THE CONTROL OF PUBLIC ADMINISTRATIONS AND THE FIGHT AGAINST CORRUPTION: SPECIAL REFERENCE TO THE COURT OF AUDIT AND THE GENERAL STATE COMPTROLLER

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Short summary of thesis of José Antonio Fernández Ajenjo [the whole text can be read here]

1. The role of public auditing in relation to accountability and corruption.

The duty of accountability for administrators of external resources is an inescapable element of governance, following the principles of accountability and control of public accounts set out in Articles 14 and 15 of the Declaration on the Rights of Man and the Citizen (1789). To this end, democratic societies have created specialised institutions to supervise the management of public funds by the Executive, via the independence vested in Supreme Audit Institutions or internal auditors.

Although the mission of these institutions appears, at first sight, easy to define, i.e. the protection of collective financial interests, the precise scope and functions that should be conferred on them are more complex, creating an important political and academic debate.

Starting with the question of institutional status, in recent decades particular emphasis has been placed on ensuring that public auditors can discharge their functions with independence and sufficient resources and powers to be able freely to express their opinions on control. In this task, which has undoubtedly been helped by the efforts of all audit professionals, the work of INTOSAI and IFAC should be highlighted, as should the widespread support of political institutions.

With respect to the scope of control institutions, new issues such as the environment or urban planning have been presented for discussion in recent times, but there is a topic whose controversy has remained in the spotlight since the debates of the 1977 Lima Declaration. This question is the role to be given to public auditors in the fight against corruption.

Although fruitful agreements have been reached in recent years, the debate on this issue starts from two opposing viewpoints: on the one hand, those who believe, following the majority position within INTOSAI, that "auditors are not policemen", and so can only carry out preventive work against fraud; and, on the other hand, those who argue, as defended by GRUNER (2000), the former Director-General of IFAC, that the investigation of corruption was one of the main tasks of public auditors.

2. Approach to the subject of the thesis.

My doctoral research work has attempted to clarify this debate by analysing the capacities of public auditors to fight corruption in order to establish a scientifically justified argument about what their role in this area should be. To this end, a multidisciplinary study has been conducted of issues such as the scope and concept of corruption, the role and powers of public control institutions, and the independence, legislative and technical regulations, and procedures and reports of public-sector auditing.

As subjects of this analysis, two well-established financial supervision institutions have been chosen: the Spanish Court of Audit (TCE) and the General State Comptroller (IGAE), which guarantee the sound management of the public funds - both domestic and Community - used by the Spanish Government.

My research has focused on analysing the current role of public audits of corruption. Therefore, apart from the historical references needed to understand the roots of the different institutions, particular attention has been paid to comparative experiences, for example the European Union and INTOSAI.

Taking a step further, the study of this problem and its possible solutions has entered the current debate on the problems of the public credibility of governments and the reform of administration needed to meet the demands of citizens of the 21st century. Therefore, issues such as the proposals of governance to bring the institutions closer to citizens, which are among the policies of the European Union and the Spanish Government, as well as the development of guarantees of good administration, latterly included in the Treaty establishing a Constitution for Europe, or the achievements of projects on Governance by the World Bank and the International Monetary Fund (IMF) have been taken into account as a potential source of solutions.

3. Corruption in the public financial sphere.

In democratic societies, corruption is, legally speaking, a manifestation of 'fraud' against the rule of law; in democratic terms, it is an example of 'disloyalty' to the will of the sovereign people; and, in social terms, it deprives citizens of their right to a dignified life, thus confirming, as Montesquieu noted, that *every man who has power tends to abuse it*. Appropriate institutional balances are therefore required.

In principle, corruption is a concept that is easy for public opinion to understand because, as TANZI (2002) eloquently stated, "just like an elephant, although it may be difficult to describe, corruption is generally difficult to recognise when viewed". Therefore, international organisations that combat this phenomenon, including the World Bank or the IMF, use the definition of *abuse of power for private gain* to delimit its scope.

However, a more complex multidisciplinary agreement may be incorporated into conventions and other regulations, as is demonstrated by the fact that the United Nations Convention against Corruption opted not to define a unitary concept but to establish a list of corrupt practices.

