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

by

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*To my parents.*

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| | |
|---|---|
| CAS Regime: | Administrative Contract of Service Regime (Legislative Decree 1057). |
| CGR: | SAI of Peru (Contraloría General de la República). |
| CGR's Organic Law: | Organic Law of the National System of Control & the Supreme Audit Institution (Law No. 27785, from 23rd July 2002). |
| C.C.: | Civil Code of Peru. |
| IDB: | Inter-American Development Bank. |
| INTOSAI: | International Organisation of Supreme Audit Institutions. |
| MOF: | Manual of Organization and Functions. |
| MPA: | Modern Public Administration (Weberian Model). |
| NPG: | New Public Governance. |
| NPM: | New Public Management. |
| NRCS: | New Regime of Civil Service (Law 30057, from July 2013). |
| OECD: | Organisation for Economic Co-operation and Development. |
| S/.: | Soles (Peruvian currency). |
| SAIs: | Supreme Audit Institutions. |
| SCJ: | Supreme Court of Justice. |
| SERVIR: | Peruvian National Authority of the Civil Service (Autoridad Nacional del Servicio Civil – SERVIR). |
| STAR: | CGR's Superior Tribunal of Administrative Responsibilities. |
| TI: | Transparency International. |
| VFM: | Value for money. |
| WB: | World Bank. |

# INTRODUCTION

## 1. Research Significance and Objectives

Differentiating between policy design and policy implementation has received severe criticism in the past few decades (Hughes, 2003) but it remains useful for academic purposes. In the sphere of the policy implementation there are various administrative systems, the most important being: i) planning and budgeting; ii) management; and iii) monitoring, evaluating, and auditing. This research deals with the auditing system of Peru (also known as "the system of control"), which is mainly conducted by the Supreme Audit Institution of Peru (hereinafter CGR[1]). The main questions this PhD dissertation answers are: *Does CGR's prosecutorial activity contribute to enhancing accountability and curbing corruption?*[2] *How and why? (Or, alternatively: how and why not?); and, what policy alternatives can be proposed to improve CGR's accountability role without diminishing the performance of the public administration?*

Supreme Audit Institutions (hereinafter SAIs) are independent intra-state agencies that make public administrations accountable through financial audits, audits of compliance, and audits of performance[3]. The accountability role of SAIs is regarded of high importance for guaranteeing financial governance, anchoring the rule of law, controlling political power, and enhancing the efficiency of the public administration.

However, SAIs must pursue their mandate in a careful manner because too much accountability is considered to paralyse the public administration (Bovens et al., 2008; Rose-

1 The official name of CGR is *Contraloría General de la República.*

2 The term prosecutorial activity refers in this dissertation to CGR's mandate to present civil lawsuits and criminal accusations and to actively participate in the judicial processes thereafter originated.

3 See *Chapter 2: Main Features of Supreme Audit Institutions.*

Ackerman, 2007; O'Donnell, 2003; Borge, 1999). In this context, the purpose of this research is to determine if the prosecutorial activity of CGR is either contributing to enhance the efficiency of the public administration or undermining it.

The Peruvian public administration suffers from insufficient technical capacity, non-abidance of the rule of law, and high levels of corruption. To Transparency International (2013) corruption perception in Peru scores 38/100 and ranks 83 among 177 countries. According to the Worldwide Governance Indicators 2012 (World Bank, 2013), corruption control in Peru scores -0.39, government effectiveness scores -0.16 and abidance of the rule of law scores -0.61, all of them on a scale from -0.25 to +0.25. In this context, two of the main problems that Peru faces today are: i) how to raise the credibility of public institutions and ii) how to improve the efficiency of the public administration (Burdescu et al., 2006). Paradoxically, while the first problem may be overcome by strengthening the accountability role of CGR -and particularly its prosecutorial activity-, the second problem may be worsened by undertaking such action. According to World Bank's special country report *"An Opportunity for a Different Peru: Prosperous, Equitable, and Governable"* at the beginning of this century, the balance between public administration efficiency and corruption control in Peru shifted in detriment of the public administration's efficiency (Burdescu et al., 2006), which suggests that the accountability role of the SAI should be lessened.

In assessing the risks of exercising too much accountability in detriment to the efficiency of the public administration, the specific objectives of this research are: i) to analyze the legal reasonability of the prosecutorial activity of CGR; ii) to inquire how the prosecutorial activity of CGR impacts on the public administration; iii) to explore the theoretical (managerial and legal) reasons that explain how CGR conducts its prosecutorial activity; and iv) to propose, if possible, legal and policy advice to guarantee that CGR fulfills

the following SAI objectives: i) to enhance the efficiency of the public administration, ii) to strengthen the rule of law, and iii) to contribute in curbing corruption. The final objective of this study is to contribute to having an honest, competent and empowered public administration in Peru, as well as a competent and efficient SAI.

This Ph.D. dissertation is composed of three parts. Part I introduces the reader to the role of SAIs and its relationship with different public administration models. Part II presents the main features of CGR in the context of the Peruvian public administration. Part III analyzes CGR's efficiency in auditing the public administration and CGR's prosecutorial activity when suing civil servants for having caused economic damages to the state and when accusing them of corruption and other crimes. The last section of this dissertation includes the research conclusions and some legal and policy recommendations for improving CGR's accountability role.

## 2. Literature Review

The academic interest in SAIs is relatively recent. In the last two decades some progress has been made in the manner SAIs self-report their activities (Talbot and Wiggan, 2010), and some independent empirical studies has also been conducted. Still, it is generally recognized that empirical studies continue to be scarce (Schelker, 2008; Torgler and Schaltegger, 2006; Santiso, 2006; Torgler, 2005; Wang and Rakner, 2005; Schwartz, 2000) and that "little is known on what explains the effectiveness of autonomous audit agencies" (Santiso, 2006: 100)

Most of the incipient literature on SAIs refers to: i) their role as financial governance institutions; ii) the principal-agent relationship that some SAIs establish with the national congress; and iii) their corruption-fighting role. Regarding SAIs role as financial governance institutions, some progress has been made since Santiso affirmed that "causality relations

between external auditing and fiscal performance remain uncertain" (Santiso, 2007: 45). In 2008, a cross-state study in the USA found that *audits of performance* have a positive and significant influence on the fiscal performance of the U.S.'s states[4] (Schelker, 2008) and that "*performance audits* seem to have a beneficial impact per se" (Schelker, 2008: 32)[5]. However, a cross-country study reported that "institutional and organizational structure of SAIs (...) are not significant for explaining differences in (i) fiscal policy, (ii) government effectiveness and (iii) total factor productivity" (Blume and Voigt, 2007: 24).

In a second study, Mark Schelker found that "removal procedures [of auditors-general] have a negative and significant influence on [Moody's] credit ratings. The easier it is to remove the auditor from office the higher are the credit ratings." (Schelker, n.d.: 23). This finding is consistent with the political sciences literature that regards tenure-stability as an important element for guaranteeing the independence of SAIs (Moreno et al., 2003). Regarding time of tenure, Schelker found that state audit institutions tend to perform weakly when the mandate of the auditor-general is too short or too long (Schelker, n.d.: 23). This author found that an auditor-general's tenure of maximum two consecutive terms of 4 years is significantly correlated with higher credit ratings. However, the ideal time-tenure is controversial and Schelker's findings cannot be extrapolated easily to other countries because the ideal time-tenure depends on too many factors (e.g., the appointment system of auditors-general, the time-tenure of auditees or governments, the possibility of governors' re-election, the quality of the public administration, etcetera). Nonetheless, it is generally accepted that when time tenure is too short auditors-general may not acquire enough expertise (*know-how*) for fulfilling their role, and when time tenure is too long there is a high risk of endangering

[4] Schelker's study measured fiscal performance using Moody's credit ratings.

[5] It should be noted that SAIs of European countries with Roman legal tradition (e.g., Spain, Italy, France) and SAIs of Latin American countries tend to emphasize *audits of compliance* over *audits of performance*.

the auditors' independence by forming too close a relationships with the public administration (Schelker, n.d.).

In Switzerland, Schelker and Eichenberger found that "auditing individual projects after implementation is negatively correlated with tax rates" (Schelker and Eichenberger, 2010: 368) and that "audits have a more important impact in larger than in smaller municipalities" (Schelker and Eichenberger 2010: 377). In the same country, Torgler (2005) found that ample mandates of SAIs increase the credibility of governments and the "tax morale"[6] and, in a later study, Torgler and Schaltegger (2006) found that "a higher audit court and local autonomy competence have a significantly positive effect on individuals' [political] discussion intensity" (Torgler and Schaltegger, 2006: 21-22).

From the political-science perspective, Wang and Rakner (2005) found that the SAIs of Malawi, Uganda and Tanzania "are not able [to] fulfill their assigned tasks due to lack of finances, infrastructure and human capacity" (Wang and Rakner, 2005: v). The authors consider that independence of auditors-general in these countries is doubtful because the president participates in their appointment –and in the case of Tanzania there is not even approval by its national congress[7]. In these three countries the quality of their annual audit reports were regarded as "substandard". In the case of Tanzania nearly 90% of its qualified/negative reports do not include a clear statement of the matters giving rise to that qualification (Wang and Rakner, 2005).

In Israel, Schwartz conducted a study based on the principal-agent theoretical framework[8] and found that: i) there is a lack of accountability because "not all large and very

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6 Tax morale is not a willingness to pay more taxes but the intrinsic motivation to comply with tax regulations.

7 In Peru the President of the Republic also participates in the appointing of the Comptroller General. See Chapter 5.2 "The Independence of the Comptroller General: An Appointment System that Creates a Mantle of Suspicion".

8 The Principal-agent relationship is characterized by "a contract under which one or more persons (the Principal(s)) engage another person (the Agent) to perform some service on their behalf which involves

large programs were audited frequently" (Schwartz, 2000: 415); ii) the SAI of Israel only carries out a limited number of audits of performance; and iii) the SAI of Israel does not fulfill its accountability role because "logistical and political considerations of Members of Knesset [Parliament] limit their interest in using audit reports" (Schwartz, 2000: 406), and audit reports "often receives no attention from the Knesset State Audit Committee" (Schwartz, 2000: 425). Consequently, Schwartz recommends the SAI of Israel to undertake more audits of performance and to strengthen its Principal-Agent relationship with the Knesset.

Also following the Principal-Agent theoretical framework, Santiso (2007) provides ample evidence that the SAI of Argentina is unable to fulfill its accountability role due to its lack of independence from the political power[9]. The Chilean SAI is recognized for having "decisively contributed to anchoring probity and integrity in the public sector [...] but causality is difficult to ascertain" (Santiso, 2007: 32-39)[10]. However, to Santiso, the SAI of Chile risks becoming an outdated institution as it suffers from a weak relationship with its Principal, the Congress. Finally, Santiso found that "[in Brazil] the designation of auditors-general follows partisan lines, with final choices subject to political negotiations among

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delegating some decision-making authority to the agent" (Jensen and Meckling, as quoted by Streim, 1994: 177). Following this theoretical framework SAIs are fully effective only when their Principal (Parliaments) are willing and able to follow-up on the SAIs' recommendations.

[9] For example "political parties in the legislature are able to interfere with the auditing process at several stages, from the definition of the agency's work-plan to the follow-up of audit findings. As a result [...] audit findings are often negotiated, rather than evaluated on their own merits" (Santiso, 2007: 16). Moreover, "In March 1990 [President] Menem dismissed the members of the TCN [*Tribunal de Cuentas de la Nación*, former Argentinean SAI], and replaced them with close allies led by his own brother, Eduardo Menem" (Santiso, 2007: 18). Santiso concludes that "the independence of the auditors-general and that of the entire staff of the AGN [Auditoría General de la Nación, current SAI of Argentina] is compromised by the partisan origins of their nomination [...] audit independence (objectivity and neutrality) has three main dimensions: the political independence of its governing authorities, the impartiality of its staff, and the ability to perform its tasks independently. None of the three dimensions of individual independence are fulfilled in Argentina" (Santiso, 2007: 16).

[10] In fact, the SAI of Chile is highly institutionalized because "the individual independence of the comptroller-general is reinforced by an unwritten rule according to which the deputy comptroller-general succeeds the comptroller-general. As the comptroller-general nominates his deputy usually from within the ranks of the agency, he or she largely determines his or her succession". (Santiso, 2007: 35).

political parties within each chamber [...] Nevertheless, the politicization of the college of auditors-general is partly counter-balanced by a stable, professional and cohesive staff." (Santiso, 2007: 25-26)[11].

