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CORRUPTION AND URBAN ISSUES: COMMENTS ON THE SOCIAL CONSEQUENCES ABOUT POLITICAL DISCREDIT

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SUMMARY: 1.Public corruption and urban development in Spain; 2.Some consequences of urban corruption, and especially the political discredit; 2.1 The accusation of corruption used as a mere tool for political discredit in electoral campaign; 2.2 The instrumental use of Law and in particular the expansion of criminal law; 2.3 The electoral punishment of corruption and the discrediting of politics; 2.4 The discrediting of politics as a determining factor in the fight against corruption: corruption as an agency problem vs. corruption as a collective action problem; 3.Urban planning corruption in Spain and its prevention: a proposal

1. PUBLIC CORRUPTION AND URBAN DEVELOPMENT IN SPAIN

Public corruption, which can be defined as «the abuse of public power for private benefit»¹, is not equally widespread among every public activity or service. There are, indeed, certain activities with more corruption risks, since only a few of them can generate enough potential private benefits.

During the last years, the annual reports of the General State Prosecutor's Office have identified urban planning and development as the sector of administrative activity most affected by corruption. According to these reports, in 2006 there was a significant increase in the number of investigations carried out by the Special Anti-Corruption Prosecutor's Office about corruption in the field of urban planning², and since then investigations into cases of urban planning and urban development corruption did only increase³ until 2010, year in which for the first time the General State Prosecutor's Office noticed a decrease in the investigations related to this type of corruption⁴.

Despite the decrease in the number of investigations carried out by the Prosecutor's Office in this area, the report published in 2013, which is remarkable for addressing the problem of corruption in detail, showed that urban planning continued to be the main form of corruption in the courts of justice also in 2012⁵, although to a lesser extent it also outlined corruption risks belonging to other public activities and sectors, such as the adjudication of public works and contracting public services trying to favor a company, and the management of public funds often in the form of a subsidy⁶.

As the aforementioned report of 2013 emphasizes, the economic crisis has led to a decrease in

¹ TANZI, VITO, "Corruption around the world. Causes, consequences, scope and cures", *International Monetary Fund Staff papers*, vol. 45, num. 4, December 1998, pp. 559-594, p. 564.

² «Si hubiera que significar algún punto relevante referido a la actuación de la Fiscalía Anticorrupción en el pasado año 2006 [...] éste es, sin duda, el importante aumento de investigaciones llevadas a cabo por la Fiscalía Especial en el ámbito de la corrupción urbanística», FISCALÍA GENERAL DEL ESTADO, *Memoria 2007*, Centro de estudios jurídicos-Ministerio de Justicia, Madrid, 2007, p. 335.

³ See FISCALÍA GENERAL DEL ESTADO, *Memoria 2008*, Centro de estudios jurídicos-Ministerio de Justicia, Madrid, 2008, p. 916.

⁴ «No obstante el descenso de las investigaciones sobre corrupción urbanística, no se ha producido un descenso en el trabajo de la Fiscalía», FISCALÍA GENERAL DEL ESTADO, *Memoria 2011*, Centro de estudios jurídicos-Ministerio de Justicia, Madrid, 2011, p. 731.

⁵ «Hay una mayoría de Memorias de las Fiscalías Provinciales que relacionan corrupción con el urbanismo en los Ayuntamientos», FISCALÍA GENERAL DEL ESTADO, *Memoria 2013*, cit., p.655.

⁶ FISCALÍA GENERAL DEL ESTADO, *Memoria 2013*, cit., pp. 655-656.

corruption-related events⁷. This crisis, which has been particularly profound in the real estate sector, suggests that corruption linked to urban planning and development would not be so prominent and would not be the sector most affected by corruption⁸.

In fact, this is evidenced by the data of investigations carried out by the Anti-Fraud Office of Catalonia. According to these data, which are given below in a table, in recent years public procurement would have tended to equate to urban planning as the sector most affected by corruption, equality that would definitely have been broken in 2013, when public procurement took off as the main area of public corruption, as can be seen in the table provided with the data related to investigations of 2013, 2015 or even 2016. In addition, corruption in the access to public employment has risen sharply since 2013, probably because of the high level of unemployment, which would have increased the risk of corruption in that area.

Table 1. Investigations Data

Subject	2011	2012	2013	2014	2015	(2016)
Public procurement	7	13	17	7	18	7
Urban planning	7	12	8	8	4	1
Conflict of interests	4	3	8	13	8	1
Public subsidies/grants	1	4	3	2	3	0
Public employment	2	5	14	5	12	3
Others	0	4	1	2	1	2

Source: Investigations data, from: <https://www.antifrau.cat/images/web/docs/investigacio/20161215-investigacions.pdf>. The information provided for the year 2016 includes the data until the 15 December 2016.

Despite the variable risk level due to a fluctuating real estate market, the urban planning corruption has been the main type of public corruption in Spain at least since the decade of 1990⁹, and has probably had a significant impact on Spanish land and cities, and its

⁷ FISCALÍA GENERAL DEL ESTADO, *Memoria 2013*, cit., p. 658.

⁸ VILLORIA, MANUEL and JIMÉNEZ, FERNANDO, “¿Cuánta corrupción hay en España? Los problemas metodológicos de la medición de corrupción (2004-2011)”, *Revista de estudios políticos*, núm. 156, abril-junio, 2012, pp. 13-47, p. 37.

⁹ See ROMERO, JUAN; JIMÉNEZ, FERNANDO and VILLORIA, MANUEL, “(Un)sustainable territories: causes of the speculative bubble in Spain (1996-2010) and its territorial, environmental and sociopolitical consequences”, *Environmental and planning C: Government and policy*, 2012, vol. 30, pp. 467-486. An analysis of urban planning corruption since the decade of 1950 could be found in CAPDEFERRO VILLAGRASA, OSCAR, *El Derecho*

development. A urban overdevelopment has been encouraged by a confluence of interests: there has been important capital gains obtained by the owners who favored by the determinations of the urban plan have been recognized with rights to develop and build (sometimes as a consequence of corrupt exchanges), together with the own economic interest of the acting administration, which receives part of the use of the urban development since the reform of the land use law of 1975, in addition to their benefits obtained through the tax applied to building activity¹⁰. This overdevelopment has resulted in a severe environmental damage, not only by the urbanization of land that should be protected to safeguard its ecological or landscape value, but also by the pressure exerted on water resources¹¹, especially in coastal areas¹².

