageous pardons.

The state that we have reached calls for a change. Not simply in our laws, because when there is an abundance of laws, people are more concerned about acting legally than acting ethically. Today's society needs more democracy (equality, transparency, meritocracy, the rule of law), better education (of the head, the will and, above all, of desires) and to regain hope.⁵⁴

With regard to all the above, it seems clear that potential for corrupt behaviour depends upon the level of political or civil service involvement of in a society's economic life: in other words, to the extent to which politicians and civil servants can take, with a large degree of discretion, decisions on economic interests that provide opportunities for large-scale and quick enrichment. Because of this, corruption will be greater:

- Particularly, the greater the involvement in the economy and the smaller market independence from politics.
- The greater the number of centres that take decisions with an economic impact: that is, the more the decentralised management of public expenditure is.
- The greater the degree of discretion in the decision-making process.

53 Luis María Cazorla Prieto, 'El caso Jérôme Cahuzac', *ABC*, 24.IV.2013.

54 Pablo Alamo, 'Ante la corrupción, democracia y educación', *Ethic*, April 2013.

- The lower the level of transparency.
- The lesser the degree of a priori or a posteriori control.
- The greater the political control of the media, when there is a tendency to conceal one's own cases and reveal only those involving adversaries and enemies.
- The weaker the penalty in the case of discovery and, finally:
- The lesser the probability of the penalty being enforced and/or the greater that of a final pardon.⁵⁵

Are there solutions to corruption?

Economist and professor Antón Costas tackles the issue of corruption with great insight when he asks, 'When is a country corrupt?', to immediately embark upon a discussion of great interest: the most widespread form of corruption is the so-called 'petty corruption'. This is small-scale corruption, consisting in (for example) paying small 'sweeteners' to accomplish everyday activities, such as progressing through red tape or accessing a public service. Also to choose your preferred school, or receive the promptest possible care from the health service.

By this yardstick, Spain is not a corrupt country, and does not come off badly in the rankings covering the aforementioned situations, with a standing close to that of Nordic countries. This does not mean, however, that we should not be concerned about corruption, and more specifically 'grand corruption', which has become entrenched in some public activities in Spain.

Amongst them, and head and shoulders above the rest, is that associated with town and country planning, when mayors and those in charge of town plans do not carry out their duties as properly as they should. The second area prone to grand corruption is civil engineering procurement by government agencies and the concession of public services for private management. The third would be the use of grants and official aid for certain activities, such as redundancy schemes or incentives for renewable energies.⁵⁶

In the same vein of providing a clearer view of what corruption is, of great use to us is the insight of Professor Javier Redondo, of Madrid's Charles III

55 'Corrupción política', *Círculo cívico de Opinión*, 18.II.2013.

56 Antón Costas, 'La ecuación de la corrupción', *El País*, 28.VII.2013.

University, when he highlights the fact that '*La Transición* transformed the external functioning of our institutions but not our political culture. It changed the form but not the nature. New elites replaced old ones, but these new elites, particularly those at local, Autonomous Community and trade union level, soon realised that by retouching but a few parameters of the discourse and tidying up things a bit here and there, they could freely carry on with the usages, habits and behaviour of past centuries. And this is how we have survived these past 30 years: the earliest one, with democratic enthusiasm, and the last ones of delusions of opulence'.⁵⁷

Having said this, the first thing in the fight against corruption is the need for transparency, for on-the-record clarity. That what is happening is known and explained. As far as we know, Spain is the only country with more than one million inhabitants that lacks a Freedom of Information Act, as we shall later see when we look at the White Paper currently under way.

In this regard, the web portal *Tuderechoasaber.es* is the first Spanish site to provide users with information on any Spanish public institution. It was also the first Spanish organisation to ask the country's Deputy Prime Minister, Soraya Sáenz de Santamaría, to ensure that the Freedom of Information Act also covered political parties and the trade unions.

Additionally, in spring 2012, two Spanish citizens submitted a petition to the website *Change.org* with a clear goal in mind: that, in the light of public corruption, Spain's *Tribunal de Cuentas*, or Court of Auditors, do its job. The petition, which collected more than 72,000 signatures in a few weeks, asked the Court (to which we will refer in the closing chapter to this Report) to publish data on the funding of political parties on a day-to-day basis, as the last time it had done so was with regard to 2007.⁵⁸

To fight against corruption, the *Círculo Cívico de Opinión* (Civil Circle of Opinion) proposes that priority be given to the following points:

- *With regard to political parties*, there is a need to guarantee internal democracy and the transparency of their actions, with annual audits of accounts and the suspension of office holders accused of improper administration in judicial proceedings. There is also a need to change the current Election Act to replace today's closed and blocked-off list of candidates with another that allows for the refusal to vote for candidates who do not merit the trust of the public due to their setting a poor example.

57 Javier Redondo, 'Nuestro momento maquiavélico', *El Mundo*, 20.VIII.2013.

58 Contra la corrupción, acción', *Ethic*, April 2013.

- *With regard to government agencies*, there is a need to do away with the duplication of structures and public functions that are like a millstone around the neck of the public and that imply unnecessary public expenditure. There is a need to rid the country, as soon as possible, of public bodies and enterprises that have led to an oversized, immoderately interventionist and unscrupulous state sector, which is conducive to collusion of interests and corruption.
- *Functions usurped by those close to political parties must be returned to the civil service on the basis of ability and merit.*
- *With regard to administrative procedures*, there is a need to eliminate, as far as possible, prior authorisations and to postpone the costs of red tape until the activities associated from the authorisations are profitable.
- *It is vital to remove any degree of discretion* from those bodies granting administrative licences or permits, or which grant contracts or administrative concessions, requiring of them due cause at all times.
- *With regard to penalties for offences*, there is a need to put to an end what the public sees as obvious impunity for political corruption, which is manifested in four ways, which require urgent measures: the slowness with which proceedings progress, for different reasons; *the lack of financial reparation for the harm caused* to the public purse or to third parties; *the failure to adopt decisions with immediate effect* on the part of political parties with regard to those accused in judicial proceedings, who are still sometimes included as election candidates (no fewer than 100 were candidates in 2011's municipal and Autonomous Community elections!); and resorting to special courts or, as the case may be, a final pardon.⁵⁹

In any case, in light of the above, it appears clear that the best way by far of fighting corruption is transparency: a new legal concept in Spain that has still not been enshrined, as we shall now see.

3. FRUITFUL TRANSPARENCY

According to the preamble to the Freedom of Information Act White Paper (which is before parliament as of spring 2013), the Act means that there should be free access to public information and all the details on the government, as one of the fundamental pillars of political action to guaran-

59 Santiago Muñoz Machado, 'Informe Corrupción', in *Posiciones*, 18.II.2013.

tee the rule of law. It is only when the actions of public leaders are subject to general public scrutiny that we can know how decisions are taken, how public funds are managed and upon which criteria institutions act. It is only under these conditions that one can speak of a critical, demanding and participative society, and of the true rule of law.

The information available

The countries with the highest levels of transparency and rules for good government are also those that boast institutions that promote the continual emergence of those manifestations inherent in the broadest form of 'civil society'. In these countries, the general public is concerned with the widest spectrum of issues affecting society and offers its opinions on the virtues of its leaders, to show that, in democracy, there are many more functions above and beyond the right to cast one's vote periodically in different elections, thereby contributing the permanent democratic renewal.

All this goes to show that Spain needs a Freedom of Information Act, to ensure an in-depth configuration of the duties of public openness, to embrace a broad variety of government agencies, including legislative and judicial bodies, as well as other organs of the state's structure, such as town and city councils, Autonomous Communities, etc.

Thus, with regard to institutional, organisational and planning information, there is a need to require of the widest possible range of bodies the publication of information on the duties they carry out, the regulations applicable to them and the organisational structure of which they form part, in addition to enforcement instruments and those for evaluating degrees of compliance.

Information of legal importance should be permanently available, offering the widest possible range of documents of interest. In the field of economic and budgetary affairs and statistics, there is a need for a catalogue of information that is accessible to and understandable by the public. In this regard, it is worth remembering the words of President Ronald Reagan, on the importance of making as clear as possible instructions on how to complete official forms, particularly tax returns, highlighting the fact that even Albert Einstein needed help to complete his return due to the unintelligibility of the official instructions.

In any case, to channel the publication of the huge amount of existing and future information, and to help compliance with the unavoidable obligations of active publicity, in this digital age there is a need for the creation and development of a true 'Transparency Portal' of the widest scope. As far as new

technologies so permit, to develop tools of great use in understanding the provisions of the Act, with all available information. It would also be a good idea if associations were to arise to work in favour of greater transparency to counteract corruption.⁶⁰ With this in mind, let us turn to look at the historical background to transparency policy in Spanish legislation before 2013.

Public access to official records and procedures to 2013

Naturally, within the Spanish Government, there are important precedents in the field of transparency. In this regard, we should take as our starting point the provisions of Article 105 of the 1978 Constitution, and particularly Paragraph b), where it states that legislation shall govern:

- a) the hearing of citizens directly, or through the organisations and associations recognised by law, in the process of drawing up the administrative provisions which affect them;
- b) the access of citizens to administrative files and records, except as they may concern the security and defence of the State, the investigation of crimes and the privacy of individuals:
- c) the procedures for the taking of administrative action, guaranteeing the hearing of interested parties when appropriate.

In the spirit of Article 105 of the Constitution, a series of specific cases are already governed:

- Law 30/1992, of 26 May, governs the public's right to access registers and documents found in administrative records, implementing Article 105 of the Constitution in its own Article 37, and governing said right. This regulation currently suffers from a number of deficiencies, repeatedly highlighted, in that it does not clarify the object of the right to access, restricting itself to documents contained in already concluded administrative proceedings and with the exercising of the right to access being severely limited in practice.
- Law 27/2006, of 18 July, specifies the rights to information, public participation and access to the legal system in environment related issues, but does so insufficiently due to its sector specific scope, which arises from the relevant EU directives.

60 In this regard, the idea of an association of this kind headed by the former Community of Madrid ombudsman Pedro Núñez Morgades seems a good idea.

- Law 37/2007, of 16 November, on the use of information on the public sector, governs the private use of documents in the hands of public sector agencies and bodies, but with a range of restrictions that cannot be sustainable today.
- Law 11/2007, of 22 June, on public e-access to public services, recognises the right to deal with government agencies digitally, thus placing it on the road to a culture of transparency, in that it reduces bureaucratic hurdles, using electronic media to facilitate participation, transparency and access to information.

Despite this, the aforementioned transparency-related laws existing up to and including 2012 made necessary a new Law, one which we will examine next, not without first noting that the Spanish Government, when submitting the Freedom of Information Act White Paper before the country's lower house, sought to attach great political importance to the decision. Specifically, the White Paper's Article 2.1.f states that transparency over public activities shall also be applied to 'the Congress of Deputies, the Senate, the Constitutional Court and the Higher Council of the Judiciary, as well as the Council of State, the *Defensor del Pueblo* (Ombudsman), the *Tribunal de Cuentas* (Court of Auditor), the Economic and Social Council and equivalent Autonomous Community institutions with regard to their activities subject to administrative law'. Additionally, after submitting the White Paper, the Catholic Church and the Royal Family were also included since, as we shall see later, account must be rendered of their connections to various ministries.⁶¹

Transparency and lobbying

The doubts and fears surrounding the future Freedom of Information Act, legislation hitherto unseen in Spain due to the country's 'lack of a culture of transparency' we replayed on 20 March 2013 in the third round of parliamentary hearings for the expression of opinions on the text. The news that day was the emphatic plea by the pressure groups, or lobbies, to the effect that the Act should include them so that they could 'step out of the shadows'. More specifically, these groups' representatives did not share the viewpoint of the spokesman for the PP's parliamentary group, Pedro Gómez de la Serna, who claimed that representative functions belonged to political groupings alone, and not to lobbies: 'You have a legitimate, remunerated activity, but this in no way makes you public representatives: you are not an alternative to parliament', he stressed.⁶²

61 M. Calleja, 'Moncloa y PSOE ultiman la Fórmula para incluir la Casa del Rey en la ley de Transparencia', *ABC*, 15.IV

62 Anabel Díez, 'Los "lobbies" piden al Congreso entrar en la Ley de Transparencia', *El País*, 20.III:2013.

In light of these declarations, the lobbies' representative, Joan Navarro (whose official title is 'Representative-spokesman for the Forum for Transparency'), referred to the poor image currently held of politicians' parliament and reminded MPs of the dim view society takes of them. Given this, he allowed himself the liberty of advising politicians that they should 'make a law that does not disappoint society, given the public disaffection for politics. You have to find a balance between not disappointing and not deceiving'.

Prior to his appearance, Navarro had sent to parliamentary groups some proposals for amendments to be considered for the Act and, in his final response, assured those present that it was not the lobbies' intention to represent the people: 'Acting as an interlocutor is not representation', he said, 'and the only thing the lobbies seek is that the law shine a light on them, that they find their own little corner in a future Freedom of Information Act. We want to be regulated. We are the first to be interested in this'. This is entirely logical when one looks at other country's regulations, such as those of the US Congress or indeed the European Parliament, which have thousands and thousands of duly registered lobbies. An important data point, it may be said, for their inclusion in a future Freedom of Information Act. And we shall see further pertinent points below.

Obviously, transparency for lobbies will be easy, strictly speaking, since, as Juan H. Viguera notes:

When one talks of tax havens, we look at just tax issues and not the problem of financial globalisation', he warns. 'I have just published a new book: *Los 'lobbies' financieros, tentáculos de poder* [Financial lobbies, the tentacles of power], which describes the movements of financial corporations to sway government attempts to regulate the sector. In Brussels, there is a whole army of more than 15,000 professionals trying to influence and control the decisions of government agencies. 'Lobbies are a power unto themselves, they are the markets'.⁶³

The Church and the Royal Family, transparent

When it came to drawing up the Freedom of Information Act, everyone finally understood that there could be no exceptions. This can be seen by the motion approved by the Plenary Session of the Spanish Congress

63 J. Sérvulo González, 'Los lobbies son el poder, son los mercados', *El País*, 29.IV. 2013.

on 26 February 2013, to the effect that the spirit of the law encompasses all bodies and institutions funded out of the General State Budget.

In this regard, the Catholic Church, via the Bishops' Conference, immediately undertook to justify the expenditure it carries out from the voluntary contributions made in income tax returns. And, accepting the demands of the European Union, the Church will pay VAT on its purchases of moveable and immoveable assets.⁶⁴ In this regard, it is worth remembering that Spain contained, at the end of 2012, a total 40,000 entities of the Catholic Church: the Apostolic Nunciature, 69 dioceses, 22,700 parishes, 905 cloistered convents, religious congregations, NGOs and foundations. All will have to draw up accounts each year for review by the authorities.⁶⁵

Transparency also embraces Spain's Royal Family. So it is that contracts, travel expenditure, security, palace upkeep and the use of official vehicles by the King and his family shall be in the public domain. Compare this with the situation still in place in 2013, where a number of the Royal Family's expenses (except for the budgetary allocations by the Spanish state, amounting to 7.9 million euros in 2013, 8.2 in 2012 and 8.4 in 2011) lie outside the Royal allocation: the Royal Family's travel expenses are met by the Ministry of Foreign Affairs, those of security by the Ministry of the Interior, and its vehicles are financed by the Ministry of Finance. Meanwhile, maintenance of Royal estates is met out of National Heritage funds. With the Freedom of Information Act, said ministries and bodies will have to publish the real costs.⁶⁶

So it is that 'everyone is transparent'. But such provisions by no means put an end to the matter since, as we shall now see, there are still issues to be clarified in this future legislation.

Proposals for improving the Freedom of Information Act White Paper

To resolve the significant shortcomings seen in the Freedom of Information Act White Paper, Jesús Lizcano, Professor at the Autonomous University of Madrid (UAM) and Chairman of Transparency International Spain (TIS) has suggested a large number of specific proposals, which are worth summarising:

1) *The text does not specifically contemplate any type of offences or penalties in the cease of breach by politicians or civil servants of transparency*

64 Carmen Morodo, 'La Ley de Transparencia afectará también a la Iglesia', *La Razón*, 19.IV.2013.

65 J. Beltrán, 'El Episcopado ya presenta al Estado hasta las pagas que recibe cada sacerdote', *La Razón*, 19.IV.2013.

66 Natalia Junquera, 'Los gastos de palacio, viajes, seguridad y contratos de La Zarzuela será públicos', *El País*, 8.IV.2013.

The points made by TIS are important ones that should certainly be taken into account when improving the White Paper, particularly because it can be seen that TIS has a real impact on the reality of the matter with its drawing up of a range of indices, which are noted above and which we will now take a closer look at.

Spain's most transparent Autonomous Communities and councils

The aforementioned Transparency Indices are of interest in judging some efforts currently taking place in the areas under review. They are drawn up by the organisation Transparency International Spain, headed by Professor Jesús Lizcano. Particularly, the INCAU index measures the degree of transparency of Spain's 17 Autonomous Communities, using a set of 80 indicators.⁶⁷

The two 'winning' Autonomous Communities, which share top place in the overall INCAU ranking, are the Basque Country and La Rioja, both with 97.5 points out of a possible 100. Bringing up the rear are Castile La Mancha (58.8) and Murcia (55.0). Of course, when judging all of this, it is important to remember that the INCAU, like other transparency indices drawn up by TIS, only looks at whether the requested information is available or not, but does not assess its quality, nor the quality of the management by Autonomous Community governments.⁶⁸

It has also published the Town and City Council Transparency Index (ITA) for 2012, the fourth such index, covering Spain's 110 largest municipalities. To do so, it used a set of 80 indicators, broken down into six transparency areas, each of which had a specific ranking for the councils.⁶⁹ In terms of results, the eight best-ranked councils, representing the top ITA 2012 group, are Alcobendas, Bilbao, Gandía, Gijón, Oviedo, Ponferrada, San Cugat del Vallès and Torrent. It should be noted that in 2008 there was only one council (Bilbao) that received an 'excellent' rating (90 or more out of 100), whilst in 2009 there were 14, and 21 in 2010. In the ITA 2013 index, there were no fewer than 33 local authorities with an excellent transparency rating.

