CORRUPTION: THE ROLE OF THE PUBLIC PROSECUTION SERVICE WITHIN THE FRAMEWORK OF THE COURTS OF AUDITORS, THE PORTUGUESE CASE

1. Today it is hard to figure out an activity with any social or economic relevance without involving public money, in one way or another.

Anyone watching TV, reading the newspapers, surfing the Internet, soon realizes the extent to which Europe uses (and misuses) public money in the support of risky economic ventures and projects that were traditionally reserved to the private sector.

The State bears the losses of the banking sector, supports industrial and agricultural production, encourages the set-up within the country of foreign companies or the internationalization of national businesses, stimulates the export of national products, promotes the industry of culture and often that of entertainment and subsidizes clubs and sports activities.

The State does this in many ways, directly and indirectly.

It subsidizes and supports with own funds and participates in the processes of those originating from the different bodies of the international community, promotes exemptions and differentiations of tax rates for certain economic activities, forgives interest relative to debts held by individuals to various publicly-owned bodies.

When the liberal speech on the limits of the role and functions of the State is on the agenda, such view can only be ironic and motivates certain perplexities.

In fact, more than participating competitively in areas that have traditionally been associated with the private initiative, the State, on behalf of competitiveness and development of the national economy, bears its risks and supports it financially in different ways, by allocating public funds which have been saved by citizens basically with the payment of their taxes.

At the same time, in an apparent contradiction, there has also been the limitation of the means of the State's direct administration and the reduction of its own competences.

Actually, many of the social tasks that were previously carried out directly by the State are now achieved on its behalf by private entities, without apparently any financial gains or improvement of the quality of services.

On one hand, there has been the 'corporatization' of health care services, the privatization of its management, the handing-over to the private management of public transports, the postal service, telecommunications, land transport networks, water, electricity, etc.

On the other hand, according to this same process, there has been a growing handling of public monies by a group of autonomous and private bodies and entities that are naturally harder to be controlled by the State.

In short, the State has increasingly interfered with economic activity, but its means and mechanisms of direct social intervention have shrunk accordingly, and its resources have not been channeled only or chiefly to ensure the services that serve the common interest.

Tony Judt, the famous English historian recently deceased, took a critical approach when he said that there has been a transfer of responsibilities from the State to the private sector. A «mixed economy» of the worst kind has been developed, in which a private company is indefinitely financed by public funds.1

In addition, many of the agents that at some point in time performed governance or public administration functions are already occupying positions, directly or indirectly, in the private sector, in areas of public interest which were previously under their responsibility.

Many of those entities that indirectly are entrusted with pursuing activities that cater for public needs are, however, according to their nature, most oriented to their own profit than to the pursuit of common good.

The confusion between the rationale and the purposes in the use of public monies has therefore been growing, and there is the need for more scrutiny, control and accountability of everyone involved in their management.

The quality and demand in the control of use of public monies therefore gain an importance that we could have never imagined.

What is needed, therefore, is to assess the equity, the transparency and even the need for and cost-effectiveness of allocating and using public monies in initiatives that are not necessarily originating from the State or the Public Administration itself.

The importance of this control must entail forms of enforcement of liability.

2. The concept of criminal «corruption», no matter how broad its definition is set in the different national legislations and international treaties, does not yet provide full legal cover to the reality and the sociological perception that society has of this phenomenon.

As a matter of fact, despite the introduction in many European legal frameworks of the new concepts of corruption for the private sector by Framework Decision No. 2003/568/JAI, of the Council, of 22 July, the truth is that the sociological dimension of corruption – the way citizens think and understand the phenomenon of corruption – is extended to a growing number of other situations that can be punished or not by law.

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[1] *The Guardian*, 20/3/2010.

On the other hand, the detection of corruption phenomena, as such, appears in our societies is too many times associated with the action of the media or with complaints of entities that have been rejected in the businesses with the State and, in many cases, they are ready to participate in that sort of crime.

From the standpoint of the bodies that defend the legality and seek to avoid the social damage associated with corruption, it is therefore necessary, beyond a concern with prevention, to find mechanisms that enable us to carry out a regular pro-active activity.

Only in this way is it effectively possible to detect situations that can be susceptible to indicate irregularities in the use of public monies, which are only justified in many cases within the context of acts that imply the previous practice of offences of corruption.

Today, the citizens of many European countries suffer the effects of a «crisis» for which they cannot be directly liable, contrary to what some theories suggest, which mix up concepts of pure racism with a radical liberal ideology.

This crisis has resulted, in many cases, from political and economic options and from an administrative activity carried out in favour of an exclusive interest of private entities - national, communitarian and even external - which even negotiate with the public powers the use and management of public monies, saved with the effort of taxpayers.

Apart from the shallowness and external appearance of things, trying to find out who made these choices, who benefitted from them and who, within the governments and public administrations, earned profits irregularly or unlawfully, there is a true demand of citizenship more than a need for a criminal policy.