In recent years have appeared a number of relevant reports¹³ which have echoed certain irregular or at least undesirable practices that had spread in the Spanish urban development causing serious damage, and in none of those reports is forgotten to mention that corruption has been behind those practices in some cases¹⁴. It is highlighted in these reports that often land has been classified as developable even when due to its natural characteristics it should have been classified (or should have maintained its former classification) as undevelopable¹⁵. In addition it is also observed a general overdevelopment of the territory, in such a way that

administrativo y la prevención de la corrupción urbanística, Marcial Pons, Madrid, 2016.

¹⁰ CLAROS PEINADO, ROCÍO, "Urbanismo y financiación municipal ", in IGLESIAS, FELIPE (dir.), *Urbanismo y democracia. Alternativas para evitar la corrupción*, Fundación Alternativas, Madrid, 2007, pp. 133-145.

¹¹ LOZANO CUTANDA, BLANCA, "Urbanismo y corrupción: algunas reflexiones desde el Derecho Administrativo", *Revista de Administración Pública*, num. 172, January-April 2007, pp. 339-361.

¹² The so-called Auker report referred to excessive urbanization in many coastal areas and noted that such a situation has led to an irreparable harm to biodiversity and environmental integrity, EUROPEAN PARLIAMENT, *report on the impact of extensive urbanisation in Spain on individual rights of European citizens, the environment and the application of Community law, based on certain petitions received (2008 / 2248 (INI))*, of February 20, 2009, p. 6.

¹³ Since 2001, Greenpeace has published annually the report titled *Destrucción a toda costa*; and in 2007, Fundación Alternativas published the report *Urbanismo y Democracia* directed by FELIPE IGLESIAS. In addition, urban planning corruption is also included in the report by Miloon Kothari for the United Nations (UNITED NATIONS (GENERAL ASSEMBLY), *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari. Addendum: mission to Spain A/HRC/7/16/Add.2*, 7 February 2008); and the so-called Auker report, submitted by the Committee on Petitions to the European Parliament also highlights the Spanish corruption in land use (EUROPEAN PARLIAMENT, *Report on the extensive urbanization in Spain on individual rights of European citizens, on the environment and on the application of the EU law, based upon petitions received (2008/2248 (INI))*, Rapporteur: MARGRETE AUKEN, 20 February 2009.)

¹⁴ According to Greenpeace, in certain cases, the baton that has directed the urban development on the Spanish coast has been the association of corruption and public administrations (GREENPEACE, *Destrucción a toda costa 2013. Análisis del litoral a escala municipal*, Greenpeace, 2013, p. 54).

¹⁵ IGLESIAS, FELIPE and AGUDO, JORGE, "Los mecanismos de la corrupción: tipología de irregularidades", in IGLESIAS, FELIPE (Dir.), *Urbanismo y democracia. Alternativas para evitar la corrupción*, cit., pp. 43-92, p. 44.

this «unsustainable development model» has ended up spoiling areas of great environmental value, especially in coastal municipalities¹⁶.

Regarding some other irregularities, it has been noticed that there are tendencies to increase the buildability to promote profitable uses of the land while sometimes it implies a breach of urban planning rules, which could affect the provisions of public housing regime and, by extension, the right to housing¹⁷ of social groups with fewer resources since, by effect of the speculation held on land and housing during the building boom years (1997-2007), they had serious difficulties to access to housing at market price¹⁸.

In the field of building permits, the profusion of illegalities has been equally serious because on many occasions it has been granted illegal licenses that have authorized buildings that once acquired by third parties in good faith, are judicially annulled and its demolition is stated. This situation has affected many third parties not only national but also from other States¹⁹ acquiring those buildings presumably in good faith, which acquired these properties without evidence of the litigious situation of the property, and whose subsequent demolition would affect their property rights.

Finally, as to another area of corruption risk, the urban discipline, it is also reported the inability of the municipal public authorities to react by restoring the urban legality undermined by illegal constructions, and it gets highlighted how often such offences of individuals tend to remain unpunished or, if punished, it is usually settled with minor penalties²⁰.

¹⁶ See EUROPEAN PARLIAMENT, *Report on the extensive urbanization in Spain on individual rights of European citizens, on the environment and on the application of the EU law, based upon petitions received (2008/2248 (INI))*, cit., pp. 6 and 9; and GREENPEACE, *Destrucción a toda costa 2013*, cit. p. 54.

¹⁷ IGLESIAS, FELIPE and AGUDO, JORGE, “Los mecanismos de la corrupción: tipología de irregularidades”, cit., p. 62.

¹⁸ UNITED NATIONS (GENERAL ASSEMBLY), *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari. Addendum: mission to Spain*, cit., p. 27.

¹⁹ See EUROPEAN PARLIAMENT, *Report on the extensive urbanization in Spain on individual rights of European citizens, on the environment and on the application of the EU law, based upon petitions received (2008/2248 (INI))*, cit.

²⁰ IGLESIAS, FELIPE and AGUDO, JORGE, “Los mecanismos de la corrupción: tipología de irregularidades”, cit., p. 49.

2. SOME CONSEQUENCES OF PUBLIC CORRUPTION, AND ESPECIALLY THE POLITICAL DISCREDIT

In this section I present some consequences of public corruption that have a significant bound with political discredit or, in a certain extent, that could have an impact on discrediting politics. Hence, in the following pages I will try to explain some issues about the relationship between public corruption and the citizens' attitude about politics and politicians in particular, and how this could shape the way we understand and curb corruption in a specific society.

2.1. The accusation of corruption used as a mere tool for political discredit in electoral campaign

After the pertinent journalistic researches, the media have made public many of the cases of land use corruption, sometimes unveiling complex and organized criminal networks, and other times revealing mere occasional practices, that have called the attention of the citizenship and have received a broad coverage²¹. However, not all the journalistic contributions are equally reliable or precise, and the lack of impartiality and professionalism in some pieces of news has resulted in claims in respect of the right to honour of public officers that have been related with the urban planning corruption²².