It should also be said that, the 2013 ITA index shows that a significant number of town and city councils have created a special web page dedicated

67 The term 'Autonomous Community' is used here to refer to the different governing institutions, irrespective of their official names (*Generalitat, Junta, Principado, Gobierno de la Región*, etc.)

68 Transparency International Spain, 'Las Comunidades Autónomas mejoran su nivel de transparencia. País Vasco y La Rioja son las ganadoras de la segunda edición del Índice de Transparencia de las Comunidades Autónomas (INCAU)', http://www.transparencia.org.es/INCAU_2012/INDICE_INCAU_2012.htm

69 Transparency International Spain, 'Los Ayuntamientos mantienen su nivel de transparencia, a pesar de la mayor exigencia informativa del ITA 2012', http://www.transparencia.org.es/ITA_2012/INDICE_ITA_2012.htm

to transparency as part of their overall site, which also contains a specific section for the ITA indicators themselves. These include some of the largest ones, like Madrid and Bilbao, medium sized ones, such as Zaragoza and San Sebastian, as well as smaller ones including San Cugat del Vallès and Torrent. All this says a lot about these councils and their wish to ensure easier consultation of and direct access to information on the part of all members of the public.

To sum up, Transparency International Spain has, for years, been playing its part in ensuring that there is more openness and transparency in the different government agencies. Something that needs to go much, much further, in terms of both quality and quantity.

It is with this promising reality that we close this section on legal certainty and transparency with regard to the rule of law. In the next chapter, we will take a look at the economic express of the rule of law, which calls for a review of economic developments in Spain in recent times, in terms of its progress towards the euro. It is important to cover this, albeit schematically, to properly comment upon what lay behind the configuration of the years from 1996 to 2002, a time that we might dare to call a paradigmatic period in the Spanish economy.

CHAPTER 3

A PARADIGMATIC PERIOD OF ECONOMIC POLICY (1996-2002)

1. TOWARD THE COMMON CURRENCY: TURBULENCE IN THE EMS (1989-1995)

In Spain, the growing integration in the European Union (EU; formerly European Community, EC) and other pan-European organisations has contributed significantly to advancing the idea of the rule of law, including a supreme judicial authority in the form of the European Court of Human Rights. And within a dynamic of sweeping political, economic and social changes brought about by Spain's membership of the EU, the country passed through a long succession of events of undoubtable and profound rationality; above all, as we will see, as regards the implementation of the new European currency and what would later become the Eurozone.

And what was done during that historic passage was not so wildly different from what Juan Prim Prats and Laureano Figuerola did—from the Provisional Government of 1868 that followed the Revolution of September

of that same year—when they created the peseta, within the framework, although without becoming a full member, of the Latin Monetary Union;⁷⁰ so also in 1998, driven by the need to facilitate the internationalisation of the Spanish economy.

And, like the 1959 Stabilisation Plan and the 1977 Moncloa Pacts, the achievements of the period 1996-2002 represented a series of economic policy decisions and rationalities which, in retrospect, we can only consider admirable. They were implemented during the first Aznar Government, with Rodrigo Rato as Minister for Economy and Finance, although the first steps along this path were taken during the closing years of the last González Government (1995 and 1996) by Minister Solbes, after it had been sidelined by his predecessor Carlos Solchaga. The process of joining a new common currency started in 1989, with Spain's accession to the European Monetary System (EMS). This decision was severely tested in 1992 with the *erga omnes* liberalisation of short-term capital movements in February 1992. In such circumstances, it was inevitable that the peseta—with an inflation rate in Spain considerably above the EC average—would become the target of fierce speculation and the currency was devalued in two stages: 5 per cent on 16 September and a further 6 per cent on 22 November 1992. Until this was done, the market mercilessly corrected the Spanish currency's artificial strength at that time.⁷¹ These events are described here in some detail to show the considerable difference between the period of major economic instability (1992-1995) and what followed afterwards as a paradigmatic period (1996-2002), anticipating what we will call, at the end of this Report, the *responsible economic state*.

The fact is that only two months after the two-fold devaluation of 1992, it became obvious that exchange rate stability had not been achieved and the possibility was raised of a third devaluation; or Spain's withdrawal from the EMS's exchange rate mechanism, *allowing the peseta to float*, as the United Kingdom and Italy had already done in September 1992 with the pound sterling and the lira, respectively. However, with Carlos Solchaga as Minister for Economy and Finance, persistent inflation continued to be tolerated in Spain and the peseta foundered under a further wave of speculative pressures against the currency. So, on Thursday, 13 May 1993, the peseta was devalued for the third time; this time, by 8 per cent.

70 Ramón Tamames, 'Prim y la Nación Española', *ABC*, 28.III.2013. As background, 'Dos grandes decisiones económicas de los gobiernos revolucionarios de 1868 y 1869: la peseta y el arancel librecambista', November 2011, text by Ramón Tamames For the General Prim Bicentenary Foundation (1814-2014).

71 Ramón Tamames and Antonio Rueda, *Estructura Económica de España*, 25th ed., Alianza Editorial, Madrid, 2007.

The situation created after the three devaluations in the currency's value evidenced the unwillingness of the Bank of Spain and the Government to accept an inevitable truth, namely that *money is the prime good* in a market economy; and on the domestic market, its price is given by the interest rates, and on the international markets, by the exchange rate. So it was futile to obstinately seek to hold a fictitious price for the peseta abroad, with the resulting drain on currency reserves, and an unsustainably high price on the domestic market that precluded any attempt to start economic recovery. This harsh reality was acknowledged with the third devaluation. With the new situation, three options were possible.

- *The first option*, maintain *business as usual* in the EMS exchange mechanism (EM), like a horse with blinkers. This became untenable, more than anything else because of the political instability of Felipe González's government. Although he had managed to hold on to power in the general elections in 1983, his Government was in an increasingly uncomfortable minority.
- *The alternative* to the first option would have been to take the peseta out of the EM. Although the effect would have been initially traumatic, it would have put an end to the pressure from the international traders as the Spanish monetary authorities would no longer have to continually intervene, at high cost, on the currency markets to remain within the fluctuation band.
- *A third possibility* consisted of devaluing the currency for a fourth time, thus avoiding having to leave the EM. In the end, this was the path chosen and, in the early morning of 6 March 1994, the peseta's value was dropped for the fourth time against the DM, this time by 7 per cent.

Of course, the situation was much more complicated than simply choosing between three options. Because while the least positive symptom given by the Spanish economy on the international markets between 1992 and 1995 was the exchange rate instability we have analysed above, from a general viewpoint, it was in the public accounts where the extent to which the situation had deteriorated was most visible. If to this we add that, during the period analysed, unemployment increased by almost one and a half million people, pushing the unemployment rate up to the top of the OECD table (23 per cent in 1995), the outlook could not be worse. As we will develop in Chapter 4, major reforms were still required before the country could leave behind an exhausted growth model.

2. THE STABILITY PARADIGM: MAASTRICHT AND EURO (1996-2002)

After all the tribulations suffered during 1992-1995, in the general elections held on 3 March 1996, a new government was voted into office, with José M^a Aznar as Prime Minister and Rodrigo Rato as Second Deputy Prime Minister and Minister for Economy and Finance. This was a new stage in which major obstacles to economic progress were resolutely addressed. These obstacles arose primarily from an oversized, debt laden public sector, persisting rigidities in several markets (employment, energy, telecommunications, finance, etc.) and an extremely high unemployment rate that was threatening the welfare state's sustainability.⁷²

The roadmap followed was compliance with the Maastricht Treaty criteria, consisting of reducing public deficit, slowing down inflation, lowering interest rates, repaying public debt and achieving monetary stability. Against what many had forecast, Spain achieved compliance with these criteria—in terms of specific parameters—on 2 May 1998, when the European Parliament approved eleven countries, including Spain, to form the Eurozone under the Central European Bank (CEB).⁷³

The basic goals were then laid out in a new steering document on economic policy that sought to move forward from the Maastricht criteria. This was the *Stability and Growth Programme 1998-2002*, which focused particularly on strict *budget discipline*, i.e., matching revenues and expenditure.⁷⁴ With the implementation of this programme, public accounts balance was achieved in 2001, with no tightening effect on the economy. Consequently, contrary to what had been forecast in various circles of debate, the budget balance brought with it a sharp drop in Spain's international risk premium.

Other *good news* also helped push down interest rates on Spanish sovereign debt. Specifically, in 2001, for the first time ever, Spain joined the select group of countries whose debt was rated as Aaa or AA+ by the leading international rating agencies. Thus, the interest rate differential with

72 For the issues that had yet to be addressed, see the volume written by several authors, *Cómo consolidar la recuperación económica*, Círculo de Empresarios, Madrid, 1998; Mariano Guindal, 'El FMI recomienda al Gobierno que amplíe la edad de jubilación y reduzca el seguro de paro', *La Vanguardia*, (6.IV.1999). See also the diagnosis of Spain by David White, 'Challenges loom to test confidence', *Financial Times*, (20.V.99). On the new approaches to economic policy, Tony Blair, 'La tercera vía', *El País* Aguilar, Madrid, 1998. See also Ramón Tamames, 'La tercera vía', *Empresarios* (23.VI.99). Finally, José Manuel González Páramo, 'Ante el Pacto de Estabilidad y Crecimiento', *Economistas*, no. 80, March 1999.

73 Ramón Tamames, 'Unión Monetaria y euro: la recta final', Espasa Calpe, Madrid, 1998. The author of this Report was personally present at the session of 2.V.1998 in Brussels.

74 A decisive contribution to this budget discipline was the appointment of Prof. José Barea Tejeiro as Head of the Prime Minister's Budget Office, a position which he held with notable merit from 1996 to 2000.

Germany shrank from 252 base points (2.52 percentage points) in 1996 to zero points in September 2003. At the same time, the debt-to-GDP ratio fell from 68.2 per cent of the GDP in 1996 to 53.9 per cent in 2002.

The new situation created favourable conditions for investment decisions, which led to increased economic growth and strong job creation. Thanks, to a considerable extent, to the wave of immigrations which had very significant effects on consumption and growth, as we will see further on. All of this leads us to view, in retrospect, the period 1996-2002 as a paradigmatic economic period.

In this changing scenario, employment increased dramatically, with the resulting increase in the number of Social Security affiliates. Thus, from a deficit of almost 2 billion euros in 1996—which had triggered all sorts of warnings about the system's possible bankruptcy—a new reality started to emerge: in 1997, the Social Security reported a surplus of nearly 2.7 billion euros, enabling it put money for the first time into the Pension Reserve Fund, whose features had been defined in the 1995 Toledo Agreement.

This contention in public spending also enabled adjustments to be made to the tax system, with two income tax cuts that gave a cumulative average decrease in families' tax payments of 25 per cent and stimulating both savings and private consumption.

This was how the situation was until 2001, when the world entered an economic slowdown caused by a crash in the United States, triggered in turn by the accumulation of financial excesses and the resulting scandals. In Spain, the confidence in the system's new-found strength was sufficient to ride through the trough of the so-called *New Economy*

This macroeconomic stability was a necessary requisite to enable Spain to undertake certain structural reforms that could ensure sustained growth and future membership of the European Monetary Union. Measures were also taken to liberalise the goods, factors and services markets in order to stimulate competition, production efficiency and prevent abuses from dominant positions.

With the privatisation of public-sector companies, goods production and services activities whose performance by the state could no longer be justified were returned to the private sector. Given their weight in the Spanish business structure, we will now study this in some detail.

3. THE PARTICULAR CASE OF THE PRIVATISATIONS

During the period 1996-2001—with prior instances in the last two Felipe González governments between 1986 and 1996)—in line with the previously mentioned programme for Spanish membership of the European Monetary Union, the decision was taken to rationalise the management of public-sector companies. As a first step, the companies that had previously been part of the National Institute of Industry (INI) were divided into two groups. The first consisted of the companies that were earning profits, which were now controlled by the Sociedad Estatal de Participaciones Industriales (State Industrial Holdings Company, SEPI) with a view to their inclusion in the privatisation programme that would follow. The companies that were in the process of being restructured, and therefore required special financial control, were grouped in the Spanish Industrial Agency (AIE).⁷⁵

The SEPI, a public law body formed under the Ministry of Finance, was given the role of the state's holding company, with the mandate to return to the private sector those companies that were capable of competing. From its creation in 1992 until 2001, more than 50 public-sector companies were privatised, minority interests in another 5 companies were divested, and 15 rural properties were sold, generating total revenues in excess of 30 billion euros. In actual fact, this process served to put all private and public-sector companies on an equal footing as regards rights and obligations. What it had been impossible to achieve with the idea of the Public-Sector Company Statute in the Moncloa Pacts now became feasible with the privatisations.

The sequence of privatisations can be seen in the following three tables: Table 1, for the companies sold directly, Table 2 for those disposed of by means of an IPO (initial public offering on the stock market); Table 3 shows the structure of the SEPI Group after the privatisations, with holdings in about 30 public-sector companies in a dynamic process that has yet to be completed with share and asset divestitures.

75 Ramón Tamames and Antonio Rueda, *Estructura Económica de España*, 25th ed., Alianza Editorial, Madrid, 2007.

Table 1. Public-sector companies sold directly

Year	Company	Industry	Selling public organisation	% sold	Sold to (nationality)
1985	Textil Tarazona	Textile	INI	69,6 ^(a)	Entrecanales/Cima (Spain)
	Secoinsa	Electronics	"	69,1 ^(a)	Fujitsu (Jap)
1986	SKF española	Bearings	"	98,8	SKF (Sweden)
	Viajes Marsans	Tourism	"	100	Trapsatur (Spain)
	Entursa	Tourism	"	100	Ciga (Ital-Spain)
1987	Seat	Automotive	"	75+25 in 1990	Volkswagen (Germ)
	En Telesincro (Inisel)	Electronics	"	40+60 ^(b)	Bull (Fran)
1987	Purolator Ibérica	Auto components	"	97,4	Knecht Filterwerke (Germ)
1989	Maquinista T.M.	Rolling stock	"	85+15 in 1992	Gec-Alstom (Fra/GB)
	Ateinsa	"	"	85+15 in 1992	"
1990	Enfersa	Fertilisers	"	80+20 in 1991	Ecros (Spain/Kuwait)
	Astican	Shipyards	"	90,7	Italmar
	Oesa(Endiasa)	Oil	"	100	Ferruzzi (Ital)
1990	Intelhorce	Textile	G.Patr.	100	Orecifi (Ital)
	Imepiel	Footwear	"	100	Cusi (Spain)
	Hytasa	Textile	"	100	Integusa (Spain)
1991	Salinas de Torrev	Minerals	"	38,5 ^(a)	Solvay (Franc)
	Enasa-"Pegaso"	Goods vehicles	INI	100	Fiat-Iveco (Ital)
1992	G.Empr. Alvarez	Porcelain	"	100	Pickman-Estudesa (Spain)
1992	Campsa	Fuel	INH	100	14
1993	Fáb. de S.Carlos	Capital goods	INI	100	Grupo Narvacel (Spain)
	Carcesa	Food	Tabacalera (G.Patrim.)	100 ^(a)	RJR Nabisco (USA)
1994	Artespaña	Craft products	INI-Teneo	100	Medino (Spain)
	C.Trasatlántica	Ocean transport	"	100	Nav.de Odiel/Marit Valen.
1995	Enagas	Gas	INH	91	Gas natural (Spain), (51000)
	Sidenor	Iron and steel	INI-AIE / ICO	100 ^(d)	Soc. Indust Ferr. del Norte
1996	Lactaria Española	Food	Tabacalera(G.Patrim.)	100 ^(a)	Leyma/Parlat (Spain)
	Sagane	Gas	SEPI	91	Enagas (Spain) [5.567]
<i>Elections in March => change of government</i>					
1997	Sodical	Regional industrialisation	SEPI	51	Junta de Castilla y León, []
	longraf	"	"	100	Company executives, []
	Sefanitro	Fertilisers	"	52,65	Fertiberia(Spain), []
	Min. de Almagrera	Mining	"	100	Navan (Ireland), []
	Supergiclinic-plus	Medical material	"	50	Hambros (GB), []
	Ferropperfil	Iron and steel	"	100	Company executives []
june 1998	Infoleasing	Financial leasing	"	100	Liscat (Spain), [3.100]
	Tisa	International telephony	SEPPA	27,8 ^(a)	Telefónica (Spain) [127.000]
	Elcano	Shipping	SEPI	100	Various ^(e)
	Inespal	Aluminium	SEPI	100	Alcoa (USA), [63.450]
	Productos Tubulares	Iron and steel	SEPI (AIE)	100	Tubos Reunidos (Spain)
	Inima	Engineering	SEPI	100	Lain,(Spain), [625]
1999	H.J. Barreras	Shipyards	"	100	Eq. Directivo ^(f) (Spain), [750]
	Suria K/Potasas del LI	Fertilisers	"	100	Dead Sea W.(Isr), [17.200]
	Initec	Engineering	"	100	Técnicas Reunidas Welco
	AYA	Capital goods	"	100	Dragados Ind.(Spain) [5.000]
	"	"	"	100	Mecaniz Acron.(Spain), []
	ICSA	"	"	100	"
2000	Astander	Shipyard	"	100	"
	Enatcar	Bus service	"	100	Italmar (Ita), []
Apr	Santa Bárbara	Weapons	"	100	Alianza Bus (Spain) [26.200]
2001	Babcock Wilcox Esp	Capital goods	"	100	General Dynamics (USA) [832]
Feb	Conversión aluminio ^(g)	Aluminium	"	100	Babcock Sourcin (Germ) [7.487]
Sep	Aerolíneas Argentinas	Airline	"	92,1%	Alucoil (Spain), []
2003	Transmediterránea	Shipping	"	95,24%	Air Comet (Spain) []
June	Musini- Riesgo industrial	Insurance	"	98,07	Mapfre [208 mill. €]

Source: Joaquim Vergés, Privatización de Empresas Públicas y Liberalización, Department of Business Economics, UAB, 2010.

14 The privatisation of Campsa, traditionally holder of the fuel monopoly in Spain, has been one of the most complex sale operations. See below.

