Whistleblowers play a key role when it comes to reporting corruption, fraud and mismanagement in which both public administrations and private companies may be involved. However, there is no institution in Spain to regulate, promote and duly protect the whistleblower who decides to collaborate with the legal system and provide efficient information to the investigation of the crimes committed, not only within criminal organizations or public administrations, but also within companies and their relationships with public administrations. This study is focused on analyzing what type of procedural handling should be applied into the Spanish criminal system, to the repentant offender who decides to collaborate with the authorities and helps to obtain evidence, because there is not a legal framework of whistleblowers in Spain. This paper discusses also that some procedural figures as the anonymous confidant, the protected witness or the repentant offender are not sufficient or effective to promote whistleblowing. Finally, it reviews the advantages and drawbacks of the inclusion of the discretionary prosecution principle in the Spanish criminal procedure, by promoting benefits (e.g. immunity) for those who collaborate with the legal system.

Keywords: Corporate Crime, Criminal Proceedings, Criminal Justice, Spain, Whistleblowing.
I. BRIBERY, FRAUD AND THE FINANCIAL CRISIS IN SPAIN

Over the past few years, there has hardly been a single day where the Spanish Media has not spoken about a new case of corruption affecting political parties, entrepreneurs, unions, or even people linked to the Royal Family. Unfortunately, we are accustomed to seeing, almost every day and on the front page of newspapers, a new arrest or prosecution connected to a fraud and bribery, and what is worse, we have gotten used to expressions such as the renowned Malaya case, Bárcenas case, Gürtel case, or the Palma Arena case, just to mention a few of the most famous ones.

However, if corruption was, nowadays, something directly linked to the public sector and essentially focused on the financial damage caused to public finances by the abuse of a position of power arising from a public post or office, the truth is that, over the past few years, citizens have seen, almost as bewildered witnesses, how corruption has spread over all of society’s layers and elements in Spain. Furthermore, they see how tax fraud within the private business world causes them much greater economic damage than that caused to the shareholders or stockholders of private companies. Together with crimes against the public administration or the economic public policy, citizens have become aware of the economic and social impact resulting from negative conduct against the market and consumers, the common denominator which consists of the importance of the damage and on consumer rights being directly affected by said crimes (e.g. investment scams) or such rights are affected by the damage caused to companies’ competitiveness (e.g. changing prices in public tenders and auctions or the abuse of inside information within the stock market). Likewise, they are aware of the impact of certain corporate crimes on the State economy (fraud concerning the legal or economic status of the company, entering into abusive agreements, or the unfair management which may lead to the company going into bankruptcy).

Since the outbreak of the financial crisis in 2008, citizens have witnessed how many criminal acts within the business world have caused real and direct damage to the whole population. For example, some judicial cases against some Banks for alleged corporate crimes (the
Bankia affair) have exposed the deep economic impact which certain fraudulent corporate acts pose for all citizens, beyond the damage caused to the shareholders of such entities, since such frauds within the private scope have driven up the cost of public services.\(^1\) Citizens have been hit hard—or rather, their pockets have—by how the so-called “bailout” of some banks, due to insolvency situations arising from their own mismanagement, has had a direct detrimental impact on them, since negative economic measures were applied to the whole country’s population. Citizens feel how they must pay for others’ mistakes and how their social rights and benefits are reduced, taxes are raised, or they directly face wage cuts, using euphemistic measures to contain public deficit. Along with this nonsense caused by the avarice of a few, there is social indignation arising from the fact that the leaders of such banks, bailed out using public money, receive millions in payments and outrageous compensations when they leave their positions as officers, while banks cannot face their liability towards their clients.

Therefore, it is no wonder that corruption and fraud are the second concern for Spanish people, only after unemployment, according to the barometer of the Spanish Sociological Research Centre (CIS) in July 2014.\(^2\) What is worse is that such feeling is not only shared within Spain. From abroad, some international concern about the Spanish situation is perceived. In 2004, Spain was ranked number 23 by the International Transparency within the index of perception of corruption. In 2015, it dropped to the 40th position.

In contrast, scholars have resumed the legal debate over whether or not certain special investigation measures should be encouraged, based on rewards and negotiated justice. Such measures are already applied in other countries as very effective tools to uncover, investigate, and punish all those behaviours related with public corruption and economic crime within business. The Report of the Spanish General Prosecutor, published at the beginning of the judicial year 2014, calls for an urgent procedural amendment to allow for the infiltration of undercover agents and to foster the protection given to any reformed offender “as

ways to fight against the most serious cases of corruption in any of its forms and with greater efficiency.” It also highlights the last report of the Study Group on Bribery of the OECD on January 8, 2013, which shows concern about the protection granted by Spanish Legislation to informers who report acts of corruption or crimes within the business scope. However, as I describe throughout this study, the intention to introduce into Spain the concept of the whistleblower who decides to collaborate with the legal system and to submit effective information to the investigation of crimes within criminal organizations, criminal associations or, more broadly, within organized economic crime, if such information is intended to be enforceable within a criminal procedure, it faces significant difficulties and obstacles.

II. WHISTLEBLOWING AND THE REWARD SYSTEM

Along with repression and punishment, States have long encouraged positive behaviours from their citizens by granting all kinds of honours, awards and rewards. Thus, we have the concept of a “Reward System,” which alternates punishment and awards; penalty and reward. As Jeremy Bentham claimed, penalty is a necessary element in the government system, and reward is a useful auxiliary resource, and even if the theory of reward is less important than criminal theory, it also deserves a lot of attention, as it is a sheer force which gives rise to certain services in high demand. More importantly, in 1764, Cessare Beccaria stated in his treatise *On Crimes and Punishments* that “yet another method of preventing crimes is to reward virtue.”

Legal instruments to legally encourage whistleblowing, including financial rewards, are part of this Reward System, as in the USA, UK or Australia, where there are incentive programmes (Bounty Programmes) through which the informer is given economic rewards depending on the amounts the State recovers when uncovering the criminal plot. The Sarbanes-Oxley Act of 2002 and Dodd-Frank Act of 2010 are the main

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3. CESSARE BECCARIA, *Dei Delitti e delle Pene* (1764) translated into Spanish in 1838 and published by the Printing Company of Mr. Manuel Sauri in Barcelona.
exponents of these economic rewards for informers in the U.S., which has a long tradition of incentive legislation in this regard, if we take into account the False Claim Act passed in 1863 to prevent that, during the American Civil War, suppliers of goods to the Union Army would defraud them.4

In Spain, economic rewards to leakers and informers have never been well accepted. It may be due, perhaps, to the Judeo-Christian tradition which for many centuries had prevailed in the Spanish justice, reason by which the whistleblowers were never well seen, if we attend to the best-known informer, Judas Iscariot, who blew the whistle on Christ for 30 pieces of silver. In the letter addressed by the General Inquisitor Sandoval y Rojas to the Duke of Lerma in 1616, he performed the following warning: “the Holy Inquisition does not usually accept accusations based on interest and on promises of money, both on the grounds of the holiness of the Inquisition and its purity, and because said signs are full of suspicions of falseness and do not deserve any credit in accordance with laws.”5

However, there have always been and still are cases of economic rewards given to the informer who reports any crime committed to the authorities. Concerning the past, we just have to remember the so-called “right to rewards for reporting a crime” established in 1903 in the Spanish General Taxation Law and developed in the Rules of the Tax Audit, although it was subsequently repealed under the Spanish Act No. 21 of 1986 (December 23).6 Presently, Article 48 of the Law No. 33 of 2003 (November 3) of the heritage of the public administrations, regulates the so-called “award for complaint” for those who denounce the existence of assets and rights which presumably are publicly owned,

4. Likewise, section 21F of the Securities Exchange Act of 1934 established important incentive measures for informers, and after the reform implemented by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, rewards which could reach 30 percent of the proceeds thanks to the information provided were expressly created.