While the above literature is important to understand the complex nature of SAIs, the most relevant studies for the purposes of this research are those that tackle the SAIs corruption-fighting role. For example, Blume and Voigt (2007 and 2011) have found that countries are more likely to suffer from lower levels of corruption if their SAIs follow either the Westminster or the Board models rather than the Court of Accounts model[12]. Interestingly, SAIs modeled as courts tend to privilege audits of compliance over audits of performance (van Zyl et al, 2009; Pereira et al., 2009; Kayrak, 2008; Santiso, 2007; Torgler, 2005; Dye and Stapenhurst, 1998)[13].

Secondly, public audits have long been considered to have a deterrence effect on corruption. Olken (2007) measured this effect among Indonesian village authorities. When villagers were previously warned that public works would be audited (raising this probability from 4% to 100%) missing expenditures dropped 30% (from 27.7% in the average control villages to 19.2% percent). This confirms that SAIs may play a role in curbing corruption, as delinquents analyze the possibilities of being caught and punished. However, these findings cannot be easily extrapolated because civil servants tend to be better educated and better

[11] It is also important to mention that Santiso (2007) elaborated an index to measure institutional effectiveness of SAIs. The index considers four variables: (i) the independence from the executive, (ii) the credibility of audit findings, (iii) the timeliness of audit reports, and (iv) the enforcement of audit recommendations. Although this index is an important contribution for the financial governance literature, it has some important caveats. For example, it measures "formal" or "legal" independence and not "real" independence. Besides, Santiso also misses to consider that "enforceability" can be executed by various other agencies of accountability (e.g., anti-corruption agencies, public procurators, public ministries, and the judiciary). See: *Chapter 2.1: Conceptualizing Supreme Audit Institutions as Independent Intrastate Institutions of Accountability.*

[12] SAIs organization models are discussed in *Chapter 2.2: Organizational Models of Supreme Audit Institutions.*

[13] CGR has been hybridly modeled. It is headed by a Comptroller General but it also has an independent tribunal within its organization. Besides, it undertakes more compliance audits than performance audits.

informed about both loopholes in the legal system and limitations that SAIs face to identifying and proving fraud and corruption.

Thirdly, Ferraz and Finan (2008) studied the effects of a Brazilian SAI's fighting corruption program where 60 random municipalities were audited in the midst of an electoral campaign and audit summaries were posted online. Ferraz and Finan found that mayors of municipalities where no corruption cases were found increased their chances of being reelected from 45% to 53%. In other words, honesty -or the efficiency that correlates with it- is rewarded by society, and SAIs can contribute in making honesty visible to the citizens. By contrast, mayors of municipalities where one corruption case was identified had their chances of being re-elected lowered from 45% to 40%. Where two cases of corruption were identified, the mayors' chances of being reelected were 30%, and with three cases of corruption chances of reelection fell to 20% (Ferraz and Finan, 2008). In another Brazilian study, Pereira et al. (2009) confirmed the negative incidence (calculated at 19%) in the possibility of being re-elected if improper activities occurred and were made public in an electoral year. However, this study demonstrates that this effect tends to disappear if corruption is detected and made public before the electoral year (Pereira, et al., 2009).

Although SAIs may have some effects in curbing corruption by making it possible for the citizenry to elect candidates that have not fallen into corruption, its actual success in punishing corrupt authorities is much more limited. Olken noted that audit findings of the SAI of Indonesia were mostly procedural in nature (e.g., that tendering processes of public procurement were not properly followed, that receipts were incomplete, etcetera) and therefore useless evidence to prove corruption. He concluded that reports of such findings "might not have led to criminal sanctions even in the presence of a fully functioning legal system" (Olken, 2007: 225-226).

In general, SAIs have failed at both curbing corruption (Dye and Stapenhurst, 1998) and imposing pecuniary penalties. For example, in Italy, the SAI is considered to "very rarely" present its findings "in such a way that a personal liability arises for governmental officials" (Forte and Eusepi, 1994: 158); in Brazil, pecuniary penalties are usually overturned by the judiciary, and "after appeal processes the collection rate of fines is less than 1% of original fines" (Speck, 1999: 10); and in Argentina "almost one fourth of audit reports [from 2000 and 2001] were redirected to the public prosecutor's office and to judicial authorities, as there were suspicions of malpractice, fraud or corruption. Yet, these have had little effect, except when relayed by the media or the opposition" (Fadel, quoted in Santiso, 2007: 17).

To Dye and Stapenhurst, SAIs in developing countries "need to reconsider the role of [imposing administrative] sanctions and penalties" (Dye and Stapenhurst, 1998: 7). These authors stress that SAIs' administrative punitive mandates are no longer in place in most Western developed countries because this "creates an environment where the auditor is feared and perhaps not respected as a professional advisor who adds value to the entity [and] the modern view is that learning lessons from mistakes is more constructive than penalizing bureaucrats" (Dye and Stapenhurst, 1998: 7). Within this logic, SAI's prosecutorial mandates should also be removed or at least carefully reconsidered to determine if the prosecutorial mandate of SAIs is: i) having the expected results (i.e., punishing crimes); and ii) putting in place the right incentives to enhance the efficiency of the public administration and to curb corruption. It is within these parameters that this dissertation examines the prosecutorial activity of CGR.

## 3. The Importance of Supreme Audit Institutions in the International Development Agenda

The international community has recognized the importance of SAIs. The United Nations' General Assembly issued a special resolution on "Promoting the efficacy, accountability, effectiveness and transparency of public administration by strengthening supreme audit institutions" (Resolution No. 66/209, 22 December 2011). This UN resolution recognizes that SAIs play an important role for development by promoting good governance, accountability, transparency, efficiency, and the effectiveness of governments.

The World Bank has also identified the importance of SAIs, especially because of their contribution to good fiscal management. From 1997 to 2002 at least 90 World Bank lending agreements (to 38 countries) were given under the condition that the accounts of the states would be audited by national SAIs, that audit reports would be published, and that States would strengthen the legal framework of SAIs (World Bank, 2004). After this period, the World Bank reduced the use of such conditionality clauses but its contributions to SAIs became more specific. In the last decade the World Bank has provided grants to about 30 SAIs (Migliorisi and Wescott, 2011: 14). Whilst some projects have been considered unsuccessful (e.g., the Indonesia Audit Modernization Project) others have shown positive results (e.g., Azerbaijan, Honduras, and Mozambique) (Migliorisi and Wescott, 2011). The World Bank has also formulated a Strategy for Supporting and Strengthening Supreme Audit Institutions (World Bank, 2004) as well as a Governance and Anticorruption Strategy, which reaffirms the importance of strengthening SAIs (World Bank, 2012).

The Inter-American Development Bank (IDB) has also disbursed various loans for strengthening SAIs in Latin America and the Caribbean. Santiso (2005) counts nine such loans from 1993 to 2004, for a total of US$ 66.76 million. This includes a US$ 12 million

dollar loan to Peru for the "Modernization of the Office of the Comptroller General"[14]. In September 2013 a second IDB loan to Peru was approved for US$ 20 million (IDB, 2013b). The three main objectives of this second loan are:

- To increase the number of audits in local governments;
- To support new roles for government oversight and to support the adoption of budgeting for results; and
- To strengthen internal control of public entities.

The international donor community has also increased its support to SAIs. Migliorisi and Wescott (2011) studied the contribution of nine OECD countries and found that from 2000 to 2002 these countries allocated US$ 8.3 million in projects that specifically referred to SAIs in their titles. From 2003 to 2005 these countries increased their funds to this type of project to US$ 11.53 million, and from 2006 to 2008 allocated US$ 22.69 million to this type of project. However, these contributions do not necessarily represent an increased concern regarding the importance of SAIs. In fact, it is the relative importance that specific countries gave to SAIs in specific years which explains much of these variations. For example, in the second period (2003 - 2005) the support of only two countries (Norway and the Netherlands) made up 89.33% of the total (US$ 10.2 million), and most of the funds were provided in the same year[15]. In the third period (2006 – 2008) it was also the support of two countries (Norway and Canada) that made up most of the bilateral support to SAIs (US$ 14.23 million, which represents 62.71% of the total) and funds were also provided at specific moments[16].

[14] Santiso (2005) considered US$ 10.15 million for this project because it was at its approval stage on February 2004. However IDB disbursed US$ 12 million in 24-12-2004. This project was closed in 7-5-2012 (IDB, 2013a).

[15] In 2003 Norway provided US$ 3.23 millions and the Netherlands provided US$ 4.58 millions to these projects.

[16] In 2007 Canada provided US$ 7.25 millions and in 2008 Norway provided US $ 5.58 millions.

In Peru, the German Cooperation Agency (GIZ) is currently executing a Good Governance and State Reform Project. According to GIZ, the SAI of Peru "has followed through on the programme's recommendation to set up a unit that is responsible for implementing internal controls, both inside and outside the National Audit Office" (GIZ, website).

# PART I

# THE ACCOUNTABILITY ROLE OF SUPREME AUDIT INSTITUTIONS IN THE CONTEXT OF COMPETING MODELS OF PUBLIC ADMINISTRATION

# CHAPTER 1

# THE COMPETING MODELS OF PUBLIC ADMINISTRATION

There are three competing models of public administration: the Modern Public Administration (MPA), the New Public Management (NPM), and the New Public Governance (NPG). Although there are extensive studies of these models, there is not yet agreement regarding all their specific features (Denhardt and Denhardt, 2000: 551). The purpose of this chapter is not to put an end to that discussion, but to provide an overview of the differing types of public administrations' objectives, principles, and characteristics, according to each model. Grasping these elements will make it possible to understand the interrelations between Supreme Audit Institutions (SAIs) and the public administration in each scenario. SAIs make the public administration accountable, and thus they are expected to impact on public administrations. At the same time, SAIs are part of the public administration. Their mandates, structures, and rationalities operate within a public administration model, and thus SAIs are also shaped by the public administration model in which they operate (Pollitt, 2003).

## 1.1 The Modern Public Administration (MPA)

The MPA receives various names: bureaucratic, traditional, progressive, and Weberian models of public administration. It has its origins in the mid nineteenth century and it was the undisputed paradigm of public administration until the last quarter of the twentieth century. MPA organization was initially described by Max Weber as the rational organization of the

state in a hierarchical structure (bureau) for providing order and other social benefits. MPA was influenced by Woodrow Wilson's idea of separating policy from administration and the adaptation of Frederick Taylor's scientific management propositions for achieving efficiency in the private sector (Hughes, 2003).

In the MPA the role of the government is to enforce and maintain social order by exercising the monopoly of the legitimate use of physical force and to provide benefits to those who are in need of social assistance (in MPA these people are referred to as beneficiaries). Because bureaucracy is regarded as "scientific" and it is the policy makers who "know best", then "beneficiaries" have no say in the decision-making processes regarding the services they receive (e.g., the manner in which services will be provided). In MPA, bureaucratic organizations are the main actors for the delivery of services. Thus, bureaucracies are "self-centred" or "organization-centred" (i.e., the emphasis of the organization is on the needs of the organization itself) and bureaucracies organize themselves under the principle of "bureaucratic control", "position of power" or "rule-centered" (i.e., emphasis is on administrative control through rules, procedures, and constraints). To put it more simply, in MPA bureaucracies organize themselves, putting their own needs at the center of the organization.

MPAs are organized hierarchically following the assumption that politicians (congressmen and ministers) and top managers (administrative head officers) can design the most convenient and most efficient policies in a *scientific manner* (which is abstract, objective, and universally applicable) and that other public servants along the hierarchical pyramid can implement these policies objectively, regardless of any individual characteristic of the "beneficiaries"[17]. Hence, there is a clear distinction between the policy making function

[17] For designing those abstract, objective and supposedly most efficient policies, policy makers need objective/quantitative information. For this reason, Hummel points out that "bureaucracy […] is the

and the administrative execution function. Modern bureaucracies are expected to operate under a mechanical rationality, and therefore any deviation from the dictated norms should be regarded as irrational, inefficient and/or corrupted. These conducts should be prosecuted and eventually punished.

The main characteristics of MPAs are: i) to be structured in a hierarchical and centralized manner, where there is "stratification of statuses, with senior management having a considerable positional authority and even autocracy" (Saxena, 1996: 706); ii) the conformity with rules; where public bureaucracies operate according to standardized rules and procedures, and these should be applied in an impartial manner (administrative discretion is at a minimum)[18]; iii) professionalism and administrative capacity; where bureaucracies are filled with the most capable professionals through meritocratic recruitment and promotion systems. Professionalism of bureaucratic officers guarantee both sound judgment and avoidance of arbitrariness[19]; iv) neutrality; public bureaucracies should be political and ideologically neutral so they can serve different governments[20]; v) efficiency is a main concern of MPAs and this was expected to be achieved as a consequence of having a professional bureaucracy that implemented policies as they were designed (Hughes, 2003)[21]; and vi) separation between the public and the private spheres; the public sphere is dedicated to pursue the common good and the private sphere is perceived as focusing on private gains and

outgrowth of a unique Western belief that everything in the world could be calculated and thereby be brought under human control" (Hummel, 2008: 73), and particularly important will be the accounting system.