Also, it should not be forgotten that in many cases the press only echoes the often interested allegations of corruption made by political rivals. Indeed, it should not be forgotten that the reporting of corruption cases is frequently used as a one more element for the stigmatization of rival politicians during electoral campaigns²³, since it has been empirically proven that the accusation of corruption influences, even if it does so in a moderate way, in the electors'

²¹ For example, the so called *Malaya case*, referred to the corruption (especially, the land use corruption) that took place from the decade of 1990 in the City council of Marbella, occupied more than 30% of the total of news about corruption that were published in the Spanish newspapers *El País* and *El Mundo* in 2006, see PALAU, ANNA M. and DAVESA, FERRAN, "El impacto de la cobertura mediática de la corrupción en la opinión pública española", *Revista española de investigaciones sociológicas*, num. 144, October-December 2013, pp. 97-126, p. 111.

²² See Spanish Supreme Court (*Sala Primera, de lo Civil*) sentence of 7th November of 2011, rec. n. 1420/2009, judge-rapporteur Juan Antonio Xiol Ríos. See also the analysis in DE LA IGLESIA PRADOS, EDUARDO, "El derecho al honor de los políticos frente a las acusaciones de corrupción en materia de urbanismo", *Revista de Derecho Privado*, n. 4, July-August 2012, pp. 81-114.

²³ According to the annual reports of several provincial prosecutors, the electoral campaign significantly increases the number of reported acts that might constitute corruption offenses, generally being crossed accusations between members of different political parties with a clear intention to influence the electorate, see FISCALÍA GENERAL DEL ESTADO, *Memoria 2013*, p. 658.

choice²⁴.

2.2. The instrumental use of Law and in particular the expansion of criminal law

While administrative law has proven to be an ineffective instrument to protect public interests, criminal law has undergone a notable expansion²⁵. Legislative policy has tended to extend the application of the penal code and to aggravate its sanctions on matters which, ordinarily, should be controlled and disciplined by the Administration through administrative law, such as the ethical behavior of the authorities and public officials. This has occasioned the use, sometimes excessive, of the criminal justice²⁶.

If the use of criminal control on the administrative action has been due to the inefficiency of the administrative instruments for the prevention and control of corruption, it seems surprising to choose that option instead of concentrating efforts to convert these ineffective controls into a more effective and efficient ones²⁷, either by formally improving them or by incentivizing their effective implementation.

It has been identified by the doctrine that turn to a reform of the Criminal Code, eminently repressive, as the main form of public authorities' response to the phenomenon of corruption has the risk of being nothing else than a «showcase legal response»²⁸. With these types of measures, the government would seek to give the impression of acting with the greatest severity against the problem, with the expectation that this would bring benefits to its political party in electoral terms, while not caring at all for the effective application of these measures, which would allow politicians to maintain the *status quo*²⁹ (which could imply the

²⁴ See letter *c* of this section below.

²⁵ MUÑOZ MACHADO, SANTIAGO, *Tratado de Derecho administrativo y Derecho público general, I. La formación de las instituciones públicas y su sometimiento al Derecho*, Iustel, 2006, pp. 70 et seq., and SILVA SÁNCHEZ, JESÚS-MARÍA, *La expansión del Derecho penal, Aspectos de la política criminal en las sociedades postindustriales*, Civitas, 2nd ed., Madrid, 2001, p. 64

²⁶ This intense penalization of public performance has been seen with suspicion by Spanish doctrine: «[e]n efecto, “abierta la veda” de autoridades y funcionarios con el cambio constitucional, ha venido a producirse un fenómeno, preocupante por su intensidad, de judicialización de la vida política, esto es, de derivación hacia el orden jurisdiccional penal del enjuiciamiento de las conductas de autoridades y funcionarios en el ejercicio de sus cargos», GARCÍA DE ENTERRÍA, EDUARDO and FERNÁNDEZ, TOMÁS-RAMÓN, *Curso de Derecho administrativo, I*, Civitas, 15th ed., Madrid, 2011, p. 652.

²⁷ See TORNOS MAS, JOAQUÍN, “¿Quién debe ejercer el «ius puniendi» del Estado?”, *Revista española de Derecho Administrativo*, num. 161, January-March 2014, pp. 11-16, p. 13; and CARMONA SALGADO, CONCEPCIÓN, “Tratamiento penal de la ordenación del territorio y el urbanismo tras la reforma de 2010. Fracaso del control preventivo administrativo y corrupción urbanística”, *La Ley Penal*, num. 103, July, 2013.

²⁸ TORNOS MAS, JOAQUÍN, “¿Quién debe ejercer el «ius puniendi» del Estado?”, cit., p. 14.

²⁹ NIETO, ALEJANDRO, *La corrupción en la España democrática*, Ariel, Barcelona, 1997, pp. 209-210.

maintenance of the networks of corruption).

While the penalties for crimes related to public corruption are increased and new criminal offences are established, the scarcity of means for its investigation and subsequent punishment is maintained³⁰; the General State Prosecutor is appointed by the Government, with all the doubts that this generates regarding the impartiality of the prosecution³¹; and, if the aforementioned is insufficient to avoid convictions for crimes related to corruption, the exceptional measure of pardon still remains at the disposal of the Government, on which, despite the recent judicial decisions, judicial control remains rather limited³².

2.3. The electoral punishment of corruption and the discrediting of politics

Among the consequences of public corruption, we can identify the electoral punishment of political parties involved in corruption practices and the discrediting of politics, meaning that most citizens believe that all the political parties are equally corrupt.

According to some estimates based on data from the Spanish local elections of 1999 and 2007, the average loss of votes after a corruption scandal would be 4%, a percentage that increases as media attention increases, up to 9-14 %³³. More recently, regarding the local elections in 2011, it has been observed that political parties accused of corruption lost an average of 5% more votes than in municipalities without corruption cases reported, although

³⁰ It is representative that during the XXIII National Meeting of Spanish Chief Judges, held in Seville between the 16th and the 18th December 2013, judges proposed, for a more effective judicial fight against corruption, the assignation of more and sufficient personal and material means (reported in: http://www.poderjudicial.es/cgpj/es/Poder_Judicial/En_Portada/Los_Jueces_Decanos_piden_mas_medios_para_luchar_contra_la_corrupcion). Moreover, we could see the complaint contained in the annual report of the State Prosecutor General's Office of 2015: «Antes de entrar a concretar la actividad desarrollada por la Fiscalía Especial contra la Corrupción y la Criminalidad Organizada durante el año 2014 es de justicia manifestar, en un primer plano, el más profundo agradecimiento a cuantos integran la Fiscalía Especial, Fiscales [...], unidades técnicas adscritas a la Fiscalía y demás funcionarios de la Administración de Justicia que colaboran con los anteriores, con cuya aportación y trabajo han hecho posible, hasta el máximo de sus posibilidades, llenar la escasez de los medios personales con que ha contado esta Fiscalía en el año 2014, afirmación especialmente aplicable a los Fiscales y Unidades Adscritas cuya composición apenas ha sufrido alteraciones en sus integrantes desde que se creó la Fiscalía Anticorrupción» (FISCALÍA GENERAL DEL ESTADO, *Memoria 2015*, Centro de estudios jurídicos-Ministerio de Justicia, Madrid, 2015, pp. 310-311).

