ERASMUS+ Capacity Building for Legal and Social Advancement in the Philippines (CALESA)

Jurisprudential evolution of corruption offences in Spain: before and after the economic crisis

Marta Fernández Cabrera
Assistant lecturer (Ph.D)

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PRELIMINARY CONSIDERATIONS

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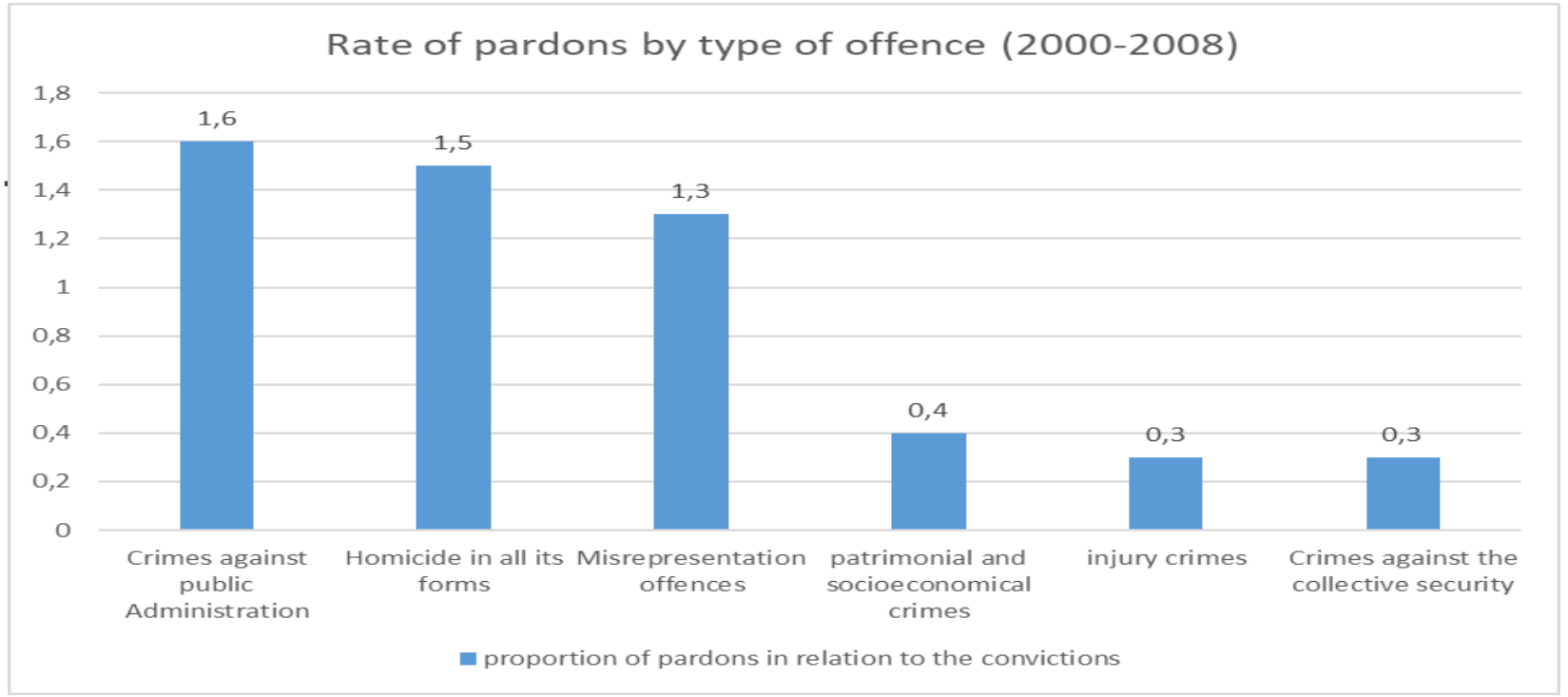
1. There are two branches to prevent corruption(administrative law and criminal law) but Spanish legislator has always trusted more in criminal law
2. Administrative mechanisms have been poor/non existent
3. Germany vs Spain
4. "corruption offenses"→ those crimes against public administration that imply a deviation towards private ends
5. Left out the crimes against the territory planning (urban planning corruption). Focus public administration
6. "Civil servants" includes public employees and political positions (art. 24 Spanish Penal Code/SPC).