18 MPAs organizations legitimize themselves by observing legal and administrative rules. The establishment of procedures and administrative manuals are the direct consequence of incorporating the so-called "scientific method" proposed by Frederick Taylor and advocators of the scientific management movement.

19 The main contribution of MPA was probably to professionalize public bureaucracies through establishment of requirements and examinations to work for the public service. Professionalism made possible that discretion power was exercised in a fairly and equalitarian manner (i.e., according to the "lex artis" or standardized rules of the profession). Sound judgment was important for cases were it is not possible to apply administrative rules or these are not clear (e.g., medical treatments in public hospitals).

20 Administrative neutrality makes possible to gain professional stability and this further contributed in the professionalization of the bureaucratic bodies.

21 The term efficiency in MPA usually refers to the ability or capacity to act and to produce changes (or "to get things done") and not to contemporary meaning of ratio between inputs (resources) and outputs (production). See: Rutgers and van der Mer (2010).

characterized by clientelistic relations (Giauque, 2003). Hence, MPAs distrust exchanges with the private sector because "reliance on private sector contracting for public services inevitably leads to high-cost low-quality products, either because of corrupt influence on the contract-awarding process or because the public contract market will come to be controlled by organized crime, or both" (Hood, 1995: 93)[22].

MPA values[23] are civic and democratic because public bureaucracies should be motivated by a strong feeling of public service mission (Giauque, 2003) and should pursue the common good (Hood 1995). MPA further upholds professional values of neutrality, efficiency, equality (non-discrimination), responsiveness, accountability, professionalism, and personal integrity (Kernaghan, 2000). These values make bureaucracies trustworthy organizations. Bureaucrats deserve the trust of governments because of their neutrality, the trust of citizens because of their selfless motivation and professionalism (or technical capacity), and the trust of other bureaucrats. However, bureaucracy is not to be trusted when they face "the corrupting forces of the world outside, notably the award of contracts, recruitment and staffing, as handling cash" (Hood, 1995: 94). Records and audit of records prevail in this type of situations, where bureaucrats are under suspicious of been corrupt.

MPA has been severely criticized for the type of policy and management cultures it creates because it does not promote efficiency. For example, MPA focuses on compliance with processes and regulations instead of focusing on efficiency, results, and goals. This

[22] To Weber modern bureaucracies are rational organizations characterized by the following six essential elements: i) fixed official jurisdictional areas (specific institutional competences and specific official duties); ii) the principle of office hierarchy (a firmly ordered system of subordination); iii) a management system based on written documents; iv) an expert trained management; v) a full-time working bureaucracy; vi) a management that follows 'general rules' (Weber as quoted by Hummel, 2008: 76-81).

[23] Following Rokeach and Kernaghan a value is defined as "an enduring belief that a specific mode of conduct or end-state of existence is personally or socially preferable to an opposite or converse mode of conduct or end-state of existence. Values are enduring beliefs that influence the choices we make from among available means and ends" (Kernaghan, 2000: 95). Hence, values illuminate public officers' acts and decision-makings through principles-rules and guidelines. To Kernaghan (2000) civil servants are more likely to comply with rules and regulations if they see the connection between rules, guidelines that operationalize social and public institutions' values, and the values themselves.

occurs because MPA focuses on the organizations themselves instead of focusing in their "clients" or "customers". It creates a culture of compliance and risk-avoidance at the cost of innovation and improvement. It is budget-driven instead of cost-efficient (because programs are financed largely from appropriations at no cost for the programs). It is monopolistic and non-competitive because governments have the monopoly of program delivery. It is voluntaristic because services are decided upon political (non-economical) considerations. MPA has been criticized further by the economic school of public choice – which is the basis economic theory of the New Public Management (NPM) movement.

### 1.2 The New Public Management (NPM)

The New Public Management (hereinafter NPM) -also referred as managerialism- emerged in the 1980s in the midst of an economic recession caused by the 1979 oil crisis. According to some authors, this situation made it difficult for industrialized countries to continue providing the same level of public services -both in quantity and quality- and, thus, these countries were urged to reduce public budgets, to make governments small, and to redefine the public sector (Osborne and Gaebler, 1993; Schwartz 2000, Azuma, 2003; den Heyer, 2010). However, economic constraints suffered in the 1980s do not correlate with the level of NPM reforms that these countries undertook (Hood, 1995). Thus, although the economic factor may have contributed to adopting NPM reforms, it did not determine this change (Hood, 1995).

Ideologically, the NPM has been identified with the right-wing liberalism (also called "neoliberalism") that was hegemonic during the 1980s and represented by Ronald Reagan in the U.S.A. and by Margaret Thatcher in the U.K. However, while the historical and ideological contexts may have also contributed to the introduction and proliferation of NPM

reforms, neither of these factors can fully explain the change of model from MPA to NPM (Hood, 1995). For example, "in New Zealand and Australia, the most radical of the public service changes were introduced by Left governments [...] [and] Canadian and French governments of Left and Right have introduced similar reforms" (Hughes, 2003: 270).

The NPM has also been seen as an "English-type" of public administration. Countries that introduced deeper NPM reforms include Australia, Canada, New Zealand, Sweden, and the U.K. Countries that introduced medium level reforms include Austria, Denmark, Finland, France, Italy, the Netherlands, Portugal, and the U.S.A. Low-level reforms were experienced in Germany, Greece, Japan, Spain, Switzerland, and Turkey (Hood, 1995). To Hood, the presence of Sweden among the countries that most favoured NPM reforms disproved the alleged "Englishness" factor of NPM reforms. However, it cannot be denied that countries with the common-law tradition (i.e., English speaking countries) were most successful in introducing NPM reforms than those with Roman-continental legal tradition: three out of four top NPM reformers are "English", and none of the English speaking countries rank in the lowest level of NPM reformers.

Hood (1995) suggests that the introduction of NPM reforms is better explained by two endowment factors: i) a motive or need to reform, and ii) sizeable opportunities for reforming the public administration. The fact that most countries of common-law tradition were more successful in introducing NPM reforms is consistent with this view, because these countries face fewer constraints for legal change, and thus opportunities for reform are usually higher. On this same view, Hughes explains that "New Zealand went further than other countries because it has fewer institutional constraints" (Hughes, 2003: 265). At a micro-level analysis, both of these endowment factors have determined not only the extent of the reforms experienced in each country, but also the policy areas reformed. Hence, different emphasis

and combinations of NPM techniques depended upon the specific country environment, particularly the perceived problems that each society (and bureaucracy) faced and the social feasibilities for undertaking NPM reforms.

NPM finds its theoretical foundations in the economic school of public choice. According to this school, all individuals are rational and self-interested agents who maximize their own benefits. Public choice economists criticize the basis of MPA. For these scholars, bureaucracies neither pursue nor are motivated by the public interest. Public bureaucrats seek privileges for their own; such as permanent and secure job tenure, public power, and other benefits. Public servants are seen as "budget maximizing bureaucrats" (Hood, 1995) and also as "obstacles to the 'pure' implementation of policies" (Giauque, 2003: 574). Due to these reasons the economic school of public choice advocates minimizing the role of the state and providing choice to public services' clients (i.e., breaking monopolies). In the 1980s, the first NPM reforms were conducted towards the objective of making governments small (i.e., privatizing public companies, privatizing social services, etcetera). Failures and insufficiencies of downsizing governments may change the public agenda in order to seek for: i) improvements in efficiency and effectiveness of the delivery systems of social services – incentives that promote efficiency are to be found and taken from the private sector (e.g., contracts for contestable services and competition among various providers, better performance monitoring, rewarding good productivity of managers and employees, punishing bad performance, client feedback, etcetera); ii) better coordinating policy; and iii) improvements of the technical capacities and motivation of the public administration (Hughes, 2003). In this stage of reform, the NPM was nurtured by other economic schools, such as the new institutions of economics, the principal-agent theory, and the transaction costs theory, as well as some public policy schools and techniques that developed during the 1970s

(den Heyer, 2010; Manning, 2001; Giauque, 2003; Denhardt and Denhardt, 2000). For this reason, NPM is frequently seen as the aggregation of different rationalities and techniques that sometimes are not fully compatible with each other[24]. Nonetheless, it can be argued that the organizing principle of NPM is the central role of market forces in order to overcome the problems of bureaucracy. Both a market-incentives rationality (e.g., competition among providers, salary incentives, focus on outcomes instead of processes, etcetera) and market structures (i.e., privatized companies, outsourced contractors) are the driving forces for providing the most efficient services to their clients. The most salient features of the NPM rationality and techniques include:

- Further separation between policy-making (corresponding to politicians and ministries) and policy-implementation (corresponding to administrative departments/agencies, private contractors and privatized companies); and demanding results according to clearly defined and pre-established policy objectives and indicators of production and productivity. In other words, policy-making headquarters establish clear objectives and measurable indicators of results (i.e., "the steering state") and the administrative departments (as well as outsourced-contractors and privatized companies) are made responsible for achieving results.
- Administrative departments and top managers gain operational autonomy in order to incentivize productivity and to achieve the agency's objectives. Managerial autonomy implies that managers become real bosses with power and responsibilities similar to those in the private sector; with discretionary power to develop their own strategies, to budget, to shop supplies, to hire and fire personnel, etcetera. The basic assumption is

[24] Dawson and Dargie found that "NPM might be characterized as reinventing government or entrepreneurship in the United States; as citizenship, decentralization and deregulation in a European, predominantly Nordic model; as contracting in New Zealand; and as cost and control measures in the U.K.". (Dawson and Dargie, 2002: 39).

that managers who work in the field are in a better position to make more efficient decisions than top policy makers who lack on-the-ground knowledge (know-how) and cannot plan for unexpected and/or changing situations. Policy success or failure no longer depends on bureaucrats who follow rules, but on managers who are empowered and have an entrepreneurial attitude, who are willing and able to take risks, who seize any opportunity for reducing costs, and who maximize profits or benefits for the public institutions they work for. In other words, managers who behave as if they were working for the private sector[25]. At the same time, front line workers ("street workers") are expected to work closer to their "clients" (or "customers") in order to help improve the efficiency and effectiveness of the process (Saxena, 1996). Thus, NPM reform "tends to invert the traditional control structure as the management is supposed to support the workers by understanding the details of their internal 'supplier-customer' working practices and problems, by helping to remove the barriers to improvement and by listening carefully to the workers' ideas on improving the performance of the processes" (Saxena, 1996: 705). Consequently, public administration departments become more flexible and more adaptable, eliminate hierarchical layers, and decentralize and delegate competencies and decision-making power to "small autonomous administrative units in charge of specialized public policies (possibly using the form of the agency)" (Bezes, 2007: 69).

- Introducing a private sector rationality within the public sector for the provision of services. This includes deregulating (debureaucratizing) governments, reducing red

[25] In NPM there is a "thermostatic" vision of control over bureaucracy: i) desired policy outputs are set in advance; ii) head officers of public organizations are given high degrees of decision-making autonomy; and iii) head officers of public organizations are held directly responsible for reaching policy outputs. According to Hood, "the underlying idea of this output-oriented approach to control is that of a regulated contract to allocate risk, blame, responsibility, and reward among top public bureaucrats and other actors in the political system" (Hood, 2002: 311)

tape[26], making public departments compete among each other (and with the private sector if possible), achieving savings without diminishing the quality of services, rewarding good performance managers and officers through bonuses or salaries based on performance achievements, making public employment flexible in order to discourage laziness and get rid of low performance managers and employees, and implementing an accountability system to measure effectiveness and efficiency.

- Making the private sector deliver public services through market and quasi-market systems. Market systems are implemented when private contractors deliver services according to contract arrangements that specify objectives, targets, and production indicators. In market systems, it is necessary to have a well-functioning market in which various providers compete among each other to gain public bids. In quasi-market systems, the private sector provides services that will be paid by the government according to unilaterally pre-established tariffs (e.g., through a vouchers system). In quasi-market systems, service providers compete against each other to be chosen by the clients. Market and quasi-market systems are considered the most extreme type of NPM techniques because services are delivered by the private sector. These systems have been widely implemented in New Zealand[27].

The professional skills of public managers include being able to comfortably make more operational decisions, assuming risks, working with more autonomy, assuming more responsibilities, and working in horizontal environments (team work instead of hierarchical

[26] Red tape refers to extensive bureaucratic procedures. It evokes the image of several thick bureaucratic files that are joined by a 'red tape' because all together correspond to only one bureaucratic procedure.