Only by constantly and effectively verifying the legality and rationality of use and management of public monies can it be possible in a timely fashion and with accurate data, to provide the necessary tips to the bodies of criminal jurisdiction that are engaged in the pursuit and punishment of corruption.

Among these bodies are the Courts of Auditors based upon the French model, which exist, for example, in countries like France, Italy, Belgium, Spain and Portugal.

As a rule of thumb, these bodies assume the independent status of the «true courts», and in some of those countries they are even part of the same constitutional judicial power.

In other countries, such functions are only performed by National Audits which respond, with independence, before the respective Parliaments, but they only give opinions justifying the political decisions that they might make.

3. The Portuguese Tribunal de Contas (Court of Auditors) exercise the function of financial and jurisdictional control in relation to those entities which are part of

the Public Administrative Sector (PAS) and of the Public Business Sector (PBS) and, in general, to all those entities that administrates or uses public moneys (article 2 of Law 98/97).

Taking into account the framework provided by the Constitution of the Republic and by the Organizational and Procedural Law of the Tribunal de Contas (Court of Auditors), the examination or financial control function comprises the application of fundamental powers which, according to the criteria for examination or control implementation, can be presented as follows:

- powers of a priori control;

- powers of concomitant control;

- powers of successive or a posteriori control.

Through its powers of a priori control, the Tribunal de Contas (Court of Auditors) verifies if the acts, contracts and other instruments which generate expenses or are representative of direct and indirect financial responsibilities as set out by law35, are in compliance with the laws in force and if the respective expenses can be covered by the allocated budget.

The competency related to this type of control is carried out by means of seal approval concession or refusal in the legal acts subject to said control or through a declaration of conformity.

Seal approval concession falls under the competency of the 1st Chamber in the daily sessions.

Although dependent on ratification by the Court, the declaration of conformity falls upon the Support Services of the Court and occurs when there are no doubts as to the lawfulness of the act or contract.

Should a seal approval or declaration of conformity be refused, the respective act or contract becomes null and void.

The public entities described in no. 1 of article 2 of the Court Auditors Ac , as well as “the entities of any nature created by the State or by any other public entities to perform functions originally provided by the Public Administration, with costs incurred for transfer of the budget from the entity which has created them, whenever an abstraction of acts and contracts to the Court of Auditors a priori control occurs.

Within the scope of its powers of concomitant control, the Tribunal de Contas (Court of Auditors) accompanies the application of acts, on tracts, budgets, programmes and projects and, in general, the financial activity carried out before the closing of the respective management.

All entities cited in article 2 of Law no. 98/97 are subject to this kind of control, that is, those entities comprising the Public Administration, be they part of the

Public Business Sector or the many entities responsible for managing public resources.

Within the scope of successive or a posteriori control, carried out following the end of the financial year or the closing of management and once the annual accounts have been drawn up, the powers of the Court are vaster and consolidate the following types of control:

- evaluation of the application of the State Budget and of the Autonomous Regions, through drawing up opinions on the respective accounts;

- carrying out audits of the accounts of PAS entities so as to evaluate the respective internal control systems, taking into consideration the legality, efficiency and effectiveness of their financial management;

- carrying out any and all types of audits related to legality, sound financial management and internal control systems, based on certain acts, procedures and partial aspects of financial- carrying out any and all types of audits related to legality, sound financial management and internal control systems, based on certain acts, procedures and partial aspects of financial management, or the sum of these aspects, in the entities cited in article 2;

- internal verification of accounts limited to «analyzing and conferring the accounts only to numerically demonstrate the operations carried out, which integrate the debit and credit of the management team, showing the opening and closing balances and, if that be the case, a declaration of extinction of liability of the secured treasurers.».

From the above, it can be concluded that auditing is the fundamental means for ensuring the control action of this Court.

4. Although many systems that chose the French model include members of the Public Prosecution Service in its organic structure and assign them relevant functions in the pursuit of financial offences and in actions leading to the replacement of public monies, not always these special prosecutors – or those who perform those functions – include the staff of the Public Prosecution Service of the Republic, which acts in all other jurisdictions.

It is precisely at this point that the Portuguese Tribunal de Contas is a model example.

At the Portuguese Tribunal de Contas, the Public Prosecution Service is represented by attorneys directly appointed by the Superior Council of the unique body of the Republic Prosecution Service.

They are therefore part of the same body of prosecutors that act in all other jurisdictions.

In compliance with the Constitution of the Republic and the Statute of the Public Prosecution Service, the Organic Law of the Portuguese Court Auditors

foresees the intervention of the latter Body before the Tribunal de Contas (Court of Auditors), represented at Headquarters by the Attorney General (who may delegate his/her functions to one or more assistant public prosecutors).

The Public Prosecution Service intervenes officiously in the 1st and 3rd Chambers, and as set out in point 4 of article 29 of Law no. 98/97, «all reports and opinions approved following verification, control and auditing actions» must be submitted to it and may attend the 2nd Chamber sessions.

It should be previously notified of the processes, so that it could deliver opinion on the legality of the questions posed by them. It must be pointed out that the Public Prosecution Service has the pre-eminence competency to request judgment to the enforcement of financial liabilities.

