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Legal Treatment of Political Think Tanks and the Lack of Regulation on Lobbying in Spain

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1. Spanish think tanks: the current state of affairs

Far from the influence that think tanks have had in other territories, particularly in Washington and Brussels, these 'idea laboratories' in Spain are still faced with the short and medium-term objective of consolidating themselves above all as facilitators of public debate to then disclose its contributions and generate influence in the large strategic sectors of the country: major companies and business associations, financial powers and especially political parties.

It's possible that the influence of the think tank in Spain has not reached the levels of visibility that its founders had originally proposed due to two reasons: firstly, the sheer competitiveness of ideas with the heads of different parties and their cabinets, both in constant renewal; and secondly, in particular, the very similar objective that the law has bestowed upon the Spanish media: to be critical and informative, catalysts, mobilizers, with duties of social control and the intellectual reproduction of the general interests of citizens. Its influence on public opinion, as on the strategic sectors, rendered it possible for the media, ideologically fragmented, to have historically occupied the space now being claimed by the think tanks.

So, on a strictly legal basis, the increase in the number of think tanks for the consolidation and development of political parties in Spain – known as 'internal' think tanks – means, especially since the last few years of the Transition period and in the absence of specific legislation, an organizational model susceptible to the support of two legal forms: the foundation, under the Law 50/2002, from the 26th December, on Foundations; and the association, subject to Organic Law 1/2002, from the 22nd March, regulator of the right to association.

Of the 32 think tanks in Spain identified by researcher Marta Tello, six of these could be defined as 'internal' in the sense of being foundationally and concisely linked to different political parties: the Jordi Pujol Centre of Studies (founded in 2005), the FAES Foundation (1989), the Alternatives Foundation (1997), the Marxist Investigations Foundation (1978), the Pablo Iglesias Foundation (1926) and the System Foundation (1981). Until January 2014, there was also the Ideas for Progress Foundation (2008), linked to the PSOE. It is curious that they should all have assumed the legal form of foundation when, as we will see, this is not the only option to consider.

2. The think tank as a foundation

With regards to the first form of the Spanish think tank, the law regards the principle requisite of any foundation as "the fulfilment of general interests". It is significant that amongst the objectives cited by the law, interests of a political or economic nature are not included, except those for the "promotion of social economy", as defined by Law 5/2011, on Social Economy, as "the various economic

and business operations with activities in the private sector, pursuing the collective and/or social and economic interests of its members". These activities must be based on the principle that people are a priority over capital, in autonomous and transparent, democratic and participatory management, in the promotion of internal solidarity and in its independence from public powers.

These objectives, according to the Law on Foundations, do not imply a *numerus clausus*, as nothing prevents a foundation from boosting research or interests in certain business or economic sectors as one of its objectives. An example of this is one of the most prestigious business think tanks in the country: the COTEC Foundation, founded in 1990 and boasting King Juan Carlos I as honorary president.

Therefore out of the thirty-two think tanks identified in Spain by Tello, twenty have adopted the legal model of 'Foundation' with the fundamental objective being based essentially on intellectual thought, the galvanization of ideas and the promotion of values of different general interests. As we have already said, all internal think tanks identified in Spain assume legal responsibility under the Law on Foundations.

3. The think tank as an association

With regards to the second form, there are no less that eight Spanish think tanks that have opted for the legal model of 'Association' under various corresponding denominations. "Non-profit association", "association of general interest" or "private non-profit organization" are some of those most commonly used, and are all protected by the principle constitution of associative freedom. None of them are considered to be linked to political parties but, as we will discover, nothing would prevent them from being converted into think tank associations.

The Association, in contrast with the Foundation, has only to comply with one fundamental requisite: to be "not-for-profit", a term lacking legal definition and which has only been addressed jurisprudentially in its criminal form in relation to Article 270 of the Penal Code, but from whose general guidelines we might infer as "the purpose of the agent to procure any advantage or benefit of a material or spiritual nature" (STS 29/01/1986), or simply as a "gains obtained through any activity" (STS 20/06/1985).

4. Financing think tanks

Considering the associative form chosen by internal Spanish think thanks - that is, the foundation – they all operate on a not-for-profit basis, and receive funds which are of a mixed nature: contributions from their patrons and sponsors, public grants and agreements via the different summons periodically convened by Public Administration. The activities themselves carried out by think tanks are a source of income for their everyday expenditure; activities that are often focused on literary edition and events organization. It is also common for internal think tanks to publish an annual auditory report with the objective of guaranteeing transparency, especially in their public contributions.

5. The relationship between think tanks and political parties

It is understood that, under the legislation currently in force, internal think tanks, whether they are of a foundational or associative nature, are fully compliant with the law as long that they are not considered political parties integrated as an organic part over the different existing political formations, including having collaborated in the formation of political parties. That's to say, according to Jones Tamayo, the relation between them has to be "competitive and not cooperative".

So, is it legally admissible for a think tank to become a political party? The answer is yes. It simply means submitting to a new legal regime along with all its rights and obligations: the Organic Law 6/2002, from the 27th June, of Political Parties.

6. The conceptual framework of lobbying in Spain

Throughout all of history there has been a desire to influence public decisions by individuals or groups. The emergence of the "lobby" phenomenon does not go much further back than the 19th Century and is linked to the processes of industrialization, the recognition of the right to association and parliamentary regulation of diverse economic associations.

Lobbies have traditionally been defined as groups or collectives of influential legal or individual entities, organized to influence

processes of decision-making in favour of certain interests. Socially, this phenomenon has been perceived negatively and its name originates from the 18th Century when members of the British Houses of Parliament christened it "political lobbying".