After analysing academic debate in various areas, ranging from the early work of NYE, LEYS and HUTTINGTON in the 1960s, to the valuable contribution by ROSE-ACKERMAN in the 1970s and studies from nearly all related branches of study in the last three decades, including contributions by MAURO from an international perspective, and by GARZON VALDES, MALEN SENA and GARCIA MEXIA in Spain, we have decided to propose a concept of an analytical nature.

On this basis, we believe that a corrupt practice exists where there is involvement by a public official (*a subjective element),* failure to observe the duty of service (*a prescriptive element)*, and an attempt to secure illegitimate personal profit (*a causal element)*. In addition, consideration has been given to a number of contingent elements that characterise most illegal acts of this nature, although these are not essential for an infringement to be deemed to have occurred: the *subjective element* of a third party as a corrupting agent, the *material element* of the potential damage to the Administration and the *formal element* of failure to publicise cases of fraud.

In another approach to the investigation of the problem, some studies have assessed the social magnitude of the phenomenon, among which the corruption indicators produced by Transparency International and the governance indicators drawn up by the World Bank should be highlighted. If we apply these indicators to a particular country, e.g. Spain, it can be concluded, as other internal surveys such as those conducted by the Centre for Sociological Research have confirmed, that there is a medium to high level of social satisfaction with the problem, although the boundary with the most virtuous societies in governance terms is never quite crossed.

If the issue of transparency in relation to fraud and corruption is analysed from the perspective of Spanish financial control institutions, there are clear shortcomings insofar as the reports that are published do not make explicit reference to the individual cases of corruption uncovered.

4. The control of corruption in Public Administrations.

Constitutional democracies have built up a complex system of public control that, based on the principle of the separation of powers, has been consolidated by the creation of *ad hoc* institutions and an increase in the role of social control. Although public control originally resided in a system of checks and balances among the different powers, the evolution of liberal democracies has gradually established - on the basis of ROUSSEAU'S ideas about the priority of law and LOCKE'S teleological linking of the executive function - a scheme of control which entails the Executive controlling itself, the Legislative and Judicial branches exercising their own political and judicial authority, and an inspecting Administration and Civil Society. In this context, as RUBIO LLORENTE (1993) stated, control institutions in the history of the constitutional State are "the very heart of the idea of constitution" as the supreme law is simply an instrument for the limitation of power and a guarantee for citizens.

Consequently, as SANCHEZ MORON (1991) stated, the network of government controls has focused on the objective of safeguarding legal and administrative efficiency and individual rights, although it seems to have ignored the primary role of democratic regimes in putting a stop to the abuse of power.

In the case of the Spanish State Administration, there are certain institutions such as the Inspection Service, the Council of State, the State Attorney-General or the State Comptroller-General which throughout their long history have been at the forefront of the struggle against administrative corruption. However, internal controls have not proved effective in these areas because the consultancy authority only carries out formal audits and the inspection authority focuses its efforts on evaluative and advisory functions to the detriment of research tasks.

Furthermore, the Legislative Branch has specialised instruments and institutions such as commissions of inquiry, the Ombudsman or the Court of Audit which not only contribute to political control but also denounce the scourge of corruption. However, as GARCIA DE ENTERRIA explained (2000), the prevailing party State prevents these institutions from carry out such work effectively.

All this means that the fight against corruption currently resides mainly in the role of disclosure exercised by Civil Society, especially the media; the issues identified in the course of investigations by the inspection authority, especially the tax system; and the prosecution of criminal acts by the Courts, in collaboration with the Public Prosecutor's Office.

5. The role of internal control by the State Comptroller-General in the fight against corruption.

The traditional institutional role of the IGAE makes it the guardian of public-sector funds in the domestic sphere, its function being to monitor, as PEREZ ROYO (2008) stated, the correction of abuses that "inevitably occur in an activity as complex as the implementation of the budget". Similarly, INTOSAI's *Guidelines for Internal Control Standards for the Public Sector* of 2004 proposed that one of the objectives of government should be self-control of *the ethical execution of operations and the safeguarding of resources to avoid losses, misuse and damage.*

Nowadays, the IGAE is an institution fully incorporated into the Spanish government which exercises financial control of public funds, including the EU funds managed by Spain. From the functional point of view, in recent years second-generation internal-control models (Latin or continental) have evolved that mainly carry out prior controls of legality, and a subsequent audit of legal and economic regularity.