6. On the right to rewards for reporting a tax fraud, see J.I. Cuadrado Rodríguez, La Denuncia en el Derecho Tributario 69 (Marcial Pons ed. 1995); Antonio Aparicio Pérez, La Denuncia Pública en Materia Tributaria: Génesis, Evolución, Perspectivas de Futuro 108 (Tirant lo Blanc ed. 2002).
in which case they will be awarded with the ten percent of the value of the property or alleged rights, whenever the procedure concludes with its incorporation into the heritage of the State. And Article 6 of the Law No. 7 of 2012, on tax rules and anti-fraud matters, sets that if one of the parties involved in a prohibited operation of cash payment claim that operation, he will be disclaimed from the punishment which entails failure to comply with the measure. Also the Framework Agreement with recruitment agencies for cooperation with Public Employment Services to integrate unemployed people into the labour market, approved by the Spanish Council of Ministers of August 2013, includes in section e, the “Incentive for Solving Irregularities”, consisting in a payment of up to 15% of the payment for incorporating the assigned person, even if such incorporation was not carried out afterwards, when the private recruitment agency provided public employment services with information which leads to imposing on that unemployed person a penalty established in the consolidated version of the Spanish Act on Social Infractions and Penalties, passed by the Spanish Royal Legislative Decree No. 5 of 2000 (August 4).

Beyond any potential financial incentives, in Spain, it is also expected that measures protecting against retaliation for the informer’s collaboration, particularly within the labour and administrative areas, will be established. In the first, we highlight the so-called "immunity guarantee," which protects workers when they are fired in retaliation for having reported certain unlawful business actions, declaring the nullity of said dismissal for infringement of the right to effective judicial protection. In the second, the main instrument to encourage whistleblowing or self-reporting is the reduction or exemption of some punishments for certain administrative offences, which is an economic incentive. For example, Competition Law includes “Leniency Programmes” in Articles 65 and 66 of Spanish Act no. 15 of 2007, pursuant to which the payment of the punishment is exempted or such punishment is reduced for the company or individual who, having been part of the cartel, was the first to report their existence and provide substantial evidence for the Spanish National Commission of Markets and Competition to investigate them. Furthermore, measures against domestic violence and human trafficking, Art. 31 bis of Spanish

7. Among others, see Spanish Constitutional Court Resolutions 14 of 1993 (Jan. 18); 101 of 2000 (Apr. 10); 55 of 2004 (Apr. 19); and 38 of 2005 (Feb. 28).
Organic Law No. 4 of 2000 (January 11) on the rights of foreigners in Spain and their social integration, provide for the suspension of the administrative case to expel foreign women illegally staying in Spain who report being a victim of domestic violence, until the criminal procedure is resolved, and if any, the possibility of granting a residence and work permit in exceptional circumstances. Art. 59 provides a similar exemption to the victim, aggrieved or witness to an act of human trafficking, illegal immigration, labour exploitation and trafficking for forced labour or exploitation in prostitution, if said person reports the facts or cooperates and collaborates with the relevant authorities, providing essential information or testifying in the corresponding proceedings against the offenders.

III. WHISTLEBLOWING AS A MITIGATING OR EXONERATING CIRCUMSTANCE IN CRIMINAL LAW

In Spanish criminal law, the best known cases of said “reward for reporting a crime” for investigation purposes and to discover criminal plots refer to crimes of terrorism, drug trafficking and criminal organizations. In this regard, the criminal privileges included in Arts. 376, 570 4th quarter and 579(4) of the Spanish Criminal Code, are aimed at encouraging the disassociation of the reformed offender from the criminal organization by reducing the penalty by one or two ranges if (s)he collaborates and helps to obtain decisive evidence to identify or arrest the other responsible persons or to prevent the action or development of the organizations or associations (s)he was part of.

There are also other examples in the Spanish Criminal Code that reward the person who reports certain unlawful actions to authorities in which the informer had also participated. For instance, Article 171(3) includes the possibility of not accusing the person who had committed a misdemeanour and reported the person threatening him/her to disclose such facts if (s)he does not perform a specific action,

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generally granting an economic benefit. Art. 177 bis 11th provides for the exemption of criminal liability for victims of human trafficking when their participation in certain unlawful activities was a direct result of the violence, intimidation, deception or abuse (s)he has been subject to, and provided that there is an appropriate proportionality between this situation and the offences (s)he may have committed. Art. 225 bis exonerates the parent who, having kidnapped his infant child, communicated the place where they are staying to the other parent or who was legally taking care of the child within the twenty-four hours following the abduction, undertaking to immediately return him/her and effectively doing so. Likewise, Art. 426 exempts those who, having occasionally given money or any other gift to a public civil servant requested by said civil servant, reported the offence to the authorities before the commencement of proceedings, and within a certain period of time. Art. 462 also provides an exemption for those who retract in due time and form for having given false testimony in a criminal procedure and disclose the truth for it to take effect before a judgment is issued in said procedure. Art 480 of the Spanish Criminal Code provides another exemption for those who avoid a crime of rebellion if they make their report in time, in order to avoid its consequences.

Lastly, another important incentive to encourage and reward the cooperation provided by companies or the persons in charge of them is implemented through the mitigating or extenuating circumstances established in Art. 31 bis of the Spanish Criminal Code, provided that their legal representatives confessed the offence to authorities or collaborate in investigations carried out by providing decisive new evidence and when companies have established effective measures to prevent and detect crimes that could be committed within them (the so-called "preventive compliance programmes") designed to establish control mechanisms to prevent the commission of an offence or to internally investigate and punish said behaviours not only to mitigate damages to reputation, but also to the criminal liability of the legal

IV. WHISTLEBLOWING AS A PROCEDURAL MEANS OF INVESTIGATION?

After checking that many of the criminal procedures related to complex fraud plots have been hindered or withdrawn, not only by the lack of time and resources of the Court System to investigate them, but also by the difficulty of obtaining sufficient evidence charge, the desirability of encouraging whistleblowing from members from the beginning of a judicial investigation is being supported, regardless of whether the true goal pursued by the informer is not the commendable interest to redeem his/her actions by collaborating with Justice, but also his/her own thirst for revenge against his/her ex partners or the pursuit of a penalty benefit, as it is deemed that encouraging whistleblowing would be a useful tool to the extend the effectiveness of criminal prosecution of economic crimes. As we know, the members of crime organizations or people who were bribed by them and stop receiving a preferential treatment (GAL or Filesa cases), or angry ex-lovers (Pujol case), or dismissed employees (Bárcenas case) are a prime source of information to discover such criminal plots. In all these cases, we demonstrate the value of the cooperation of a member of a criminal organization with which we may be able to uncover and punish certain criminal actions, without their decisions arising from repentance reasons or to expiate their guilt, or even to reduce the effects of crimes by covering the damages caused to those (s)he had offended.

