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## 主 論 文 の 要 旨

論文題目

Analysis of the Prosecutorial Activity of the Supreme Audit Institution of Peru

氏 名

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## 論 文 内 容 の 要 旨

In Peru, the Supreme Audit Institution (Contraloría General de la República; hereinafter CGR) is expected to play an important role in curbing corruption. For this reason it does not only conduct public audits but it has also been mandated to: 1) accuse civil servants if they commit criminal activities and 2) to sue civil servants if they cause economic damages to the State by infringing administrative regulations. However, several newspaper columnists have repeatedly criticized CGR for accusing and suing civil servants unfairly or unnecessarily (Althaus 2014, Blume 2013, Du Bois, 2009; Kuckzynsky, 2009; Webb, 2009; Bullard, 2008). These critics, however, have never been supported by empirical data and, thus, these remain controversial. Moreover, CGR claims that it is the judiciary which fails to imposing appropriate sanctions.

In this context, the objective of this Ph.D. dissertation is to answer empirically the following research questions: Does CGR's prosecutorial activity contributes to enhancing accountability and curbing corruption? How and why? Or alternatively: how and why not? This dissertation also proposes some policy recommendations aimed at improving CGR's accountability role without diminishing the performance of the public administration.

In order to answer these research questions, this Ph.D. dissertation is composed of three parts. The first part (which includes chapters 1, 2 and 3) introduces the basic concepts of supreme audit institutions (hereinafter SAIs), such as their main models, scope of mandates, types of public audits, their role in corruption fighting, and the different types of relationships that SAIs establish with the public administrations. Part 1 makes clear: 1) that the specific characteristics of public administrations determine the organizational features of SAIs; and 2) that public administrations need to be audited in different ways, depending on their specific characteristics. Hence, there exists a two-ways relationship between SAIs and public administrations. On the one hand, SAIs contribute in making public administrations accountable and thus in shaping public administrations. On the other hand, SAIs organizational features are highly determined by the

specific characteristics of the public administration in which it operates.

The first part of this dissertation also includes a discussion regarding the corruption-fighting role that corresponds to SAIs. Different expectations exist on SAIs regarding this matter and thus it is important to reconcile such expectations. Most SAIs representatives consider that identifying and prosecuting corruption is primarily the responsibility of other investigative institutions (such as the police, the public ministry, and anti-corruption agencies) (Borge, 1999; INTOSAI, 1996). However, the most specialized up-to-day literature agrees that SAIs should also contribute in fighting corruption by surfacing or signaling possibilities of corruption to these other institutions that specialize in corruption fighting (Alastair, 2008; Kayrak, 2008; Khan, 2007). In other words, SAIs should participate actively in the National Integrity System (see: Pope, 2000; Dye and Stapenhurst 1998; Langseth et al., 1997). It should be noted, however, that there is still not agreement among scholars regarding this issue and, thus, there are still some demand for a more active participation of SAIs in corruption fighting and even to develop mechanisms to identify corruption (Dye, 2007).

The second part of this dissertation (chapters 4 and 5) presents the main features of CGR in the context of the Peruvian public administration. The Peruvian public administration is organized following the Modern Public Administration model and the Principle of Legality; but, it suffers from severe deficiencies that are common among public administrations of developing countries (e.g., various labor regimes that do not follow any rationality, unclear rules of administrative responsibilities, different salary regimes, lack of administrative capacity, excessive and detail regulations that cause red tape, high personnel turn-over ratio that hinders the efficiency of the public administration, widespread non-abidance by the rule of law due to either lack of administrative capacity or corruption, etcetera). These circumstances make CGR's priority to enforce the public administration's abidance by the rule of law. To some extent the specific characteristics of the Peruvian public administration incentivize CGR to prioritize audits of compliance over audits of performance. These characteristics (as well as the strong social demands for corruption fighting) may have arguably justified CGR's assuming a prosecutorial mandate and undertaking an intense prosecutorial activity.

Part III is composed of three sections. Chapter 6 analyses the cost-benefit relationship between CGR's public audits and CGR's operational costs. Chapter 7 analyses the legal reasonability of CGR's prosecutorial activity (both criminal accusations and civil lawsuits) and its incentives in the public administration.