The current regulations guarantee the IGAE a high degree of functional autonomy and ensure the objective and impartial performance of its control functions. The Auditor-General is assigned an important self-organising and functional role, as well as holding the senior rank of Under-Secretary within the State administration. The legal status of the IGAE's staff also guarantees its objectivity and impartiality, and may require internal collaboration with public authorities and external collaboration with those who have economic relations with the Administration.

Nevertheless, we should highlight two important limitations in legal powers that are vital to the investigation of corruption,

i.e. free access to public buildings and the attribution of authority, without which fully valid credible evidence of frauds cannot be obtained.

The objective scope of the IGAE's work is to verify the proper management of public finances from the legal and economic perspective, thus validating it in principle as an institution capable of detecting corrupt practices, albeit only partially.It can therefore be argued that a corrupt act is always an illegal act and, generally, an economically inefficient one, but internal controls of these aspects do not take account of other relevant factors relating to corruption such as the existence of an improper advantage for officials or the possible involvement of third parties. It can thus be stated that the verification of fraudulent operations and the integrity of officials is not a priority of internal financial control.

If the functional aspects are analysed, prior intervention was less effective in preventing the misuse of public funds because the new legislation did not include appropriate powers of investigation, such as unexpected access to public buildings, the lodging of appeals and claims, or the restriction of unfavourable reports to strict legality criteria in the so-called control of basic requirements. A similar path was followed by the control approach which subsequently emerged in the 1980s with the aim of inspecting fraudulent activities in the management of public resources; this was later to include the performance of audits associated with the verification of annual accounts and the compliance with the law. By contrast, the monitoring of subsidies has fully assumed an inspection function designed to detect losses of public funds and, where appropriate, to demand enforcement of the responsibilities arising from the fraudulent actions detected.

Despite such limitations, the IGAE is expressly authorised to investigate fraudulent practices through its *Special Reports* in which it draws attention to facts that appear to reveal the existence of criminal acts, whether of an administrative or accounting nature. However, its effectiveness in the fight against corruption has the disadvantage of being purely auxiliary and reactive, as it only begins when signs of fraud have been detected by internal controls.

Of more direct significance is the IGAE's forensic audit function where it collaborates closely with the Courts on economic crime by virtue of its organic law, providing assistance with appraisal, intervention and judicial administration. In addition, it assists the Public Prosecutor's Office through the Support Unit established in the Anti-Corruption Prosecutor's Office which participates in searches and other criminal investigations.

6. The external control of the Spanish Court of Audit in the fight against corruption.

The guarantees offered by the Supreme Audit Institutions (SAIs) in exercising their functions in the fight against corruption is a widespread concern among professionals and researchers, as has been demonstrated by the repeated debates within INTOSAI. Although there is general agreement in the field of public audit on the measures needed to guarantee the institutional independence and functional capacities of the SAIs, the issue of the anti-fraud role played by these institutions is still a matter of considerable debate.

This disparity is also seen in the solutions adopted by various national and international SAIs. For example, the European Court of Auditors has decided, in keeping with the majority view of the members of INTOSAI, to declare that its role in the fight against fraud is to warn of the risks of corruption, while the U.S. General Accountability Office has fully assumed an anti-corruption role, including it within its remit. At the Spanish Court of Audit, the majority position restricts the institution's liability in this regard to the detection and reporting, in the words of former President NIETO DE ALBA (2006), of the 'moral hazards' that favour misconduct in the management of public funds.

To analyse what the TCE's role in this area could be, it has to be taken into account, as JIMENEZ RIUS (2007) noted, that the institution's current legal and technical powers meet all the standards that INTOSAI requires to validate an SAI's independence, such as autonomy with respect to Government, its own functional and internal organisation, or guarantees that its members cannot be removed. Nevertheless, some researchers have pointed to certain shortcomings in the TCE's functioning, such as the predominance of political parties which seek to influence its decisions, or the institution's staffing arrangements, which display limitations in the selection, appointment and empowerment of public auditors.