³¹ GRECO (Group of States against Corruption) had already warned of this problem in 2001 but, in the light of the limited progress made in this regard, it reported again the same issue in 2014, see GRECO, *Fourth evaluation round. Corruption prevention in respect of members of parliament, judges and prosecutors. Evaluation report: Spain*, 15th January 2014, p. 35.

³² See CÓRDOBA RODA, JUAN and TORNOS MAS, JOAQUÍN, “El indulto y el control judicial de su concesión”, *Revista Jurídica de Catalunya*, vol. 113, núm. 1, 2014, pp. 39-78.

³³ COSTAS-PÉREZ, ELENA; SOLÉ-OLLÉ, ALBERT y SORRIBAS-NAVARRO, PILAR, “Corruption scandals, voter information, and accountability”, *European journal of political economy*, vol. 28 (4), 2012, pp. 469-484.

most mayors involved in corruption cases were reelected³⁴. It has also been observed that electoral punishment does not occur in all cases of corruption: politicians who committed allegedly corrupt irregularities that in some way also benefited the municipality did not obtain electoral punishment but a benefit, receiving on average a greater support than what they would have obtained "without corruption", an electoral benefit that is estimated by the authors in the 4,8%³⁵.

2.4. The discrediting of politics as a determining factor in the fight against corruption: corruption as an agency problem vs. corruption as a collective action problem

During the second half of the 20th century, some influential studies that revolutionized the way in which corruption had been understood and curbed were published³⁶. Its great innovation consisted on applying to this phenomenon a theory from the economic sciences that had already demonstrated its functionality in the study of business organization: the agency theory³⁷.

The approach based on the agency theory is based on the premise that there are some principals who, in order to act, must use agents, who represent them, as could be the case of elected officials (agents) who represent the citizenry (multiple principals), or public officials and senior officers (agents) acting on behalf of the government or any hierarchical superior (principal), to give just a few examples. The goal sought in these agency relationships is for the agent to act serving the interests of the principal³⁸. Otherwise, we would be faced with a

³⁴ This is the general trend internationally. With data from the United States of America and the United Kingdom, see MUÑOZ, JORDI, "El precio electoral de la corrupción: ¿por qué los votantes la castigan tan poco?", *Pasajes*, num. 42, pp. 23-24.

³⁵ BARBERÁ ARANGÜENA, PABLO and FERNÁNDEZ-VÁZQUEZ, PABLO, "Los electores ante la corrupción", in ORTIZ, JAVIER and EMBID, JULIO (coords.), *Informe sobre la democracia en España 2012*, Fundación Alternativas, 2012, pp. 75-101.

³⁶ In particular, ROSE-ACKERMAN, SUSAN, *Corruption: A study in political economy*, Academic Press, Nueva York, 1978; and KLITGAARD, ROBERT, *Controlling corruption*, Berkeley, University of California Press, 1988.

³⁷ JIMÉNEZ SÁNCHEZ, FERNANDO, "La trampa política: la corrupción como problema de acción colectiva", in PASTOR SELLER, ENRIQUE; TAMEZ GONZÁLEZ, GERARDO; and SAENZ LÓPEZ, KARLA ANNETT CYNTHIA (eds.), *Gobernabilidad, ciudadanía y democracia participativa: análisis comparado España-México*, Dykinson, Madrid, 2014, pp. 157-174, p. 159.

³⁸ This theory has also been assumed among Spanish juridical-administrative doctrine. As a notable example, these words by ALEJANDRO NIETO, although using a different (but close) terminology, are certainly evocative of what the theory of the agency applied to corruption assumes: «La corrupción pública empieza cuando el Poder que ha sido entregado por los ciudadanos a título de administrador —o sea, para gestionarlo de acuerdo con los intereses generales— no es utilizado correctamente, sino que el gestor, defraudando la confianza de sus mandantes, desvía su ejercicio para obtener un beneficio particular» (NIETO, ALEJANDRO, *El desgobierno de lo*

pathology in that relationship.

Such authors have applied these premises of agency theory to the institutional framework in which principals and agents develop their activity, giving rise to the economic institutionalism, and, based on a rational choice model, they conclude that agents tend to be more tempted to betray the confidence of their principals when the possibilities of detection and the severity of the punishment of their irregular performance are scarcely dissuasive while the private benefit that they may obtain is high³⁹.

Theorists of economic institutionalism stated that cases of corruption are just the consequence of a pathological situation in the agency relationship, since they assume that the principal has some interests (for example, citizenship would have general public or common interests), and who should act on their behalf (government officials, senior officials and officials, for example), instead of acting in order to satisfy those interests of the principal, they take advantage of the power and position that has been conferred on them trying to obtain a private benefit different from the interests of the principal. Such a situation would be possible because of a lack of information from the principal, who would not have the sufficient means of control and sanction to properly warn and punish that betrayal in the relationship of trust. In conclusion, the agent would make a rational calculation, weighing the possibilities of detection and punishment for acting in pursuit of one's own interests and in view of the fact that there would be more incentives than disincentives to betray the mission entrusted by the principal; he would act chasing his or her private interests.

As a result, anti-corruption measures inspired by this scholar theory have focused on increasing knowledge about agents and their activities (eg, by declarations of assets, interests and activities, measures on transparency in public administrations, control or limitation of discretion, etc.)⁴⁰.

However, as a result of the unsuccessful outcome of enforcement measures and corruption sanctions in some countries⁴¹, authors such as BO ROTHSTEIN have questioned the validity of

público, Ariel, Barcelona, 2008, p. 154).

³⁹ JIMÉNEZ, FERNANDO; GARCÍA-QUESADA, MÓNICA and VILLORIA, MANUEL, "Integrity systems, values and expectations: explaining differences in the extent of corruption in three Spanish local governments", *International Journal of Public Administration*, num. 37, 2014, pp. 67-82, pp. 68-69.