[27] It is in New Zealand where most radical NPM reforms were implemented (Schick, 1998; Hughes, 2003). For this reason, it has been considered as a different model of public administration: "the new contractual model" (Davis, as quoted by Hughes, 2003: 281). In New Zealand "virtually every element of reform has been designed to establish or strengthen contract-like relationships between the government and ministers as purchases of goods and services and departments and other entities as suppliers" (Schick, 1998: 124). Furthermore, "ministers can purchase services from government departments or from any alternative public or private supplier" (Schick, 1998: 125). In this context of extreme privatization even the role of supreme audit institutions has been questioned (Pallot, 2003).

structures). The core values and organizational culture of NPM include: i) focusing on the taxpayers; economy, efficiency, and effectiveness of service delivery[28] (i.e., through performance management and performance accountability –or accountability for results instead of processes); ii) focusing on the clients (i.e., introduction of client culture, customer services offices, total quality philosophy, measurement of customer satisfaction, etcetera); iii) seeking continuous improvements, quality focus, risk-taking, innovation, team-work, and excellence of service delivery; and iv) accountability to "political principals". Importantly, public servants do not deserve special trust; they are made accountable and gain trust according to their performance. Performance agreements replace the old civic service ethic of trust and responsibility for measurable results. Legitimacy is achieved through results ("work well done"). To Kernaghan "a persuasive argument can be made that accountability is the dominant value in contemporary public administration". (Kernaghan, 2000: 97).

Although NPM has been widely adopted in most developed countries (Bezes, 2007; Peters, 2001) and it remains highly hegemonic among administrative practitioners, it has also been widely contested, especially from academia. NPM has been criticized for various reasons, including:

- That management by measurement tends to replace management by mission. Since public managers are made accountable by performance of measured indicators, they focus on indicators and managerial instruments instead of focusing in the purpose of the work. To Kernaghan "chief executives [in New Zealand] were ignoring matters that were not specifically listed in their contract with the government" (Kernaghan, 2000: 99). This problem is aggravated because governments' interests do not always

[28] In NPM the terms efficiency and efficacy are separated; the former corresponding to the ratio of productivity and the later to the capacity to produce change.

"fit easily into the contracting framework" (Schick, 1998: 126) and NPM "can induce managers to take a checklist approach to accountability" (Schick, 1998: 126).[29]

- That NPM implementation is undermining traditional public-service values, such as service-driven motivation, neutrality, professionalism, and personal responsibility (Plant, 2003, Giauque, 2003, Shick, 1998)[30].
- That there is a decline in the feeling of belonging to a larger entity and a lost in the feeling of cultural substance: the emergence of group culture takes the place of the broader ministerial (or agency) culture (Giauque, 2003). This situation has important consequences such as, for example, there have been coordination problems within administrative services (Giauque, 2003).
- There are not yet serious and global assessments of the impact of NPM reforms, and thus its alleged advantages have not been empirically proven (Saint-Martin 2004; Morin, 2004; Hood, 2002). Some scholars argue that NPM benefits may not be that relevant considering all the associated costs, such as transaction costs for "negotiating and enforcing contracts" (Schick, 1998: 126) and the "explosion of administrative tasks" (Giauque, 2003: 581).[31]
- There is no agreement regarding which NPM techniques are useful and which ones are not. For example, in New Zealand "chief executives, senior managers, and others attribute most of the improvement in government performance to the discretion given to managers rather than to formal contracts. Managers differ on how much value is

[29] To Behn (2003) there exist eight managerial purposes for measuring performance (i.e., to evaluate, to control, to budget, to motivate, to promote, to celebrate, to learn, and to improve) and each purpose require different types of measurements. Thus it still remains the question of "who will pick the purpose, the measure, and the performance standard?" (Behn, 2003: 599). Furthermore, Behn argues that performance management has failed due to practical, political, managerial, and psychological reasons (Behn, 2002).

[30] As Plant points out: "[to] design a system under the assumption of self-interest behaviour, may well lead to self-interest behaviour even in areas where this did not occur before" (Plant, 2003: 576).

[31] On the other hand, NPM reforms are also claimed to produce 3% savings in the public sector (Manning, 2001).

added by contracts but few think that they have been the main contributor to higher operational efficiency" (Schick, 1998: 126)

- There are important concerns regarding democratic and accountability deficits when the private sector delivers public services through market and quasi-market systems (Kernaghan, 2000; Plant, 2003).

### 1.3 The New Public Governance (NPG)

The New Public Governance (NPG) model of public administration is currently emerging and being called by various names, such as new public service, good governance, good administration, and participative public administration. NPG does not deny the managerial principles and techniques of NPM, but it incorporates and prioritizes other principles and objectives in an attempt to provide a more comprehensive public administration. Castro defines good governance as "the proper exercise of the government's powers and the accountable fulfillment of its duties guaranteeing the realization of human rights and the protection of the public interest while providing transparent and participatory institutional frameworks for the effective functioning of all the state apparatus from a democratic rule of law perspective in order to ensure the equitable and decent development of all the members of the society" (Castro, 2014: 248)[32]. According to Addink, the elements of Good Governance are: public administration properness, transparency, participation, effectiveness, accountability and fulfillment of human rights (Addink, 2007, 2010). It has been argued that the NPG is the answer of the democratic Left to the problems of the MPA and the NPM (Plant, 2003). However, while most representatives of the Left oppose NPM, it is also the case that important scholars and institutions associated with Right liberalism have

[32] Definition translated from Spanish by Alberto Castro (e-mail from July 10th, 2014).

favoured NPG ideas (e.g., the World Bank). NPG finds its academic foundations in the social and legal sciences, particularly the direct democracy literature, the good governance literature, and the philosophical movement of humanism (Denhardt and Denhardt, 2000).

NPG puts value on democracy, responsiveness, fairness, and equity. Pursuing efficiency is still relevant, but it is the citizenry which defines efficiency and decides its relative importance in relation to other competing values. The citizenry participates and takes a central role in defining and choosing policy objectives, strategies, and implementation mechanisms. In other words, efficiency and effectiveness are not abandoned but have to be harmonized with the aforementioned values[33]. In NPG, public administrations organize themselves with the objective of incorporating citizens in the decision-making process (Gains and Stoker, 2009); thus, there is a compelling argument that the organizing principle of NPG is citizen participation. NPG is citizen-centred because it recognizes that governments belong to the citizens and, consequently, it devolves ownership and power to them. By reducing the decision-making power of the public administration, NPG overcomes the criticisms originally made by the economic school of public choice to the MPA.

In NPG, the public administration's legitimacy is realized through the citizens' participation in the decision-making process (Gains and Stoker, 2009). Hence, public servants should "see citizens as citizens (rather than merely as voters, clients, or customers); they should share authority and reduce control, and they should trust in the efficacy of collaboration" (Denhardt and Denhardt, 2000: 552). The idea is to serve and empower citizens, and to "join all parties together in the process of carrying out programs that will move in the desired direction" (Denhardt and Denhardt, 2000: 555). It is the role of

[33] According to Addink: "governance includes a reference to the methodology of government in the post-modern, minimal state, and covers the concept of 'Good Governance' and the efficiency targets of new public management [...] norms of effectiveness and efficiency are included in the Principles of Good Governance" (Addink, 2010: 22).

governments to help create and support community and connections between citizens and their communities. Public service is legitimated by helping citizens create common values, through negotiation among different stakeholders, bridging different interests, building coalitions of public non-profit organizations, agreeing upon both mutual needs (policy purposes) and solution processes. Public servants have the responsibility of conciliating interests, mediating, and adjudicating rights, while making sure "that solutions to public problems are consistent with laws, democratic norms, and other constraints [...] it is the role of public administrators to make these conflicts and parameters known to citizens, so that these realities become a part of the process of discourse" (Denhardt and Denhardt, 2000: 556).

Public servants' work ethic is driven by the desire to "mak[e] a difference in the lives of others" (Denhardt and Denhardt, 2000: 556). In NPG, public servants' motivation cannot be reduced to a matter of salary or job security; they should react with integrity and responsiveness to their purpose of serving and empowering citizens. Public servants' skills include brokering, negotiating, conflict resolution, and democratic values. Public servants should feel comfortable sharing leadership with other actors as they play the role of "facilitators of citizenship and democratic values" or "catalysts for community engagement" (Denhardt and Denhardt, 2000: 557).

NPG is not without theoretical and practical problems. It is difficult to control or restrain public servants' self-interested behaviours due to the strong asymmetries in motivation and knowledge between the public servants and the citizens who wish to participate in public affairs. There are also different motivation levels between citizens, and this may cause the wishes of a silent majority to be overcome by a noisy minority. If NPG is not tuned carefully, it may also pose a serious problem to the foundations of the modern (representative) democracy because it may provide a stronger voice to non-elected citizens

(citizens who have self-interests of their own and who are usually organized through non-profit or non-governmental organizations) than to politicians (who have been elected by the entire citizenry), and to public administrators (who try to implement the policies that have been designed and ordered by politicians). Finally, NPG has few possibilities to work properly where the education level of the citizenry remains low.

### 1.4 Public Administrations in Developing Countries

Public administrations of developing countries have some particularities of their own. Almost all developing countries were at some point in time colonies and, consequently, bureaucratic organizations were installed by European colonizers with the main objectives of controlling native populations (maintenance of law and order to guarantee continuity of colonial regimes) and implementing efficient tax collection systems (Perez, 1991; Turner and Hulme, 1997). To Hughes "Weberian bureaucracy and Taylor's scientific management were successful exports to developed and lesser developed countries alike and formed the basis of the model adopted in the period following independence" (Hughes 2003: 219).

Bureaucratic organizations in developing countries changed little after their independence (Acemoglu et al, 2001; Turner and Hulme, 1997, Hughes, 2003, Saxena 1996). Moreover, MPA was transplanted from developed countries in an attempt to guarantee that public administrations would contribute to (or even conduct) the developmental process of their nations (Perez, 1991; Turner and Hulme, 1997; Hughes, 2003). Hence, some of the main features of the public administrations of developing countries are precisely those of MPA: strict hierarchies, strong centralization[34], and lifetime careers for public servants. In some developing countries, working for the public sector is even a prestigious and relatively well-

[34] Centralization occurs when the decision-making power is reserved for the top layers of the hierarchy. In some countries centralization was further stressed by the authoritarianism of political and legal systems (Saxena, 1996)

paid work (Hughes, 2003: 218). However, MPAs were never properly implemented, and therefore public administrations, despite their mantle of formalism, remained highly pre-modern.

The public administrations of developing countries are characterized by two detrimental factors: i) the lack of professionalization; and ii) the subordination of the rule of law to political will[35]. Lack of professionalization of public administrations in developing countries occurs mainly because public employment is never filled by the most capable professionals and through competitive procedures[36]; lifetime employment was only present at the lowest layers of bureaucracies (where there is no decision-making power); and top and middle-ranking public officers were removed from office once the politicians who appointed them lost elections. A high turnover ratio of public officers makes it difficult for the public administrations of developing countries to provide continuity of public policies. What is worse, the political intervention in hiring and dismissing public officers makes bureaucracies loyal to politicians (and their interests) instead of the public institutions they work for. In other words, the public administrations of developing countries are not self-centred (much less citizen-centred) but party-politics centred. According to Hughes "features which worked in the West, notably political neutrality and incorruptibility, were not followed in the Third World and the bureaucracy, while maintaining the appearance and institutions of traditional bureaucracy, served particular elite, ethnic or religious interests. Above all it served itself" (Hughes, 2003: 226).

Limited rule of law in developing countries creates a phenomenon of informality in public administrations. This means that "the rules of behaviour that people actually follow can

[35] See: Ginsburg and Moustafa (2008).

[36] Different deviations from MPA may be found in each region and/or developing country. For example, public employment may be filled by those of same ethnicity, those of same political party, or those who paid for the job.

be very different from those that are written down" (Polidano, 1999: 23). However, informality is a complex factor that creates both positive and negative effects, and thus it should be considered carefully:

> To say that there is an informal system is not to conclude that the rules always are ignored or that corruption always flourishes, although these pathologies may occur. Rather, it is to argue that the informality contributes to public order; in the case of the civil service, it enables the government to recruit and retain skill persons [...] Informality is a mixed blessing. On the one hand, it cuts through red tape, unresponsive bureaucracies, and bad policies; on the other hand, it opens the door to (and sometimes it institutionalizes) corruption and inefficiency. The positive side of informality in public management includes the maintenance of fiscal discipline despite unrealistic budgets and the provision of public services despite rigid rules and controls. But the costs are high; they include widespread evasion of civil service rules and other controls, the time and resources spent in beating the system, distrust of government routinized corruption, and inattention to the outputs and results of public programs and the performance of government agencies and officials. It would not be surprising if some of the most esteemed and productive civil servants in developing countries are those who use their entrepreneurial and managerial skills to outwit the formal controls" (Schick, 1998: 128).