- (a) This percentage represented the entire state holding
- (b) 33.9% in 1988 and 26.1% in 1993
- (c) First (in 1987), the INI sold it to Tabacalera (G. Patrimonio)
- (d) 50% of the shares were held by SEPI-Tenco and 50% by ICO-Argentaria (G. Patrimonio)
- (e) Soponata (50%), Remolcanosa (40%) and Nav. Murieta (10%)
- (f) Apart from the management team, shipping and fishing companies from the Vigo area
- (g) Formerly 'Aluminio Español'

As regards the results achieved by the privatisations, apart from having a very positive effect in reducing Public Debt—from 70 to 35 per cent of the GDP between 1998 and 2007—the restructuring of the entire Spanish State-run corporate sector brought in a new mind-set based on business and profit criteria in the public holding organisations and, in general, in the management of the PSCs themselves.⁷⁶

For more detailed information on the privatisation systems used, we also refer to the above-mentioned study by Joaquim Vergés, which explains the different types of privatisation operations, which were carried out rapidly in accordance with proper legal procedure:

- *Sale of a PSC to a single buyer.* For example, the case of Seat sold to Volkswagen; or the sale of the Canadian aviation company De Havilland to the United States company Boeing.
- *Sale on the stock market of part of a PSC's shares*, while still retaining public sector control.⁷⁷ Obviously, the public sector holding would be further reduced in successive operations, to zero in some cases.
- *Sale of a PSC's assets* (land, buildings, concessions, production plants, or a subsidiary) without formally selling the company. For example, the sale of the 'Santa Bárbara' subsidiary specialising in the manufacture of tanks to the North American company General Dynamics.
- *Stop 'producing' certain services within the Public Administration, outsourcing them instead to a private company.* For example, road maintenance, traditionally carried out by staff employed by the

⁷⁶ Joaquim Vergés, *Privatización de Empresas Públicas y Liberalización*, Department of Business Economics, UAB, 2010.

⁷⁷ A fully equivalent operation would be a capital increase by the PSC in which a share issue would be floated on the stock market with the intention of the shares being fully subscribed to by private investors (which is one way of financing new investments in growth or modernisation without resorting to the owner state). The outcome is that the percentage held by the state in the PSC automatically decreases.

Ministry of Public Works; or the cleaning services of many public universities.

- *Restructure a PSC, endowing it with organisation structures and efficiency criteria typical of private companies (organisational privatisation or commercialisation).* Usually, this entails 1) changing its legal form to the Spanish equivalent of a PLC; 2) dividing the PSC internally into divisions or business units and—above all—setting financial, profitability or cost reduction goals for the company and, perhaps, for each of these internal management units. (The cases of RENFE in Spain and the Post Office in Great Britain are examples of this).

However, it should be pointed out that the specific procedures used to carry out the privatisation operations do not differ much before and after the change of government in 1996, the main innovation being that when the PP came to power, a Privatisation Advisory Board was created.

To this should be added the fact that the privatisations transformed a series of companies, often kept going with the sole support of the INI or the SEPI, into veritable multinational companies, for instance, Telefónica, Endesa, Iberia, Repsol, Argentaria, Indra, Retevisión, etc. All this has contributed very significantly to the internationalisation of the Spanish economy.

Table 2. Privatisations by share flotation (or call for bids)

Year	Company	Belonging to the holding company	Industry / Business	% sold	Amount obtained (million pesetas)	% remainder state-owned
1986	ACESA	FG.D ^(a)	Motorways	57,6	s.d.	0
	GESA	Endesa/INI	Electricity	38,-	s.d.	55,3
1988	ENDESA (1 ^º)	INI	Electricity	20,4	80.000	75,6
	ENCE	"	Paper	34,8	13.200	66,2
1989	REPSOL (1 ^º)	INH	Oil	30,6 ^(b)	156.229	69,4
1990	REPSOL (2 ^º)	"	"	2,9 ^(c)	31.919 -y	66,5
1992	REPSOL (2 ^º)	"	"	2,1 ^(c)	y	64,4
	REPSOL (3 ^º)	"	"	10 ^(d)	70.000	54,4
1993 s	ARGENTARIA (1 ^º)	Gr. Patrim	Banking	24,1	119.000	
	ARGENTARIA (2 ^º)	"	"	24,34	173.000	51,66
1994	REPSOL (3 ^º)	INH	Oil	13,9	110.000	40,5
1995	ENDESA (2 ^º)	INI-Teneo	Electricity	8,7	145.000	66,9
	REPSOL (5 ^º)	SEPI-Teneo	Oil	19,5	200.500	21
	ENCE (2 ^º)	"	Paper	14,9	13.000	51,3 <=
	TELEFÓNICA (1 ^º)	Gr. Patrim	Telecommunications	10,7	158.000	21,16
1996	INDRA (1 ^º)	SEPI-Teneo	Electronics	24,9 ^(e)	3.000	63
	AUXINI(1 ^º)	SEPI-Teneo	Construction	40 ^(f)	3.030	60
	REPSOL (6 ^º) Feb	SEPI-Teneo	Oil	11	132.710	10
	ARGENTARIA (3 ^º)	Gr. Patrim.	Banking	25,4	160.000	26,2 ^(g)
<i>Elections in March: change of government</i>						
1997	GAS NATURAL	SEPI	Gas	3,8	36.066	0
	TELEFÓNICA (2 ^º)	Gr.Patrim.	Telecommunications	21,16	607.079	0
Apr	REPSOL (7 ^º)	SEPI	Oil	10	168.692	0
Jul	CSI (1)	AIE	Iron and steel	35 ^(h)	^(h)	65
Jul	RETEVISION (1 ^º)	Min Fomento	Telecommunications	60 ⁽ⁱ⁾	116.359	40
Sept	ALDEASA	Aena(*)	Duty-free shops	20%	n .d.	
Oct	"	SEPPA	"	80%	≈ 45.000	0
Oct	ENDESA (3 ^º)	SEPI	Electricity	25	750.000	41,9
Now	CSI-Aceralia (2 ^º)	AIE-SEPI	Iron and steel	12,2 ^(j)	44.692	52,8
	AUXINI	SEPI	Construction	60	n. d.	0
Dec	CSI-Aceralia (3 ^º)	SEPI	Iron and steel	52,8	162.174	0
1998	ARGENTARIA (4 ^º)	SEPPA	Banking	28,6	325.000	0
Apr	TABACALERA	SEPPA	Tobacco/food	52,4	≈ 310.000	0
June	ENDESA	SEPI	Electricity	39	≈ 1.490.000	2,9
Jul	COMEE	"	Cia Op Merc Elec Esp	100		0
1999						
Mar/Apr	INDRA	"	Electronics	63	92.500	0
Jul	Red Eléctrica de E.	"	High voltage grid	31,5	≈ 80.000	28,51 <=
	Retevisión (2 ^º)	Min. Fomento	Telecommunications	30 ^(k)	123.300	10 <=
Dec	Iberia	SEPI	Airline	40 ^(l)	≈ 174.000	53,9
2001	Iberia (2 ^º) ^(Abr)	"	"	48,1	97.431	5,81 <=
Jul	ENCE	"	Wood pulp	51,3	229,87M€ ^(m)	0

Source: Joaquim Vengés, Privatización de Empresas Públicas y Liberalización, Department of Business Economics, UAB, 2010. The symbol (O) indicates the last operation in which public holdings were involved (December '99).

The symbol (<=) indicates the last operation in which public holdings were involved (December '99).

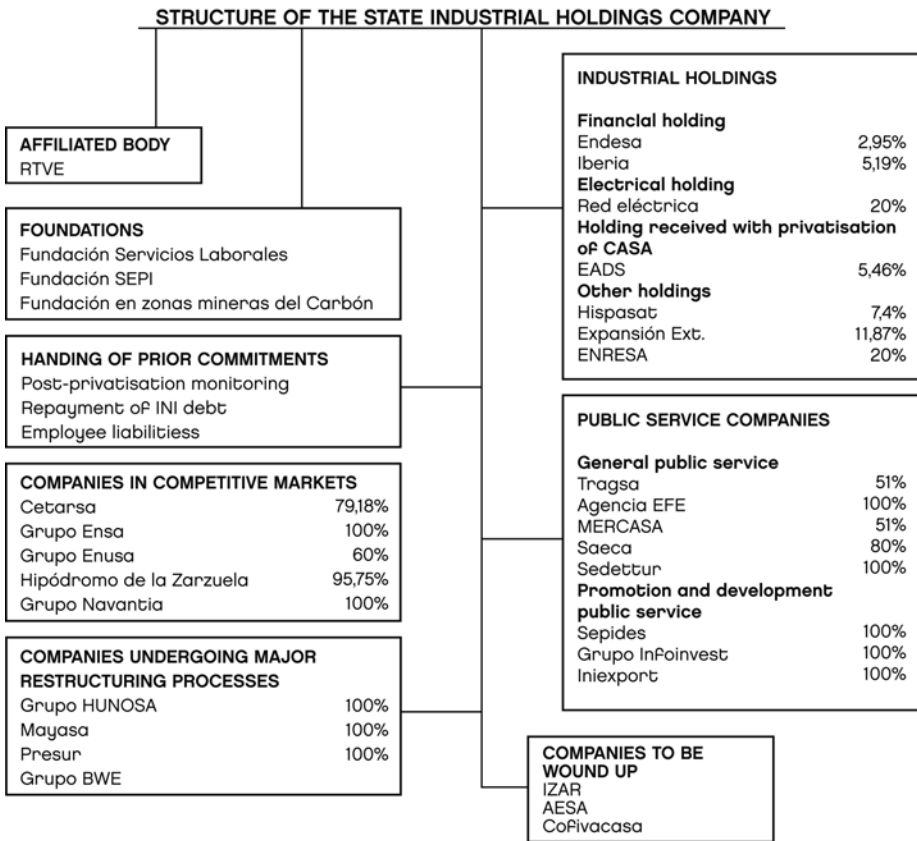
n.d. = no data

(a) Fondo de Garantía de Depósitos (Deposit Guarantee Fund) (Ministry of Finance)

(b) A package of 4.2% sold directly to Banco Bilbao-Vizcaya (BBV)

- (c) To the Mexican oil company Pemex
- (d) By means of an issue of exchangeable bonds
- (e) To the French electronics company Thomson
- (f) To the Spanish construction company OCP
- (g) Plus 2.4% held by SEPI

Table 3. Structure of the SEPI



Source: Estructura Económica de España, op. cit.

As regards the immediate future of possible privatisations (see Figure 4), the prevailing idea is that selling public-sector companies would be a very unprofitable enterprise, with the stock market currently languishing with no clear upward trend. However, the new programme should put an end to a public sector presence in the production or goods and services system that really serves very little purpose, except in very specific instances.

Figure 4: State holdings in listed companies

VALUATION AT MARKET PRICES				
COMPANY		INDUSTRY	STATE HOLDING (%)	VALUATION (M. EUROS)
	EADS	Aerospace	4,00	1.300
	Red Eléctrica	Energy	20,00	1.034
	Ebro Puleva	Food	8,45	202
	Enagás	Energy	5,00	225
	IAG	Airline	2,71	143
TOTAL:				3.307

Source: SEPI, Santander Investment Bolsa

ABC

Even so, it has been estimated that in normal conditions, the sale of PSCs and other public assets could bring in revenues amounting up to 30 billion euros, including the minority holdings in AENA and Loterías del Estado, regional broadcasting companies or parts of them, SEPI holdings such as Ebro Foods and Red Eléctrica de España, or Paradores Nacionales—actual management, without losing their network status, Renfe and the shares held by the state in IAG (formed after the merger between Iberia and British Airways), including the privatisation of regional companies such as the Canal de Isabel II in Madrid, television companies, etc.

As well as the PSCs and the holdings, there is a complex web of about 5,000 bodies, public-sector companies and miscellaneous organisations held by the central, regional and local governments. Of these, about 90 per cent are losing money and less than half could be privatised.

In addition, plans to sell properties continue and Inland Revenue has launched a programme for divesting such assets, which will probably start with the sale of 423 buildings, including the former buildings of the National Securities Market Commission (CNMV) and Radio Televisión Española (RTVE).

The Government has also put 132 sites on sale, with a total area of 492,234 square metres.⁷⁸

Recapitulating everything that has been said here about privatisations, we would say that it has been a fruitful experience, not only to amortise public debt with the resources obtained but also because it took the state out of economic activities that it should not be in, since most of them are not public services and because the private sector can perform them much better. And it has contributed to preventing previously public-sector companies from acquiring privileges and monopolies. All of this helped strengthen the rule of law and provided Spain with a series of companies that, in their new roles, soon became—as we have already noted—veritable multinationals.

4. THE END OF THE PARADIGM (2003-2007)

But not everything was *bright and rosy* in the saga we have called the paradigmatic period 1996-2002. The *blessing from heaven* that entry in the euro seemed to be in 1998 would later cause some unexpected developments, for a variety of reasons:

- With the incipient prestige of the euro and the facilities this brought on the international markets and moved both by greed and the obvious wish to get a lot done (with serious involvement in the so-called *State/Infrastructures complex*), a large number of companies and organisations went on a borrowing spree, a veritable credit bang, that later led to the financial and housing bubbles.
- This excessive surge in the growth of credit was not detected in time neither by the CEB nor by the central banks in the Eurosystem, which could have introduced some type of regulation to curb it. Consequently, no corrective measures were taken until after the Great Recession had started, with clearly recessive effects and no signs yet of recovery.
- Caught between the recession-induced drop in public income and the need to continue providing public services and welfare benefits, the States resorted increasingly to issuing debt.

In short, in 2008, virtually the entire world entered a severe economic slowdown, which has been called the *Great Recession*, causing unemployment, credit crunches, troubled banks and a dramatic increase in sovereign debt. Now in its sixth year, this crisis still persists in many countries, without any signs of a recovery of economic activity in the short term.

78 .M.J. Pérez/ S. Alcega, 'Montoro Frena las privatizaciones y acelera la venta de inmuebles', ABC, 15.IV.2013

CHAPTER 4

THE PERSISTENT CRISIS AND ITS PROBLEMS

1. FROM RECESSION TO DEPRESSION

What we have called the paradigmatic period of 1996-2002 was not taken into account in the change of development model in the next phase. In spite of having done such important things as strictly applying the Maastricht criteria to the Spanish economy, the next period, starting in 2002, was marked by an excessive, and even irresponsible, easing of credit supply—with credit growing, in some years, up to 7 times more than the real growth rate of the GDP—causing the credit bang explained in the previous chapter, with the emergence of the financial and housing bubbles (the so-called the brick culture).

To put it simply, growth during the five-year period 2003-2007 was caused by an *irrational euphoria* (Greenspan, dixit) that was based on leveraging the entire system; in other words, heavy borrowing which inevitably led to the credit crunch, which is the opposite phenomenon consisting of a severe contraction in lending. And overall economic growth was also burdened by a low-productivity (with all due respect to the individuals) workforce imported from abroad. So we have two major ills: leverage and low productivity, for which a heavy price would be paid in subsequent years.

So one could say that growth during 2002-2007 was akin to that of a malignant tumour: chaotic and without any clear purpose. In spite of this, this five-year period was lauded as the most promising in Spain's recent economic history. However, it was a hollow promise; its serious internal inconsistencies ultimately led to recession at the end of 2008,⁷⁹ and then to *depression* in the meaning given by the English economist Saul Eslake, who gives two criteria for determining when a recession has become a depression:

- Recession lasting three or more years. It is clear that this is the case of a large part of Europe, now in the sixth year of hardship, albeit with a few more or less fleeting and more or less real upward turns.
- Cumulative negative growth of the GDP of 10 per cent or more. This is also the case of several European countries.

⁷⁹ According to Eurostat, an economy is said to have entered a state of recession when negative GDP growth continues for two or more consecutive quarters.

And, we would add, in a depression, unemployment is above 15 per cent of the active population. This level of unemployment had already been exceeded in a number of European countries by December 2012.

2. NO LIGHT AT THE END OF THE TUNNEL

With the current state of depression in which Spain and a large part of Europe is immersed, it is difficult to see any prospects for recovery and, above all, return to a normal growth path. This leads us to ask the following question: When will the economy return to the level it had in 2007, the last normal year before the crisis? Taking all factors into account, the following projections seem plausible:

- The 8 nominal percentage points lost from the 2007 GDP will not be recovered before 2018.⁸⁰
- There is no immediate prospect at all of regaining the 21 million-strong workforce of 2007. Now (March 2013), with 16.3 million people officially employed, it is feasible to think that it will not be possible to create 4.7 million jobs (not including the 2 million people who may be working in the informal economy) in less than 8 years, that is, by 2021. And it is quite possible that the figure of 21 million people in employment will never be reached again, at least in the foreseeable future, due to the reduction of the active population with the departure of former immigrants and the emigration of Spanish nationals.
- The public sector debt will not be stabilised at an acceptable level within the Eurogroup (60 per cent of the GDP) in less than 10 years, that is, by 2023.
- The migratory flows have changed direction. From the 4.5 million immigrants who came to Spain between 2002 and 2007, there is now a net emigration: in 2012, the population decreased for the first time since 1939 by 250,000 people.

These forecasts seem quite plausible and indicate that the Spanish economy will not return to a normal track until 2018-2022. This could lead us to

⁸⁰ And it could even be more because although the National Accounting defines payments to the unemployed, via either unemployment insurance or unemployment benefit, as income, a more incisive view casts considerable doubt on the matter. Particularly, as happened in Spain in 2012, the 38 billion euros allocated to unemployment, financed by public debt, some of it sold on the international markets, accounted for 3.5 per cent of the GDP.

conclude that the crisis that started in 2007 is not a transient event but a far-reaching transformation of the Spanish economy, with a significant fall in the world GDP rating from 8th to 15th place.

And, in the midst of this situation, Spain's membership of the European Union and the Eurozone forces it to apply, since 2010, a strict austerity policy whose purpose is to redress a series of basic macroaggregates, particularly public deficit and borrowing.