Thus, the relationship between the Tribunal de Contas (Court of Auditors) and the Public Prosecution Service is really significant.

So, as to ensure the necessary technical and administrative support for the competency of the Public Prosecution Service and upon the latter's request, the Directorate-General provides the necessary staff and other specific support, namely the drawing up of studies and opinions.

5. This particular characteristic of the Portuguese financial jurisdiction does not only play by the needs of a proper organizational model of the Portuguese Public Prosecution Service. It concerns however the specific status and responsibilities of the Tribunal de Contas in the control of legality of public expenditure.

This advanced conception of the Tribunal de Contas justifies the constituent’s will of the Portuguese judiciary of being provided with a specific financial jurisdiction.

At the same time, there is also the need for an interface body –the Public Prosecution Service – being active in all jurisdictions that allow for enforcing different levels and types of liability arising from the specific competences and actions of financial control conferred on the Portuguese Tribunal de Contas: a priori control, concomitant and successive control.

The Prosecution Service has therefore within the framework of the Portuguese Tribunal de Contas a competence that is co-natural to its status and that consists in the initiative to submit a sanctionatory or reintegratory case to court relative to all Audit Reports that the Portuguese Tribunal de Contas identifies as suspected of committing financial violations.

Nevertheless, the Public Prosecution Service itself, because it consists of attorneys of that unique national body, is properly fit to launch all initiatives that are adequate to simultaneously hold liable the same offenders in the criminal and administrative jurisdiction.

In truth, the Public Prosecution Service that represents the Public Prosecutor at the Tribunal de Contas is appointed indistinctively by the Superior Council of the Prosecution Service to the Supreme Courts – Supreme Court of Justice, Supreme Administrative Court, Constitutional Court and Tribunal de Contas – and, after being placed in one of them, is provided however with the power to launch legal procedures in any other jurisdiction.

Today, many of the most relevant and significant cases from the point of view of the fight against corruption that are brought to the Portuguese courts of justice directly result from the warnings and claims made by the Prosecution Service at the Tribunal de Contas originating from the Audit Reports that are brought to it.

6. The approach of the Prosecution Service at the Tribunal de Contas regarding the Audit Reports therefore aims at three objectives:

- first, to hold the offenders financially liable;

- second, to forward the said reports to the administrative jurisdiction with the purpose of cancelling the contracts that generate unlawful expenditure;

- and finally, to detect signs and check indications of corruption that may have determined the illegalities detected by the Tribunal de Contas.

From this triple analysis of the facts shown in the Audit Reports, it is therefore possible for the Public Prosecution Service to articulate, at the level of the different jurisdictions that incorporate the judiciary, a joint judiciary strategy.

I refer to an intervention plan of the Public Prosecution Service that involves the different jurisdictions and that simultaneously aims at preventing the socially pernicious effects of the acts and contracts generating unlawful expenditure, recovering and coping with the damage already made to the public coffers and punishing, financially and criminally, the different agents that were responsible for the unlawful acts detected in the Audit.

For example, let us see the cases related with urban planning and expansion.

In many of these situations it is possible to verify, from the audits carried out by the Tribunal de Contas, signs of unlawful financial acts by the entities that legalized and made the business possible.

It is also possible to verify damages for the environment and territory planning and seek to prevent them through the specific relevant role of the administrative jurisdiction.

It is also possible, as is common, to detect an entire network of corruption of the public authorities and entities that endorsed those projects.

7. It turns out that, if it is true that the Portuguese system allows for this capacity of interactive action of the Public Prosecution Service in the different

jurisdictions, an adequate organization model that enhances its virtues is still lacking.

In truth, it would also be necessary an organizational model that consistently would allow for gathering together in one single specialized Prosecution Service, experts in these three types of Law: financial, administrative and criminal.

This aims at obtaining from that vertical and specialized organization the best possible outcomes: efficiency, effectiveness and enforcement of the action of justice.

It is true that the existence of a single court of the Public Prosecution Service for all jurisdictions makes it easier to speed up information that is of interest to anyone of them and to allow for proactivity leading up to public scandal.

This undoubtedly reinforces the efficiency of investigation.

There is also the need for an optimized organizational model which simultaneously concentrates, devises and carries out a coordinated and efficient intervention of the Public Prosecution Service in all jurisdictions.

The challenge that must be addressed in the future is to combine the traditional horizontal and territorial mechanism of a Public Prosecution Service, which generally exists in all countries before each jurisdiction, with vertical and specialized mechanisms that are also able to intervene in a simultaneous and coordinated manner in all jurisdictions in the cases of corruption.

Only in this way can we concomitantly devise a single procedural strategy that, making use of distinct procedural mechanisms, allows for reducing future damage, recovering damage that has already occurred and punishing those responsible for related infractions and offences.

The area of resource organization and the real specialization of prosecution offices in view the perspective of criteria related to the social and economic matters on their own and not only, as it is usual, of the different jurisdiction will probably provide a new field of reflection that MEDEL may soon start to develop.

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António Cluny