Since the 1980s there have been some attempts to reform public administrations in developing countries. Following the recommendations and financial assistance of the World Bank, the International Monetary Fund, and other international cooperation agencies, NPM reforms prioritized certain departments, such as ministries of economy, health services, and water services. The idea has been "to concentrate political and administrative effort on radical change in few areas [...] rather than to spread it ineffectually by attempting comprehensive reforms" (Perez, 1991: 642)[37]. In the 1990s and 2000s, some elements of NPG have also been

[37] Some scholars criticized NPM reforms in developing countries and predicted them to fail on the basis that increasing discretionary powers of the public administration was not suitable where there is wide corruption, nepotism, and disregard for the rule of law. In the absence of control these practices were foreseen to proliferate. By contrast, NPM advocators argue that "the problem is, rather, that those who want to get around the rules for the wrong reasons are able to do so somehow, while well-intentioned managers can find themselves bound hand and foot by centralised red tape" (Polidano, 1999: 23-24). Interestingly, when evaluating NPM reforms in developing countries, Polidano (1999) concluded that reform success was primarily determined by localized contingent factors (e.g., leadership, need to reform, political consensus, etc.) rather that by generalized problems that developing administrations may face (e.g., politicization, corruption, nepotism, poor administrative capacity). In any case, it should be taken into consideration that if

adopted; for example, the creation of ombudsman offices, sanctioning transparency laws, establishing participative-budget procedures at the municipal level, etcetera. It could be argued that while most departments are formalistic in appearance and follow informal practices to escape formal constraints, some agencies have implemented NPM techniques and others have been influenced by the positive and strong leadership of chief officers who have incorporated practices of NPG (e.g., undertaking regular public consultations in the decision-making processes). However, it should be recognized that, in the best-case scenario, "most government functions remain performed by vertically integrated bureaucracies functioning pretty much as Weber might have intended" (Manning, 2001: 300).

Hence, public administrations in developing countries are very complex; they are characterized by the strong presence of pre-modern elements, a mantle of formalism provided by the recognition of MPA, and some elements of NPM and NPG. This far-from-consistent system imposes several constraints on public administrations, such as constant political interference, lack of professionalization, high levels of formalism (i.e., red tape), various types of labour and salary regimes for public servants, and time constraints for policy implementation, among others. In this context, the legitimacy of the public administration is usually determined by the capacity of being effective in spite of rule constraints (i.e., being able to stretch legal and administrative constraints); and constant inefficacy of public administrations make society tolerate (or even accept) corruption as long as public administrations deliver services and construct public works. In this regard, some doses of corruption might be seen as the price to pay for being effective and gaining social legitimacy. Corruption may also be institutionalized due to informality and lack of transparency in the

there is a decision to implement NPM reforms, this should follow a rational order. For instance, performance accountability (accountability for results) should not be introduced until the public administration is capable of undertaking performance budgeting and results-oriented management –which implies radical changes in the structures of government and the culture of the public administration.

public administration. Finally, it should also be noted that due to conditions of poverty, the majority of the population in developing countries do not pay taxes, and therefore lack motivation -or incentives- for both making governments accountable and fighting against corruption.

### 1.5 Structuring Administrative Discretion and Liability Rules Against Civil Servants

The most fundamental dilemma in any public administration is to determine the level of discretionary power of civil servants. This managerial and philosophical discussion goes back to the Friedrich – Finer debate that took place in the early 1940s (Schillemans and Bovens, 2008; Kang, 2005; Hibbeln and Shumavon, 1983; Finer, 1941). At that time, Friedrich's main concern was to guarantee high levels of efficiency in the public administration, and thus he advocated for enlarging civil servants' discretionary power. To Friedrich, administrative efficiency was achieved if civil servants were not bound by detailed rules of procedures but with the best accepted practices and knowledge of their professions (Kang, 2005; Hibbeln and Shumavon, 1983). By contrast, Finer's main concern was to guarantee administrative obedience to democratic order and, consequently, to minimize the risks of abuse of power. He thought that public administrations should be tightly regulated (Kang, 2005; Hibbeln and Shumavon, 1983; Finer, 1941).

From the previous sections it follows that in MPA civil servants usually have a low level of discretion because they must follow very specific and detailed administrative regulations (Hughes, 2003). Indeed, the cornerstone of administrative discretion in MPA is to respect the Principle of Legality, which implies that civil servants can only make an administrative decision if they have been clearly mandated (or expressly entitled) to make such types of administrative decisions.

In NPM, managerial discretion has been widened by stipulating public policies in a very broad manner or by regarding public policies as referential (Giauque, 2003)[38]. Furthermore, in market and quasi-market arrangements, public sector policies have been completely replaced by contracts with the private sector. Besides, administrative restrictions imposed by the Principle of Legality have been narrowed by the legal doctrine of administrative implicit competences.

In NPG, civil servants must enjoy enough power of discretion so as to incorporate the citizen's concerns during the design and/or implementation of public policies. From the legal perspective, there have been some attempts to lessen the importance of the Principle of Legality by strengthening the Principle of Prohibition of Arbitrariness, which "means that administrative orders should result from a balance of interests (...) As a consequence, only severe mistakes by administrative bodies or other legal entities will compel a court to nullify the legal act subjected to review" (Addink, 2010: 35).

The second element of the Friedrich – Finer debate was how to oversee and discipline civil servants. To Friedrich, civil servants had to be made accountable by the public administration itself, based on the principle of administrative hierarchy and the implementation of the *Lex Artis* (i.e., the rules that regulate a professional duty) (Hibbeln and Shumavon, 1983). To Finer, civil servants had to be made accountable by outside forums that had the power to impose sanctions (e.g., the judiciary, the Parliament) (Hibbeln and Shumavon, 1983; Finer 1941).

[38] Saxena defines management empowerment as "the ability of an individual or a team to work in their own way within agreed time-lines and with agreed resources to achieve a goal set by the leadership of the organization" (Saxena, 1996: 705). In the NPM model "all strategic decisions and major guidelines are decided at a higher organizational level, i.e. in the steering committees, whilst working groups are free to use the instruments, tools, and processes that they want [in order] to accomplish the tasks entrusted to them" (Giauque, 2003: 582).

It should be noted here that Finer's position incentivized risk-adverse behaviours (or, in other words, it disincentivized the decision-making of the public administration). By contrast, within Friedrich's framework, civil servants faced little chance of being disciplined if committing administrative wrongdoings or mistakes. Hence, in Friedrich's framework, decision-making was incentivized in the expectation that servants would take the most cost-efficient decisions at the expense of some incidental or marginal wrongdoings.

The Friedrich – Finer debate makes clear the difficulties of determining the level of civil servants' discretionary power and the mechanisms to render civil servants accountable for their wrongdoings. Making this choice depends on the professional competence and honesty of a given public administration in a particular country. When the level of administrative competence is low and the risk of corruption is high, then it makes sense to reduce the administrative power of discretion and to establish a powerful oversight agency in order to identify administrative responsibilities and to discipline civil servants. However, in this scenario, a second problem arises because too much regulation may slow down the decision-making process (and therefore the efficiency) of the public administration. Besides, too many and too detailed administrative regulations increase the possibilities of committing unintentional administrative faults. Finally, if disciplinary proceedings or sanctions are too burdensome or too severe (i.e., disproportionate to the seriousness of administrative faults) then civil servants are incentivized to avoid any decision-making. In this scenario, competent professionals are also discouraged from joining the public administration.

By contrast, if the level of administrative competence is high and the risk of corruption is low, then it makes sense to increase the discretionary power of civil servants. However, such a public administration would be very difficult to find in developing countries. Besides, as Finer puts it "history of all ages, the benevolent and the tyrannical, the theological and as

well as the secular, has demonstrated without the shadow of a doubt that sooner or later there is an abuse of power when external punitive controls are lacking" (Finer, 1941: 337).

# CHAPTER 2

# MAIN FEATURES OF SUPREME AUDIT INSTITUTIONS

Supreme Audit Institutions are independent intrastate institutions specialized in making public administrations accountable[39]. SAIs do not operate in a vacuum; they are part of the public administration which they oversee. Hence, SAIs' institutional vision, operational structure (organization), and strategies are determined by the public administration model to which they belong. Moreover, public administration models are also determined by several factors, such as social values, cultural norms, legal traditions, educational level of the citizenry, economic development, technological resources, etcetera. Consequently, SAIs organize themselves and conduct their accountability role in different ways. It would not be possible in this study to characterize all the forces that act upon SAIs, but it is important to be aware of this limitation. The purpose of Chapter 2 is to understand the main features of SAIs (i.e., their accountability role, their main models, the type of audits they conduct) and how these features both influence and are influenced by the public administration model to which SAIs are part.

## 2.1 Conceptualizing Supreme Audit Institutions as Independent Intrastate Institutions of Accountability

Accountability is far from a consensual concept. Accountability has been understood

[39] SAIs are also named auditor general's offices, audit institutions, comptroller general's offices, national audit offices, courts of accounts, tribunal of accounts, and autonomous audit agencies (Santiso, 2007). SAIs "play important roles within the institutional mechanisms of the democratic state. They are given high independence in order to secure public accountability for, first, the probity and legality of public spending and, second, economy, efficiency and effectiveness" (Pollit and Summa 1997: 313).

as responsibility, control, answerability, responsiveness, management of expectations, dialogue, and transparency (Mulgan, 2000; Bovens, 2007; Fox, 2007). Although all these concepts have similarities and interrelate with that of accountability, they also differ and have distinguishing features of their own. Accountability is best defined as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences" (Bovens, 2007: 450). Accountability may take different forms depending on its objective. Schedler (1999) identifies eight types of accountability: political accountability, professional accountability, moral accountability, constitutional accountability, legal accountability, administrative accountability, and financial accountability.

From the definition it follows that accountability is a three-dimensional concept. It is composed of *answerability*, *sound judgement*, and *enforcement*. The answerability dimension is composed by two sub-dimensions: *the informational dimension*, with regards to the public institutions' legal obligation to inform about their acts and decisions, and *the argumentative or explanatory dimension*, which refers to the public institutions' legal obligation to explain or to justify those acts. Answerability is perhaps the most distinctive feature of accountability and it is sometimes taken as a synonym.[40]

Sound judgment refers to the political, legal, and other types of conclusions rose by the "forums" (or "institutions of accountability") regarding those acts that were reported to them. It should be noted that there is no agreement regarding the nature of judgements that institutions of accountability may pass. In other words, there is no agreement regarding the object of accountability. In the most restrictive perspective, judgements should be limited to

[40] Note that although I use Bovens' definition of accountability, I divert from its original content. To Bovens, obligations to inform and justify one's own actions can be formal (i.e., legal obligations) or informal (i.e., moral obligations). To Bovens, informal accountability mechanisms are the following: press conferences, informal briefings, and voluntary audits.

the legality of political authorities and public servants' actions (O'Donnell, 1998a; 2003). In a wider perspective, institutions of accountability also oversee and inform about political disagreements that do not necessary involve unlawful transgressions. Kenney, for example, points out that "when we consider parliamentary regimes, […] in which ministers can be constitutionally censured and removed from office by the legislature for purely political reasons, we are left with a conceptual gap. In these cases, agents of the state are empowered to politically sanction other agents of the state for actions or omissions that are not qualified as unlawful" (Kenney, 2003: 66-7). Institutions of accountability that adopt either a New Public Management (NPM) or a New Public Governance (NPG) perspective may recommend the public administration to adopt measures that, while not legal requirements, would certainly contribute to improving their performance or raising their social legitimacy[41]. For example, Bovens states that "many accountability arrangements are not focused on finding fault with actors –forums will often judge positively about the conduct of actors and will even reward them" (Bovens, 2007: 452).

Enforcement refers to either the power to punish improper behaviour or, at least, the possibility of having to face consequences. To some scholars, the power of imposing sanctions is an essential element of any institution of accountability (Moreno et. al., 2003). A second group of scholars consider that institutions that lack punitive power hold a diminished type of accountability (Fox, 2007; Schedler, 1999). A third group of scholars make the case that institutions of accountability must work in connection with each other, forming a network or system of accountability (Kenney, 2003; Mainwaring, 2003). From this perspective, it is possible to identify a division of functions in which some institutions (e.g., supreme audit institutions, ombudsman offices) exercise the answerability and sound judgment dimensions

[41] See: *Chapter 1: The Competing Models of Public Administration.*

of accountability, while other institutions must exercise the enforceability function, either by prosecuting authors of misdeeds or by punishing them (i.e., public procurators, anticorruption agencies, public ministries, and the judiciaries). Hence, single institutions of accountability need not impose sanctions by themselves but work in a system where the three dimensions of accountability are present and where political actors and public servants may face consequences for their actions. In other words, institutions of accountability that cannot impose sanctions by themselves should still be regarded as such if they have formal, appropriate, and available mechanisms for redressing misdeeds and punishing misbehaviours (Mainwaring, 2003).