In short, Spain is one of the countries that has been hit hardest by the economic crisis that started in 2007. This situation, in principle, is not significantly different from that of other countries within the OECD, as is argued in a recent book by Reinhart and Rogoff.⁸¹

However, the same book says that unemployment has increased by an average of 7 percentage points in the 4.8 years that have elapsed since the crisis started. The figures referring specifically to Spain deviate significantly from this average: from 8 per cent in 2007 to a rate that, in 2012, exceeded 25 per cent according to the INEM (National Institute of Employment) and 27 per cent according to the EPA (Economically Active Population Survey). This situation was initially caused by excessive growth of the construction industry, but since then it has followed its own dynamics. Which means—as Prof. Francisco Cabrillo points out—that Spain's job market is not comparable to others and reform of this market should have gone even further than it has so far.⁸²

'Unemployment in Spain is so severe that if it wasn't for undeclared work and the fact that a percentage of these unemployed people work in the informal economy [and, together with other population groups, may total 2.5 million people] while continuing to receive unemployment benefit, there would have been riots on the streets,' Sandalio Gómez explains. He reminds that Germany managed to bring down the unemployment rate in 2005 through close monitoring of the unemployed, who were required to enrol full-time in specific training plans in order to show that they were actively looking for work. Furthermore, as from 2005, they were not allowed to turn down a job offer.

The fact is that, drawn by fifteen years of economic growth in Spain, more than five million immigrants came to the country

81 Carmen M. Reinhart, Kenneth Rogoff, *This Time Is Different: Eight Centuries of Financial Folly*, Princeton University Press, Arizona, 2009.

82 Francisco Cabrillo, 'España, ¿una crisis diferente?', *Expansión*, 17.IV.2013.

in search of work opportunities (1996-2007). Today, they have either gone back to their home countries or they have joined the ranks of the unemployed. The unemployment rate of immigrants as a proportion of the active population is more than 12 points higher than the Spanish average. Out of the total number of active immigrants (3,321,200), slightly more than 2 million are working and the rest are unemployed.⁸³

To help palliate this situation, Royal Decree-Law 4/2013, of 22 February, added a number of tax incentives with deductions on recruitment, and other specific measures to promote employment. The greatest beneficiaries are those under 30 who intend to become self-employed and people with no prior work experience who want to enter the job market.⁸⁴ However, neither this nor other measures are sufficient to increase employment unless demand picks up. And the only evidence of the latter is the growth in exports.

In this situation, the most urgent issues to be addressed are the deficit and borrowing, applying the Eurozone criteria, in the form of austerity policies, in the case of the Euroclub countries. Such a policy is unavoidable in Spain if spending is to be brought into line with the resources actually available instead of maintaining indefinitely a costly leverage that would severely hamper future growth. On the downside, this policy by itself deepens the recession and there are no truly decisive *EU*-wide measures that could attenuate it and restore growth. This is to be ascribed to a considerable degree to Germany's orthodoxy and its deep fear of inflation. On the other hand, Berlin is not worried about there being two different levels of interest rates within the Eurozone as this clearly benefits the Germans.

In such a scenario, the EU measures intended to stimulate growth are far too timid, while a very tight Central European Bank is unwilling to depreciate the euro, which could ease exports. This contrasts sharply with the monetary easing measures implemented by the US Federal Reserve, and the Chinese and Japanese Central Banks.

Germany's responsibility in this excessively austere policy cannot be overstated. As Rafael Poch, *La Vanguardia's* correspondent in Berlin, says:⁸⁵

Today, Germany is isolated. It is isolated in Europe and isolated in the G-20. The big question in Europe today is: How much

83 Susana Alcelay, 'Economía sumergida e inmigración explican la mitad del desempleo', *ABC*, 28.IV.2013.

84 Antonio Ballester Sánchez, 'Real decreto-ley 4/2013. La hora de los emprendedores', www.tomarial.com

85 RaFael Poch, 'Europa, pendiente del calendario político alemán', *La Vanguardia*, 28.IV.2013.

longer before other countries stand up against Germany? The answer is until the president of the European Commission, José Manuel Durão Barroso, a man who always turns with the prevailing wind, says that austerity 'has gone as far as it can go', which means that it won't be much longer.

From Germany's viewpoint, it will be at least five months [from the end of April 2013], as there will be no significant policy changes in Berlin before the general elections of 22 September 2013. Five months is a long time for a European economy in recession and much longer for Italy, Spain, Portugal, Greece and France, but very short time for German politics. In Europe, it's just a question of time, but, for the moment, Germany is still holding the stopwatch. Will Europe's time match the five months marked by Berlin's time?

In this context, a situation has been created in which—as the Demoscopia opinion poll reveals—most of the Spanish population views an uncertain future with a high degree of pessimism. This pessimism heightens the recession by creating an atmosphere of dispiritedness in which public and individual initiatives are stymied by the lack of enthusiasm and any reactivation becomes even more difficult, due to the non-existence of truly collective endeavours and projects. We will come back to this pessimism at the end of the chapter.

3. ASSETS AGAINST THE CRISIS

However, the negative trends that we have described do not mean that Spain does not have assets capable of changing the present trends, creating a more positive outlook. First of all, in spite of these difficult times, Spain is an advanced country, with a rule of law that works, in spite of the many deficiencies we have outlined here. Thus, even in the depth of recession, the citizen security and delinquency rates have improved. Together with other indicators, this evidences that Spanish society has matured and is able to defend itself against even the most disruptive vicissitudes; which does not prevent people from being unhappy and protesting about the problems.

We should also remember the solid foundation that has been built up with the development of Spanish democracy over the last 35 years and which is now an inseparable part of most aspects of social life. For example, undoubted progress has been made towards equal rights and obligations for men and women, and our education system, in spite of all the problems

in its evolutionary process, is now universal for all children and teenagers. Furthermore, after many years of intense public and private investment, Spain now has a high-quality network of basic infrastructures (roads, motorways, high-speed railways, telecommunication systems, ports, airports, water supply, fuel networks, etc.). In some cases, they exceed the EU average, although there are also cases of underuse. So, *infrastructures, yes, but no more than are needed.*

And we could talk in similar terms about our health and social security systems which have improved considerably. Obviously, there is still work to be done to improve efficiency, within a welfare state that requires on-going realignment to keep it focused on what is essential.

Furthermore, the country now has the best entrepreneurs it has ever had in its entire history, backed by strong corporate structures in many branches of activity. This has given rise to the emergence of veritable Spanish multinationals in recent years, particularly after the privatisations of public-sector companies in the '80s and '90s, as we saw in Chapter 3.

In particular, the companies included in the stock market index Ibex-35 enjoy a significant presence abroad; in fact, more than 60 per cent of their business is done outside of Spain. These companies operate worldwide in the industry and services sectors, with a growth path punctuated with significant successes in recent years in major public tenders on all five continents. All this indicates an increasing competitiveness, with substantial improvement in work standards to levels that seemed impossible not so very long ago, on markets where international competition is increasingly fierce.

As regards the financial system, after a dramatic crisis—including all manner of abuses and regulatory and supervisory failings, with almost a hundred executives indicted in various cases, things are starting to move in the right direction again, after a lengthy and costly overhaul. However, the absolutely vital credit flow to the SMEs has yet to be started.

4. FIRST SIGNS OF IMPROVEMENT WITHIN THE CRISIS

Signs are starting to appear that indicate that the situation may be improving in specific areas. In just over 3 months (January-April 2013), the risk premium has fallen to less than half what it was at the height of the crisis (from 650 to 295), indicating greater confidence in Spain on the international markets. This is mirrored by rapid drops in the interest rates on Spanish debt issues, with long-term rates falling from 7.5 to under 5 per cent.

There are other encouraging signs, such as the growth in exports and the reduction in the current account deficit, with a coverage greater than 100 per cent for the EU and 85 per cent globally. Tourism is a major contributor to this and it shows all the signs of recovering from the drop during the first years of the crisis.

There are also substantial improvements in the indicators related with Spanish membership of the Eurozone, compared with previous years. Excluding bank debt, the government deficit was under 7 per cent in 2012, compared with more than 9 per cent in 2011. Over a period of slightly more than a year, debt issues seem to show signs of levelling off, after which they would foreseeably start to decrease.

However, this is not to belittle the gravity of the underlying structural problems, with a level of government debt that, in 2014 or 2015, will exceed 100 per cent of the GDP. And the general economic situation continues to be fraught with difficulties. This year, 2013, will still close with a substantial contraction of the GDP and the overall demand continues to fall, particularly in certain segments related with the use and consumption of durable goods. Precisely for this reason, it is necessary to implement measures that go beyond complying with Eurozone requirements and seek to formulate a policy for economic recovery.

Given the persistence of the recession, a radical change is needed in the Eurozone's economic policies. Indeed, the need for a change was clearly enunciated by the International Monetary Fund, after detecting in its report issued in spring 2013 that the austerity imposed by Germany was weighing too heavily on the EU economy and was contributing directly to the generalised deterioration of growth prospects. So, in a three-speed world economy, we now have a situation in which the Eurozone, the largest exporting area and second-largest world power by GDP, has become a sick person that needs a new treatment⁸⁶ and more reforms. This will be the subject of the next section for the specific case of Spain.

5. PENDING REFORMS

In economics, as in painting, there are always areas of chiaroscuro. This means, with respect to the subject we are analysing here, that alongside certain encouraging signs we have already mentioned, there is a need to continue implementing structural reforms, of which the most significant so far have addressed the finance industry and employment. However, the-

86 H. Montero, 'El FMI duda de la capacidad de Merkel para rescatar a la UE', *La Razón*, 17.IV.2013.

re is also a need for a greater attention to other areas, starting with the food industry and agriculture—consistently neglected by successive governments—which shows signs of a considerable resilience against the crisis and a definite potential for future export growth, which should be assisted with ad hoc policies. However, there is understandable concern in this industry as regards the direction that the reform of the common agricultural policy (CAP) could take. Indeed, for the sevenyear period 2014-2020, it seems to be less favourable to south European countries, including Spain.

In the energy sector, Spain still does not have a true national programme to guarantee the entire system's legal certainty and rationality and which also addresses the environmental issues, for example, validation of landmark international agreements, implemented with growing delay; the fight against global warming; and climate change. Neither should we ignore the unfair penalisation of renewable energy resources for purely revenue purposes. Until now, Spain has played a leading role worldwide in the technological development of these resources, but the achievements could be reversed by insufficiently thought out and inadequately designed policies. As regards the basic issue of water and its consumption, the situation seems fraught with uncertainty, with disputes between Autonomous Communities and a lack of a long-term global vision.

A cause of particular concern is the growing *deindustrialisation* of the country, driven by an illthought policy to outsource production and which has contributed to unravelling Spain's industrial fabric. Combined with the previously mentioned deagriculturalisation, this will significantly hamper job creation when the recovery starts, creating conditions very similar to what, in development theory, is termed 'the middle income trap', that is, the need for policies that bring about a profound economic and social transformation in order to advance towards higher levels of economic and social development. Thus, a resolute reindustrialisation policy is needed to reverse previous neglect.

Within the public sector, there are instances of high rationalisation and improved functioning, for instance, in citizen security and national defence. It also seems that further progress will be achieved in justice in a relatively short time and it is on this progress that the hopes in the fight against corruption are pinned. However, government as a whole still needs considerable reform, particularly as regards its territorial organisation in order to put an end to a plethora of public sector employees, overlapping jurisdictions, wasteful investments, and provincial and municipal institutions that are no longer able to respond adequately to the changing times. A new, far-reaching effort is needed to bring all this up to date, with a smaller number of city and town

councils (albeit more efficient), and more compact and more responsive provincial and regional governments. Not to mention the abolition of thousands of bodies—we already talked about this in Chapter 3 of this Report—that have ceased to serve any purpose in today's information and knowledge society. And all this within a framework of transparency in public institutions at all levels.

Another area of concern is the cutback in resources for science and research (R&D&I, Spanish National Research Council (CSIC), CEDETI, presence in CERN and ESO, etc.) where we have gone from clear chronic insufficiencies to harsh cuts in public and private research which will make it difficult, in some cases, to return to the levels achieved in recent years in aerospace, biotechnology, electronics, etc.

We should not be afraid of reforming the Constitution if it can help solve a not insignificant number of pending problems. It should be noted that for the first time in its history, after 35 years of life, specific articles of the 1978 Constitution have been reformed on two occasions: to grant voting rights to citizens from the European Union and other countries in certain elections and to open the way for the first goals of the European tax union. Accordingly, future reforms of the Constitution should focus on new goals that seek a more efficient use of national resources, more solidarity and government agencies that are better matched to the times.

6. AN URGENT NEED TO MODERNISE GOVERNMENT AGENCIES

Modernising administration deserves a section to itself as it is the biggest task facing the Government, to reduce the state's weight, trim the bureaucracy and apply financial resources where they are most needed. In April 2013, Brussels urged the Spanish Government to speed up the process, as it could be the lever for driving growth in the medium term.

On 18 April 1993, the Fundación Ciudadanía y Valores (Funciva) delivered its report *Propuestas para la Reforma de la Administración General del Estado*, written by José María Román, Miguel Córdoba, David Delgado and Rocío Dívar, in which it puts forward new ideas for adding flexibility to the functioning of the state:⁸⁷

- *Rationalise public-sector companies.* On July 2012, only 198 public-sector companies controlled by the autonomous governments had been downsized. Two-thirds of the pledged cutback, affecting 675 companies, is still pending.

87 Pablo Cerezal, 'La reforma pendiente de la Administración', *Expansión*, 19.IV.2013.

- *The Civil Service Act.* Civil servants must be subject to performance assessments, avoiding arbitrariness and lack of transparency. Sanction, selection and compensation processes must also be developed in line with those used in other EU countries.
- *Expand the role of e-administration.* An indispensable part of the process of modernising the civil service is to focus on the beneficiary, the citizen, avoiding asking for documents that are already held by other government agencies. It is also necessary to standardise computer systems and achieve compatibility between the different levels of Government.
- *Lighten government structure.* According to Funciva, spending on advisors should be subject to particularly close scrutiny, ensuring that the positions given to temporary staff really are temporary and that the people recruited are qualified to perform the tasks required.
- *Reduce spending by the autonomous governments.* The Government should pressure the Autonomous Communities to align their level of spending with the population's needs and possibilities. Current spending has increased three-fold since 2002 as the bubble expanded and has remained stuck at that level. If spending was brought back down to the level of 2006, for example, by unifying contracts with suppliers, it would knock almost a percentage point off the deficit.
- *Audit the public sector.* Delays in the Tribunal de Cuentas (Court of Auditors) negatively affect its sanctioning power, preventing irregularities from becoming public knowledge. It would also be necessary to require that the auditing bodies justify in writing the procedure chosen, so that the process's transparency guarantees the free entry of competitors and reduces corruption.
- *Simplify administrative procedures.* Simplify and unify procedures across departments, so that citizens and companies waste less time. Time is money.
- *Restructure the bureaucracy.* The administrative mesh continually grows in size and complexity but it does not answer the needs of the time and, in many cases, 'performs invented tasks'. The experts advocate facilitating civil servant mobility to other areas in other administrations, which would enable the number of public sector employees to be reduced without affecting existing civil servants.
- *More accountability:* It is fundamental to closely monitor public spen-

ding, both to reduce waste and to fight corruption. To publicise the criteria followed when signing a public contract gives wings to free competition and shows up the shortcomings of those who can only compete with bribes.

And above all, beyond reforming government agencies, it is necessary to put an end to what has often been called the *casino capitalism* economy, speculative and absolutely lacking in innovation. To take a new step in organising the general economic framework, remembering that in spite of capitalism's drawbacks (which are no greater than those of real socialism or central planning), the *Mixed Economy System* (Paul Samuelson dixit) has the power to give seven lives to spending.⁸⁸

The new changes to come or which are already taking place will probably not be the refounding of capitalism (that Sarkozy talked about). Rather, there will be a series of reforms, which have already started, and which must inevitably be tied to sustainability criteria, reconciling unstoppable human demographics and technology with nature.⁸⁹ In this, one notes a lack of a more active policy within the Government to solve typically Spanish problems. We need to stop obsessively viewing problems in terms of *financialisation*, concerned only with risk premiums, interest rates, and the like, neglecting to directly address—effectively bypassing Brussels—problems that are specific to the country and whose solution would have a substantial impact. If only the current Government had more resolute ministers and a more clairvoyant Prime Minister.

7. AGAINST THE PREVAILING PESSIMISM

Taking a global view, we need to take a stance against the all-pervading pessimism, a little along the lines of Antonio Gramsci's old idea when he said his famous phrase that 'against the pessimism of intelligence, there is the optimism of the will'. A pessimism which is compounded by certain political attitudes held by certain autonomous governments which, instead of throwing themselves into solving the problems of the crisis, in a concerted effort with the rest of the country, espouse more or less separatist views.

Of course, within the pessimism, there are a number of psychological issues that are caused by the crisis and for which it is difficult to find a solution. Starting with the situation of the employers, among whom, with the crisis in its fifth year, one notes a worrying sensation of weariness and confusion,

⁸⁸ Ramón Tamames, *Globalización y Ecoparadigma*, Institució Alfons El Magnanim, Valencia, 2003.

⁸⁹ Ramón Tamames, *El Grito de la Tierra*, RBA, Barcelona, 2010.

faced with a government that applies the inevitable austerity but fails to offer any diagnosis for the medium and long term. But, within the business community, there are other contrasting outlooks, such as that shown in the following dialogue:

Are you one of those who thinks that 2013 will be the last year of recession in Spain ⁹⁰

-I sincerely hope that in 2014 the economy will start to show signs of recovery, with more positive macroeconomic indicators. However, unemployment is causing considerable hardship and, much as I would prefer otherwise, I don't think that it has bottomed out yet. I would really like to say that things are going to get better but I'm not very optimistic. We have yet to create favourable conditions for a productive economy that would enable employment and competitiveness, as a country and as an industrial sector, to improve. A country is competitive when it has an innovative industrial sector. It cannot be competitive with a financial sector or a services sector alone.

What are the most pressing reforms?

- We need to change certain types of social perceptions. Our young people still aspire to be civil servants and not entrepreneurs. In Spain, people still look askance at entrepreneurship, probably because entrepreneurship has been confused with other things.

We need to have a lot less red tape; starting a new business is still an administrative minefield. We must help new entrepreneurs with less red tape and more tax incentives. And we should probably have a different conception of work and view it less as a question of looking for a job as of creating one's own employability. And education, always education. These are social measures that should not be left entirely to the Government.

Within the transformations that are taking place and which are vital for instilling a sensation of optimism, the first is the unstoppable forward march of the information technologies, with the enormous possibilities offered by Internet for globalisation. They can also contribute to more efficient government, far removed from the obstructive red tape of the officialdom of the past, of the era of 'come back tomorrow' or 'go to another window' (Larra and Galdós *dixierunt*).