The lack of regulation in Spain, together with the first steps of policy in Europe and the extensive experience of the United States are escalating the ever-present debate in our current democracy on whether to regulate lobbies in Spain.

7. The lack of regulation in Spain: attempts and a possible regulatory framework

What is absent from our Law is a specific regulation on lobbying activity, whilst initiatives and attempts to regulate this practice have not been lacking.

The first attempt dates back to the formalities of drafting the Constitution, an initiative to constitutionalize the practice of lobbying through Article 77, based on the consolidation and regulation of the right to petition the Chambers. The text was eventually rejected by the Plenary and, as a consequence, Article 77 EC was formed as and how it is today.

Following this there were three parliamentary initiatives on the issue, and two are currently pending. The first was on the 25th of January 1990 by the Popular Parliamentary Group, on the regulation of firms handling private interests converging with public interests. The second was filed on the 28th January 1993 by the CDS Parliamentary Group, another non-legislative proposal to the Plenary on the regulation of advocacy groups. Despite that fact that both were approved unanimously by the Chamber, neither was transformed into law.

The third proposal was also filed as a non-legislative proposal to the Plenary on the 10th April 2008 by the Republican Left United-Initiative of Catalonia, on the creation of a register for lobbies and interest groups. This was eventually rejected.

Finally, the Plural Left Parliamentary Group (January 2012) filed two non-legislative proposals, one to the Plenary and another to the Commission, for the creation of a register for lobbies or interest groups – both of which are still pending.

As we can see, the debate on the necessity and adequacy of a regulation on lobbies is not a new one and in recent years has been more animated than ever. The fundamental reason for the awakening of the debate is the birth of a more or less generalized process of the revision and improvement of our democratic system, in which the principles of transparency and anti-corruption constitute indisputable objectives. This process is being crystallized in Law 19/2013, from the 9th December, on transparency, access to public information and good governance, for which the regulation of lobbies could be an important element.

8. Regulation in the EU

The birth of lobbying in Europe dates back to the first election of the European Parliament, specifically in Brussels in 1979. Currently Brussels, together with Washington, is one of the greatest lobbying capitals and is estimated to have more than 15,000 lobbyists and 2,600 interest groups with permanent offices there.

It is not surprising, therefore, that Europe has already taken its first steps in regulating this phenomenon. The Union's actions regarding lobbying can be separated into two kinds of measures. On the one hand, there is the provision of general information for the public on relations between Union institutions and these groups, and the possibility of some external control. On the other hand, it has adopted rules of practice and a code of conduct for lobbies to follow.

The first significant movement in this direction was the *White paper on European Governance* and the subsequent *Communication* in 2002 prepared by the Commission in compliance with its commitments in the *White paper*. Meanwhile, the *Green paper on the European Transparency Initiative*, prepared by the Commission in May 2006, is totally relevant as it represents an international agreement that defines lobbying as a legitimate part of the democratic system and conceptually frames it by establishing its scope and range.

Assuming that the representation of interests forms a legitimate part of the democratic system, the Commission initiated its own voluntary register of lobbies in Europe in June 2008, and whose first enrolment was Telefónica, Spain's largest telecommunications company.

The Commission made it clear that enrolling in the register does not imply any type of privilege nor permit access to privileged

information. So, the registered lobbyists commit to respecting the Code of Conduct, which contains rules on transparency, honesty and integrity.

This transparency Register, the establishment of which was eventually agreed by Parliament and the Commission in 2011, is based on the public interactive tool in order to enhance the transparency of the EU's decision-making progress. Today the Register has over 6,000 organizations and all information is available to the public.

In contrast to what we can see in the United States or Canada, where proceedings are far more rigorous, in Europe it remains clear that on the whole this regulation reflects an undemanding model whose main element is the voluntary registration of individuals and groups.

9. The legitimacy of lobbying and the adequacy of its regulation

As we keep mentioning, this is not a new debate in Spain, nor elsewhere in Europe. In our country it has not only been discussed in Parliament, but the Courts of Justice have also dealt with the topic on various occasions, granting full legal aptitude and lawfulness to the activity of lobbying (STS of April 7th 2004 and STS of June 11th 2012).

Following the lines of the Supreme Court, the legitimacy of lobby activity is being established in our country. However one of the key elements for reaching the same level as Europe is the definitive separation of criminality, such as influence peddling, trading insider information or forfeiture. Lobbying is a lawful activity with clear objectives: to provide more information and promote the merits of the decision-making of public authorities.

Thus it seems clear that when a certain organized group acts to try to change political reality without resorting pressure or interest, the rule of law should consider offering a less suspicious alternative. Therefore, the idea of the standardization of lobby activity in Spain is constantly given weight by three main objectives intended to be achieved, and which drive forward Law 19/2013 of the 9th December on transparency, access to public information and good governance, as follows:

a) *Transparency:* The non-existence of regulation implies the propagation of grey areas and blind spots, and the tendency to speculate on activity of an undoubtedly lawful nature. Hence, regulation will permit citizens to distinguish legitimate from illegitimate lobbying, such as influence peddling, the use of insider information and professional cronyism, and will make it possible to remove them from daily political life.

b) *Monitoring influence*: A specific regulation is a tool that can control the process of influence that certain groups might have over public powers, and one which is currently lacking.

c) *Europe:* As we have already mentioned, the European Union has already taken the first steps with a voluntary registry of individuals and groups which has been reinforced in the last few tears, and which is also true of all advanced democracies on the European continent.

FOR MORE INFORMATION

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