Guillermo O'Donnell (1998a, 2003) coined the terminology *vertical accountability* and *horizontal accountability,* the former for referring to acts of accountability that are exercised by the citizenry (i.e., in the election process) and the later for referring to acts of accountability that are exercised by governmental institutions. However, vertical accountability is a contentious concept because political and administrative authorities do not have the legal obligation to justify their acts to the citizenry (beyond the general obligation to provide information) and the citizenry does not always have mechanisms available for punishing criminal activities. By contrast, horizontal accountability refers to acts that are exercised by "state agencies that are legally enabled and empowered, and factually willing and able, to take actions that span from routine overseeing to criminal sanctions or impeachment in relation to actions or omissions by other state agents or agencies of the state that may, presumably, be qualified as unlawful" (O'Donnell, 1998a: 11). It should be noted that the term horizontality refers to their independence from the institution that is being made accountable and, therefore, it does not imply an "equivalent" or "equal" power (Schedler, 1999). To avoid such confusion, Mainwaring invites us to abandon the term "horizontal

accountability" and to adopt the use of *intrastate accountability* for referring to "state agencies [that] are formally charged with overseeing and/or sanctioning public officials and bureaucracies" (Mainwaring, 2003: 8).

Independent intrastate institutions of accountability are of three types: i) independent intrastate institutions with authority over the political and administrative actors that they make accountable; ii) independent intrastate institutions with the specific function of overseeing the public administration and exercising answerability and judgment prerogatives; and iii) independent intrastate institutions with prosecuting and/or punitive power (Mainwaring, 2003). The first type of independent intrastate institutions of accountability operates under the *principal-agent framework*; which has the following formula: "A (public administration) is accountable to a principal B (the Parliament) for its actions X". This framework is common in parliamentarian regimes because the Parliament (the principal) delegates power to the public administration (the agent) to execute its orders (public policies). In other words, the public administration does not hold authority by its own right; its authority has been delegated from the Parliament and thus it is accountable to it. The punitive or sanctionary power of the Parliament (and its representative; i.e., the institution of accountability) over the public administration follows the same rationality.

It should be noted that some authors regard the existence of accountability relationships only under the principal-agent framework (e.g., Moreno et al., 2003; Hughes, 2003; Busuioc, 2009). However, not all accountability relationships respond to this framework. As per Kenney (2003), an ombudsman can be appointed by the Congress and can also incriminate a congressman for his misdeeds; but this situation neither means that the agent is accusing its principal nor that the ombudsman has become the principal of the congressman. More importantly, the principal-agent framework does not apply in Republican

regimes either. Indeed, in this type of political arrangement, the Executive holds power by its own right and thus it cannot be regarded as the agent of the Parliament.

Independent intrastate institutions with the specific mandate of overseeing the public administration and exercising the answerability and judgment prerogatives can be regarded as *independent intrastate institutions specialized in accountability*[42]. This category includes Supreme Audit Institutions (SAIs) and Ombudsman Offices[43]. These specialized institutions of accountability are of key importance for impeding arbitrariness in the public administration, especially in Republican regimes where public administrations tend to have more power concentrated (O'Donnell, 1994; 1998a; 1998b). In general, the role of these institutions is to oversee the public administration, to pass sound judgement regarding administrative acts (and sometimes also public policies), and eventually to activate legal and institutional mechanisms to ensure that the public administration: i) complies with legal regulations and operates within their mandates; ii) acts efficiently and provides good quality services; and iii) fulfills and promotes principles of good governance.

Finally, independent institutions that hold prosecutorial and/or punitive powers but whose main function is not to make the public administration accountable can be regarded as "sanctioning actors" (Mainwaring, 2003: 20). This category includes the judiciary (when administrating justice in cases of corruption or unlawful encroachment of competences), the Legislature (when conducting an impeachment process), and Electoral Tribunals (when punishing a specific electoral candidate).

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[42] Independent intrastate institutions specialized in accountability have also been defined as "watchdog agencies" (Pope, 2000; Dye and Stapenhurst, 1998; Langseth et al, 1997), "superintendences" (Moreno et al., 2003), and the "fourth power" (Addink, 2007, 2010).

[43] Public Procurator Offices and Anti-Corruption Agencies may also be considered *independent intrastate institutions specialized in accountability* as long as these operate with independence from other powers of the State, especially from the Executive.

## 2.2 Organizational Models of Supreme Audit Institutions

SAIs are independent intrastate institutions specialized in accountability because they are forums with the mandate of passing informed judgement on the public administration's activities. The type of judgements a SAI makes defines the nature of its role, which can be one of the following: i) as a public accountant, passing judgement on the reliability of the public administration's financial statements (i.e., exercising financial accountability); ii) as a legal operator, passing judgement on the legality of the actions of public bodies (i.e., exercising legal accountability); and iii) as a management consultant and/or as a research-based organization, providing managerial advice to public bodies to help them improve themselves and/or creating and disseminating new, scientifically tested knowledge about how public programmes and projects are working and their effectiveness (i.e., exercising managerial accountability) (Pollitt, 2003). Because all SAIs undertake the role of public accountant, the choice between acting as a legal operator or as a managerial consultant will determine its institutional mission and organizational structure. Hence, there are two main models of SAI organizations: the Westminster Model and the Court Model[44].

### 2.2.1 The Westminster Model

In the Westminster Model (also called the Anglo-Saxon model or the Monocratic Model) SAIs are entirely at the disposition of the legislature and the head of the SAI is considered an officer of Parliament. These SAIs tend to assume the role of managerial consultants or research-based organizations. The Westminster model is found in the United

[44] Less popular models -and more contested ones- are: i) the independent board under the Executive and ii) the Board Model. The former model has been implemented in Japan and Korea (Lienert and Jung, 2004) and its main risk is the lack of independence from the Executive. In the Board Model, SAIs are composed of independent courts without jurisdictional power. This type of SAIs is found in the Netherlands, Germany, Argentina, and Nicaragua (Lienert and Jung, 2004; Santiso, 2006 and 2007). However, this type of model has been contested because it is not differentiated enough from the Court Model. Indeed, some of the most typical courts of account also lack judicial power (Pessanha, 2010).

Kingdom, the United States, Canada, Ireland, Austria, Sweden and Finland (Lienert and Jung, 2004; Santiso, 2006 and 2007, Pollit 2003; Suzuki, 2004). Needless to say, there are different approaches to the way these SAIs fulfill their managerial accountability role.

### 2.2.2 The Court Model

In the Court Model (also called the Roman-Law model or the Quasi-Judicial Body) SAIs have traditionally focused on exercising legal accountability, and thus auditors tend to assume the role of legal operators, concerned with the legality of public acts and how the public administration conforms to formal procedures and requirements (van Zyl et al, 2009; Pereira et al., 2009; Santiso, 2007; Torgler, 2005; Dye and Stapenhurst, 1998). In this model, SAIs are organized as independent jurisdictional bodies with a collegiate decision making structure and with punitive powers similar to that of courts of justice. This model has been mainly implemented in countries with Roman legal tradition, such as Belgium, France, Italy, Greece, Luxembourg, Portugal, and Spain (Lienert and Jung, 2004; Santiso, 2006 and 2007; Suzuki, 2004), and SAIs that follow the Court Model tend to operate under the Modern Public Administration (MPA), which is characterized as being hierarchical and as focusing on regulations[45].

As mentioned in the introduction, Blume and Voigt (2007) have found that countries with SAI modelled like courts are more likely to suffer from higher levels of corruption[46]. The Court Model has also been severely criticized because of its poor performance in some countries. For example, the role of the Audit Court of Italy is "to write voluminous reports that are broadly reported to the press but do not produce any real effect and require them

[45] See: *Chapter 1.1: The Modern Public Administration (MPA).*

[46] The authors of this study make the point of adding that "this result is both very significant and quite robust since never vanishes when adding the available control variables" (Blume and Voigt, 2007: 20). Causality however is difficult to ascertain.

[high bureaucrats] to sit as judges in time-consuming controversies of minor practical interest" (Forte and Eusepi, 1994: 160). Likewise, courts of accounts in Brazil are criticized because they "perform compliance or conformity audit and not efficiency or impact auditing; they are therefore not concerned with poor administrative practices" (Pereira et al., 2009: 735).

### 2.2.3 Supreme Audit Institutions in Latin American countries

In Latin America, from colonial times all countries inherited a SAI organized as a Court. Some of these SAIs continue to be organized as such (e.g., Brazil, El Salvador) (Santiso, 2007) but others adopted the Westminster Model in the 1920s following the recommendations of the American economist Edwin Walter Kemmerer (Drake, 1989).

Among the countries that changed their organizational structure were Bolivia, Chile, Colombia, Ecuador, Guatemala, Mexico, and Peru; but despite such organizational changes, these SAIs continued to assume the role of a legal operator. In other words, regardless of their organizational structure, all SAIs of Latin American countries are concerned with making the public administration conform to legal and administrative regulations through audits of compliance[47]. For this reason, the negative aspects of SAIs organized as courts also apply to SAIs of Latin American countries, regardless of their organizational design.

## 2.3 The Role of Supreme Audit Institutions: Typology of Audits

SAIs main task is to make the public administration accountable through audits. The objectives of public audits have been specified by the International Organization of Supreme

[47] Santiso considers that "performance auditing is hindered by the legalistic culture that still prevails in Latin America, which privileges formal compliance with legal rules over substantive accountability with managerial objectives" (Santiso, 2007: 10).

Audit Institutions (hereinafter INTOSAI[48]) in its Lima Declaration of Guidelines on Auditing and Precepts (1977):

> [A]udit is not an end in itself but an indispensable part of a regulatory system whose aim is to reveal deviations from accepted standards and violations of the principles of legality, efficiency, effectiveness and economy of financial management early enough to make it possible to take corrective action in individual cases, to make those accountable accept responsibility, to obtain compensation, or to take steps to prevent –or at least render more difficult– such breaches. (INTOSAI, Lima Declaration of Guidelines on Auditing and Precepts, Article 1)

To the World Bank, the objectives of auditing are: a) to guarantee the proper and effective use of public funds; b) to guarantee the development of sound financial management; c) to guarantee the proper execution of administrative activities; and d) to guarantee the communication of information to public authorities and the general public throughout the publication of objective reports (World Bank's website). As we see from both INTOSAI and the World Bank, the purposes of auditing are multiple. There are four different types of audits according to their purposes. These are: 1. Financial-accounting audits (also called financial audits); 2. Audits of compliance; 3. Audits of performance (also called value for money audits; audits of economy, efficiency, and effectiveness; and the three Es audits); and 4. Audits of good governance (also called deliberative audits or integral audits).

### 2.3.1 Financial-accounting audits

*Financial-accounting audits* "guarantee the accuracy and reliability of government financial reporting" (Santiso, 2007: 9). In other words, "in financial auditing, the auditor

[48] The International Organisation of Supreme Audit Institutions (INTOSAI) "operates as an umbrella organisation for the external government audit community (…) INTOSAI is an autonomous, independent and non-political organisation. It is a non-governmental organisation with special consultative status with the Economic and Social Council (ECOSOC) of the United Nations. INTOSAI was founded in 1953 at the initiative of Emilio Fernandez Camus, then President of the SAI of Cuba. (…) At present INTOSAI has 189 Full Members and 4 Associated Members". (INTOSAI's website)

attests to, or verifies, the accuracy and fairness of presentation of financial statements. Attest [financial] audits result in opinions that indicate whether reliance can be placed on a government's financial statements" (Dye and Stapenhurst, 1998: 15). Schelker emphasizes that "because governments face incentives to misreport, independent review of the financial statements is crucial" (Schelker, 2008: 3). All SAIs conduct financial-accounting audits and some authors suggest that SAIs should restrict their mandate to this type of audit.

### 2.3.2 Audits of Compliance

In *audits of compliance* "the auditor asks if the government collected or spent no more than the authorized amount of money and for the purposes intended by the government. The audit team reviews transactions to see if the government department or agency conformed to all laws and regulations that governs its operations" (Dye and Stapenhurst, 1998, 15). It is important to note that SAIs that follow the Court Model focus on audits of compliance[49]. The same occurs in all SAIs of Latin American countries, regardless of their institutional organization. The term "audits of regularity" (Suzuki, 2004) refers to both *financial-accounting* and *compliance audits* indistinctively because of the overlap that exists in their overall objective of guaranteeing that governments "spend money in accordance with the budget" (Jones and Pendlebury as quoted by Streim, 1994: 185). Accordingly, the Lima Declaration recognizes these two types of audits as "the traditional task of Supreme Audit Institutions" (INTOSAI, Lima Declaration of Guidelines on Auditing Precepts, Section 4.1).