⁴⁰ JIMÉNEZ SÁNCHEZ, FERNANDO, "La trampa política: la corrupción como problema de acción colectiva", cit., pp. 161-162.

⁴¹ PERSSON, ANNA; ROTHSTEIN, BO and TEORELL, JAN, "Why Anticorruption Reforms Fail—Systemic

the agency problem in dealing with corruption⁴². The main criticism has been that the agency model presumes that the problem is always the agent, who acts in pursuit of his personal interests (or those of his political party, or those of his family and friends) betraying the general interests that the principal pursues, at the same time as assuming that the principal does not have sufficient information about the agent or his activities. According to BO ROTHSTEIN *et al.* it is not taken into account that those measures of greater control and sanction of the "offender" agent only have validity as long as the same principal has a real interest in preventing and, where appropriate, punishing corruption.

There are, indeed, cases where the principal also acts in pursuit of illicit particular interests. Some scholars have referred to those principals as "principals without principles"⁴³, and it seems that in these situations, rather than an agency problem, we would be faced with a collective action problem⁴⁴.

This theory has its roots in the classic commons dilemma described by Garrett HARDIN in 1968⁴⁵. According to HARDIN, in a situation in which several individuals act independently and rationally driven only by personal interests, they end up destroying a limited shared resource (the common good) even if for all of them the destruction of that common good is detrimental, both in individual and collective terms. According to this approach to the problem of corruption, it is understood that the performance of the subjects depends to a great extent on the expected performance of the rest of the society. Thus, if a large majority is expected to break the rules by acting in a corrupt manner, even though each of these people individually believes that a smaller level of corruption would be beneficial to society as a whole, the temptation of all subjects (including not only the agents but also the principal ones) to resort to corruption practices pursuing their personal interests is much greater⁴⁶.

Corruption as a Collective Action Problem", *Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 26, num. 3, July 2013, pp. 449–471, p.449-450.

⁴² ROTHSTEIN, BO, "Anti-corruption: the indirect 'big bang' approach", cit.

⁴³ JIMÉNEZ SÁNCHEZ, FERNANDO, "La trampa política: la corrupción como problema de acción colectiva", cit., p. 164.

⁴⁴ PERSSON, ANNA; ROTHSTEIN, BO and TEORELL, JAN, "Why Anticorruption Reforms Fail—Systemic Corruption as a Collective Action Problem", cit.

⁴⁵ HARDIN, GARRETT, "The Tragedy of the Commons", *Science*, vol. 162, 1968, pp. 1243-1248.

⁴⁶ According to ANNA PERSSON *et al.*, «actors engage in corrupt behavior not because they morally approve of it or do not understand the negative consequences for society at large, but because as long as they expect everyone else to play foul, they perceive the short-term benefits of engaging in corrupt behavior to be greater than the costs. In terms of one prototypical model of collective action, this game of corruption could be interpreted as an assurance game (Hardin 1995; Sen 1967). According to the logic of this game, everyone prefers that no one

Given the different analysis, the proposed solutions should also be different, and classic measures inspired by agency theory could have counterproductive effects: for example, greater transparency could lead to more people being aware of the irregular functioning of public authorities, which could increase the number of people considering the necessity to participate in such illegal practices⁴⁷.

Following authors like SUSAN ROSE-ACKERMAN or BO ROTHSTEIN, it can be affirmed that the two approaches coexist. They are not excluded but each one is better to explain and to propose solutions to a different type of corruption. On the one hand, the analysis and proposals of the agency problem seem to work better in countries or regions where the legal system is appropriate to combat corruption and the cases of corruption are sporadic actions of people who, in the exercise of their public functions, seek to illicitly obtain a particular benefit⁴⁸. On the other hand, the approach to the phenomenon as a problem of collective action seems appropriate for those cases in which the social perception of corruption is very high⁴⁹ and also has acquired the condition of systemic⁵⁰, where there would be few possibilities for a sincere willingness to combat corruption in the short term. In these contexts of systemic corruption, traditional measures inspired by agency models and rational choice would not be effective on their own and would require other measures⁵¹.

At this point, we should ask to what theory or theories does Spanish land use corruption fit in? What kind of measures should be proposed in order to combat corruption effectively?

We can say that the typical proposals of economic institutionalism, based on the theory of

cheats (i.e., acts corruptly) as compared to the outcome where everyone plays foul. However, being the sole “sucker” in a corrupt game is the even worse outcome to everyone, which tends to lock the game into the suboptimal “corrupt” equilibrium as long as everyone expects everyone else to be corrupt» (PERSSON, ANNA; ROTHSTEIN, BO and TEORELL, JAN, “Why Anticorruption Reforms Fail—Systemic Corruption as a Collective Action Problem”, cit., p. 457).

⁴⁷ PERSSON, ANNA; ROTHSTEIN, BO and TEORELL, JAN, “Why Anticorruption Reforms Fail—Systemic Corruption as a Collective Action Problem”, cit., pp. 464-465.

⁴⁸ ROSE-ACKERMAN, SUSAN, “The institutional economics of corruption”, in DE GRAAF, GJALT; VON MARAVIĆ, PATRICK and WAGENAAR, PIETER (eds.), *The good cause: Theoretical perspectives on corruption*, Barbara Budrich, Leverkusen, 2010, pp. 47-63, p. 51.

⁴⁹ In these cases, where intersubjective mistrust and the perception of the partial (or interested and corrupt) functioning of public institutions is widespread, it is considered to exist a vicious circle since such perception would feed more mistrust and the temptation to engage in corrupt practices. See JIMÉNEZ SÁNCHEZ, FERNANDO, “La trampa política: la corrupción como problema de acción colectiva”, cit., in particular pp. 164-169.

⁵⁰ ROTHSTEIN, BO, “Anti-corruption: the indirect ‘big bang’ approach”, cit., p. 231.

⁵¹ For example, those presented by AZFAR, OMAR, “Disrupting corruption”, in SHAH, ANWAR (ed.), *Performance accountability and combating corruption*, World Bank, 2007, pp. 255-284, pp. 260-262.

agency and rational choice, require a principal interested in avoiding and punishing corruption. The principal can be both the citizenship in general and public entities or institutions with the capacity to control and punish corruption, or the entities or institutions that are in charge of configuring and endowing the entities in charge of such functions, exercising an indirect control with a significant impact on the persecution of corruption.