The foundations of this Criminal Law reward system, present in many not-guilty verdicts, are political and criminal reasons on the grounds of the criteria of usefulness, as it is deemed that reducing the punishment of those who collaborate in investigations or exempting them from punishment is more useful for prosecuting and judging

certain behaviours, thus encouraging accusations and self-reporting through penalty benefits. Nonetheless, the main issue to be addressed when it comes to legally encouraging whistleblowing as the process to obtain relevant sources of evidence against economic crimes is to determine the scope of the benefits which said offenders would receive as a reward for denouncing the organisers or leaders of the corrupt plot, and particularly, to determine if the "reward" given to someone who has been part of a criminal plot and decides to testify against his cohorts should be a simple reduction in penalty or the total remission of the sentence for especially significant cases (substantive criminal scope) or if such person could be granted full immunity from criminal prosecution (criminal process scope) by introducing a legal framework of criteria to let the use of opportunity in the exercise of criminal action, when it is decided not to accuse someone who, with his/her information, will help authorities to obtain decisive evidence to identify or arrest the other liable parties and to dismantle the criminal plot.

As it can be seen, the regulation of the concept of the whistleblower or "collaborator with justice" is, indeed, a change from an essentially substantive criminal concept to a procedural concept, as there is a keen interest in receiving collaboration from the defendant from the beginning of the pre-trial investigation as an incentive to obtain new evidence in the criminal procedure. Moreover, this may lead not only to a punitive reduction to be determined by the trial court upon the judicial individualisation of the punishment, but also to a lack of criminal prosecution determined by the investigating judge or, if appropriate, the party exercising the criminal prosecution, based on said utilitarian reasons to fight against corruption and corporate crime more effectively. Thus, applying reasons to dismiss or drop the charges on grounds of expediency leads to the early application of rewards similar to those regulated in the criminal law reward system, but without the need to wait for the trial and issuing of the judgement to take place. No wonder it has been recognized that the most powerful and effective stimuli or incentives to encourage collaboration are those used in criminal procedures, as companies that effectively collaborate with the investigation find said "procedural carrots" offered by the

Spanish Public Prosecution Service highly attractive.  

Far from the classic theories about the preventive purposes of the penalty, here lies a utilitarian approach of criminal policy within the scope of state persecution against organized crime, based on said Reward System as another instrument to disrupt it. Thus, the State considers the conflicting interests and principles and determines that the need to identify criminal structures, their methods or the role played by their members, leaders, etc., whose activities are particularly detrimental to Society as a whole and are also something difficult to detect, result in the need to grant certain benefits, not only of a criminal and penitentiary nature, but also of a procedural nature, for those who cooperate in the investigation thereof. It is deemed that this would improve effectiveness in criminal prosecution, because it would undermine the trust between the members of a criminal plot by offering rewards to the first who decides to report the incidents and provide effective assistance to authorities, emulating the famous prisoner's dilemma.  

V. WHISTLEBLOWING AND CURRENT SPANISH CRIMINAL PROCEDURE: LEGAL AND CASE-LAW CHALLENGES TO OVERCOME

For decades, comparative law has procedurally encouraged the behaviour of those willing to report unlawful actions, not only within criminal organizations to which they have belonged, but within the company for which they work or the public administration where they carry out their duties. All of this is achieved not only by implementing attenuated criminal offences or the principle of discretionary power based not only on cooperation with Justice, but on creating

13. Serrano, supra note 5, at 81.
14. In Europe, the report Legal Scope of Non-Prosecution in Europe (J. P. TAK, United Nations European Institute for Crime Prevention and Control (HEU-
many public and private agencies to which information may be given anonymously, and also by receiving protection from the State. Those subjects are the so-called whistleblowers or informers, who report the commission of crimes to people or entities which hold the ability to take measures to correct them. Such information is not only limited to the commission of crimes, it may also consist in denouncing infringements of labour or administrative legislation by their company. To do so, together with the aforementioned economic incentive programmes (bounty programmes) and leniency programmes, there are mainly programmes and mechanisms to protect whistleblowers (witness for the Crown, Informer privilege, and Grant of Immunity).

In Spain, giving information anonymously reminds us of the role played by many informants and traitors during the Franco dictatorship (1939-1975), in which those who could be politically against the regime were accused. But the truth is that anonymous accusations were already regulated and encouraged in Spain in the inquisitorial and secrecy system of the early 13th century, for example, in the Bull of Innocent IV of 7 March 1254 to avoid retaliation in areas infested with heretics, which was later adopted by Boniface VIII. In the current Spanish Legislation, the concept of the anonymous informer is hardly regulated, and only in a limited way within the tax, healthcare or labour areas, as we have seen. However, it is strongly criticized when it is intended to be used in procedural legislation. Indeed, when the person collaborating with Justice has taken part in the offences or has information regarding such, we see how words such as "sneak" or "informer" (whistleblower) have a very strong pejorative connotation and it is easy to appreciate how Spanish Law is still very reluctant to reward offenders throughout the criminal procedure, because it conceives the duty to report a crime as an obligation that citizens have and should be selflessly fulfilled.

NI), Finland, 1986) made a comparative study between regulations in Germany, France, Belgium, Portugal, Ireland, Norway, Denmark and Luxembourg. In Latin America, the concept of the “collaborator with Justice” expressly provided in Mexico ((Federal Law against organized crime, November 7, 1996, as amended by the Act of March 14, 2014); Colombia (from Law No 81 of 1993, amended in 2000, 2004 and 2009); Brazil (Lei No. 9.807 of 13 Julio 1999); or Argentina (under Law No. 25,241).


16. SERRANO, supra note 5, at 97.
without expecting any reward, notwithstanding that, upon the criteria of the court, criminal and penitentiary benefits may be optionally applied to offenders who, for various reasons, undid the damage caused, ceased carrying out such actions, or somehow repaired the damage caused. Although many centuries have passed since the people of Hispania battled fiercely against the Roman Empire, the fact is that the current Spanish legislation holds, in this respect, the slogan "Rome does not pay traitors."  

Nevertheless, in the Spanish criminal procedure there are some concepts which relate to the concept of the "collaborator with Justice" provided in other Legislations, and those legal figures could be an effective way of promoting cases of repentance and collaboration with the Justice System in the task of obtaining valuable information and effective evidences to prosecute and discover crimes of corruption and, in general, white-collar crime. Those are the cases of the protected witness, the anonymous police informer and the reformed offender. Such concepts refer to individuals who, in one way or another, provide police and law authorities with significant information. However, it should be highlighted that important controversies arise from said concepts if they are to be used with the aforementioned utilitarian purposes to disrupt organized crime or plots of corruption and corporate crime which, unfortunately, are more and more common in Spain.