### 2.3.3 Audits of Performance

*Audits of performance* examine "the achievement of a given result with the least

[49] See: *Chapter 2.2: Organizational Models of Supreme Audit Institutions.*

possible expenditure, workers or other resources [which is the economy criteria]; the best ratio of output to cost [which is the efficiency criteria]; [and that policy programs and projects have been successfully implemented] to meet the established policy goals or objectives [which is the effectiveness criteria]" (Streim, 1994: 185 -186; see also Dye and Stapenhurst, 1998). It should be noted that audits of performance should be restricted to the analysis of means and the achievement of policy objectives, but shall never question the objectives themselves because these are a matter of political decision (Ahlenius, 2000). INTOSAI's Lima Declaration recognizes this type of audit when stating that "... there is another equally important type of audit – performance audit – which is oriented towards examining the performance, economy, efficiency and effectiveness of public administration. Performance audit covers not only specific financial operations, but the full range of government activity including both organizational and administrative systems" (INTOSAI, Lima Declaration of Guidelines on Auditing Precepts, Section 4.2). As mentioned before, SAIs that follow the Westminster Model tend to prioritize audits of performance over audits of compliance.

### 2.3.4 Audits of Good Governance

*Audits of good governance* are in an incipient stage. This type of audit focuses on the level of citizens' participation in policy making and policy implementation, the level of responsiveness and equity of the public administration, and the recognition of community values and citizens' interests in public policies. To Khemakhe (2001), SAIs are expected to adopt the role of facilitator. In this function, auditors employ their capabilities and skills "[to] raise questions linked to citizens' rights, such as: how national strategies and policies match users' needs; the implementation of mechanisms which allow citizens to participate in representative structures to decide national strategies and policies; the equitable and equal

treatment of users; the availability of information on the use of public funds; and the extent to which government activities provide quality services and ensure better social and regional outreach to the underprivileged" (Khemakhe, 2001: 7). Robert Denhardt and Janet Vinzant Denhardt argue that public servants should be made accountable for the respect and fulfillment of "statutory and constitutional law, community values, political norms, professional standards, and citizen interests" (Denhardt and Denhardt, 2000: 555). To Khemakhe, SAIs should undertake "integral audits", which include: i) traditional public administration values, such as: a. equality of citizens; b. neutrality of public administration; and c. the continuity of public service; ii) principles of democratic management, such as: a. the right to information; b. transparency; c. respect for due process; d. the responsibility to evaluate its actions; e. the accountability of civil servants; f. equity that avoids the abusive or arbitrary use of power; g. the clarity of laws and regulations; h. the accessibility of public services; i. the participation of officials in modernization efforts; and j. the right to a healthy environment and legal protection; and iii) contribute to simplifying administrative procedures and promoting decentralization (Khemakhe, 2001). This author stresses that auditors are already examining important issues, such as equality in government services, the transparency of institutions and decisions, the establishment of institutional mechanisms for consultation and participation in decision-making, and the resources for consultations on major issues (Khemakhe, 2001).[50]

[50] It is important to note that audits of good governance are different from good practices of auditing. While the former puts emphasis on the object of audits, the latter concerns the way the audit is undertaken. Examples of good practices in auditing are the peer review processes undergone by the SAIs of Canada and Iceland (Ferguson and Rafuse, 2004; and Thordarsson, 2000). Good practices of auditing also include transparency of audit findings and engaging the civil society in the audit process (INTOSAI, 2011; INTOSAI, 2013b). There are also grayer areas where it is difficult to distinguish between audits of performance and audits of good governance. For example, Streim (1994) suggests that, given the lack of interest in audit reports by the legislatures, governments should be obliged "to prepare a special annual citizen-oriented report providing information about the fulfillment of the promises made during the previous election campaign [and that] such a report should be audited by the supreme audit institution" (Streim, 1994: 187).

# CHAPTER 3

# THE ACCOUNTABILITY ROLE OF SUPREME AUDIT INSTITUTIONS IN EACH PUBLIC ADMINISTRATION MODEL

This chapter analyzes the various accountability roles that SAIs play in each public administration model. It is important to keep in mind that while all public administration models and types of audits pursue efficiency, honesty, and fairness, they also have severe caveats. Hence, it is a political decision to establish the type of public administration model and the type of audits that a specific SAI will perform. These decisions depend on too many variables, such as the ideological perception regarding the role of the public administration and how public services should be provided, what type of relationships the public administration should have with the citizenry, what the given characteristics and human resources of the public administration are at the national and sub-national levels, how much social trust the public administration has, what the economic constraints of the public administration are, what the most urgent problems that the public administration should overcome are, what the most urgent perceived problems (or social demands) are, etcetera. Undoubtedly, the assessment of all these variables should be done in a case-by-case manner, at specific points in time.

It is important to note that SAIs are part of the public administration environment in which they operate and, therefore, their own objectives, operational structures, strategies, and the type of audits they conduct are also determined by these different environments. Hence, the characteristics of a specific public administration determine the needs and justification for

auditing it, and therefore the type of audit to be undertaken. Thus, it is essential for SAIs to understand the rationality of the bureaucratic organization that is audited[51].

Nonetheless, it is also important to note a SAI's choice for undertaking specific types of audits is also determined by the self-image of the auditor-general. Brodtrick (2004) finds that most auditors from various countries (Canada, Cyprus, Philippines, Singapore, and Sweden) see themselves as either 'archivists' whose work is to "verif[y] accounts and documents findings […] without caring whether the results were desirable or undesirable, expected or unexpected" (Brodtrick, 2004: 235), or as 'detectives' whose work is to "identif[y] and repor[t] infractions. If shortfalls are not evident, it will search diligently until it finds something that it can report as an infraction" (Brodtrick, 2004: 236). Usually these self-images correspond to auditors who undertake financial audits and compliance audits and who work in a MPA environment. Brodtrick advocates for the promotion of another type of auditors' self-image, such as an 'expert' or a 'consultant', whose recommendations aim to contribute to "greater efficiency and effectiveness" (Brodtrick, 2004: 236), or as a 'catalyst', who "accepts individual imperfections in operations if the overall result is positive, yet points out areas where further improvements could be made" (Brodtrick, 2004: 236), or a 'partner', who "publish[es] weaknesses in government operations but would also report characteristics that indicate good performance" (Brodtrick, 2004: 236).

### 3.1 The Accountability Role of SAIs in Modern Public Administration: Focusing on Audits of Compliance and Financial-Accounting Audits

As explained in Chapter 1, in Modern Public Administrations (MPA) bureaucracies are self-centred hierarchical organizations where emphasis is on rules and procedures, and

[51] See: *Chapter 1: The Competing Models of Public Administration.*

there is distrust of the public bureaucracy when it interacts with the "corrupting forces" of the private sector (especially when awarding contracts, hiring personnel, and handling money). Hence, in this model SAIs' institutional mission, organizational structure, and audit objectives are determined by the SAIs' accountability role of guaranteeing: i) that the administrative hierarchy of the public administration has been respected (i.e., there is no encroachment of competences); and ii) that rules and regulations have been fulfilled by the bureaucracy. Thus, in MPA, SAIs privilege audits of compliance and financial-accounting audits because these types of audits are useful means for identifying deviations from the norms. Financial-accounting audits are also privileged because they allow for more "scientific planning".

In MPA, legal and administrative norms are assumed to be efficient because these have been elaborated following the rational/scientific method. Thus, SAIs do not need to evaluate the rationality or efficiency of administrative systems. Non-compliance with legal and administrative regulations can be regarded as the reason (or excuse) for explaining the failure of public policies. Moreover, non-compliance with legal and administrative regulations can be taken as corruption, especially when private companies are awarded public contracts (i.e., collusion may be assumed as the reason for non-compliance with legal and/or administrative regulations).

However, the excessive number of administrative regulations and rigorousness of compliance audits have both been under severe criticism. This system of legal accountability drains out creativity and entrepreneurship from the public bureaucracy because it "aims at avoiding mistakes, so [it] encourages risk-averse behaviour" (Hughes, 2003: 245). For the public bureaucracy, it becomes more important to avoid administrative mistakes than to be efficient and effective in delivering public services. Low decision-making power from frontline public managers further slows down the decision-making process, negatively

affecting the timing provision of services and increasing their costs. Moreover, audits of compliance focus on fine details that are usually useless for discovering significant corruption cases. Indeed, corruption can occur while respecting all the established rules and while complying with every formal regulation. Entangled legal and administrative procedures may even work as smoked windows to cover up corruption. Osborne and Gaebler illustrate some of these disadvantages with the following example: "When Massachusetts enacted a series of controls after construction scandals in the 1970s, public construction slowed to a crawl and its price skyrocketed. The reformers legislated an absence of even the appearance of wrongdoing 'at a price of no product' said former Boston Redevelopment Director Frank Logue" (Osborne and Gaebler, 1993: 111). To Bruno Frey "when public employees decide to *strictly* observe their legal obligation and to 'work to rule' the effect invariably is that the performance drops drastically (examples are postal services and public transport)" (Frey, 1994: 170). Likewise, Brodtrick states that "[in] situations that are fuzzy, characterized by uncertainty and inconsistency […] being guided by appropriate values matched with experience, intelligence and innovativeness usually yields better results than complying with prescribed rules" (Brodtrick, 2004: 229).

Finally, in the most extreme cases of distrust of the private sector, audits of compliance may be executed before administrative actions take place. The objective of these *ex-ante controls* is to review the administrative procedures and to authorize final approvals. It is assumed that *ex-ante controls* prevent wrongdoing and in some cases these authorizations may release the bureaucracy from administrative responsibilities. However, *ex-ante* audits do not allow for a clear distinction between the role of auditing and the role of management, the latter corresponding to the government and not to SAIs. It should also be noted that SAIs that

undertake *ex-ante controls* have a strong capacity to paralyse the public administration during the period in which final approval takes place[52].

### 3.2 The Accountability Role of SAIs in the Paradigm of New Public Management: Focusing on Performance Audits

The organizing principle of NPM is to make the public administration more efficient. Hence, accountability is usually considered a central feature of NPM because it impedes bureaucracies from maximizing their own benefit at the expense of the taxpayers[53]. The role of SAIs is to hold public managers accountable for their results. In NPM, SAIs conduct *audits of performance* and verify the following: "1.) the targets of each policy are clearly established; 2) the performance indicators that can properly evaluate the effects of each policy are selected; 3) administrative tools that can attain the targets of each policy most efficiently and effectively have been adopted; 4) the target values of performance indicators are set at appropriate levels; and 5) the actual values of performance indicators are accurate and not biased" (Azuma, 2003: 87). In a cross-state study conducted in the U.S., audits of performance proved to have a positive and significant influence on fiscal performance (Schelker, 2008). The preferred methodologies of performance audits vary from SAI to SAI, and from audit to audit. Performance audits began with examining records and interviewing key people, but nowadays it includes more sophisticated techniques such as case studies, issue analysis, stake-holder panels, consultation with experts, focus groups, cognitive mapping,

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[52] SAIs have also received the same criticism of any public agency that operates under the MPA. To Streim (1994), SAIs have four features that raise considerable doubts about their proper functioning: i) auditors usually receive a fixed salary, ii) auditors hold lifetime positions; iii) auditors may lose reputation without losing money; and iv) there are no liability rules compared to those in the private market. He concludes that governmental auditing only works in a satisfactory manner "if auditors are motivated intrinsically" (Streim, 1994: 184).

[53] The New Public Management (NPM) is founded in the economic theory of *public choice;* which recognizes public bureaucracy as rational and self-interested actors. See: *Chapter 1: The Competing Models of Public Administration.*

client interviews, customer satisfaction surveys, statistical analysis of routinely collected data, and operations research models (Ling, 2003; Pollit, 2003; Talbot and Wiggan, 2010; Bechberger et al., 2011).[54]

As public administrations (and SAIs within them) move from the MPA model to the NPM model, the international trend in the past decades has been to undertake fewer audits of compliance and to increase the number of performance audits (Suzuki, 2004; Pollitt and Summa, 1997). Changes brought in bureaucratic organizations by implementing NPM policies have strongly changed the way SAIs do their work. In a study of thirteen OECD countries, Lienert and Jung (2004) found that all of them carried out performance audits[55]; however, "financial audits still comprise the majority of the SAI workload" (Ruffner and Sevilla, 2004: 136)[56].