With regard to the most obvious principal, which is the citizenship as a whole, collective action theorists have used the democratic elections as an indicator to determine whether or not it has a real will to punish corruption. According to this doctrine, the fact that corruption is not punished in the elections can indicate the lack of will to fight against corruption by this main group. As we have pointed out, in the Spanish case up to now the electoral punishment of corruption has been, at best, timid⁵². However, we believe, with SUSAN ROSE-ACKERMAN, that this indicator can only be significant to the extent that, in an election, there is an honest and credible alternative⁵³(moreover, we can add, that honest alternative should represent similar interests in several fields, since the vote is not only determined by political representatives' ethics or honesty). My viewpoint is that the recent rise of political party *Podemos*, which has made the fight against corruption one of its hallmarks⁵⁴, together with the recent efforts of all political parties (including those most affected by serious cases of corruption) to show a firm commitment in the fight against corruption⁵⁵, makes me think that at least from the perspective of the principal understood as citizenship, there is in Spain a sincere desire to eradicate corruption in public life, a will that political parties try to channel in their own benefit in electoral terms.

⁵² BARBERÁ ARANGÜENA, PABLO and FERNÁNDEZ-VÁZQUEZ, PABLO, "Los electores ante la corrupción", in ORTIZ, JAVIER and EMBID, JULIO (coords.), *Informe sobre la democracia en España 2012*, Fundación Alternativas, 2012, pp. 75-101.

⁵³ ROSE-ACKERMAN, SUSAN, "The institutional economics of corruption", cit., p. 48.

⁵⁴ It is significant that this political party included Carlos Jiménez Villarejo, who was the anti-corruption chief prosecutor from 1995 to 2003, as number 3 in its list in the first elections to which the party was presented (the elections to the European Parliament in May 2014). Also, during the campaign of those elections, they proposed some measures mostly related to the fight against corruption and which they put together in a document referred to as the 'Villarejo Directive', intended to be risen to the European Parliament. See: http://podemos.info/wordpress/wp-content/uploads/2014/05/directiva_villarejo.pdf.

⁵⁵ Just as an example that occurred right after the elections to the European Parliament in May 2014, the political parties PSOE (*Partido Socialista Obrero Español*) and UPyD (*Unión Progreso y Democracia*) signed with Transparency International-Spain an agreement for transparency and against corruption on the 11 and 24 November, respectively, by which signatory parties undertook to adopt the various measures for the transparency of parties and against corruption proposed and published by Transparency International-Spain. Also in November 2014, the President of the Spanish Government announced his willingness to give impetus to a series of reforms aimed at preventing and suppressing corruption.

However, if we make a change in the principal position, the answer does not seem, for the moment, to point in the same direction. Many international bodies have certified that, in fact, the Spanish legal system has sufficient formal instruments to carry out a satisfactory fight against corruption, and yet such mechanisms have failed in many cases and are generally considered ineffective⁵⁶. According to ALEJANDRO NIETO, public authorities, who are at the same time affected by corruption and in charge of preventing and repressing it, would have no interest in acting against themselves. While it is true that, as ALEJANDRO NIETO points out, the State as an abstract entity has an interest in combating corruption (in part, we could add: because this is the interest of the principal constituted by the citizenship), that State acts primarily through the Government, and although it proclaims its will to fight corruption, such an intention would be merely formal, limited to "launching measures without a fuse"⁵⁷. In our political context, it should not be forgotten that, more than the Government, political parties are the ones who can influence all the public institutions⁵⁸, and in addition, they have often benefited from corruption⁵⁹.

If we move to the field of Spanish urbanism, from multiple studies on the phenomenon in different parts of our geography we can draw that although there may also sometimes be a problem of collective action that would discourage the fight against corruption and favor the creation and expansion of networks of political patronage⁶⁰, the most reasonable explanation for the large number of cases of urban corruption for more than a decade is surely offered by economic institutionalism, based on agency theory and rational calculation, as it seems that this public activity has been related for years to a very high potential benefits together with an

⁵⁶ TRANSPARENCY INTERNATIONAL, VILLORIA, MANUEL (Dir.) and BEKE, MIKE, B. (Coord.), *El marco de integridad institucional en España. Situación actual y recomendaciones*, Tirant lo Blanch, Valencia, 2012, pp. 6-8, and EUROPEAN COMMISSION, *Anexo: España, al Informe de lucha contra la corrupción de la UE*, 2014, p. 16.

⁵⁷ NIETO, ALEJANDRO, *El desgobierno de lo público*, cit., p.174.

⁵⁸ According to NIETO, A.: «Un organismo normal dispone de mecanismos defensivos para contener invasiones y corregir desviaciones. Cuando esos mecanismos fallan o no existen, el organismo queda indefenso. Y esto es lo que cabalmente sucede en España con la corrupción, puesto que los partidos se encargan de paralizar las reacciones defensivas del Estado y lo único que se hace es negar su existencia o, a todo lo más, conjurarla con remedios mágicos y retóricos de ineficacia probada» (NIETO, ALEJANDRO, *El desgobierno de lo público*, cit., p. 179).

⁵⁹ For example, see the *Auto del Juzgado Central de Instrucción* num. 5 (*Audiencia Nacional*), 26 November 2014, judge-rapporteur Pablo Rafael Ruz Gutiérrez; and EUROPEAN COMMISSION, *Anexo: España, al Informe de lucha contra la corrupción de la UE*, cit., p. 6.

⁶⁰ See GARCÍA-QUESADA, MÓNICA; JIMÉNEZ, FERNANDO and VILLORIA, MANUEL, "Can't control/won't control: opportunities and deterrents for local urban corruption in Lanzarote", *Crime, law and social change*, November 2014, pp. 1-20.

inefficient system of control, detection and punishment of corruption⁶¹. My own research, which in addition to being based on this doctrine has also considered and taken into account interviews with experts in the field and the study of sentences on cases of land use corruption, leads me to a diagnosis of the phenomenon to a great extent coincident⁶².

As a result, I consider that Spanish corruption in land use is, at least on a theoretical level, close to what is proposed by economic institutionalism, according to the application of the agency problem and the rational choice. Hence, the proposals for preventing corruption in the next section (below) have the aim to modify the legal-administrative regulations in order to improve the capacity of the legal tools available.