A. Whistleblower as Anonymous Informer?

On a general basis, it is extremely difficult to keep informers of a certain offence completely anonymous if legal proceedings are brought. Administrative proceedings do not allow reports to be made anonymously, as Art. 70(1) of the Spanish Act on the Legal System of Public Administrations requires that any application to bring proceedings is identified with the name and surnames of the interested party. Furthermore, in regard with filling complaints, the Art. 11(1)(d)) of Spanish Royal Decree No. 1398 of 1993 (August 4), implementing the Regulations of the Procedure to Exercise Powers to impose

Penalties, determines that complaints must specify the identity of the person or persons presenting them. In the Labour field, Art. 13(2) of Spanish Act No. 42 of 1997 on the Ordinance on Labour Inspectorate and Social Security expressly indicates that anonymous complaints shall not be processed, and Art. 9(f) of Spanish Royal Decree No. 928 of 1998 (May 14) implementing the General Regulation on procedures to impose penalties for social infringements and files relating to the settlement of pending Social Security contributions, requires that the plaintiff bringing inspection activities prior to the penalty shall include the personal details of the informer and his/her signature, although the so-called "anti-fraud mailbox" enabled since 2013 on the website of the Spanish Ministry of Labour and Social Security\(^\text{19}\) does not require the plaintiff to identify himself/herself and specifies that "The informer will not have to provide personal details. The mailbox will only request information about the alleged irregularities which the informer is aware of." However, in the event that the offences which were originally investigated following a complaint constituted a crime, although Spanish Royal Decree No. 138 of 2000 (February 4), implementing the Regulation on the Ordinance on Labour Inspectorate and Social Security, states that Labour and Social Security inspectors and Labour and Social Security deputy inspectors must keep the origin of any complaint about breach of legal dispositions as confidential, they are excluded from keeping secret any detail, report or record which they may have been aware of "to investigate or prosecute public offences."

Likewise, Art. 114 of the Spanish General Tax Law of 2003 establishes that "public accusations shall not be part of the inspection on administrative proceedings." However, case law has mostly deemed that this does not at all mean that it must be subject to the judicial control determined in Art. 106(1) of the Spanish Constitution. Alike, the Spanish Act on the Stock Market determines that the identity of the entity informing the Spanish National Commission for the Stock Exchange about transactions where inside information could be used shall be subject to professional secrecy.\(^\text{20}\) Moreover, it also specifies

\(^{19}\) See http://www.empleo.gob.es/buzonfraude/index.jsp. One year later, it was reported that 8,192 tax audits had been initiated, contributions to Social Security up to 1.4 million Euro had been settled and fines which amount to 4.4 million Euro had been imposed on offending companies.

\(^{20}\) See Arts. 83 quater and 90 of Spanish Act No. 24 of 1988 (July 28) on the Stock
that the confidential information or data that the Spanish National Commission for the Stock Exchange or other competing authorities receive cannot be disclosed to any person or authority, unless they are requested by the competing legal authorities or by the Spanish Public Prosecution Service in a criminal procedure.

Within the field of the Criminal Procedure, case law has validated the possibility that the police may use confidential sources to gather information that will pave the way for its constitutionally established activity to investigate crimes and arrest offenders, since the value of an anonymous witness is only and exclusively limited to leading or guiding a police investigation, and is something that will lead to finding the incriminating data which could result in the initiation of a judicial enquiry. However, the intention to use in Criminal Procedures the information anonymously offered by the whistleblower through the police informer system would have a very limited scope, as case law has expressly warned that anonymous information can never be used as evidence, not even through the testimony of witnesses, nor may it be used as the direct and only evidence to adopt measures restricting fundamental rights, except for extremely rare matters of necessity (for instance, imminent and serious danger to the life of a person who has been kidnapped). The inclusion of the information offered by the informer in the criminal procedure as incriminating evidence is initially inconsistent with the prohibition of anonymous complaints established in Art. 268 of the Spanish Criminal Procedure Law, which determines that the identity of the whistleblower shall always be specified, as well as with the clearness of case law when pointing out that considering the statements of anonymous police informers, included in the procedure through the testimony of the police, as evidence, infringes the constitutional right to a trial with all its guarantees and, specifically, the right to examine the witnesses and have them examined, guaranteed by Art. 6(3)(d) of the European Convention on Human Rights, as the

Market.


ECHR\textsuperscript{24} has warned, since Art. 710 of the Spanish Criminal Procedure Law is emphatic: it determines that witnesses “must specify the origin of the news, indicating the name and surnames of the person who offered him/her such details, or the way in which said person was known.”

Therefore, the doctrine issued on police informers and witnesses would not be applicable to the "collaborators with Justice" who were perfectly identified and located, and whose contribution is not only initial information comparable to the communication of the notitia criminis, but effective and sometimes essential information to discover the criminal plot and to sentence its leaders, so that the steps to be followed should be that collaborators with Justice were called as witnesses, and if their participation in the offences was known, as co-defendants, and courts should assess their testimonies with particular attention.

B. Whistleblower as Protected Witness?

According to various international recommendations, the enactment of Spanish Organic Law No. 19 of 1994 (December 23) on the Protection of Witnesses and Experts in Criminal Cases was aimed at introducing security and defence mechanisms for those who testify in a court and collaborate with the Administration of Justice against potential dangers which may arise from the person or group for whom said testimony may be used as evidence against a criminal offence. Applying such witness protection measures to those who are willing to collaborate in the prosecution of crimes related to economic corruption or organized crimes as a reformed defendant who decides to cooperate with the legal system do not present any significant speciality, except for the lack of resources of the Spanish system to guarantee an effective protection beyond the duration of the criminal proceeding.\textsuperscript{25}


\textsuperscript{25} On the application of witness protection measures to collaborators with Justice, see I. Sánchez García de Paz, El Coimputado que Colabora con la Justicia penal: Con Atención a las Reformas Introducidas en la Regulación Españolas por las Leyes 7 y 15/2003, 7 RECP 1-33 (2005), available at http://criminet.ugr.es/recpc/; I.J. CUBILLO LÓPEZ, LA PROTECCIÓN DE TESTIGOS EN EL PROCESO PENAL 35 (2009).
Furthermore, together with the provisions of said Spanish Organic Law No. 19 of 1994, Spanish Legislation has other measures to protect these persons, such as the aforementioned support measures against gender-based violence and human trafficking, or even the possibility of refusing the passive extradition of a person whose extradition had been requested by foreign authorities, when that person carried out a relevant collaboration with Spanish authorities against tax fraud, as it happened with Mr. Falciani and the refusal of the Spanish judge in 2013 to extradite him to Switzerland on the grounds of the lack of dual criminality.26