Following its historical tradition of auditing public accounts and prosecuting those identified as liable, Article 136 of the Spanish Constitution of 1978 requires the Spanish Court of Audit to report each year to Parliament any abuses and irregularities which it has discovered in the course of its audit work. However, as subsequent legislation has not established the fight against corruption as a priority, the annual programmes focus on controls aimed at legality and efficiency,

although in recent years, on its own initiative or at the instigation of Parliament, fraud-related audits have been included, mainly in the field of urban development. In addition, control staff have broad authority to carry out audits, although some important gaps remain, such as the power to demand information from third parties or the conferral of authority.

In any event, the Spanish Court of Audit is assigned a dual function that endows it with the judicial authority to follow up the financial responsibilities highlighted by its audit work, such as the need to recover losses to the Administration resultulting from corruption and the embezzlement of public funds.

However, most research has emphasised that this anti-fraud function has two important procedural limitations on its effectiveness. The first is the existence of a preliminary forensic audit which, based on *prior actions* or *separate pieces,* is difficult to overcome because the investigator does not have full investigative powers since he is closely linked to the results of previous audits or contributions by individual complainants. The second concerns the restrictive legal conditions for civil action which, although mitigated and made flexible by legislative changes, still require a complainant to provide detailed references of the allegedly illegal acts, data that can only be obtained after painstaking research work.

Therefore, in our opinion, following the views of MENDIZABAL ALLENDE (2001) as representative of the majority position, if the institution's purpose is to facilitate the general principle of parliamentary accountability, it must also be entrusted with the task of safeguarding public interests, defending honest managers and raising public awareness of illegal actions, inefficiency and corruption.

7. Proposals to reform the role of financial control institutions in the fight against corruption.

The search for a solution to reduce the gap between the expectations of citizens - who repeatedly ask why auditors have been unable to prevent cases of corruption - and the powers of financial control institutions to prevent the fraudulent use of public funds should take account not only of the deliberations and experiences of public-audit organisations such as INTOSAI, the ECA or the GAO, but also of the reform proposals relating to ethics and the proper management of public resources that have been generated at institutions like the UN, the World Bank, the IMF or the EU under the influence of ideas such as Governability, Good Administration and Governance.

The approach to *Governability,* understood as the capacity of government to prevail over other social systems of power, arises in the context of development aid promoted by the World Bank, the IMF and the UN, in recognition of the need to establish a democratic system of government that holds sway over other external agents and whose premises should include the sound organisation of institutions of control.

The translation of these ideas into an institutional role for specialised control institutions in the fight against corruption refers back to the position of those, such as INTOSAI or the ECA, who argue that the work of public auditors is merely to draw attention to the regulatory and management weaknesses that facilitate fraudulent activities, as opposed to those, such as the majority of academics or the GAO, who have chosen to give a preeminent role to auditors in the fight against the defrauding of public interests.

The proposal advanced prefers the latter option in order to avoid what GARCIA DE ENTERRIA (2000) calls the principle of blind confidence, which, based on the premise of the good will of public managers, replaces the principle of investigative control with relative and rational confidence based on accountability in order to obtain a sufficient understanding of actions by public managers.

The proper performance of this new mission requires institutional independence to be strengthened so as to avoid interference with the institutions' technical activities. In this connection, a number of solutions have been successfully implemented by other organisations, such as the establishment of a public appointment process, in line with the approach by the Nolan Report, and the creation of an auditors' statute, as demanded by professional associations.

Similarly, the proper technical investigation of public fraud requires the specialisation of public-sector audit in such matters, although national and comparative examples offer two alternatives: the creation of an *ad hoc* agency, such as the European Anti-Fraud Office, which tries to mitigate the weaknesses identified by ECA Special Report No 8/98, or the creation of a specific unit within the organisation itself such as the Forensic Audits and Special Investigations department of the U.S. GAO.

The existence of units partly designed for this purpose within the Spanish control institutions has led us to favour the second option, i.e. the creation of an *Anti-Fraud Unit* at the Spanish Court of Audit and the conversion of the First Section of the IGAE's National Audit Office into a *Forensic Audit and Special Investigations* unit.

In addition, the proposals relating to Good Governance and Administration return to the issue of good administrative management that was a priority for certain established experts, such as HAURIOU. Within this new framework, public leaders are required, as noted by RODRIGUEZ-ARANA (2006), to have the abilities and techniques needed to guarantee citizens' welfare through efficient, legal and democratic governance, which should also be characterised by responsibility and quality. This paradigm should apply to two groups, namely public managers and citizens as a pillar of the democratic system, being viewed in the latter case as an authentic basic right, exactly as described in the *European Constitution* (Art. II 101 TEC), the *European Charter of Fundamental Rights* of 2000 and the *European Code of Good Administrative Behaviour* of 2001.