One thing is clear: *nobody should throw in the towel*. This country deserves

90 R.L. Vargas, 'La entrevista: Ángel Simón, Presidente de Aquae Group', *La Razón*, 7.IV.2013.

everyone's effort to uphold the welfare state, albeit rationalised and better managed. And employers should be given the confidence and support they deserve, because only they create jobs and generate growth.⁹¹ As the writer Carmen Posadas says:

'Following the example of other nations, we should use what is happening as a call to action, to say with confidence that we will come out of this stronger. Because we are a great country and we have proven this in the course of our history, in circumstances that were more adverse than now. I would even dare to go a step further and say: we need to be chauvinists. Not just because there are more than enough reasons to feel proud of what we are as Spaniards but because believing we are great is the first (and almost mandatory) step towards regaining our greatness'.⁹²

The international financial services corporation Morgan Stanley must have been thinking along similar lines when, in March 2013, it postulated a rapid recovery of the economy, in which the Spanish 'would be the new Germans of Europe'.

CHAPTER 5

THE RESPONSIBLE ECONOMIC STATE. ESTECORES* VERSUS THE LEVIATHAN

1. BASICS OF ECONOMIC RESPONSIBILITY

Chapter 3 of this Report examines how the Spanish economy developed during the paradigmatic period 1996-2002, with such significant changes in the structure of the country's economy and in its financial culture. Therefore, it could be said—and that is the main thesis of this Report—that the rule of law, with its legal certainty and transparency, cannot work unless at least what we call the *responsible economic state* is also in place. There was a series of indications of this from 1996 to 2002, which would need to be prolonged indefinitely, improving the economic policy of what we have called the *paradigmatic period*.

The opportunity for abuse, wasteful spending and corruption must be prevented in public economic activity through a series of measures that im-

*Translator's note: The author has created the name Estecores as a type of mythological creature representing the responsible economic state, which in Spanish is the *estado económico responsable*, or Estecorés.

91 From the lecture given by Prof. Ramón Tamames in Cesine, Santander, on Thursday, 8 November 2012 on 'Expectativas de recuperación en la crisis económica en la Eurozona y en España: retos y respuestas'.

92 Carmen Posadas, 'Seamos chauvinistas', ABC, 7.IV.2013.

se permanent transparency of all activities, which for that reason must be assessed and monitored. Furthermore, this new situation would be the best for entering, in the case of Europe, and particularly for Spain, a process of sustained economic recovery.

The experience of the Eurozone in favour of greater union

It could be said that an ambition like the aforementioned is difficult, utopian and even chimerical. However, recent events since the crisis that started in 2007 are forcing a series of safety nets to be adopted for the economic environment. This is what is already happening in the European Union (EU) and particularly in the Eurozone, where bailouts of states at risk from bankruptcy (Greece, Portugal, Ireland and Spain, for the banking sector) have been promoted. In order to address the situation,⁹³ the European Financial Stability Facility (EFSF) was created in 2010, with the permanent consecration of this federal reserve system in the European Stability Mechanism (ESM) in 2012.

In order to prevent new situations like those that triggered the crisis that started in 2007, the Fiscal Union project is already underway in the Eurozone, with specific public deficit targets, in order to fulfil the golden rule of zero-deficit in 2020.

Furthermore, in relation to the serious situation created by the banking sector and in order to prevent these episodes from being repeated, the Eurozone also resolved to address the creation of a European Banking Union to apply common rules to the entire financial sector (Basel III), to gradually create a real European Deposit Guarantee Scheme and to set up a Single Supervisor for the entire financial sector in the Eurozone with the expectation that, one day, there will be a public debt mutualisation of Eurozone countries. This, along with the creation of a European Treasury Secretariat—if the resistance of *Germany et alia* can be overcome—would allow the so-called Eurobonds to be issued.

However, with everything described above about the progress of the Eurozone to support the Euro, it is clear that it still does not have a single financial market. This is demonstrated by the very different interest rates paid in the different countries; very low or even negative in Germany, while Italy and Spain, which still have strong risk premiums, have to pay much higher interest rates.

93 Which should have been foreseen much earlier, in the era of prosperity, as proposed by Ramón Tamames, in *Unión Monetaria y Euro. La recta fina*, Espasa, Madrid, 1998. And in a very detailed way by Otmar Issing in *Der Euro*, Cambridge University Press, 2008.

Secondly, the European financial and monetary policy does not foster future growth; while the US restrains its accounts, Japan causes sensation with a wave of liquidity, and emerging powers (mainly BRIC) reinforce their policies, Europe paints a clearly depressive picture. This is so much so that in Washington DC, during the International Monetary Fund (IMF) spring meeting in 2013, there was already talk of a world at three speeds: emerging countries, in first, the United States and countries such as Switzerland and Sweden in second, and finally, the European and Japanese economies in the process of remaining more or less stagnant.

In this respect, Managing Director of the IMF, Christine Lagarde, said that Europe is not making the flood of liquidity from the ECB reach the real economy, while the banking sector is restructuring itself extremely slowly. Furthermore, the IMF also warned that, in Europe, the gap between its two speeds is also growing: 'The plumbing is clogged up and we are seeing more financial fragmentation. The thousands of millions spent on banks are not bringing the economy out of deadlock. The weakness of large Euro economies like Spain and Italy are being joined by a small, yet damaging fire, like that of Cyprus and the fears over Slovenia.' To sum up, five years after the fall of Lehman Brothers (September 2008), the USA is experiencing sustained growth, underpinned by internal demand, while Europe has still not found the key to getting back into the race.⁹⁴

The responsible economic state

We thereby reach the main thesis of Chapter 5: the rule of law must be completed with a more driving state, with what we are going to call the *responsible economic state*, linked with the rule of law. Responsible in two respects; it must always take on its duties with total guarantee of quality, and in case of error, it must respond to the omissions or errors it has committed.

For the sake of even more completeness, it is clear that it will be difficult to govern the European Monetary Union, unless measures are taken to impose real discipline on public spending. This entails—with several procedures already underway—a certain capacity for economic authorities in the Eurozone to censor the budgets of the 17 countries of which it is made up. And what's more, it could be said that the memorandums of understanding that are arising following the series of bailouts within the Eurozone are putting forward very clear recommendations regarding whether certain public investments should be monitored so that they adapt to real profitability and social criteria.

94 Amanda Mar; 'El FMI enciende la luz roja en Europa', *El País*, 15.IV.2013

It should also be considered that in the future, there will be a series of warning signs, related not only to employment levels, deficit and government debt—as now happens—but with more detail, in order to know, at any time, the true stress of the economic situation, making it feasible to prevent rather than cure.

However, the future responsible economic state policy needs a repertoire of values to support the policies to follow, which should have a significant economic and philosophical component. That is where the following list of philosophers and economists comes in.

Philosophers and economists: society and state organisation

In addition to the authors already considered when referring to the origins of sovereignty of the people as the basis of the rule of law, below is a list of philosophers and economists who have left their mark on the theoretical and historical evolution of what constitutes human society and how the state should be organised. This will help us to appreciate a series of foundations of the concept we are trying to explain, ultimately, as the real foundations of the responsible economic state.

1. **Parmenides** (born 540 BC?), was the starting point for a new way of philosophising about many aspects, with a radical metaphysics posture. As opposed to Heraclitus with his 'everything flows', he maintained that 'everything that exists, is at rest', leading us to understand that existence is a natural order of things, which, as we will see later, is deeply modified by human actions.
2. **Socrates** (470-399 BC), going beyond the ontology of Parmenides, he introduced the first restriction on human knowledge: 'Wisest is he who knows he does not know'. He went on to emphasise his idea with what we could call the first categorical imperative: 'know thyself'. In any case, with the Socratic method of questions and answers, the great master spent his entire life trying to discover and value problems before looking for their solutions. One of his disciples, Xenophon, was the first to write about the chrematistics of things, *Oeconomicus*, considered the first work on economics.
3. **Plato** (429-347 BC), writer, exegesis and follower of Socrates, sought the idea of the Highest Good 'that like the sun makes physical objects visible and generates life on earth and which exceeds the being, deriving beauty, intelligence and goodness.' All of this falls within the context of a cosmos driven, not by chance and necessity (Leucippus

and Democritus), but by necessity and intelligence, the latter prevailing over the former. Regarding human organisation, in his dialogue *The Republic*, Plato proposed the organisation of the polis under the ruling of the philosophers and the benevolence of the Highest Good in the form of Demiurge. This is how the search for co-existence started, which would trigger a series of contributions from Augustine of Hippo to Kant, through Moro, as we will see.

4. **Aristotle** (384-322 BC), continuing with the vision of Plato, saw philosophy as the essential instrument of science, subordinating in it theology, the theory of the physical world and the doctrine of the soul, which in turn, are the basis of their ethical and political doctrines. It was the Greek ideal of moderation and knowledge, with a world of thought with very precise rules for logical interference but without experimentation.
5. **Augustine of Hippo** (354-430) led a passionate and active life, in line with the theological controversies of his time, and alongside the *credibilia*—or 'things that must be subject to faith'—sought seminal reasons or the seeds of things in his future. These included issues related to right and wrong and freedom, which he was able to link in his most organisational works, *The City of God*, in a neo-Platonic vision, precedents of More and Bacon.
6. **Thomas Aquinas** (1225-1274). It has been said that he culminated the movement to bring Aristotle to Western philosophy, based on the works of Arab (especially Averroes) and Jewish (Maimonides) translators and reviewers, in what was an authentic resurrection of the classics, which should not be forgotten. Thus, Thomism was born as a Christian formulation of Aristotelian philosophy. Scholasticism emerged from this as highly formalised medieval expression that would trigger the replication of philosophers from the Renaissance onwards.
7. **Giordano Bruno** (1548-1600) defended the doctrine of the infinity of the universe with poetic exaltation. Within this, the human mission of man was the enthusiastic contemplation of this infinity, which had to permit the 'communion of man with the forces of nature', in a sort of pantheism. All of this with a vision that was clearly neither Aristotelian nor Thomistic and would lead Bruno to clash with the Church and to his own death burned at the stake by the Inquisition.
8. **Thomas More** (1478-1535) represented a leap forward in the idea of the state as defender of justice, order and material and social progress, in a utopian vision of regulation of human labour, with no more than 36 hours

per week, in addition to peaceful management of relations between citizens and the state. A vision reflected in *Utopia*, which laid the foundation of all subsequent futurology.

9. **Francis Bacon** (1561-1636). His main goal was to provide an instrument to substitute the Aristotelian-Thomistic Organon, which in his opinion was inadequate to support the sciences, as it could not be used as a method in favour of new discoveries. To this end, Bacon sought visible truths in facts. To do this, he saw man as an interpreter of nature, proposing mechanical arts as a new philosophy. In a similar way to More, he described his ideal society in *Nova Atlantis*.
10. **Galileo** (1564-1642), along the same line as Bacon, he raised new problems: the philosophy of science and epistemology, constituting the first expression of maturity in terms of modern physics by contributing to the Copernican revolution. And not only to observe, experiment and oppose Aristotelians, but also, and above all, to find the mathematical reason underlying the relationships between various phenomena. He concluded that 'Philosophy is written in the great book of the Universe which lies always open'. Immediately afterwards, he stated 'but we must first understand the language and the character in which it is written'. In this search, Galileo, like Bruno, encountered the Inquisition, but was able to dodge it to save his life (*Epur si muove*).
11. **Descartes** (1596-1650) represented a new level in philosophy on the path to what could be called modernity, without his work being reduced to a critical methodology with Aristotelian syllogistic; based on methodical doubt, on the *cogito ergo sum*. This is because Descartes saw the foundation of invention and discovery in the path open 'to everyone who participates equally in reason and good sense'. Ultimately, with Descartes, Aristotelianism and Thomism were definitively left behind.
12. **Spinoza** (1632-1677), with a pantheistic view that distanced him from the Sanhedrins of his time, sought a rational approach to eliminate any reason for error, any confusing and vague representation. Based on this, he became an advocate of religious and ideological tolerance within the state, whose mission is to dispense justice and protect all its members against the passions, and in accordance with the rational mandates. A true precursor of the rule of law, his ethics became one of the most influential repertoires leading to a society free of dogmas and prohibition.
13. **Leibniz** (1646-1716). In his life's work, he strove to convince Louis XIV, and then the Russian Tsar Peter the Great, that it was necessary to es ta

blish an alliance of Christian states, abandoning the struggle between them, linking to that end the union of all Churches. Besides philosophically promoting mathematics, Leibniz referred to the central ideas of harmony, continuity and universality as the foundations of modern philosophy and science, and seeking a universal language accessible to all humans, capable of describing ideas. Leibniz thus had a first universal vision of life and philosophy.

14. **Adam Smith** (1723-1790). Author of a philosophical book first, *The Theory of Moral Sentiments*, he then switched to economic science with *The Wealth of Nations*. In this book, he presented a new vision of the economic system with a devastating attack on commerce, advocating, to the guilds, the division of labour and against protectionism, free trade. All this occurred at an historic time, which started to benefit from the new forces of the industrial revolution, steam and machinery, new ideas about civil liberties emerging at the same time. Ultimately, nations can only prosper through international trade, with minimum state intervention in the metaphorical framework of the action of the 'invisible hand'. Therefore, with Smith, the first economic globalism arose, as a premonitory phase to today's globalisation.
15. **Kant** (1724-1804) exalted the sanctity of duty, for both the esteem man feels when fulfilling it and because it is the rationality of morality. In his essay *Perpetual Peace* (1795), already considered elsewhere in this Report, Kant proposed the major categorical imperative: 'there should be no war'. With ethics against what was and is normal in the cynicism of politicians: 'act first and justify your actions later'; 'if you are the perpetrator, deny it'; 'divide and conquer'. As a force to unite the pieces of his intended world state, Kant referred to 'the spirit of commerce which cannot coexist with war'; in line, therefore, with modern ideas of economic integration.
16. **Hegel** (1770-1831), placed at the confluence of the currents of transcendental idealism and Romanticism, strongly rejected the idea of the Absolute to explain anything. According to Hegel, science is essentially systematic and consists of a succession of ideas that are necessarily derived from one another. For this reason, the only kind of truth is that based on 'the scientific system', which uses the dialectic process; thesis-antithesis-synthesis, an advance of the dialectic of later left-wing Hegelians (including Marx and Engels).
17. With **Marx** (1818-1883), the philosopher, sociologist and economist from Trier, a new descriptive, interpretive and prospective framework of ca-

pitalist society emerged, initially stated in the manifesto written with Engels. It had a vision of historic materialism, class struggle succession (bourgeoisie/proletariat), civil war and revolution for change from capitalism to socialism and an instrumental concept of economic structure as a series of production and exchange relations, seated on an infrastructure (the environment) and organised by a superstructure of institutions that emanate a particular ideology, which is imposed to maintain the existing order. After Marx, nothing would be the same and left-wing parties and class unions would push for structural change in society, from Smith's Manchester capitalism, to socialism, now with social democracy, to the mixed economy and the welfare state.

18. **Max Weber** (1864-1920) and **Habermas** (1929-) also made a significant contribution, from the Germany of Marx and Engels, to matters related to economic and political organisation. In this respect, they contributed to the myth of the rationality of modern society, by believing that the legal instrument, state bureaucracy and market logic generated institutionalisation of the reasonable, which directed individuals to pursue better ends. Although Habermas coined the term 'rationalisation of action', in a similar way to Weber's, he warned of the risks that are generated when there is a disconnection between the ideals proclaimed and the policies put into practice. When this distance is insurmountable, power turns to propaganda, festivities or entertainment to distract citizens from the abyss that has been created between the political rhetoric and the results of the action,⁹⁵ a perception that is still fully valid today.
19. **Keynes** (1883-1946) is the maximum that formalised capitalism could accept to be reformed, compared to the revolutionary positions of Marxism. In this respect, Keynes advocated pursuit of full employment through state policies, which had to intervene for the economy to recover from the depression, deploying actions related to the investment multiplier with public capital to encourage private investment and complemented by the investment accelerator (of businesses that invest in a trend of growing consumption). All of this with the pre-requisite of defending a level adapted to aggregate demand—via unemployment insurance and other measures of the welfare state—thereby contributing not only to full employment but also to the redistribution of wealth and revenue. There was no greater advocate, therefore, of capitalism than Keynes, through the deep reform he proposed and which is still the subject of debate between neo-Keynesians and neoliberals.

20. **Friedman (1912-2006) and the Washington Consensus.** The aforementioned author and text complete the eternal philosophical dialectic, the antithesis of J.M. Keynes, and from the Chicago School he knew how to present what in the aftermath of the twentieth century, following the fall of the Berlin wall (1989), would be called *pensée unique* (single thought). Due to the disappearance of the bi-polar Marxism/neo-capitalism clash, taking advantage of the decreasing trend in Keynesianism, ideas developed between the 1980s and 1990s, thus giving rise to the Washington Consensus (developed by the English economist Richardson), in the following terms:

- *Fiscal policy discipline.* This is an essential component of the programmes negotiated by the IMF with Member States who ask for loans.
- *Tax reform.* This is the best method for redressing budgetary deficit, unless reduction of public spending is implemented.
- *Interest rates.* These should be based on two basic principles: they must be set according to the market in order to avoid incorrect allocation of resources and, at the same time, they must be positive in real terms in order to increase saving and discourage capital evasion.
- *Exchange rates.* These must also be set according to the forces of market offer and demand.
- *Trade liberalisation.* Access to imports of factors of production at competitive prices is essential for promoting exports, whereas protectionism of national industry against foreign competition creates all types of very costly distortions.
- *Liberalization of inward foreign direct investment (FDI),* as long as technology and experience are provided and not just capital. This helps to boost production of goods needed for the national market and for export.
- *Privatisation policy.* Helps take the pressure off government budgets, in both the short term—from revenue generated from selling the companies—and the long term, as long as the government does not have to fund new investments or cover debts.
- *Deregulation policy.* Maximum freedom of economics—prices, mobility of factors, etc.—stimulates competition compared to economic interventionism.

- *Property rights*. These must be clear and clearly delimited and must be guaranteed by the functioning of the legal and judicial system.
- *Principles of democracy and freedom*. Individual rights should be given priority over collective rights. If not, misunderstood social criteria could damage the functioning of society as a whole.