The main problem of using this regulation from 1994 to add information provided by the reformed offender and/or informer is the scope of protection—anonymity, change of identity, family relocation, etc.—which shall be given to the collaborator with Justice, who shall also be called to serve as co-defendant in the proceedings,27 in light of the important consequences which could affect the Court System if a criminal sentence was revoked on the grounds of having failed to respect the rights of defence, immediacy and confrontation of the defendant, due to the fine line between "hidden" witnesses and "anonymous" witnesses, in accordance with the doctrine issued by the ECHR28 related to the Article 6 § 1 of the Convention read in conjunction with Article 6 § 3 (d). These rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he or she was testifying or at a later stage of the proceedings.29 When a conviction is based solely or to a decisive degree on statements that have been made by a person whom the accused has had no opportunity to examine or have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 of the Convention.30

26. See Order no. 19 of 2013 (May 8) of the Criminal Division (2nd section) of the National Court of Spain.
28. An important abstract of the ECHR doctrine appears in the Resolution no. 75 of 2013 (April 8) of the Spanish Constitutional Court.
30. See Lucà v. Italy, 2001-II Eur. Ct. H.R. 295; Al-Khawaja and Tahery v. the Unit-
As these collaborators will not only provide details about the commission of a specific crime but may also inform about the basic structure of the criminal organization, its members, activities, modus operandi, operation methods, links with other groups, place where goods are concealed, etc., it is clear that their collaboration may pose serious risks or danger. Thus, the State should protect him/her or his/her family as a way to obtain such valuable information to dismantle the criminal plot. Nevertheless, applying said witness protection legal measures granted by Spanish legislation may not be a sufficient incentive to achieve such collaboration, given two significant limitations.

First, Spanish regulations on protection of witnesses and experts do not completely establish an "Informer Privilege." Thus, it does not always authorise the complete anonymity of informers in when the defence requires, on a reasonable basis, to know the identity of the informer to guarantee a correct exercise of the right to defence. According to the case-law of the Spanish Constitutional Court on the figure of the witness protected,31 it has differentiated between the anonymous witness and the "hidden" witness (meaning one who testifies without being seen by the accused, but in which the possibility of contradiction and the knowledge of the identity of witnesses—both for the defense and for the judge called to decide on the culpability or innocence of the accused are respected). With respect to the non-disclosure of the identity of the protected witness, case-law has split that, although the right to a fair trial requires, as a general rule, evidence to practice at the heart of the trial's hearing with orality, contradiction and immediacy guarantees, the need to consider the aforementioned fundamental with other interests and worthy of protection rights allows one to modulate the terms of that rule and introduce certain cases of exception, always which are duly justified in response to these legitimate purposes and, in any case, allow the due exercise of the cross-examination defense by whomever is subject to criminal prosecution. These modulations and exceptions serve presence in game of other principles and constitutionally relevant interests that can go with the defendants. In such exceptional cases, the legitimate cause that justifies the claim to prevent, limit or modulate their presence at the trial to undergo personal interrogation of the prosecution and the defence, has to do

31. Among others, see the Ruling No. 64 of 1994 (February 28).
both with the nature of the investigated crime as with the need to preserve their emotional stability and normal personal development. But the fact cannot be ignored that before an accusation based on anonymous testimonies, defense is faced with difficulties that should not be accepted in criminal proceedings.\textsuperscript{32} If the Defense does not know the identity of the person who tries to question, it can be deprived of data that will allow it to precisely prove that the testimony is biased, hostile or unworthy of credit; the defense can hardly prove this if no information enabling him to oversee the credibility of the author, or put it in doubt is provided. For that reason, and according to the Spanish case-law, the anonymous witness statement must meet three specific requirements: The first of them is that anonymity has been agreed to by the Court in a reasoned decision in which reasonably conflicting interests have been weighted; the second, that deficits of defense which generate anonymity have been compensated by alternative measures allowing the defendant to assess and, if necessary, combat the reliability and credibility of the witness and his testimony; and third, that the testimony of an anonymous witness is accompanied by other evidence, in a way that may not, by itself or with an evidence decisive weight, upset the presumption of innocence.

And second, because the protected co-defendant will also be subject to the punishment for his/her involvement in the criminal plot, even if it may be mitigated. He will save his life and may achieve some protection for his family, but will also be condemned and go to prison. How can you convince someone to collaborate and incriminate himself/herself, knowing that (s)he will go to prison and that you cannot guarantee in advance that (s)he will have penitentiary privileges? Concerning the most severe cases of organized crime, with tentacles and networks even within institutions (including prisons), the "carrot" offered to the informer may not be enough attractive to break the law of silence, which is another reason to support the reform of Spanish criminal Legal System to allow not only a reduction in penalty, but immunity to a criminal who has confessed and who collaborates with Justice.

C. Whistleblower as Repentant Offender?

The Spanish Criminal Code allows the "reward" of reformed offenders on the grounds of their cooperation with Justice mitigating their punishment by one or two degrees. In accordance with the privileged types of criminal offence of Arts. 376, 570 quater 4th and 579 of the Spanish Criminal Code, this concept has been accepted by Spanish courts, which admit the information given within a criminal procedure as valid evidence to render the presumption of innocence ineffective. However, the truth is it has also been admitted that said concept creates some issues which many times are outside the procedure itself or the evidence itself, as said informer should be considered a co-defendant regarding the assessment of evidence, and as an informer who provides key details from the time (s)he begins to act pursuant to such repentance. Our courts deem that the problem is not so much legality (without any express procedural regulation on this defendant-witness version) but credibility. Therefore, the Spanish Supreme Court has established that the assessment of the evidence provided by the reformed offender shall be considered on the basis of certain valuation criteria, accepted by case-law but not regulated,\(^{33}\) such as the identity of the informer offender and the relationship which (s)he previously had with partners; the strict examination of the possible existence of shady and unlawful motives (revenge, personal hate, resentment, bribery) which could lead to the testimony of said person being considered false or spurious, or at least significantly undermine its plausibility or credibility; and the need for their testimony to be corroborated by other evidence against the other defendants.

Thus, the major objection to the use of the statement of the informer as a reformed co-defendant is precisely focused on “false reasons” which may have motivated said collaboration. Together with hate, revenge, enmity or self-exoneration, courts may also consider the wish to obtain criminal advantages and benefits as reasons for invalidating said statements, even though not as complete reasons, because they may undermine the credibility thereof. That is why including such testimonies result in \textit{significant yet clearly dangerous evidence which},

therefore, shall be accepted and assessed with extreme caution, since it is an unsuitable, rare and special instrument.\(^{34}\)

Another obstacle concerning its use is that the application of the mitigated types of criminal offence is deemed optional by the court, which must explain in its ruling whether they decide to apply it or not, but which is not bound by a hypothetical previous negotiation between the public prosecutor and the reformed offender, unlike those systems where the collaboration provided by the reformed offender usually arises from a prior agreement between the attorney thereof and the representative of public prosecution, protected by the tolerance to criminal law settlement in such systems. Pursuant to that agreement, the plaintiff waives his right to bring actions on the grounds of public interest. Thus, the accused reformed offender loses said condition or never achieves said status, and only appears as a witness\(^{35}\).