In contrast to the archetype of good administration lies the concept of maladministration, including administrative irregularities (legal or economic), governmental irregularities (corruption) or individuals irregularities (fraud). This new concept, which has its origins in the institution of the Ombudsman, has been developed in the European Union in the context of the protection of financial interests since the *First Report of the Committee of Independent Experts on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission* of 15 March 1999.

This new conception of good administration requires a rethinking of financial control objectives so as to incorporate parameters such as quality, transparency or accountability and, particularly in the latter case, the fight against fraud and corruption. From this perspective, the audit institutions must assume and strengthen their investigative functions to ensure more effective detection of fraudulent practices.

Thus, the inspection function requires a proactive approach to the discovery of public fraud that incorporates the investigation of illegal and improper activities into financial control work, as in the case of the U.S. GAO and entails special monitoring of high-risk areas until the defects that jeopardise public resources are corrected.

In a complementary capacity, institutions should be endowed with the investigative powers they need to uncover the truth behind the dossiers, for which the powers of OLAF and the ECA can serve as a reference, allowing access to all types of buildings, personnel and documentation, and the practice of on-the-spot checks and inspections.

The last bastion of current administrative reform is Governance, where, as PRATS (2006) notes, the aim is to establish quality interaction among public bodies and with social actors. This approach includes the objective of respect for ethical values since, as GARCIA MEXIA (2008) highlights, a governance agenda cannot be developed without dealing with the legitimate use and related abuse of power. Accordingly, the *White Paper on European Governance* (2001) proposed a renewal of European procedures on the basis of the principles of openness, participation, accountability, effectiveness and coherence in order to open up the process of the development of EU policies to a greater number of participants.

From the perspective of financial control, the first task is to address the establishment of a single audit model that ensures the proper functioning and coordination of public-sector audits in order, as was pointed out by BLASCO LANG (2004), to prevent inefficiencies in the fragmented and uncoordinated implementation of control powers.

This model should follow the guidelines set by the pioneering *Single Audit* proposal of the U.S. GAO, and the principles and rules recommended in *Opinion No 2/2004 of the Court of Auditors of the European Communities on the 'single audit' model,* for which permanent committees should be established with a view tofostering inter-agency collaboration and mutual trust. These organisations should operate within the framework of anticorruption policy, e.g. by coordinating research on high-risk areas, by permanently delegating the investigation of accounting responsibilities to regional institutions or by creating a *National Database of Financial Accountability.*

Such interaction in the public sphere should also extend to social participation in the prevention and prosecution of corruption since, as the *White Paper on European Governance* highlighted, greater involvement by civil society requires "a structured channel for their feedback, criticism and protests" as a means for citizens to express their concerns and to support those suffering from exclusion and discrimination.

This approach leads us, from a financial control perspective, to propose the adoption of legislation to facilitate civil action demanding financial responsibility, the establishment of a public denunciation procedure to highlight any accounting or criminal responsibilities, and the right to petition for audits to be carried out. Moreover, from a technical perspective, hotlines should be established to make it easier to lodge complaints in a confidential manner and by any means afforded by modern technologies.

Lastly, social inter-collaboration must be considered the cornerstone of full transparency in the actions of public authorities, but, as ROSE-ACKERMAN (2001) reported, inspection reports are often written in a language replete with euphemisms behind which authentic cases of fraud are hidden. Therefore, in line with the conclusions of the 16th INTOSAI Congress of 1998 on combating corruption, the establishment of a communications policy is recommended in order to maintain a good relationship with the media, to create effective channels of public disclosure for audit reports and other relevant information, and to produce appropriate reports that are understandable and easy for recipients to use.

As a corollary of the collaboration of the financial control institutions in the fight against corruption, the Spanish Court of Audit has been proposed as the ideal candidate to produce the regular Report on the State of Corruption in Spain as advocated by Article 10 of the United Nations Convention against Corruption, either directly or through a committee similar to the Portuguese Council for the Prevention of Corruption.