INTRODUCTION

- Traditionally, corruption in Spain→ social problem of little relevance for society and public power
- Corruption cases rarely came up to light
- This thinking was high during de economic boom generated by housing bubble (90)
- Possible explanation: not so long time ago we had dictatorship in Spain and dictatorships cause deviation of institutions that are assume by society as "normal"
- This resulted in a situation in which→ persecution and conviction for the corruption-related offenses were low. The numbers of acquittals was high compare to others offences
- There was a privilege treatment received by the penal system to this kind of criminality
- Good proof of the privilege treatment received:

1. The pardons granted to corrupt offenders
2. The regulation of crimes against Public Administration in our SPC was (were written in confusing way/non necessary requirements)

INTRODUCTION



Source: "Las concesiones de indultos en España (2000-2008)" DOVAL PAÍS,A. *et al.,* en *Revista española de investigación Criminológica, nº*. 9, 2011. Obtained from the National institute of statistics (INE)

INTRODUCTION

- However the classic social indifference to corruption has disappeared after the economic crisis
- The opposite effect occurred since 2010
- Corruption became a serious social problem according to the Spaniards

- In the national survey of the Sociological Research Center (CIS) , the importance of corruption during many years was only overcome by unemployment

- Only in October 2017 was also overcome by the concern of the independence of Catalonia

INTRODUCTION

Source: "El País" newspaper (CIS data)

INTRODUCTION

There were two factors that influenced this change of opinion:

1. Economic crisis (2008) and caused the government to cut public services (education, health, salaries)
2. Media:
    - The press, especially the written one. During the crisis Spaniards saw in the front of the page of the most important papers a new corruption scandal.
    - It contributed to create an angry public opinion
    - The scandals affected:
        - All territorial scope
        - All institutions (government, autonomous regions,also de Crown)
        - Urban planning and public procurement

INTRODUCTION

15M MOVEMENT (2011), INDIGNADOS("The movement of the outraged people")

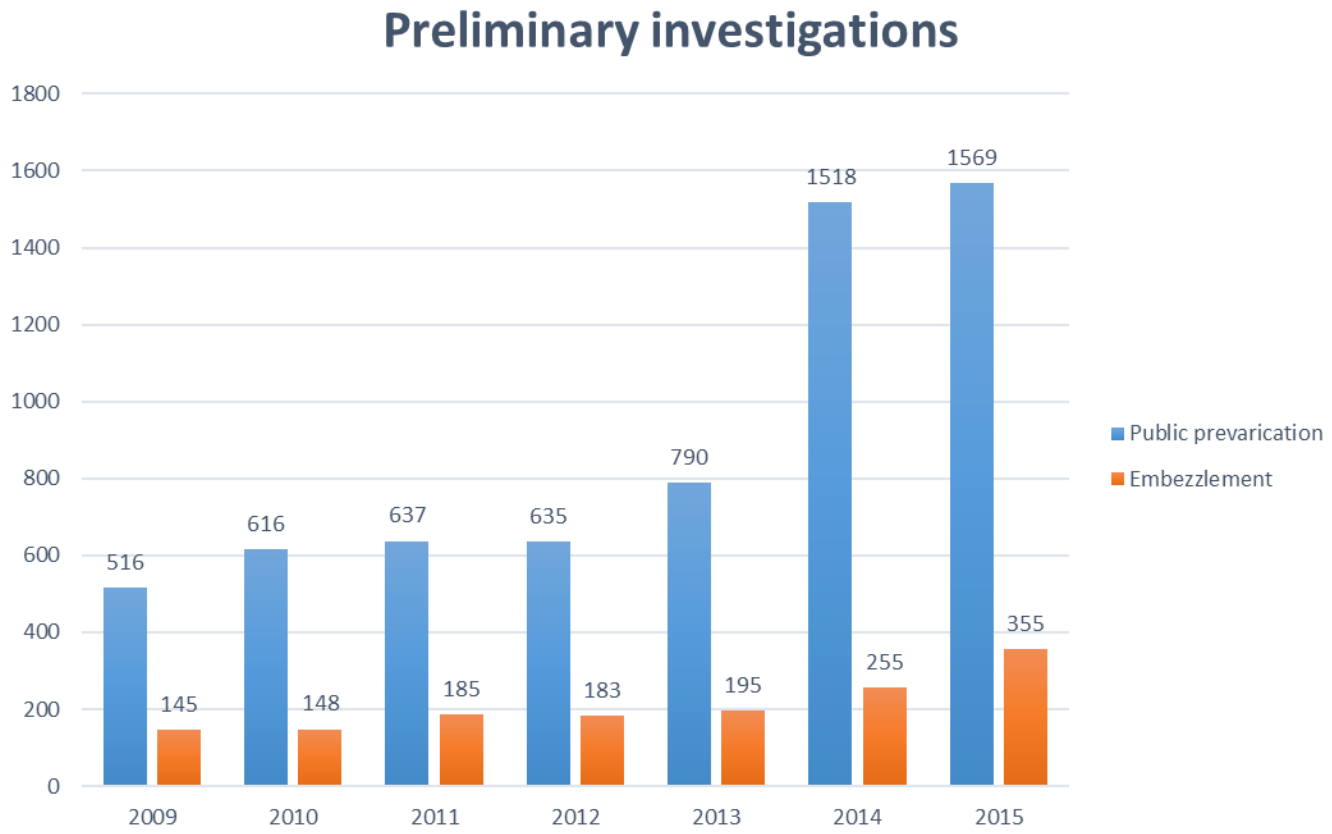
INTRODUCTION

The legislator noted this situation and:

1. Criminal legislator implemented the reforms of 2010 and 2015 where corruption played a leading role (more crimes against public administration in SPC were included, other existing crimes were extended, penalties were increased, prescription period increased, sanction to private corruption was incorporated, etc.)

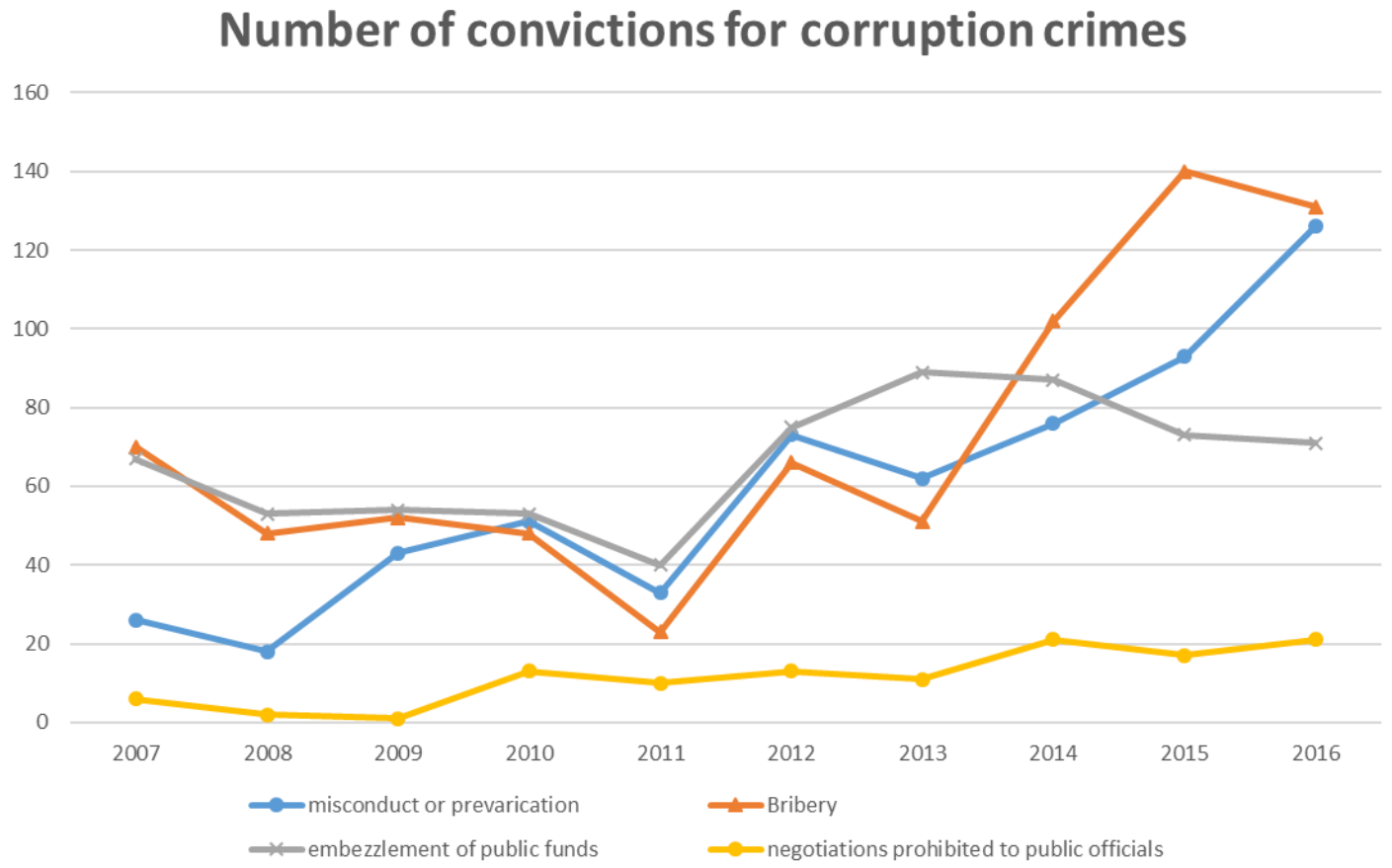
2. There is also a change in the practice
   - There has been a change in judges and prosecutor´s attitude towards this type of behaviour.
   - The prosecution and convictions have increased