VI. CURRENT AND FUTURE MEASURES TO ENCOURAGE WHISTLEBLOWING IN THE SPANISH CRIMINAL PROCEEDINGS

As we have seen, there are important limitations in the Spanish procedural system when it comes to encouraging accusations from informers, protected witnesses and repentant offenders, as it does not guarantee full protection for the informer or procedural immunity to reformed offenders who decide to become informers who cooperate with the Legal System. Together with this, we have another disadvantage: nowadays, neither the procedural or criminal law foresee the use of "leniency programmes" similar to those included in the administrative disciplinary area of competition law in order to effectively fight against Cartels, or the possibility to authorise the Spanish Public Prosecution Service to enter into agreements with partner companies for non-prosecution (Non-Prosecution Agreements, NPA) or to suspend the exercise of the prosecution (Deferred Prosecution Agreements,

\(^{34}\) Ruling of the Spanish Supreme Court of February 14, 1995.

\(^{35}\) Villarejo, supra note 8, at 8.
DPA) and that such suspension shall be subject to compliance with some requirements—paying certain fines, implementing corporate reforms, fully collaborating with the investigation, etc.

Nevertheless, there are different arguments which allow us to infer that the regulation thereof in the Spanish system is closer than ever, as it arises from some current interpretations of the legislation by the courts aimed at reducing the penalty of those who decide to collaborate with the Legal System, and from certain proposals to establish the principle of discretionary power within our legal system that would, if necessary, allow the accusation to be withdrawn. Moreover, even the scholar sector which has been the most critical with the introduction of the opportunity in the Spanish legal system or with the application of benefits to reformed offenders, acknowledges the effectiveness thereof.36

A. International Recommendations to Introduce a Legal Framework of the Informer (Whistleblower)

The encouragement and development of legal instruments to protect the informant collaborating with justice is a reality already established internationally. Concerning the United Nations, as an example, we have the provisions of the UN Convention against Transnational Organized Crime of 2000 and the UN Convention against Corruption, 2003, regarding measures to encourage cooperation from reformed criminals with State authorities to provide useful information for investigation and evidentiary purposes, through witness protection measures, mitigating punishment and even granting immunity from prosecution. In addition, we also have the works developed within the OECD, such as the 1998 Recommendation on improving ethical conduct in the public services including Principles for managing ethics in the public service, the 2003 Recommendation on Guidelines for managing conflict of interest in the public services, or the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International

36. For instance, the current judge of the Spanish Supreme Court, Mr. Antonio del Moral García, *Justicia Penal y Corrupción: Respuestas, Carencias, Resultados, Posibilidades, 80 JUECES PARA LA DEMOCRACIA 47-73 (2014),* has declared ‘I am not very fond of them (benefits for whistleblowers), but I admit that nowadays it is an element which cannot be ignored’.
Business Transactions. These Recommendations encouraged countries to create clear rules and procedures for whistleblowing irregularities, as well as measures to protect the whistleblowers of said practices. Undoubtedly, the most outstanding work of the OECD in this area is its Report from July 2012 on the Protection of whistleblowers.\(^\text{37}\)

In Europe, the Parliamentary Assembly of the Council of Europe has also focused on encouraging regulations to protect informers,\(^\text{38}\) through a series of guidelines that have concluded with the approval of the Recommendation 7 (2014) of the Committee of Ministers to Member states on the protection of whistleblowers, of April 30, 2014, where Member States are recommended to review their national laws in order to create a policy, institutional and legal framework to protect those who, within the context of their relationship based on work, provide information about threats or damages to the public interest. The study International Principles for Whistleblower Legislation drafted in 2013 by International Transparency, and funded by the European Commission, should also be highlighted. It presents a general assessment of the conformity of the legislations of the member states of the European Union concerning the protection of whistleblowers. Particularly, it does not leave Spain in a good position, as it is stated that: "Spain lacks a comprehensive legislation to protect employees from the private and public sector from retaliation for reporting irregularities. There is no tangible culture for employees or citizens to report crimes or any apparent movement among political leaders to implement legal protections for whistleblowers. Despite strong recommendations from the OECD to improve the situation of the informers, and despite political and economic uncertainties in progress which have undermined public confidence in the leaders of the country, Spain has not tried to apply any measures to protect whistleblowers."


\(^{38}\) Special attention should be paid to the 1916 Recommendation (2010), on the Protection to Informers, discussed at the Parliamentary Assembly of April 29, 2010, and Resolution 1729 (2010) adopted at the Assembly.

B. Expansion of the Plea Bargaining

Beyond international recommendations and trends, it can be said that the reduction of the punishment of the defendant willing to collaborate with the Court System would not be the first case of “negotiated justice” under the Spanish system. In no way would it currently be allowed to grant immunity from prosecution to those who collaborate with justice, as the legislation in force does not permit it, but it is a fact that the use of the principle of discretionary power has exceeded the legal framework of the Spanish Criminal Procedure Law to become a hasty negotiation between the defence and the prosecution. The reforms of the Spanish Criminal Procedure Law in 2003 introduced the so-called "plea-bargaining" in Art. 801 of the Spanish Criminal Procedure Law as a procedural resource similar to an ex post facto confessio with a one-third reduction of the requested punishment for less serious crimes, without requiring in exchange any act of constraint, acknowledgement of guilt or reparation of damages. In principle, this possibility is not available to all defendants, but only in the event of misdemeanours mentioned in Arts. 795-803 of the Spanish Criminal Procedure Law. This is why it has been criticized that such regulation gives rise to a serious problem of unequal treatment of defendants in similar cases, since there is no reason consistent enough not to apply the reduction of punishment arising from plea bargaining in the common procedure of very serious crimes and in the procedure before the Jury, especially when the person recognises the facts during the investigation and when punishment does not exceed three years imprisonment.

However, the truth is that the plea bargaining in previous stages to the hearing has been encouraged to the maximum, to achieve negotiated settlements. The result is a ‘softening’ of the degree of the offences and

40. See Nicolás Cabezudo Rodríguez, Justicia Negociada y Nueva Reforma Procesal Penal (I), 5815 DIARIO LA LEY 1-15 (2003); Nicolás Cabezudo Rodríguez, Justicia Negociada y Nueva Reforma Procesal Penal (y II), 5816 DIARIO LA LEY 1-6 (2003).


the reduction of the penalty that the Spanish Public Prosecution Service will request in his arraignment, pursuant to the situations of consensus which can be reached with the defendant and his defence. If we also take into account the current reductive case law trend concerning the scope of intervention of the private prosecution, it seems increasingly clear that, except for those cases in which the private prosecution has become a party, the sentence to be finally imposed on the defendant collaborating with Justice will largely depend on the penalty the Spanish Public Prosecution Service requests, subject to potentially achieving previous agreements to encourage collaboration to obtain evidence against the other members of the criminal group.

C. Application of the Mitigating Effect of Confession to Acts of Information and Collaboration with Justice

There has also been some evolution in case-law favouring the application of the mitigating factor of the 4th paragraph (confession) to those who provide useful collaboration when investigating crimes, based on the aforementioned utilitarian theories, so that the confession can be accepted as an analogous mitigating factor in any type of crime, depending on its usefulness to facilitate investigation, help to clarify the matters under investigation and, ultimately, save costs for the Court System, since the help given to justice would also save the execution of civil liability,\(^4\) beyond of the assumptions expressly provided on terrorism and drug trafficking.