The Washington Consensus has been reproached many times but there is no doubt that it contains many elements of what we will call the responsible economic state, provided that it contains facts with a vision that favours change and redistribution of wealth and revenue and not as a catechism for maintaining a conservative and static order.

21. **Galbraith** (1908-2006), with his institutionalism, represents an intermediate stance: not neo-liberal, close to Keynesianism and from a structural vision of advanced industrialised countries; as 'affluent societies' structurally organised in the style of the New Industrial State (NIS), with multinational corporations ruled by complex technostructures and with a view of the world in which the biggest business of the rich will be the fight to end mass poverty. This is in addition to countervailing powers against monopolistic or oligopolistic tendencies, developing the leading role of all types of trade unions, cooperative organisations and civil society.
22. **Brundtland** (1939-) / **Lovelock** (1919-): **sustainability and Gaia**. To close the list of philosophers and economists that we have lined up here, we must include the main contributors to the concept of sustainable development, as a balance between demographics and human technology with nature and the environment. In this respect, in 1987, the Brundtland Commission defined sustainability, which was later dealt with in-depth at the Earth Summit in Rio in 1992. Later, Lovelock's Gaia hypothesis was added to it, presenting the Earth as a self-regulating planet, which could punish its inhabitants if they continued abusing the environment. Both of these ideas must be included in the organisation of the production system for better use of natural resources (earth, air and water) and to manage the entire economic system.

Philosophical consensus on human coexistence

The aforementioned philosophical phylogeny emphasises that humanity is constantly facing huge challenges that put at risk the life, freedom, coexistence and survival of millions of human beings and, since not too long ago, the rule of law. However, given these wide trends, it could be

said that today, we lack a 'common reason' that allows us to tackle these huge challenges, in a *de facto* globalisation, but still not *de iure* in many aspects. Therefore, we must re-think the relationship between *ethos*, *polis* and *kosmos* in order to adapt them to the conditions of a global society that is getting more and more complex, interdependent and uncertain.

In summary, we need to completely renew the exercise of thought. Therefore, far from being an outdated and futile occupation, philosophy has a huge task and a lot of responsibility: help to reconstruct the common reason so that living humanity, in a single, interwoven and planetary society, takes charge of its multiple past and faces its future with a reflexive and cooperative attitude.⁹⁶ For this reason, from the list of philosophers and economists, we have prepared what could be called a *philosophical consensus on human coexistence*:

- Natural order is neither perfect nor permanent and it is influenced by the action of man (Parmenides).
- In order to know this order, there is nothing better than to 'know thyself', also applicable to collective entities and notably to states (Socrates).
- All of this would be much easier with ruling of the polis—and therefore, of the rest of the organisations—assigned to the philosophers (Plato).
- Philosophers who should not forget the idea that politics must be linked to ethics (Aristotle).
- This would be feasible in the 'City of God', but until it is reached, it is necessary to bear in mind seminal reasons in human coexistence (Augustine of Hippo).
- Furthermore, in social life, the wisdom of the classics and their Christianised moral cannot be forgotten, in a cosmic vision or not (Thomas Aquinas).
- And also, in that social life, man must enter into communion with nature, nowadays, the environment (Giordano Bruno).
- Without ever losing the necessary utopian vision to think in the mid and long term (Thomas More).
- And in order to improve this vision, it is necessary to seek visible truths basing them on fact (Bacon).

96 Antonio Campillo, 'La crisis del pensamiento occidental', El País, 13.IV.2013.

- Without losing sight of the great open book of the Universe, which must be understood and studied (Galileo).
- Neither should critical sense and methodical doubt be forgotten when tackling any problem (Descartes).
- And all of this must be done with a state focus, which defends its people from intolerance (Spinoza).
- In a universal context in search of peace (Leibniz).
- An initial Universalist vision that must be extended to the economy to find true wealth of the nations in free trade (Smith).
- And by doing this, the closer economic relationship between nations will allow perpetual peace (Kant).
- Remembering that in this iter, there is always a fight with opponents and the thesis-antithesis-synthesis dialectic process works (Hegel).
- With no place in historical dialectic for evading confrontation between social classes in search of revolutionary change to a new economic system (Marx and Engels).
- A change that is not easy to derive through the pretence of a path of reform; the latter being just as necessary as the former (Max Weber and Habermas).
- In the intermediate path (revolution/reform), it must be emphasised that full employment and redistribution of wealth and revenue must always be the goal of the government (Keynes).
- It is true that interventionism cannot stifle business initiatives and the dynamism of the economic system (Friedman).
- The objective of an intervention-deregulation balance must prevail, in which mass poverty must be brought to an end (Galbraith).
- And above all, in the configuration of the new political and economic framework, it will be necessary to consider the unavoidable constraints for protecting the biosphere with ecological criteria (Brundtland/Lovelock).

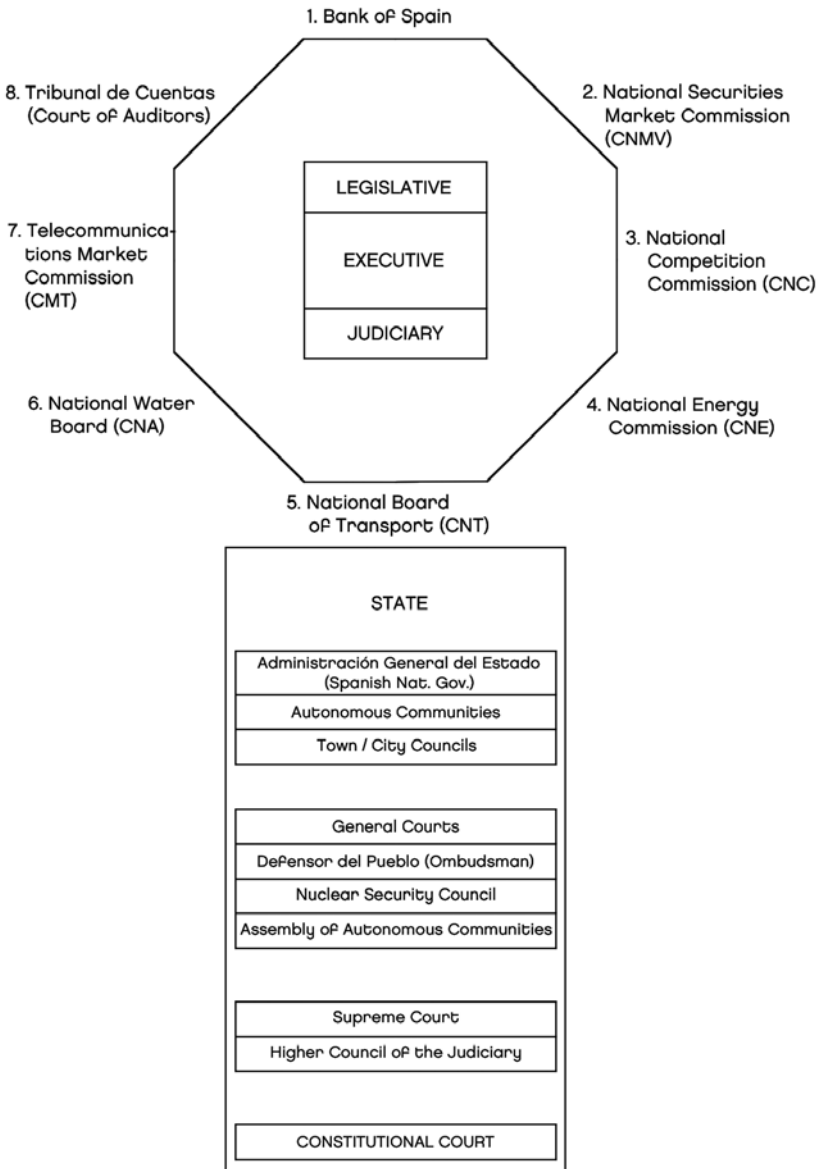
To sum up, from the 22 cases of philosophers and economists that we have listed, a road to perfection is derived, with an organisation that is increasingly democratic, rational and sustainable for the human race.

2. THE RESPONSIBLE ECONOMIC STATE

Following the observations about the advances of the EU and the philosophical consensus that we have outlined, we will now go into more detail about the meaning of responsible economic state. We are going to start by emphasising that we conceive this idea, applied to Spain, as a whole, with its multiple components, which must be coordinated with one another. This is done through a schema (diagram 1) with two related pieces. The first is the state environment, consisting of a constellation of eight regulatory/supervisory bodies.

The second block in the diagram shows the details of the state, thus showing the three powers conceived by Montesquieu: legislative, executive and judiciary. These are broken down with their corresponding components. A fourth power, so to speak, must also be emphasised: the Constitutional Court of Spain, which is not part of the global jurisdiction of justice and is also independent from Parliament, without the possibility of establishing a third chamber, as already said on many occasions. It is the guardian of the principle and of the application of the constitution, in many cases criticised for its partisan formation when electing the members of the *Cortes Generales* (the Spanish Houses of Parliament).

Figure 1. THE RESPONSIBLE ECONOMIC STATE



Regarding the regulatory or supervisory bodies, they define the framework for state activity, whose most direct expression, the government, must act decisively, using its own sources but always listening to the opinion of the aforementioned bodies in order to ensure impartiality towards citizens and the adequacy of their solutions. These are (E&OE) as follows:

- *Bank of Spain*, for monetary and banking issues.
- *National Securities Market Commission (CNMV)*, for regulating and supervising the stock exchanges on which major companies are listed.
- *National Competition Commission (CNC)*, to settle matters related market functioning, in terms of free competition, without monopolies or oligopolistic formations.
- *National Energy Commission (CNE)*, regulates issues related to energy sources, their use, transport and distribution.
- *National Board of Transport (CNT)*, with regulatory and supervisory functions of different types of transport and networks.
- *National Water Board (CNA)*, develops solutions to the problems related to water basins, including those involving two or more Autonomous Communities, as well as matters related to transport and distribution for different types of consumption.
- *Telecommunications Market Commission (CMT)*, for a vital sector of growing importance for the development of ICTs.
- *Tribunal de Cuentas (Court of Auditors)*, which is responsible for ensuring the correct implementation of the budgets of all government agencies.
- *Tax Authority (due to be set up in 2013)*, in order to ensure good coordination between different state tax areas, general government, Autonomous Communities and town and city councils.

The problem with this configuration of the aforementioned state agencies is that some of the regulatory and supervisory bodies do not have sufficient capacity to undertake the tasks assigned to them. Furthermore, a number of cases of manifest bias also arise, due to the political composition of these bodies. All of this results in anomalies and distortion. It is therefore clear that in a responsible economic state, these bodies must be totally independent, impartial and efficient, a subject dealt with in the next section.

3. ECONOMIC REGULATORY AND SUPERVISORY BODIES

A total of ten comparable agencies or bodies are mentioned, which appear in figure 1, also including the non-existent Tax Authority.

Bank of Spain

The Bank of Spain is the Spanish state agency that acts as a central bank and supervisor of the Spanish banking system. Its activity is regulated by the Autonomy Act of the Bank of Spain. It is also a member of the European System of Central Banks (ESCB) and subject to the provisions of the Treaty on European Union and the Statute of the ESCB. From 1 January 1999, the Bank of Spain participates in the development of the following basic tasks attributed to the European System of Central Banks:

- Define and implement the monetary policy of the Eurozone in order to maintain price stability across the zone.
- Conduct foreign exchange operations in accordance with the provisions of Article 111 of the Treaty on European Union.
- Hold and manage the official foreign reserves of Member States.
- Promote the smooth operation of payment systems in the Eurozone.
- Issue legal tender bank notes.
- The rest of the tasks are related to its status as a member of the European System of Central Banks.

As we will do with all agencies to study, after describing its main features and functions, below is a brief critical assessment of the Bank of Spain, with some recommendations.

In all of the aforementioned tasks, the Bank of Spain has had very questionable enforcement during the years of the crisis that began in 2007. This demands a new direction for the entity, better protecting the interests of bank users who are in situations of unfair treatment, real exploitation; abusive, as stated by the European Commission. This is the case of mortgages with minimum interest rates, so that the Euribor is no longer a true reference or the case of accused and even convicted banking executives who are still active and in preferential positions, without the Bank of Spain expelling. At the time, the Bank of Spain tolerated credit growth of five to six times GDP growth, in what was the most dangerous credit crunch, leading to the dual financial and housing bubble with the consequen-

ces known after it burst in 2008. In the same vein, we cannot forget the sad role of the Bank of Spain in all the poor conduct of the managers of savings banks.

National Securities Market Commission (CNMV)

The National Securities Market Commission (CNMV) is an agency that reports to the State Secretariat for Economy and Business Support of the Ministry of Economy and Competitiveness, set up in 1988, responsible for supervising the Spanish securities market.

Its aim is to ensure transparency of these markets and correct pricing in them and to protect investors. To exercise these powers, it receives a significant amount of information, much of which is included in official records and is public. The activity of the CNMV as a supervisory body focuses primarily on:

- Companies issuing securities for public listing in the primary market
- Secondary securities markets
- Companies providing investment services and collective investment institutions

The Commission supervises these with caution, seeking to ensure security of their transactions and solvency of the system. Furthermore, through the National Numbering Agency, it assigns an ISIN code to all securities issued in Spain.

The CNMV's international activity focuses on their participation in both institutions that bring together securities regulators and supervisors (International Organisation of Securities Commissions (IOSCO) and the Committee of European Securities Regulators (CESR)) and in working groups with a cross-sector component (JOINT FORUM and 3L3, which bring together the banking, securities and insurance sectors worldwide and in Europe, respectively).

The CNMV receives a lot and constant criticism. This criticism is mainly related to its lack of strictness when monitoring a series of control operations or for its benevolent acceptance of accounts filed that are then proved to be defective in many aspects. In addition, it is criticised for accepting financial products that are then revealed as highly dangerous for the

general public, especially for savers who are less experienced in economic matters, as happened with the preferred shares. Another criticism is the uncontrolled proliferation of boiler rooms and pyramid schemes. Consequently, it is clear that transparency should reach the CNMV with as much or more force than any other state agency.

National Competition Commission

The National Competition Commission (CNC) is a body of the Spanish competition defence system, established by Law 15/2007, of 3 July, on the Defence of Competition (LDC). Known as the Competition Defence Court until 2007, it is responsible for protecting, guaranteeing and promoting effective competition in national markets.

This body is independent from the government and includes the former Competition Defence Service and Court and carries out its tasks across Spain and in relation to all markets and production sectors of the economy. The activities of the National Competition Commission are based on three pillars: a) persecution of anti-competitive conduct, b) control of economic concentration operations, and c) promotion of competition.

By controlling economic concentration operations, the CNC can ban or condition merger or acquisition operations that imply an alteration to the market structure that goes against maintaining effective competition. The National Competition Commission must be informed when certain market share or turnover thresholds are exceeded.⁹⁷

Moreover, it should be pointed out that in its annual report Doing Business, the World Bank ranks countries in terms of the facilities they offer to do business. Spain does not come out too well in this ranking, particularly due to the tangle of regulations of the Autonomous Communities that trap and discourage firms from investing. To address this situation, in 2012, the government promised to develop a unified market law, which was strongly backed by the National Competition Commission (CNC), which positively assessed the initiative 'as the ultimate guarantor of the unity of the market for the effectiveness of the system'. It would involve creating a National Markets and Competition Commission (CNMC), which would integrate the CNC and have the power to challenge any provisions and public actions that go against market

97 Presidency of the Spanish Government, La Moncloa.es (http://www.lamoncloa.gob.es/ConsejodeMinistros/Referencias/_2011/reFc20110916.htm)

unity, either ex officio or on receiving a complaint from any operator affected.⁹⁸

Obviously, we cannot review the activities of the CNC without including the Autonomous Community defence courts, which were set up starting in 2002 in the framework of Law 1/2002 on the coordination of the powers of the State and the Autonomous Communities on this subject, starting with Catalonia. It could be said that the experiment was short-sighted, after falling into a real administrative jam and inefficiency. A large number of unresolved cases (149) have been accumulated, according to data published on 15 April 2013 by the National Competition Commission, in one of its supervisory reports.

This situation led some Autonomous Communities—such as Madrid and Castile-La Mancha to choose to close their respective courts at the end of 2012 and as part of the austerity policy, returning their power to the CNC. The centralised body continues to beat records in terms of the number of cases resolved. In 2012, the CNC imposed fines amounting to €242 million for prohibited conduct.⁹⁹

The CNC does not seem to have sufficient scope of monitoring to detect what is really happening in Spain's economic activity, where there can be all kinds of collusive agreements that are not investigated in-depth. Furthermore, its activity related to large oligopolistic markets, particularly the electricity and liquid fuel markets, is deemed indulgent. We should also emphasise that it often resists mergers of companies that could be important for making the Spanish economy in general more competitive, as it fears excess economic power in the Spanish market and not in the European or global market, which are more relevant in these times of globalisation. An example of this is when it rejected the acquisition of Orizonia by Globalia in 2013, which led to the virtual disappearance of the former.

National Energy Commission

The Spanish National Energy Commission is the regulatory body for energy systems, established by Law 34/1998, of 7 October, on the hydrocarbon sector, and developed by Royal Decree 1339/1999, of 31 July, approving its regulations. Its purpose is to ensure effective competition in the energy systems and objectivity and transparency of their activities,

98 Presidency of the Spanish Government, La Moncloa.es (http://www.lamoncloa.gob.es/ConsejodeMinistros/Referencias/_2011/rePc20110916.htm)

99 Víctor Martínez, 'Atasco en los tribunales de competencia', *El Mundo*, 16.IV.2013.

benefiting all agents operating in these systems and consumers. For this purpose, energy systems are the electricity market and the hydrocarbon markets, both liquid and gas (natural gas, petroleum, etc.).¹⁰⁰

Being given the opportunity to contribute to an in-depth review of the national energy system, the National Energy Commission has not been capable of doing so over the last few years. This has allowed the astronomical ex-crescence of the so-called tariff deficit to almost €30 billion in 2013, which is considered state debt with the companies, as it did not set levels that would, theoretically, cover costs.

Moreover, there is not enough clarity over what alternative energies could represent in the tariff deficit and their eventual future development, which is essential for reducing the national energy deficit and for combatting global warming and climate change.