I believe, however, that it would be a grave mistake to ignore what in my view may be the greatest contribution of collective action theorists: sometimes the principal has no genuine interest in eradicating corruption.

In the Spanish case it is not only those who hold public office or perform public functions who personally benefit from corruption, but in some cases the beneficiaries are also the political parties⁶³. To this must be added that in Spain virtually all institutions suffer from an excessive politicization, so that, following ALEJANDRO NIETO, it seems easy to imagine why the rules that serve to guarantee the impartial exercise of public service (and, when appropriate, punish their infringement) have had a limited effect⁶⁴.

Faced with this problem, I understand that in order to combat corruption properly other elements and tools that are beyond the law should be used, such as citizen training in ethics, the political impartiality and a vigilant attitude of the media, or the "clean" and reliable alternatives to political parties and their representatives more strongly associated with corruption⁶⁵.

Law plays a necessary but not decisive role when there is an unprincipled principal or, at

⁶¹ See JIMÉNEZ, FERNANDO; GARCÍA-QUESADA, MÓNICA and VILLORIA, MANUEL, "Integrity systems, values and expectations: explaining differences in the extent of corruption in three Spanish local governments", cit.

⁶² See CAPDEFERRO VILLAGRASA, OSCAR, *El Derecho administrativo y la prevención de la corrupción urbanística*, Marcial Pons, Madrid, 2016.

⁶³ JIMÉNEZ, FERNANDO and VILLORIA, MANUEL, "Political finance, urban development and political corruption in Spain", cit., pp. 129-130.

⁶⁴ NIETO, ALEJANDRO, *La corrupción en la España democrática*, cit., pp. 203 y ss.

⁶⁵ See MUNGIU-PIPPIDI, ALINA, "The good, the bad and the ugly: controlling corruption in the European Union", *European Research Centre for Anti-corruption and State-building. Working paper n. 35*, pp. 30 y ss, available at: <http://www.againstcorruption.eu/wp-content/uploads/2013/04/WP-35-The-good-the-bad-and-the-ugly.pdf>

least, little determined to eradicate corruption. The proposals for fighting corruption should rely on the greater effectiveness of preventive measures to deal with the phenomenon of corruption, and in this respect I consider that the ideal instrument is in the legal-administrative order. Although the deficiencies of a legal system are not a relevant cause to explain corruption, it is possible to identify in the regulation those shortcomings that, far from hindering it, facilitate corruption⁶⁶, maintaining ineffective prevention systems and inoperative punishing mechanisms with little dissuasive effect.

Although I trust in Law as a system to ensure a good administration, a good governance and an effective fight against corruption, a lack of will in the application of the prevention, control and sanction mechanisms may undoubtedly lead to a failure of that legal system. With that threat in mind, I tried to equip the proposals below with the capacity to increase the degree of effectiveness and visibility of the control carried out by those control bodies *a priori* better positioned, based on their supposed higher degree of independence and technical preparation to carry out such control functions. Moreover, formative instruments for public employees and officials should be considered, such as codes of conduct and their associated training and monitoring systems. Of course, as I have already pointed out, other measures would be necessary, measures that are more related to education, ethics and values than to law⁶⁷ but, as JESÚS GONZÁLEZ maintains, the fact that corruption cannot be eradicated only by means of legal rules, that should not prevent passing, as far as possible, the measures available to deal with it⁶⁸.

3. URBAN PLANNING CORRUPTION IN SPAIN AND ITS PREVENTION: A PROPOSAL

According to the main bibliographical and jurisprudential material available, I have identified

⁶⁶ According to MIGUEL SÁNCHEZ, «la evolución reciente de nuestro Derecho público ha facilitado el desarrollo de la corrupción política en vez de ponerle freno» (SÁNCHEZ MORÓN, MIGUEL, “La corrupción y los problemas del control de las administraciones públicas”, in LAPORTA, FRANCISCO J. and ÁLVAREZ, SILVINA (eds.), *La corrupción política*, Alianza editorial, Madrid, 1997, pp. 189-210, p. 191).

⁶⁷ In this regard, see PAREJO ALFONSO, LUCIANO, “Urbanismo y corrupción: un problema no solo de legalidad”, *Temas para el debate: revista de debate político*, núm. 223, 2013, pp. 35-41, p. 41; BOIX PALOP, ANDRÉS, “Modelos de financiación de partidos políticos y corrupción”, in JAREÑO LEAL, ÁNGELES (Dir.), *Corrupción pública: cuestiones de política criminal (I)*, Iustel, Madrid, 2014, pp. 161-195, p. 162, p. 165; and IGLESIAS RÍO, MIGUEL ÁNGEL and MEDINA ARNÁIZ, TERESA, “Herramientas preventivas en la lucha contra la corrupción en el ámbito de la Unión Europea”, *Revista Penal*, num. 14, 2004, pp. 49-69, p. 64.

⁶⁸ GONZÁLEZ PÉREZ, JESÚS, *Corrupción, ética y moral en las Administraciones públicas*, Civitas, 2nd ed., Navarra, 2014, pp. 58-59.

some defining notes of the Spanish public corruption. First of all, public corruption in general, and corruption in urban planning and development in particular, is, although widespread, a relatively infrequent phenomenon. Apart from exceptional cases like the case of corruption in the Marbella Town Hall⁶⁹, it does not form part of the normal functioning of public administrations. Secondly, public corruption in general is, essentially, the corruption of politicians (members of the Government, senior officials and personnel of confidence), much more than the corruption of professional civil servants⁷⁰. In third place, the weakness of Spanish institutions to combat corruption lies not in the lack of formal legal instruments, but in their effectiveness in practice⁷¹.

Urban corruption is caused in any case by the concurrence of great benefits to developable land owners, ineffective control mechanisms and a sanctioning system insufficiently dissuasive⁷², accompanied by a lack of adequacy between the individual behavior of public officers or civil servants and public ethics⁷³. Occasionally, some additional causes are added, as the regulatory complexity in the land use field. Specifically, the land use areas with the greatest risks of corruption are urban planning, the granting of building permits and the exercise of urban development discipline⁷⁴.