At a first moment, the Spanish Supreme Court had declared that, in order to apply the plea for mitigating factor, the chronological requirement shall be met. This is that the confession should have been performed prior to the informer being aware of the fact that the procedure had been brought against him/her, understanding that the initiation of police investigations already included court proceedings.\(^5\) However, it soon highlighted that the requirement of strict chronological requirement usually made confessions ineffective when the defendants

\(^4\) See Rulings of the Spanish Supreme Court of October 21, 2003 and February 7, 2005.

had been previously summoned to testify. Thus, since the practice proven that the procedural collaboration of the guilty party usually begins after the detainment by the police, the Spanish Supreme Court amended its doctrine and highlighted the need to extend the concept of mitigation based on pietistic or remorse motivations and address criminal policy reasons, because the confession spares efforts in investigation and facilitates bringing criminal prosecution. Since then, case-law deems that the application of reductions in punishments may be extended to all cases in which confessions, although made untimely, facilitate the outcome of an already initiated investigation. Therefore, it considers that it is necessary to deem that the defendant confessing the crimes, if (s)he became a relevant source of collaboration and helps to incriminate other members, providing conclusive evidence for said purposes, or finding relevant sources of investigation, (s)he must receive a special bonus, always based on reasons of criminal policy, taking him/her into account as highly qualified collaborators based on the intensity of their help. And in response to the request made by the Spanish Public Prosecution Service on the grounds of the information offered by the defendant, the general analogous mitigating factor may always be applied, pursuant to Art. 21.7th of the Spanish Criminal Code, when individualizing punishment.

D. The Future Introduction of the Principle of Discretionary Power in Spain

The possibility of extending the current margins of application of the principle of discretionary power in criminal proceedings is a constant in the attempt to adapt the Spanish legal system to the international trend, highlighting an increased application of discretion in the exercise of criminal action, as we can infer, among other proposals, from the Recommendation R (87) 18, of the Council of Europe of September 17, 1987 on the Simplification of Criminal Justice (recommendation no. r (87) 18 of the committee of ministers concerning member states to the

46. See Rulings of the Spanish Supreme Court of June 23, 2004, October 5, 2010 and February 18, 014.


Moreover, the application of that principle, together with the designation of the Spanish Public Prosecution Service as the governing authority of the criminal investigation, constitute the two main debates of the Spanish doctrine every time we reflect on the reform of Criminal Justice in Spain. More than a quarter of a century after the major reform of the criminal procedure code established under Spanish Law No. 7 of 1988, on which a large part of the doctrine debated the most recent and relevant legal topics when addressing the structure and the principles that should govern the criminal procedure in our country. Given their importance to Society, these two debates are fully current within the procedural doctrine, as well as in the future legislative reforms of Spanish ancient Criminal Procedure Law.

Regarding the role and position that the Spanish Public Prosecution Service is supposed to play in the criminal procedure as a key player in the division of powers in an accusatorial system of Justice, it has been claimed that the Spanish Public Prosecution Service is still unknown to Society; an institution which is little understood by the politicians in charge of the Spanish Public Prosecution Service; a permanent temptation to get involved in its duties and establish links with the Executive Branch; a headache for theorists, an institution that is difficult to shape and which refuses to be naturally categorized into the three areas of power that make up the Modern State. And with regard to the second point of the discussion—the application of the principle of discretionary power to criminal procedure, it appears that the position and powers granted to the Spanish Public Prosecution Service in the criminal procedure, as well as the different rights and options granted to the other litigants concerned, will largely depend on whether it is decided to opt for the application of a pure opportunity, with exclusive monopoly of the Spanish Public Prosecutor when deciding whether

or not to initiate a criminal investigation, or otherwise, a regulated opportunity and subject to the legal control to avoid a discretion that could affect the principle of equality in the application of the Law. So the intervention of the Spanish Public Prosecution Service in criminal procedure is not only mandatory since the late 18th century, but it is aimed at defending the public interest and legality (a fortiori, the equality in the application of the Law) and to exercise public criminal procedure, two aspects inextricably linked to the defence of the principle of equality as a "general principle of the law" and a cornerstone of the Spanish legal system.

One of the main objections to the introduction of regulated discretionary power assumptions when exercising criminal actions is a kind of idealistic approach, which also waives any type of negotiation between the prosecution and the defence. In this regard, it has been questioned if it is an intelligent strategy to force investigating authorities to clarify all crimes using the same methods and intensity, since the material and personal resources of said authorities will always be insufficient. Thus, it cannot be ignored that, even if the criminal legal system is perfect, it is unable to absorb all criminal acts and guarantee the investigation and prosecution thereof. In addition, we must take into account the mandatory period for such investigations, given the limitation time of criminal acts. Therefore, and without utopias, it must be recognized that in practice, expediency criteria are applied when selecting matters to be brought to the system and when selecting cases going in thereof, and on which the police, prosecutors and judges focus their efforts. Thus, one may conclude that the implementation of the principle of the regulated expediency does not encourage arbitrariness, but instead, always governs a selection policy, whether we like it or not, with criteria that is clearly established by law.

Furthermore, it cannot be denied that the Spanish criminal legislation has gradually introduced examples which show the application of the principle of discretionary power. And everything


51. Serrano, supra note (2005), at 5053.
seems to indicate that the future reform of the Spanish criminal procedure will include a general regulation concerning the principle of discretionary power to encourage collaboration from certain individuals in the investigation and dismantling of organized criminal networks. Indeed, the proposal to reform the Spanish Criminal Procedure Law submitted by the Spanish Minister of Justice before the Council of Ministers of July 22, 2011 already featured some types of opportunity, such as closing the procedure "in the event of active collaboration against a criminal organization," although only for crimes committed within a criminal organization and punished with penalties of up to six years imprisonment, provided that the collaborator met a number of requirements established by Law. And the Code of Criminal Procedure proposal submitted to the Minister of Justice on February 25, 2013 extended such limits, by generally establishing the principle of discretionary power in our legal system, under a list of regulated criteria, including the assumption that the perpetrator or participant in the punishable crime fully collaborates with the Court System and the latter is deemed sufficiently relevant by the Spanish Public Prosecutor.\(^{53}\)

That possibility of not accusing whoever is the first person to confess to a crime and collaborate effectively with authorities clearly reminds us of the Leniency Programmes incorporated into the Spanish Competition Law since 2007, whose effectiveness largely depends on the incentives that potential applicants have to submit applications for exemption from and/or reduction of the possible fine (e.g. the guarantees on the anonymity of the applicant for leniency in relation to the confidentiality of the submittal of the application for leniency).\(^{54}\) Therefore, there would be no serious obstacles to extend said “leniency programmes” to the Criminal Procedure, as within the international scope, the current trend is focused on proposing not only the inclusion of measures to protect collaborators with justice who also hold the status of defendants in the procedure, but also on supporting the regulation of the reduction of punishments in cases of substantial collaboration,

52. Art. 153.
53. The Spanish Criminal Procedure Code, art. 91(4).
and even on judicial immunity as a valid way to encourage those who are or have been involved in the commission of crimes to collaborate with Justice.