National Board of Transport

The National Board of Land Transport is a higher government body for sector advice, consultation and debate on issues related to the functioning of the transport system. Its purpose to prepare the corresponding mandatory reports on all issues and matters set out in Law 30/1987, of 30 July, on land transport planning, creating the same, and in the Regulatory Decree approved by Royal Decree 1211/1990, of 28 September, in addition to any other reports that the government or Ministry of Public Works considers necessary.

The National Board of Transport is strongly influenced by the Ministry of Public Works, which tends to provide the national transport system fully profiled, but which could undergo numerous innovations to make it more fluid and cheaper.

In this respect, the policy followed for the AVE (Spanish high-speed train)—appreciating its high value for connecting Spain—reveals contingencies in terms of committing to lines that would never be even close to profitable. Also evident is a serious lack of resources for cargo transport, including the Mediterranean Corridor, Algeciras-Port Bou, in which privatisation could have a very significant presence. In the case of the ports, the lack of transparency is very acute, and in the airports, AENA has the entire market at its disposal, with all sorts of inefficiencies and monopolistic characteristics, which is proven time and time again with the issue of the air traffic controllers.

100 <http://es.wikipedia.org>. Latest reports

National Water Board

According to data collected by the World Economic Forum, by 2025 more than a third of the world's population, 3 billion people, will suffer water shortages. By this time, 40% more water will be need just to maintain the same rate of consumption as the growing economy.¹⁰¹ This shows the importance of water, which in Spain has its own global body in the National Water Board, regulated by Royal Decree 1383/2009, of 28 August.

The chairmanship of the National Water Board corresponds to the Ministry of Agriculture, Food and the Environment. It is comprised of the *Administración General del Estado* (Spanish National Government), the Autonomous Communities, local entities through the most wide-spread national association, the *Organismos de Cuenca* (water basin bodies), the most representative national professional and economic associations, and non-profit organisations whose purpose is to protect the environment. It mandatorily reports on:

- The National Hydrological Plan
- The hydrological plans for water basins
- Projects involving general provisions applicable across the country related to protecting waterways and public water domain
- Plans and projects of general interest related to agricultural, urban and industrial planning and to the use of energy or land management, before they are approved by the Government
- Issues shared by two or more water basin bodies related to use of water resources and other assets of the public water domain
- Issues related to the public water domain on which the government or other higher executive bodies of the Autonomous Communities could consult it

They can propose lines of study or research for developing technical innovations related to obtaining, using, protecting, recovering, treating and saving water to the government and public bodies.

The National Water Board is a body that could be decisive for correctly restructuring the country's water resources,

¹⁰¹ Thiago Ferrer, 'Presente y Futuro(s) del agua potable', *El País*, 14.IV.2013.

which are not used rationally, such as the current reservoir system. It does not have sufficient capacity to rationalise policy decisions, as proved in 2005, when the National Hydrological Plan, which planned to redirect the Ebro river, which was already underway with significant European funding (lost forever), was shelved and replaced with an absurd Water Plan for building wastewater treatment plants that were then barely used. Inadequate management is also noticeable in what could be a more sophisticated tariffing scheme for different types of consumption. Another example is the in-depth discussion, with significant repercussions, between several Autonomous Communities in relation to the water basins in which two or more of them participate. Finally, there is a lack of presence in a series of decisions on awarding tenders or official privatisation matters, which must be reported to ensure responsibility of government or Autonomous Community authorities.

Telecommunications Market Commission (CMT)

This is the National Regulation Authority (ANR) of the Spanish telecommunications sector. It was set up in 1996, during the telecommunications sector liberalisation process, as a public regulatory body, independent from the national electronic communications markets. Its headquarters is currently located in Barcelona. It has several major objectives:¹⁰²

- Set out and monitor the specific obligations that telecommunications market operators must fulfil.
- Foster competition in multimedia markets in accordance with the provisions of its regulations.
- Resolve conflicts between operators.
- Act as an arbitration body in disputes between operators.

The tasks initially allocated to the body were defined in Royal Decree-Law 6/1996, of 7 June, which was ratified by Law 12/1997, of 24 April. This law was abolished when current Law 32/2003, of 3 November, came into force, Article 48 of which established the legal, asset and budgetary framework of the commission. Therefore, the Telecommunications Market Commission is

¹⁰² <http://es.wikipedia.org>, *Comisión del Mercado de las Telecomunicaciones de España*.

a public body with legal status and full public and private capacity and its own assets, separate from the assets of the state (Articles 48.1 and 48.13 of Law 32/2003, respectively).

The CMT has a bright future, as the activity of ICTs does not have any foreseeable limits. For this reason, its activity should be maximised, also setting out to achieve the lowest costs for users of the system, who on many occasions have been constricted by the decisions of large telecommunications companies.

These include Telefónica in particular, for its previous status as a monopoly, which is still a major carrier for many activities of other telecommunications companies. In this context, incumbent landline and mobile telephone companies behave in a way that goes against users' free choice to change operator. Furthermore, the tariffs offered are not always applied, with many cases of abusive failures and non-compliance.

Defensor del Pueblo

This is the Spanish institutional agent which derives from the Swedish Ombudsman (commissioner or representative) and is in charge of protecting the rights that Title I (although in practice, it applies to all constitutional rights) of the Constitution of 1978 grants citizens, and in order to do this, it can even monitor the activity of the government.

Article 54 of the Constitution of 1978 states: 'An organic law shall regulate the institution of the Ombudsman, as high commissioner of the *Cortes Generales* (Spanish Houses of Parliament), appointed by it to protect the rights included under this Title, for which purpose it can monitor the activity of the Government, reporting to the *Cortes Generales*'.

Regulated by Organic Law 3/1981 of 6 April, the *Defensor del Pueblo* is defined by Art. 1 as: 'the high commissioner of the *Cortes Generales*, appointed by it to protect the rights included under Title I of the Constitution, for which purpose it can monitor the activity of the Government, reporting to the *Cortes Generales*. It will carry out the functions entrusted to it in the Constitution and this law'.

This institution does not have executive powers and therefore, its influence is persuasive and political due to the reports it sends to the *Cortes Generales*, which are not binding but for purely information and recommendation purposes.

The activities of the *Defensor del Pueblo* can be initiated ex officio or on receiving a request from any person or entity claiming a 'legitimate inter-

est', by filing a complaint or request in person at the office of the *Defensor del Pueblo*, by postal mail, fax or via the Internet. These people can be 'any Spanish or foreign citizen,' 'regardless of age or legal status in Spain' and can make the complaint both individually and collectively.

As the social and democratic state has developed, the Autonomous Communities have created similar figures to the *Defensor del Pueblo*, whose scope is limited to the Autonomous Community, and always with the obligation, which is not always fulfilled, to cooperate and coordinate with the state *Defensor del Pueblo* in its investigations, since it may ask for its assistance.¹⁰³

The *Defensor del Pueblo*, a state body rather than an agency, deals with a large number of issues, the vast majority of which end up in nothing at all in terms of efficiency in citizens' complaints. Most years, its annual report to the Congress of Deputies is simply a formality without any further relevance. It is also noteworthy that the work of the *Defensor del Pueblo*—and the Ombudsmen that exists across the EU—is detracted by the proliferation of the *Defensor del Pueblo* in virtually all seventeen Autonomous Communities, whose activity overlaps with that of the state *Defensor del Pueblo*, creating a costly and very unhelpful bureaucracy. A thorough review of the institution, and not to mention the corresponding Autonomous Communities, therefore, seems essential.

Nuclear Security Council

The Nuclear Security Council (CSN) is the Spanish institution, independent from the *Administración General del Estado*, with legal status and its own assets, whose basic aim is to ensure nuclear security and to protect people and the environment from radiation.

Its structure, tasks, powers and organisation were widely modified in October 2007 with the reform of its Statute. It also provides operating details of the nuclear power plants located in Spain, reporting their operating mode, thermal output, electric output, primary pressure, primary temperature, the boron-10 concentration of the nuclear reactors, among other details.

The CSN is a collegiate body consisting of a chairman, deputy chairman and three directors, whose appointment is restricted to a maximum of two

103 25 aniversario del defensor del pueblo español (www.defensordelpueblo.es)

terms of six years each. Before they are elected, they must pass an acceptance process before the competent committee of the Congress of Deputies. The Council is assisted in its work by a Secretariat General, to whom the technical, administrative and legal bodies needed to fulfil their purposes report. In total, the CSN has more than 450 employees, 62.12% of whom are technical staff, specialised in nuclear safety and radiation protection.

The Nuclear Security Council is constantly criticised by environmental organisations, for what is deemed a benevolent attitude in relation to electricity companies, by not monitoring them closely enough or even somehow covering up for operating deficiencies. Furthermore, the CSN does not have a long-term policy to modernise the power plants and review tariffs.

Tribunal de Cuentas

In Spain, the *Tribunal de Cuentas* (Court of Auditors) is the highest accounts and economic management supervisory body for the state and public sector, without detriment to its own jurisdiction, according to the Constitution, Organic Law 2/1982, of 12 May, of the Tribunal de Cuentas (LOTcu) and Law 7/1988, of 5 April, on the functioning of the Court (LFTCu).

It exercises external supervision of the financial-economic activity of the national, Autonomous Community and local public sector, as well as the accounts of political parties. The main tasks of the Tribunal de Cuentas (Art. 2 LOTcu) are:

- External, permanent and consumptive supervision of the economic-financial activity of the public sector.
- Prosecution of accounting liability incurred by those who are responsible for managing public funds or monies.

The *Tribunal de Cuentas* responds to these two tasks. In addition to the plenary council, consisting of 12 Directors and the Chief Prosecutor of the *Tribunal de Cuentas*, the institution is organised into two sections, Supervision and Prosecution, which are also divided into departments.

Many studies often refer to the clear lack of independence of this body. Even the Supreme Court complained, in February 2013, about its apparent politicisation, noting that in the *Tribunal de Cuentas* more civil servants are appointed through

political parties than their careers. Lax controls over the accounts of political parties (one of the functions of the Court) is also often mentioned, as in February 2013, when it came to light that the last year party accounts were analysed was 2007. This delay is too long, as offenses in this area expire after four years, which makes the Court almost completely inefficient, or, putting it bluntly, practically useless, with all its bureaucracy and all the perks enjoyed by executives with disproportionate salaries and other clearly excessive allowances. In this regard, the Court has to be thoroughly reformed, so that public accounts are analysed no later than one quarter after being filed. If the INE (National Statistics Office) issues quarterly GDP reports, why can't the *Tribunal de Cuentas* audit public accounts in the same period? Only then could the many public accounts that should be covered by bodies that receive public funding, such as trade unions, employers' associations, the Catholic Church, the Royal Family, etc., be pursued and rationed, as already set out in the Freedom of Information Act.¹⁰⁴

Independent Tax Authority

On 12 April 2013, the Spanish Government approved the initial text of the Law on the independent tax authority, a former European requirement of Spain, which will, it is said, help monitor achievement of the country's budgetary targets. The aim of creating an independent tax agency is to boost investor confidence in Spanish public accounts, after several reviews of the Spanish public deficit targets in recent years. In this respect, Spain ended 2012 with a deficit of 6.98 per cent of GDP, over the 6.3 per cent set by its European partners, and that is not counting the more than 40 billion for the banks, with which the deficit would reach over 10 per cent.

It is supposed that the new tax entity, which will have a legal status and not be subject to instructions from the Government, will supervise and ensure that all government agencies meet their deficit targets and monitor the evolution of the Spanish macro-economic forecasts. The body will be based, according to the Government, on similar institutions already operating in the US and several Members States of the Eurozone. Their reports and recommendations shall be public.¹⁰⁵

104 <http://es.wikipedia.org>

105 Blanca Rodríguez in *Invertia*, 15.IV.2013.

A future possibility rather than a reality, the Tax Authority cannot be criticised in any way, as it would be totally premature, as it is still a *nasciturus legalis*. If anything, it should be noted that among the delays to the launch of new official instruments to respond to the crisis and the restructuring of the state, the Independent Tax Authority is one of the most conspicuous, as it was one of the demands of the troika in the memorandum of understanding that regulated the bailout for the Spanish banking sector from the ESM. In the new paper presented by the Executive on 26 April 2013, its definitive organization is delayed, without explanation, until the end of 2013.¹⁰⁶

Along the same lines as Blanca Rodríguez, albeit more forceful, is Xavier Vidal-Folch, for whom the main mistake that could be committed when configuring the definitive Independent Tax Authority would be, precisely, that it were not independent: 'carrying out the tasks of a *butler* to the Ministry of Finance'.

Vidal-Folch emphasises that the law reiterates claims of alleged independence but it will be rather weak if the institution is not strengthened during draft bill discussions. He adds that the authority 'will be attached to the Ministry of Finance (Art. 7) and that its president will be appointed by the Council of Ministers upon proposal by the Minister for Finance (Art. 24). To make matters worse, the appointee will have the rank of sub-secretary, below the rank of the minister and of the State Secretary. Furthermore, the organisation will have to obey *its master's voice*; of the master of the butler, as each division director will be appointed by the Council of Ministers (Art. 26)¹⁰⁷.

4. ON THE TASKS OF THE RESPONSIBLE ECONOMIC STATE

The review of the national regulatory and supervisory bodies gives us the idea that there is a whole body of knowledge and advice available to the government in order to deal with the main problems related to public management. But at the same time, the economic crash that started with the current crisis reveals that these entities have not played a significant role in preventing and mitigating or resolving the situation.

It is true that given the criticism that we have made of these agencies, one by one, it could be that their inefficiency in improving the situation is due to the depth of the recession/depression, which reduces the chances of finding solutions. But an observation like that is no more

106 J. Sérvulo González, 'El Gobierno aplaza una treintena de reformas estructurales', *El País*, 28.IV.2013

107 Xavier Vidal-Folch, 'Un mayordomo para Montoro', *El País*, 25.VII.2013.

than a catchphrase given the obvious lack of economic responsibility of the state as a whole, which has been increasing with the vicissitudes of the crisis, and especially between 2004 and 2011. In this sense, a political commentator put in numbers the changes needed to leave the morass in which we find ourselves in a forceful series of insights that are transcribed below:

Almost all Autonomous Communities are dispensable and 40 per cent of civil servants and those who continue must be paid half of what they are currently paid. We must privatise schools, universities and hospitals. We must guarantee public services through agreements and only to those who really need it and have done everything possible not to need it...

The State does not know how to manage and just ends up ruining everything. Public healthcare is bankrupt. Public education, too, and what's more, it is a disaster. Schools and hospitals have to be private and compete against each other with the logic of a company, to give the best service and at the most competitive price, each within its range...

The current political class completely lacks the political and moral authority that is required to drive such drastic regenerations. We have put all of our trust in them and they have let us down...

Taxes are not the solution: they are the problem. The solution is for the government to stop interfering and let citizens run their own lives. The solution is to enable citizens to live with their money and from their own money instead of having to give it to a state that wastes it with its delirious management and which always ends up in bankruptcy.

The state is the problem, its intervention is fraud and freedom is, as always, the only reasonable solution. Only the mediocre, shirkers and incompetent fear it, because they are not idiots and know that living off my money and not on theirs is much nicer.

They are Social Democrats, not by conviction, but because they are afraid to of having to live according to their means.¹⁰⁸

108 Salvador Sostres, 'La única solución', *El Mundo*, 28.IV.2013.

In relation to the extracts above of the text by Salvador Sostres, the author refers to a previous assertion he made: 'the Spanish state is still cumbersome', what the dictionary of the *Real Academia Española* defines as a large object that is not very useful.

In other words, the state, in its broadest sense, not only fails to resolve many problems, but is also the source of many difficulties, hindering the freest development of the production forces, which are held back in many endeavours by a bureaucracy that is as implacable as it is, in most cases, unnecessary. This often appears in a despotic and corrupt manner.

Given the situation of a lack of a responsible economic state we are living, we will summarise the minimum tasks that it should have in order to fit into the rule of law so as to form a single body with it and give full responsibility to the economic policy:

- *Estimate the size of the state* (*Administración General*, Autonomous Communities, provincial councils, island councils and town councils) to adjust to what is strictly necessary in the near future. Not being able to give a figure for this size at the moment, there is almost unanimity on the issue, as stated by three economists who gave their opinion in a recent survey, in the words transcribed below:¹⁰⁹

- David Taguas: 'Tax increases are due to the inability to control the size of the public sector'

- Daniel Lacalle: 'We insist on maintaining a huge and predatory administrative structure'

- J.R. Rallo: 'By not slimming down a bloated public sector, they opt to impoverish the private sector'

- *Reduce tax pressure* in proportion to the new size of the state, favouring entrepreneurial activity, abandoning capital levy methods, with tax on assets or tax that could cut bank deposits.

- *Zero-based budgeting*, so that when preparing the general state budgets, allocation of resources to bodies, agencies and public sector companies considered unnecessary are ruled out whilst it would be necessary to adapt the resources of all entities that are still in force with the strictly appropriate allocation of funding.

109 Pablo Rodríguez Suanzes, 'Clamor contra Rajoy por subir impuestos sin reducir Estado', *El Mundo*, 28.IV.2013.

• *Dramatically reduce the number of public employees* based on a prior identification of the existing plethora; making civil servants access public jobs through tests that demonstrate that they have the level of training and capabilities demanded. In this sense, Professor Jaime Lamo de Espinosa firmly comments on the subject in the following conversation:¹¹⁰

Q.– *Do you expect further cuts?*

A.– They are inevitable. Families and companies have made very tough adjustments. Now, it is the turn of government agencies and these cannot be small. The Government commissioned a report for the end of June on the restructuring of the Administración General del Estado, because that is one of the causes of our economic crisis. We have a gigantic public system, especially on the side of the Autonomous Communities, for what our economy can support, so much so that it drives out the private sector. That is why it neither grows nor creates employment, it destroys it. However, where do you point the finger and say this is where the cuts are? That's the difficult part...

When the UCD lost the election of 1982, there were one million civil servants and public employees. And there were no computers! Today, three million and with computers. It doesn't make sense.

The standard cost of the Autonomous Communities must also be adjusted. What is the standard efficient cost of healthcare, justice, education? How many euros per inhabitant? Well, apply that ratio and adjust the expenses of the Autonomous Communities efficiently. There should be a large consensus on that...

• *Secure the Single Market* throughout the country to avoid the traditional and anti-competitive compartmentalisation that has led to excessive legislation and regulation work in seventeen Autonomous Communities.