INTRODUCTION



Elaborated with data from the Public Prosecutor's Office

INTRODUCTION



Elaborated with data form statistics National Institute (INE)

INTRODUCTION

- My intuition was that the number of convictions not only increased because the persecution rise, also because there was a change in judges criteria when applying this offences
- My idea was that crisis made judges/prosecutors to find new arguments or abandon others to punish more severely conducts related to corruption
- The jurisprudential change occurred from 2010
- Methodology: analysis of judgments before and after 2010
- During my PhD I read many judgements and I realized that there was a jurisprudential turn from 2010(I discovered an attitude of judges of trying not to acquit everything)

MAIN CHANGES DETECTED

1. To require an economic damage in a non economic crime
2. A wrong concept of general interest or common good
3. The absence of an administrative need behind the administrative decision as an aspect not valued by courts
4. The difficulty to proof intention
5. Principle of subsidiarity as an argument to acquit

CHANGE 1

- For Spanish criminal judges→ corruption was only relevant if the civil servant undermined public funds or got an illegal economic advantage for himself/herself
- Judges acquit civil servants due to the absence of the economic damage for public Administration, even if it (economic damage) was not legally required in the offence provided for SPC.
- SCS 226/2006 of February 19 "There is no evidence that the price paid was different form the real price, nor that economic interest of the public Administration were affected"
- SCS 927/2003 of June 23 "No (economic) damage was caused to complainants"

CHANGE 1

- This argument of acquittal was very used with the offence of public prevarication (art 404 SPC), that is an offence which exists in Spain and other countries and punishes de adoption a an illegal or arbitrary decision by a civil servant (example: awarding a contract to a relative).
- However, since 2010 I can say there is a tendency to abandon this argument
- After this year I haven´t read a sentence in this sense
- A good proof of this change of the mentality of the prosecutor ands judges is the spectacular increase of the prosecution and convictions of the public prevarication offence.

CHANGE 2

- Before the crisis, criminal judges conceived the concept of general interest/common good in a wrong way
- Judges have acquitted civil servants because they wanted to satisfy with their conduct general interest or common good
- Award arbitrarily a contract is allowed if the civil servant in the "in the depths of his mind"wanted to satisfy a public interest (build a park, a hospital, etc.)
- Controversial acquittal STS 927/2003 of June 23→mayor of Cadiz
- This jurisprudential position is criticisable because this concept of common good is wrong

CHANGE 2

- This jurisprudence is changing

- STS 259/2015 of April 30 "the appellant´s objective was laudable (of general interest)to pay tribute to the victims of the civil war and subsequent repression. But precisely for this reason, this purpose cannot be obtained at all costs, by undermining public funds, through a fraudulent procedure that deliberately dispenses from legal channels, to make effective the will of the civil servant"

CHANGE 5

- Principle of subsidiarity has been use many times for judges to acquitt
- Definition: Criminal law is the heaviest form of legal social control, thus, it should be used only as a last resource in order to protect society. Where possible, other forms of social control, formal or informal, ought to be used in their stead.
- Principle of subsidiarity (*ultima ratio*) as acquittal argument:
  1. Absolute nullity and relative nullity are enough
     STS 727/2000 of October 23 (acquittal)
  2. Punishment in administrative law (disciplinary law) is enough to deter corrupted conducts
     STS 1823/2000 of November 23 "criminal law intervenes in more important matters"

CHANGE 5

This reasoning deserves two criticisms:

1. PS is a political-criminal criterion which guides legislator not the judge
   - The judge is delimited by legality principle
   - The judge can acquit→ principle of insignificance/social adequacy
2. In the reality is not true that Disciplinary law offers a faster or more effective answer to corruption
   - Disciplinary law doesn't act as a deterrence because:
     - ~~✓ Local authorities~~ § 7 (Spanish Disciplinary Code)
     - ✓ Sanctions are lenient
     - ✓ The responsible of initiating the process are not independent
   - In practice, very few disciplinary proceedings are initiated

Today courts refer to this principle but since 2010 as a cliché, not to acquit

CONCLUSIONS

1. Only typifying corruption offences is not enough to have an efficient anti corruption criminal law system
2. Judges are human and are influenced by social changes when they sentence
3. There are empirical studies that show that a high social concern for corruption is I was able to find a positive aspect:
    - A slight argumentative improvement in corruption sentences
    - The crisis put end the leniency that existed in Spain regarding this white-collar crime
    - Criminal law was applied in an absolute unequal way (common crime with sever respond and white collar crimes with a lenient respond) and I think this has change.

SALAMAT PO

THANK YOU VERY MUCH FOR YOUR ATTENTION