On the basis of these synthetic characteristics, I propose the following in order to develop a better and more effective fight against corruption:

- a) The continuous corruption risks assessment and management and its concretion in the urban field

⁶⁹ Regarding the public corruption in Marbella, see PÉREZ FRANCESCH, JOAN L.; COCCIOLO, ENDRIUS E. and EYRE DE LORENZO, JOSÉ A., “Disolución de los ayuntamientos en España y corrupción sistémica. Aproximación al «caso Marbella» y comparación con la normativa italiana en materia de disolución en supuestos de emergencia extraordinaria”, *Revista de Estudios de la Administración Local y Autonómica*, num. 305, 2007, pp. 299-324.

⁷⁰ According to an estimate made by MANUEL VILLORIA and FERNANDO JIMÉNEZ from the data published in the annual reports of the General State Prosecutor's Office between 2004-2010, ratios of crime, even if they are approximate, are almost 100 to 1 between politicians and public employees (VILLORIA, MANUEL and JIMÉNEZ, FERNANDO, “La corrupción en España (2004-2010): datos, percepción y efectos”, *Revista Española de investigaciones sociológicas*, no. 138, April-June 2012, pp. 109-134, p. 121).

⁷¹ See EUROPEAN COMMISSION, *Annex: Spain, to the EU Anti-corruption Report, COM(2014) 38 final*, 2014, pp. 14-16.

⁷² Among others, see JIMÉNEZ, FERNANDO; GARCÍA-QUESADA, MÓNICA and VILLORIA, MANUEL, “Integrity systems, values and expectations: explaining differences in the extent of corruption in three Spanish local governments”, *International Journal of Public Administration*, núm. 37, 2014, pp. 67-82.

⁷³ Among others, NIETO, ALEJANDRO, “¿Es inevitable la corrupción?”, in *Responsa iurisperitorum digesta*, vol. IV, Universidad de Salamanca, 2004, pp. 101-114, p. 112.

⁷⁴ FISCALÍA GENERAL DEL ESTADO, *Memoria 2013*, cit., pp. 655-656.

To perform an adequate fight against this phenomenon we understand that it is necessary to introduce a mechanism to assess and manage corruption risks, which in our view should be done by using two different instruments. Firstly, the State must prepare an annual report indicating which areas are subjected to a greater risk of corruption in public administration at all territorial levels. That report should be based on data obtained from various sources, such as periodic surveys among public officials and employees about the risks and vulnerabilities of their post, the analysis of the discovered cases of public corruption or queries to external experts from both the professional and academic fields. Using as an example the urban planning corruption, this type of report when referring to the municipal level will probably identify as areas of corruption risk the preparation of urban plans, the granting of building permits and the exercise of urban development discipline; with special risk with regard to the involvement of Mayors, Councilors and municipal architects or surveyors.

The second report that should be added would be an *ad hoc* evaluation on the risks of corruption which should also identify measures that can (or should) be taken in order to prevent corruption in each case. That evaluation should be conducted by any administration in the context of the development of all the own acts or own provisions that have been previously identified as performances at high risk of corruption in the annual report proposed in the previous paragraph. This singular corruption risk assessment aims to inform subjects that must take part in the procedure with risks of corruption of what specifically are the issues that can compromise the performance of its functions in accordance with public ethics and good governance, as well as propose the practices to be followed to avoid the appearance of corruption. So as to ensure the effectiveness of the measure once the procedure under corruption risks ends, a second report is needed to assess the degree of compliance with anticorruption measures.

b) Promoting the use of precautionary measures in court

For years, most of the illegal constructions have come to completion even when at an early stage they were challenged before the judicial authorities. Even when the sentence, pursuant to legislation, has imposed the demolition of the illegally built, it has been frequent not to apply its judgment on its own terms. This situation can be especially serious when these constructions are allowed by urban plans or illegal building permits that were adopted essentially by the intermediation of any form of urban corruption. In that case, the illegal profit gained by corrupt means is perpetuated, so as it is the impunity for perpetrators and

highlights the weakness of the public controls. Notwithstanding, this unsustainable situation can be corrected through the effective implementation of precautionary measures which, to date, the judges have been using very limitedly in court. To ensure that these precautionary measures are broadly adopted when appropriate in the urban field, we believe that an amendment of law 29/1998, of 13 July, regulating the administrative jurisdiction (LJCA), is needed. Firstly, it should allow the judges and courts to adopt *ex officio* precautionary measures in those cases in which there are high risks of corruption. Secondly, in those cases where there is a risk of corruption it should be required to adopt precautionary measures when allegations of the plaintiffs are based on specific public corruption practices which, in his view, are directly related to the adoption of the contested act or general provision.

c) Strengthening the involvement of officials with national qualification and their impartiality

This staff in local government, in principle, can act more independently and it is also one of the most prepared for a thorough report on the legality of the actions taken at the local level. Consequently, we believe that it is necessary for the Secretary (a local official with national qualification) to intervene in those urban processes in which there are high risks of corruption, in such a way in that their reports should be mandatory in the preparation of development plans and the granting of building permits. This provision implies to modify all that regional urban planning regulations, such as the Land Use Act of Catalonia, in which the mandatory intervention of the Secretary is not guaranteed in every procedure with high risk of corruption, such as the granting of building permits⁷⁵. As additional measures, which would result in a better quality and objectivity of these reports, it is desirable that no organ of the local Corporation could be competent to impose disciplinary sanctions on officials of local government with national qualification. Moreover, it should not be allowed in any municipality to cover the jobs reserved for officials of local government with national qualification by the system of free designation (which also includes free removal).

d) The ethics training

As much as the urban planning system is designed so that it can provide great benefits to individuals through administrative acts insufficiently controlled and sanctioned, ultimately it

⁷⁵ According to article 188.3 of the revised text of the Catalan Land Use Act, the Secretary must inform in the record for a building permit when the previous legal and technical reports are contradictory in the interpretation of the applicable law or in cases that there is no other legal assistance.

is in the inner individual level where the person who performs public functions decides whether or not to ignore the general interests of their own office in favor of its private interests. In this situation ethical values and codes of conduct play a key role. Therefore, it seems highly advisable that codes of conduct should cover how to deal with situations that can attend any risk of corruption, and endow an entity with material and personal means enough to be able to provide training sessions on ethical issues related to the provision of urban services. This training should be taken for those who are particularly vulnerable to urban planning corruption, in special Mayors, Councilors in urban planning and municipal architects and surveyors. The training should be a requirement, if not for entering upon the duties of a public office or employment, then at least to participate in any of the urban planning activities identified as of high risk of corruption.

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