• *More focus on state activity* by fostering on-going renewal of society by supporting science, research, new technologies, productivity, competitiveness, etc., so that the facet of the Ministry of Public Works prevails in the participation in business activities, which in a modern and efficient economy correspond almost entirely to the private sector. This means completing previous privatisation programmes.

110 Victoria Prego, 'Conversaciones sobre España. Jaime Lamo de Espinosa: Corremos el riesgo de que haya un estallido social', *El Mundo*, 28.IV.2013.

- *Study eliminating the forty-three provincial councils*, transferring their tasks to the Autonomous Communities or *Administración General del Estado*. The size (504,700 km²) and population (74 million inhabitants) of Spain, with modern transport and telecommunications systems, demand the elimination of institutions that emerged in nineteenth century Spain, with 15 million inhabitants and a transport system still driven by animals.

- *Reconfigure the map of the 8,120 Spanish towns* so that there are no unfeasible town councils—in principle, with less than 5,000 inhabitants—which will allow a new local delimitation, resulting in significant savings in human and economic resources, without loss of efficiency.

- *Principle that nobody in a government agency can have a higher salary than the salary corresponding to the Prime Minister* (80,730 euros/year), so that the rest of the leaders elected by the people receive salaries that correspond to their dedication, responsibility, reference population and other criteria.

- *National system for setting the salaries of public officials*, with standardisation criteria, in Autonomous Communities, town and city halls and other entities, in order to avoid the current lack of standardisation and the clear abuse incurred. In this sense, it is worth mentioning the *Defensor del Pueblo* in the Basque Country:

The *Defensor del Pueblo* in the Basque Country has more hand-picked positions than the majority of ministries. The so-called Ararteko, Íñigo Lamarca, works surrounded by 32 positions of trust—including a driver—two more than the Ministry of the Economy...

– *Last year, you earned 80,730 euros, more than Mariano Rajoy [72,600.36]. Is that reasonable?*

– My salary is set by the Basque Parliament. I don't know if that is a lot or a little...

- *Maintain, with appropriate rationalisation of the state, the Autonomous Communities*, avoiding their current overlaps with the *Administración General del Estado*, town and city halls, etc. The Autonomous Communities should have the right to return the power to the *Administración General del Estado* and the power to suggest economies of scale in the functioning of the state, based on enhanced coordination and joint

management. In this regard, we again refer to some ideas of Prof. Jaime Lamo de Espinosa:

If our system of Autonomous Communities has gone from use to abuse, it is partly due to what we could call the competition emulation system. That is, if you draw up regulations for lifts, I can draw up stricter regulations and if you appoint an inspector, well, I appoint three. Furthermore, only progressive decentralisation is considered democratic and that is not the case. Article 149 of the Constitution set out the exclusive powers of the state but 150.2 allowed these powers to be transferred to the Autonomous Communities, which already had their own exclusive powers and that was a mistake. Therefore, whenever a new government arrives, new transfers are negotiated, especially if the winner does not have the majority vote.¹¹¹

- *Set up a definitive financial system for Autonomous Communities* to prevent the weaving and unravelling of regulations there has been up until now. The Autonomous Communities should be given a deadline for deciding if they are going to return the powers they have to the *Administración General del Estado* or if the *Administración General del Estado* plans to re-nationalise some tasks.
- *Dramatic reorganisation of the external public sector* in order to give the decisive push to internationalisation of the Spanish economy, with more exports and more high-quality tourism. This should be done fully aware that with the current demographic guidelines of the country, a large part of the demand for the national production system cannot come but from the outside, with an increasingly high quality of goods and services and more technology, and without undervaluing the very important traditional exports.
- *More dedication to expanding our common language* in all areas because, although Spanish is one of the most widely-spoken languages in the world, it does not have the status it deserves for its 450 million speakers. For this reason, the Real Academia Española, Instituto Cervantes and other cultural institutions should be fully overhauled in search of improving their important tasks.
- *Give the Spanish National Research Council (CSIC) the significance and dynamism it needs*, seeking enhanced efficiency—as a national body for science and research—and reviewing its departments and institutions

111 Victoria Prego, 'Conversaciones sobre España. Jaime Lamo de Espinosa: Corremos el riesgo de que haya un estallido social', *El Mundo*, 28.IV.2013.

in order to adapt to new needs. Furthermore, this should be done seeking a closer connection between R&D&I and companies.

- *Perform an innovative renewal of the eight Reales Academias* integrated in the Instituto de España—organisations whose body of knowledge has not been taken advantage of up until now—in order to give them tasks that favour the progress of the sciences and innovation in many areas of the country.

- *Eliminate subsidies* for employers' associations and trade unions, which should be funded by contributions from their members rather than depending on state subsidies, which creates intolerable sinecures and a strange marriage with the state.

- *Eliminate any official subsidies from any government agency* to political parties, which should be funded exclusively by their members and from the contributions of their political appointees. Elimination of donations from companies to political parties should also be studied.

- *Increase use of concession methods* for public services in all areas, with high levels of productivity and quality in order to improve and lower the cost of providing infrastructures and other public services.

- *Reconsider the role of state agencies*—described in Chapter 5 of this Report, which includes many observations, criticisms and recommendations—to turn them into think tanks in order to continue modernising the socioeconomic framework of the government.

- *Sustainable management of natural resources*, both renewable and recoverable, with particular attention to developing a more rational policy on use, water recycling and treatment, systems for more effective energy use and more appropriate care and better management of forests.

- *Independent audits* of public entity accounts, every quarter and monitoring of these with the same frequency by the *Tribunal de Cuentas*, with a system of sanctions for any type of anomaly.

- *Consideration of any authority with dubious honesty*, apart from the rules of conduct in their own political party, they should be removed from their post, elected or appointed, as soon as they are accused in criminal proceedings. Then, they should be reinstated or paid the appropriate indemnity if proved innocent.

- *Accountability of administrators* for their actions, explaining any possible deviations or breaches of their political duties acquired in manifestos. This accountability, which is being increasingly claimed, is described by Pedro J. Ramírez in the following terms:

In the introduction to his recent book *Los señores del poder*, Varela Ortega claims that 'the most insecure way of assessing' governors 'is to measure them by the results obtained in relation to their own objectives'. In other words, examine them 'not on the subject that we would have liked them to study' but on the subject they chose.¹¹²

- *Economic responsibility of governors* of any level in terms of serious errors and arbitrary decisions that due to lack of investigation, are harmful to citizens.

- *Monitoring of public investments*, to prevent unnecessary extravagance in the development of infrastructures and facilities of all kinds, which currently, especially in small towns and in rural areas, are very underused, which is a clear waste.

5. THE SUMMING UP

If you will allow me, in the conclusion of this Report, poetic license, I will explain the meaning of the title, which is the title of one of the best works by English writer Somerset Maugham,¹¹³ published in 1938, as a summary of his life. A text with which, moving away from his typical narrative, he tried to create a literary framework, part autobiographical and of very high quality, about the roots of his own personality.

The harshest critics of this book say that it was a valiant effort to get the jurors of the Swedish Academy to award him with the Nobel Prize for Literature. One goal that after many years of trying, he never achieved, due to the attitude of the Stockholm academics, who considered Maugham too popular to give him the Nobel, and who—is it also said—were a bit envious of his being one of the most successful novelists and playwrights of his time.

In his own defence against the jury's rejection for the Nobel, in his *The Summing Up*, Maugham searched for the ideal of his life, personalising it in an archetype and he found it in the leading figure of Fray Luis de León,

112 'Cantata al Director: Fiable y seguro como Kaká', *El Mundo*, 28.IV.2013.

113 Somerset Maugham, *The Summing Up*, Doubleday, Doran & Co, New York, 1938.

the great Spanish poet of the Golden Age, whom he admired not only for his excellent literary qualities but also for his honesty in the face of attacks from the Inquisition and for his serene appreciation of human life, from the last man or woman to the highest authority, as was Charles V, to whom he dedicated his most famous poem, the one that begins with the verse 'how restful a life ...'.

In analogy to Maugham's *The Summing Up* and with all of the exceptions you want, in this final point of the Report, we have to do our own summary of what has been written—apart from the two part dialogue we have done—and see if we can finally reach a certain ideal. In the case we are studying, we have tried to profile the terms of the rule of law and how it fits in with the responsible economic state in legal, political, economic and social terms. This is based on a cast of philosophers and economists, from very distant times, with utopian expressions and categorical imperatives that give substance to the aforementioned idea. At the same time, current experiences have also been taken into account.

However, there is no doubt that we have to work more on the idea of a symbiosis of the legal and economic in favour of a more responsible society. To do this, there is a number of possible formulations, which we have tried to profile on these pages, putting it in the context of a number of streams of thought and experiences that constitute a whole political and economic evolutionary iter on a path to perfection, at the service of the rule of law and general wellbeing, measuring legal certainty and transparency with an effective and efficient method for citizens' progress within a framework of social justice and environmental sustainability. All of this is to configure a model of behaviour, as already emphasised, that has the dual quality of being responsible; as a series of ideas of reason not to be imposed but to be applied fairly and equally and objectives that must be fulfilled by political administrators.

We could elaborate further on this issue in this *summing up*, but the author of the Report feels that it would be better to end this work with a second part to the dialogue opened in its initial pages.

SECOND PART OF THE DIALOGUE THE RESPONSIBLE ECONOMIC STATE: ESTECORES VERSUS THE LEVIATHAN

We began this Report with a reference to Cervantes' *Dialogue of the Dogs* (one of his *Exemplary Novels*,¹¹⁴ by way of a literary 'Executive Foretaste'. And we shall conclude it with the same format, a question and answer session that also has, I believe, a touch of Socratic method to it. Off we go!

– So, you're convinced that your idea of the responsible economic state can be of some use.

I honestly do. Especially after noting what is being done in the EU and the Eurozone to bolster the euro's institutions with the taxation union, the banking union, the future common treasury, etc.

– Yes, yes, but all this will be too little too late, it might be argued. And there are even doubts as to the very future of the euro...

Whatever you say. But the fact is just three years ago the Eurozone was virtually adrift, whilst today it has a route to follow to reach safe harbour.

– If only. I think it is more likely heading towards more recession or even an actual depression.

Say what you like, but from the very start of the crisis it was clear that, without first undertaking a thorough restructuring of this highly leveraged economy, it would be completely impossible to get it moving again. In this regard, the Eurogroup itself is already preaching a reasonable easing of austerity measure. Alongside this, the ECB is assuming new, more expansive role...

– May God hear your prayer... as many of us still say. However, most of all, I'd like to know what the real bases of this admirable optimism of yours are...

– These bases to which you refer come from the thoughts of a select number of philosophers and economists, whom I have taken the liberty of allu-

¹¹⁴ Almost unintentionally, the author was inspired by said *Dialogue of the Dogs* on 10 April, when putting the finishing touches to the second version of this Report. Oddly enough, two days later, he noticed that a theatre company (Els Joglars) had had the opening of its dramatization of the *Dialogue of the Dogs* in Madrid, demonstrating how Cervantes' prose remains so powerful even today.

ding to in the preceding pages. It can be argued that the common thread linking these great thinkers is an evolutionary vision of human society as something clearly improvable, with an organisation much improved over that in the past.

You say this, after simply making a roll call of everyone from Parmenides to James Lovelock? Isn't that a bit pretentious and smug of you?

– Maybe so, but that's more the way it looks than what actually lies at the heart of the matter. Because, whether you like it or not, we are now at a stage of active worldwide cooperation, of regional integrations, of sustainability and of so many other things. We simply can't flinch and give in to your pessimism. As Antonio Gramsci put it: 'I'm a pessimist because of intelligence, but an optimist because of will'.

Okay, okay, aside from the quotes, what actually seems to be going on here is that you're a lost cause, indefatigable...

– And you're some kind of devil's advocate. Whilst it's true that we each have our role in this dialogue, I think I have a better grasp of how things really are. I'm convinced that human society will progress along its road to permanent perfection, with almost unbelievable scientific and technological advances, which have only just begun. Remember Keynes' maxim about 'science and compound interest'.

Whilst it might even be that we agree on this last point, I simply can't see how we in Spain will be able to rise to be worthy of such an outlook, in these darkest of times for support for scientific research....

– This is also something that is dealt with in the Report, especially in the final chapter, which expounds the virtues of the responsible economic state. It should be responsible in two ways: in having enough integrity to fulfil its mission, taking into account the efforts of the contributing public, and in being responsible for those managing this State, who must be subject to possible penalties so as to be liable for any eventual inefficiency or ineffectiveness.

In short, you really believe that the Leviathan will give way to a new and promising Estecores. If I may, I'm going to give a snappier name to your responsible economic state: 'here and now'.

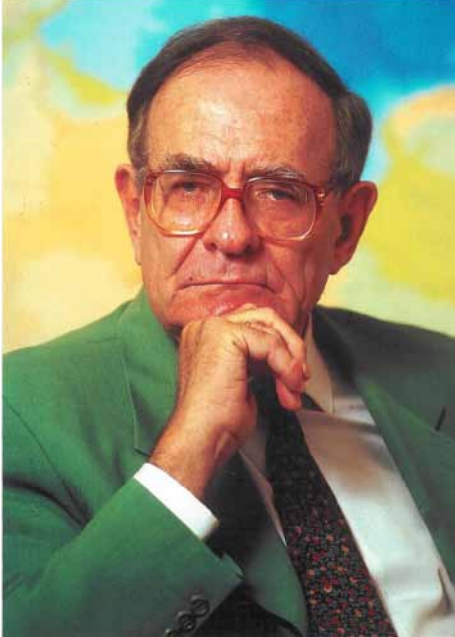
– Of course you may, although 'Estecores', as a good summary of what this Report suggests, actually doesn't sound too grating to me. The Estecores

will be an organisation that replaces the submission/security trade-off of the Leviathan with a new social contract...

Rousseau reborn?

– If you like, because, as you say, the Estecores cannot be based on anything other than a new social contract between authorities and citizens for the better management of the state, in the midst of a constellation of agencies, each complying with its obligation as best it can and to the best of its knowledge in each sector; making a core of government agencies to guarantee the rule of law, legal certainty and transparency, assuming in this way government of the res publica with a commitment to an on-going search for perfection.

It only remains for me to say (not that you've convinced me): Amen, which in Hebrew means 'God willing'. Or one could use the Spanish word ojalá, from the Arabic Insha'Allah, which means the same as Amen.



RAMÓN TAMAMES

Born in Madrid in 1933, he has a PhD in Law and Economics from the University of Madrid, having also broadened his knowledge at the Institute of Political Studies and the London School of Economics. Since 1968 he has been a professor of Economic Structure, first in Malaga and later, starting in 1975, at the Autonomous University of Madrid. Between 1983 and 1985 he was a professor at the Sorbonne in Paris, as well as at the University of Malaya in Kuala-Lumpur (Malaysia), and is currently a professor at the University of Macau, China. He is the author of a large number of books on both Spanish and international economics, ecology, history and political and cosmological-philosophical questions. He has been a financial consultant with the United Nations Development Programme (UNDP) and the Inter-American Development Bank (IDB/INTAL). He has honorary professorships and doctorates from the Universities of Buenos Aires, Lima, Guatemala, Beijing (BFS), and Rey Juan Carlos (Madrid). Club of Rome member since 1992, he was elected as a Jean Monnet Chair of the European Union in 1993 and was awarded the Rey Jaime I Award in Economics in 1997 and the National Award for Economics and Environment in 2003. In 1978, as a Congress deputy, he was one of the first to sign the Spanish Constitution. He has degrees ad honorem in Forestry (1998) and Agronomic (2009) Engineering, both from the Technical University of Madrid (UPM). On 12 June 2012 he was elected member of the Royal Academy of Moral and Political Science.

RAMÓN TAMAMES: MAIN WORKS

- *Estructura Económica de España*, Alianza Editorial, 25th ed., Madrid, 2008 (1960; the date indicated here in parenthesis for this book and all the following is that of the first edition).
- *Introducción a la Economía Española*, Alianza Editorial, 26th ed., Madrid, 2004 (1967). English (C. Hurst) and French (CE-DES) translations available.
- *Estructura Económica Internacional*, Alianza Editorial, 21st ed., Madrid, 2009 (1971). Portuguese translation available, Universidade Moderna.
- *La República. La Era de Franco*, Alianza Editorial, Madrid, 12th ed. Revised and expanded, 1987 (1973).
- *Ecología y desarrollo sostenible*, Alianza Editorial, 7th ed., Madrid, 1995 (1974). Portuguese translation available, Universidade Moderna.
- *Historia de Elio (Novela)*, Planeta, Barcelona, 1976; edition also available from Círculo de Lectores, 1977.
- *Una idea de España*, Plaza y Janés, Barcelona, 3rd ed., 1986 (1985). German translation available from Klett-Cotta.
- *La Reconquista del Paraíso*, Temas de Hoy, 2nd ed., Madrid, 1993 (1992). Portuguese translation available from Editorial Diario de Noticias.
- *La España Alternativa*, Espasa Calpe, Madrid, 9th ed., 1994 (1993). Premio Espasa de Ensayo.
- *La Unión Europea*, Alianza Editorial, Madrid, 5th ed., 2002 (1994).
- *La segunda vida de Anita Ozores*, Sial Ediciones, 2nd ed., Madrid, 2000 (a novel).
- *Diccionario de Economía y Finanzas*, Alianza Editorial, Madrid, 13th ed., 2006 (1988).
- *El siglo de China. De Mao a primera potencia mundial*, 4th ed., Planeta, 2007. Pocket edition from Booket, 2008.
- *Ni Mussolini ni Franco. La dictadura de Primo de Rivera y su tiempo*, Planeta, 2008.

- *Para salir de la crisis global*. Análisis y soluciones, EDAF, 2009.
- *El grito de la tierra*, RBA, Barcelona, 2010.
- *Cuándo y cómo acabará la crisis*. Tractatus Logicus Economicus, Turpial, Madrid, 2011.
- *Breve historia de la Guerra Civil Española*, Ediciones B, Madrid, 2011.
- *La crisis de la deuda soberana en la Eurozona: España, un proyecto de país*, Turpial, Madrid, 2012.
- *China tercer milenio. El dragón omnipotente*, Planeta, Barcelona, 2013.
- *Más que unas Memorias*, RBA, Barcelona, 2013.

NOTES

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