**VII. CONCLUSIONS**

The possibility of establishing appropriate protection measures, as well as important criminal and procedural benefits which the reformed whistleblower or the member of the corrupt plot who offers to collaborate with the authorities in the prosecution of other members of the organization may access, means granting the Spanish Public Prosecution Service a wide margin of discretion to give up on the prosecution of said persons for certain crimes or subject it to certain conditions, as a means of criminal policy under the pragmatic decision to obtain information that is potentially relevant to identify the white-collar crime and, in particular, to break up the criminal organizations to which the accused party belonged to or collaborated with.

However, this pragmatic solution, that could be dealt with from a criminal material scope (reduction or a full waiver of criminal liability) or from a procedural scope (procedural immunity of the collaborator with justice or the temporary suspension of the accusation made against him), is not consistent with the traditional purposes of the punishment and may not be understood by Society, who see how the offender in question is not only not severely punished for his crimes, but also rewarded for his collaborative actions with state authorities. In fact, the defenders’ proposals of the incorporation of these utilitarian theories to the Spanish criminal procedure has been subject to various criticisms.

Firstly, its unequal character. By rewarding collaboration for the discovery of criminal plots, the higher ranking members of the organization could benefit, to a greater extent, from such discovery, as they have more information to offer, compared with the subordinates. That is, the person who knows the most, and therefore, the guiltiest, will have the greater reward. The applicability of procedural immunity to the reformed offender shall only occur when the accused party is in a position to offer effective and key information. The people that have the
most information are usually those who hold a greater degree of liability within in the organization who, paradoxically, are those who should be charged with having greater criminal liability.\textsuperscript{55} Not surprisingly, the mitigating cause established in Art. 31 bis of the Spanish Criminal Code for the legal persons, demands that the confession made before the authorities or collaboration with the investigation is carried out “through their legal representatives”.

Secondly, the contradiction with the principle of proportionality of the punishments in those cases where the reduction in the penalty is deemed excessive or even when it is completely disregarded is also pointed out. This has been criticized for considering that the total exemption of the punishment would almost be comparable to a legal pardon,\textsuperscript{56} and would lead to a disproportionate benefit for the accused party, as it would mean pardoning the accused for the crimes he has committed.\textsuperscript{57} It has been claimed that promoting collaborative behaviours, without even waiting for sincere repentance, means accepting the fact that the State is unable to carry out an efficient fight against organized crime or corporate crime, so the generalisation of measures exceptionally provided for in the fight against concrete serious crime like terrorism could generate an unacceptable interference in the criminal procedure,\textsuperscript{58} and because those incentives should be temporary and exceptional, and not permanent. Scholars have proposed that it would be more advisable in such cases the way of pardon.\textsuperscript{59} Thus, it has been claimed that “the instruments of the criminal process that put an end to it through the consensus or negotiation between the parties, regardless of the actions leading to the trial, resulting in the saving of personal and material resources, carry out a questionable assessment of values, by favouring quickness and efficiency over justice.”\textsuperscript{60}


\textsuperscript{56} Ortúzar, \textit{supra} note 11, at 192.

\textsuperscript{57} Rodríguez, \textit{supra} note 55, at 7.


\textsuperscript{59} Villarejo, \textit{supra} note 8, at 10.

Pradillo

Ultimately, and perhaps the most important criticism of the introduction of “negotiated” matters to the criminal prosecution is the fear of going back to a time where the interrogation process carried out during the investigation became an inquisitorial method for obtaining evidence\textsuperscript{61} and to the possible exploitation that such a wide margin of discretion, to be granted to the Spanish Public Prosecution Service, could lead into practice. Said negotiation has come to be described as a "way out"\textsuperscript{62} of the process, which could favour the accused party's behaviour, where his first indictment was no longer the result of the specified assessment of the facts and of the evidence produced to be developed in the plenary session, but instead "a mere declaration of intent in which we will see a meaningless aggravation of the criminal charges, beyond what the plaintiff himself deems a fair solution" that it "could even lead to intimidating the accused party with the possibility of extending the accusation to third parties who are sentimentally linked to him or with standing against his interests in obtaining certain advantages" if the accused party does not agree to collaborate with uncovering the facts, so that the Spanish Public Prosecutor could thus become the dominating party in the criminal procedure and, consequently, of the possible application of the State's right to punish, acting \textit{supra voluntas legislatorem}, as if a negative legislator were involved.\textsuperscript{63} This, in the worst cases, would convert such negotiating power during the investigation stage in to possible pressures that, under the protection of the power of the disposition of the accusation made by the Spanish Public Prosecution Service, could lead to a perverse development of the use of provisional detention by the questioning judges with the coercive purposes of uncovering evidence, prohibited by our Courts in the recent past. When facing such criticisms, it is not so evident that the right to the presumption of innocence shall be enough to reduce that hypothetical inequality between the plaintiff and the defence.\textsuperscript{64}

Without going to such extremes and against such criticism, we

\textsuperscript{61} C. Lamarca Pérez, \textit{Tratamiento Jurídico del Terrorismo} 348 (1985).
\textsuperscript{62} Rodríguez, \textit{supra} note 36, at 9.
\textsuperscript{63} N. Cabezudo Rodríguez, \textit{Sobre la Conveniencia de Atribuir la Instrucción Penal al Ministerio Fiscal}, \textit{14 Revista Jurídica de Castilla y León} 211 (2008).
\textsuperscript{64} O. Fuentes Soriano, \textit{Sobre el Fiscal Instutor y la Igualdad de Partes en el Proceso Penal}, \textit{in La Reforma del Proceso Penal} 213 (2011).
must remember that currently, and without the need for any reform in our system, the validity of the doctrine, where the hearing for certain crimes can only be brought by the Spanish Public Prosecutor Service (and if, by the private prosecution, if any) linked to the wide margins with which the Spanish Public Prosecution Service can agree a sentence in accordance with the defendant, now allows the State to use such possibilities as instruments to get the accused party to collaborate more in exchange for that “softer” punishment to be imposed.

It is clear that these reward options are in favour of those who provide information during the criminal procedure, by adopting the appropriate protective measure, but above all when it comes to important legal and procedural benefits in favour of the reformed criminal, also pose moral dilemmas. Where do we draw the line on rewarding those who have committed a crime with a ‘carrot’?

However, against this stance, it could be argued that, if the punishment for negative behaviour (the commission of an offence) could be criminally diminished if the offender behaves positively or otherwise (e.g. the repair of the damage or the confession to the crimes), it could also be claimed that said negative behaviour could be redirected through procedural instruments (e.g. by the decision made not to charge for certain minor offences, the withdrawal of the accusation when an efficient collaboration is made, or the suspension thereof conditioned to certain compliances), when the accused party behaves in a certain, positive way that results in a benefit, not only for the victim, but also for the State itself. If repairing the damage directly benefits the victim of the crimes, the collaboration in dismantling the organized plot, and capturing those responsible benefits the Court System. The Court System would have to allocate fewer resources to the investigation and prosecution of such behaviours and would be able to use the scarce and valuable material and personal resources it has for other investigations which are yet to be discovered.