Finally, the Conclusion makes some legal and policy recommendations in order to improve the accountability role of CGR and to eliminate its negative incentives.

At the institutional level, Chapter 6 finds: a) that every year CGR's running costs are higher than the economic damage it is able to identify through public audits; b) that CGR's recoveries in the judiciary are insignificant compared to its running expenses; and most

importantly c) that an overwhelming majority of civil servants sued and/or accused by CGR are found by the judiciary not to be responsible of having caused economic damages to the State and/or not guilty of having committed any criminal activity.

Chapter 7 analyses 35 criminal files and 34 civil lawsuits against Peruvian civil servants. For the most part the author of this dissertation agrees with the judiciary's decisions. In the study of these 35 criminal files (which contain 61 independent criminal cases in which 194 civil servants were accused of committing 305 different crimes) the author of this dissertation identifies that CGR accuses civil servants unnecessarily and in excess (only 3 civil servants were found guilty of committing 6 crimes). CGR over-prosecutes civil servants due to the following reasons: a) CGR criminalizes civil servants for exercising their administrative discretion or decision-making powers if there exists technical discrepancies between civil servants and CGR's public auditors; b) CGR criminalizes civil servants who do not perform administrative tasks (instead of initiating the corresponding administrative disciplinary process); c) CGR accuses civil servants by presuming them guilty (i.e., without adequate and sufficient proof); d) CGR accuses civil servants even when facts do not meet all the elements of a crime (i.e., some elements of a crime may be present but not all of them); and e) CGR prioritizes criminal processes instead of seeking compensation through civil proceedings. In this section, the author demonstrates that compliance audits are not conducive to identifying and proving acts of corruption. The author argues that the main reasons that explain CGR's over-prosecutorial activity are: a) CGR's unrealistic expectations regarding a SAI's real possibilities to identify corruption; and b) the combination of CGR's narrow interpretation of the Principle of Legality (i.e., limited discretionary power of civil servants) with an expanded interpretation of what constitutes a crime.

In the 34 civil lawsuits the author identifies that: a) CGR succeeds at suing civil servants who infringe administrative regulations in order to obtain personal benefits for themselves; and b) that CGR prosecutes civil servants unnecessarily when sues them for exercising their administrative power of discretion. The latter cases explain why most civil servants sued by CGR are found not responsible of causing economic damages to the State. The author of this dissertation considers that CGR's sues civil servants unnecessarily due to strong inadequacies in the rules that govern the civil responsibility of civil servants. Indeed, according to the Peruvian legislation civil servants are responsible of the economic damages they cause even if they acted with mild fault (a burden that is very uncommon for any modern public administration).

This dissertation responds its main questions in Chapters 7 and the Conclusion. Firstly, it finds that CGR over-prosecutes civil servants by presenting criminal accusations and civil lawsuits based on weak legal grounds. This over-prosecutorial activity disincentivizes the decision-makings of the public administration because CGR's prosecutorial activity sends the following message: that civil servants will face criminal accusations and/or civil lawsuits if CGR's auditors do not agree with their political, technical and/or managerial decisions. If this occurs civil

servants will have to explain their managerial decisions to judges and will bear the costs of a judicial processes (not only monetary but also non-monetary costs; such as time-consuming, diminish social reputation, etcetera). Secondly, this dissertation concludes that CGR's over-prosecutorial activity and its extremely inefficient performance are caused by: 1) CGR's own rationality; which corresponds to the Weberian model of public administration and the Roman legal tradition in which CGR is embedded; and 2) severe deficiencies in the legal regulations of civil responsibility of civil servants.

The reasons that explain CGR's over-prosecutorial activity point-out the right directions to address the root-causes of the problem. Hence, in order to deter corruption and to promote abidance by the rule of law in the Peruvian public administration, the author of this dissertation proposes the following: 1) to re-define CGR's accountability role in order to strengthen a more comprehensive and well working system of accountability (i.e., a National Integrity System); 2) to modify the liability rules for civil servants in order to protect them from nuance litigation and, thus, to incentivize or accelerate their decision-makings; and 3) to progressively prioritize audits of performance over audits of compliance in order to promote more efficiency in the public administration.

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