In NPM, *ex-ante* audits are rarely undertaken because the principle is that managers should be made accountable for their results or managerial performance. Nonetheless, some situations have led to carrying out *ex-ante audits of performance*. This occurs when policy implementation will take several years and it is acknowledged that the taxpayers are entitled to know what is being done with their money (Ling, 2003). In these situations the objective of performance *ex-ante* audits is to predict possible problems and outcomes of current policies. There are various methodologies for undertaking performance *ex-ante* audits, some intuitive

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[54] To Suzuki (2004) the scope and features of performance audits can be grouped as follows: 1) to be conducted independently by a third party to enhance credibility of information; 2) to check the degree of conformity (to provide critical conclusions); 3) to be based on generally accepted sound management principles (to measure management as performance measure); 4) to aim to improve economy and efficiency; 5) to aim at minimizing risks and costs (to measure costs and outcomes as performance measurement); 6) to measure progress towards goals; 7) to measure the appropriateness and usefulness of decision-making, to evaluate the usefulness of management, and to verify program compliance; 8) to evaluate the results and the impacts of programs; 9) to verify the cost-effectiveness to alternative approaches; 10) to evaluate whether the performance results are incompatible or not; 11) monitoring by Parliament; and 12) peer reviews.

[55] Lienert and Jung's study included the SAIs of Canada, Denmark, France, Finland, Germany, Japan, Korea, New Zealand, Norway, Spain, Sweden, the United Kingdom, and the United States.

[56] Ruffner and Sevilla add that "only in a few countries like the United Kingdom and the United States do VFM and effectiveness audits account for more than half of the work performed by the SAI" (Ruffner and Sevilla, 2004: 136).

and others more analytical. These methodologies include free association, behavioural simulations, issue analysis, scenarios, hexagon mapping, and systems modelling (Ling, 2003). It should be recognized that performance *ex-ante* audits pose serious theoretical problems because the line between policy-making and auditing is more diffuse and contestable. However, from a NPM perspective, performance *ex-ante* audits work as competitors against monopolistic public administrations. The most rounded example of this situation takes place in Switzerland at the municipal level, where some municipal audit institutions elected by the citizenry are entitled to propose alternative policy options to those of the government. In these cases, it is up to the citizens to choose between implementing the policy designed by the public administration or the counterproposal designed by the audit institution. In Switzerland, introducing a market force that breaks the monopoly of the public sector and enhances public participation in the decision-making process has been shown to have a positive effect in reducing public expenditures (Eichenberger and Schelker, 2006).

Audits of performance -alongside NPM theoretical background- also have important caveats (Kells, 2011). Firstly, it has been argued that although in NPM fewer regulations and decentralized decision-making may be conducive to achieving higher performance in certain cases, this may also increase the possibilities of corruption, and therefore of lowering performance. By contrast, in MPA, audits of compliance may promote efficiency (at least in certain conditions and to a certain extent) because of their deterrent effect on corruption or misdeeds. Thus, the quality and honesty of a country's bureaucracy is an important aspect to assess before choosing the model of public administration to be implemented and the type of audit that a specific SAI will conduct.

Secondly, most countries do not have the capacity to make real measurements of performance, and thus performance audits become merely an illusion or, at best, a

philosophical or ideological inquiry about how things might have been more efficient if services had been run differently. In other words, performance audits are only possible when public administrations have the capacity to measure their provision of public services (both quantitatively and qualitatively) – a condition that is hard to find even in the most developed countries (Grönlund et al., 2011). Thus, when there is no hard data to make real comparisons, SAIs will probably infringe upon the principle of neutrality if undertaking performance audits.

Thirdly, there is the question about how to interpret 'good performance', and this depends on the nature of the public policy (Brodtrick, 2004; Behn, 2003; Schwartz, 1999). There is significant risk that the concepts of performance and quality are defined in terms of what can easily be audited instead of social objectives. Gray and Jenkins argue that due to NPM reforms "what matters is what works may have become what matters is that that it is shown to work" (2004: 287) and Power considers that "VFM prioritizes that which can be measured and audited in economic terms –efficiency and economy– over that which is more ambiguous and local –effectiveness" (Power, 1996: 26). Indeed, Schwartz studied eight SAIs from OECD countries[57] and found that only two of them (SAIs of Sweden and the United States) where actually undertaking audits of effectiveness. The rest of them (Australia, Canada, Germany, the United Kingdom, and Israel[58]) were conducting various other types of performance audits, but did not measure effectiveness (Schwartz, 1999).

Fourthly, it has been argued that the "culture of control" (or the culture of accountability) may have shifted the focus of the public administration from doing (or providing services) to monitoring, evaluating and auditing. The best-qualified public servants may be found setting targets and controlling other public servants, instead of managing and

[57] Israel joined the OECD later but it has been included.
[58] The SAI of France did not respond to Schwartz's request.

providing best VFM (Power, 1996). Moreover, audits of performance may have become "a very distracting add-on an irritant and, worse, real obstacle for change [...] a slavish devotion to the universal meeting of targets, many of which have not been set very intelligently" (James Strachan, Chairman of the the U.K. Audit Commission, as quoted by Gray and Jenkins, 2004: 269)[59].

Fifthly, performance audits only make sense in deregulated contexts in which public administrators are willing and able to enhance their decision-making power. However, most public servants have not been trained and/or do not feel comfortable in this type of situation. They may even be afraid that their decisions will be later regarded as inefficient – and these fears are sometimes legitimate. Brodtrick illustrates this situation with the following example: "In 1998, the U.S. vice-president had asked all department and agency heads to promote innovation and to streamline the granting of waivers that would allow deviation from existing policies and procedures in order to make operations work better. The results, however, were not encouraging. Most federal agencies failed to respond to the directive" (Brodtrick, 2004: 241).

Sixthly, SAIs need to prove that their work is important and this can only be done by identifying problems in the public administration. Since performance audits increase the room for criticism, it will always be easy to criticize the public administration even if it is working fairly well (Behn, 2002; Streim, 1994). In Canada, managers that had been audited complained that: "certain recommendations did not target the true source of problems" (Morin, 2004: 150). Similar results have been found in other countries (Morin, 2004).

Seventhly, SAIs that undertake performance audits unavoidably assume policy-making roles that are not among their competences (Schwartz, 1999). Besides, performance

[59] In the same vein, Patricia Hewitt, U.K.'s Secretary of State for Trade and Industry declared: "I frankly think we have fallen into a trap of having too many targets" (Gray and Jenkins, 2004: 269).

audits infringe upon the principle of neutrality because they are intrinsically political, in the sense "of promoting certain ideas and values" (Saint-Martin, 2004: 133). Moreover, NPM empirical foundations "remain more a political ideology than an administrative science – something that cannot yet be tested or measured objectively with agreed-upon social scientific techniques and methods" (Saint-Martin, 2004: 132) and its alleged advantages have not been adequately proven by empirical studies (Saint-Martin 2004; Morin, 2004)[60].

### 3.3 The Accountability Role of SAIs in the New Public Governance: Focusing on Fairness, Equity, Community Values, Citizens' Participation and Citizens' Interests

According to the role that corresponds to the public administration in the NPG, audits of good governance shall inquire about the levels of citizens' participation in the formulation and management of public policies (Akyel and Köse, 2013; Almquist et al., 2013; Ling, 2003). Ling promotes a *deliberative audit* that should be concerned with auditing both "the deliberative credentials of the decision-making process –'Whose voices are heard?' and 'Are public interests identified through deliberative processes?'– and acknowledges the contested nature of assessing 'value' in the VFM process" (Ling, 2003: 450). Plant (2003) points out that SAIs should also inquire about the production of equity and equal access to public services. Audits of good governance should make public administrations accountable for the responsiveness, fairness, and equity of public policies.

Audits of good governance neither oppose audits of compliance nor audits of performance. Constitutional law and other regulations -especially when these norms guarantee human rights- are important in both the MPA and the NPG. Similarly, efficiency and effectiveness are shared values of the NPM and the NPG. Audits of performance may use

[60] Regarding managerial preconditions for implementing performance audits, see: Colleen et al. (2007).

the same techniques in both NPM and NPG; however, in NPG, audits of performance should be practiced on socially discussed and agreed-upon indicators of effectiveness and efficiency (Gains and Stoker, 2009; Power, 1996) or should focus on NPG interests. For example, in NPG performance audits based in scenario thinking (analysis of possible scenarios) will be "concerned with capturing different voices, fostering shared understandings, and building an adaptive culture" (Ling, 2003: 450).

Audits of good governance are not very frequent because the NPG is still in its beginning stage. Nonetheless, some examples can be mentioned. For example, the SAI of Brazil has the mandate to audit the "public morality" of the public administration. Likewise, the SAI of Israel has the mandate to examine if auditees have operated "in a morally irreproachable manner". In the Israeli context, ethical issues are regarded as "the probity, integrity and honesty of officials and politicians in the conduct of financial and administrative transactions and in the decision making process" (Hardman, 1996: 11)[61]. Audits of good governance also recognize and promote "best administrative practices". For example, SAIs of Australia, New Zealand, the United Kingdom, and the United States identify and report practices of good administration found in ministries, and also prepare guidebooks that include best administrative practices and/or best practices of financial reporting (Azuma, 2003; Pollitt, 2003; Grönlund et al., 2011).

Audits of good governance bring practical and theoretical problems of their own. Firstly, audits of responsiveness, equity, and fairness can be very subjective and are very difficult to both establish in advance and to measure. If indicators have been established in

[61] In this context, audits of ethical issues are considered "a reasonable concern of the SAI when executive decisions and policies clearly show that the government has departed from prevailing moral standards and societal values" (Hardman, 1996: 11). In Hardman's opinion: "While government audits are conducted within the constraints of law, those SAIs who rely exclusively on the law for guidance on ethical issues run the risk of auditing in a moral vacuum because ethics by its very nature cannot be defined in its temporal way, In such moral alienated auditing environment, SAIs would be reduced to the status of robots controlled solely by the legal and technical requirements of legislation to the total exclusion of all conduct not specifically covered in printed law" (Hardman, 1996: 12).

advance, then audits of good governance do not differ much from audits of compliance or audits of performance; but if indicators haven't been set in advance, then audits of good governance would create high levels of uncertainty in the public service. Secondly, audits of community values, citizens' interests, and professional standards may be regarded as improper if these values, interests, and standards have not been incorporated into the legal system. Moreover, community values and citizens' interests may respond to the activism (or lobbyism) of specific groups of citizens that are just well organized to make their voice heard, but which may not represent the majority of the population. In fact, the theoretical foundations of this *participative (deliberative) democracy* collides with the theoretical foundations of *representative democracy*, which are: i) the idea that governments should be selected by majorities and ii) the idea that people are represented by member of Congress that are elected by the entire citizenry.

### 3.4 Are Audits of Compliance and Performance Audits Compatible?

Most SAIs are legally competent to conduct financial, compliance, and performance audits. Most of them conduct these three types of audits, although with different emphasis. Some SAIs are also legally empowered to undertake certain types of good governance audits. As mentioned before, audits of good governance do not oppose any other type of audits. However, the question of compatibility arises when audits of compliance and audits of performance are conducted by the same SAI. What are the theoretical foundations or consequences of this practice?

Some authors consider that audits of compliance and performance audits are perfectly compatible. Some allege that the former are necessary and the later represent a higher standard of audits (Lienert and Jung, 2004) and others consider that both types of audits are

simply necessary. To Santiso, performance audits are necessary "to overcome the inefficiency of procedural driven bureaucracies" (Santiso, 2007: 10) and audits of compliance are also necessary "to uphold standards of integrity and probity necessary to combat corruption, especially in countries where the rule of law is weak" (Santiso, 2007: 10).

However, encompassing compatibility among compliance and performance audits is not an easy task to undertake and perhaps not a desirable one. For example, when analyzing the situation of SAIs of Malawi, Tanzania, and Uganda, Wang and Rakner (2005) posed serious doubts about the convenience of conducting both compliance and performance audits because none of these SAIs were able to fulfill their most basic roles and they all lacked human and economic resources. In developed countries, conducting these two types of audits by the same SAI has also been severely criticized because it sends incoherent signals to the public administration, creating a sort of schizophrenia in SAIs (Saint-Martin, 2004). When discussing the case of the Canadian Office of the Auditor General (OAG), Saint-Martin states that:

> [W]hen wearing the financial [compliance] 'hat' the OAG focuses on control, processes and respect for rules and procedures. But when wearing the VFMA [Value for Money Audits] 'hat', the OAG advocates fewer rules, less bureaucracy, risk-taking and a focus on results rather than on processes. It promotes a more 'business-like approach to management' […] in 'wearing two hats' at the same time, the office has developed towards managerialism 'an ambivalent' position […] Thus, one consequence of the OAG's double role as consultant and auditor is that the office lacks a clear coherent and consistent position and set of opinions about managerialist reforms and innovations in government. (Saint-Martin, 2004: 124, 132)

The possibility of conducting audits of compliance alongside audits of performance is indeed highly problematic. In a country managed by a Modern Public Administration (MPA) it would be unfair to make public administrators accountable for the delivery of VFM services (through performance audits), because public managers do not participate in policy design,

have minimum discretionary power, and face too many regulatory constrains. Hence, in MPAs, public managers' capacity to deliver VFM services is very limited[62]. In other words, audits of performance only make sense in the context of deregulated public administrations (NPM), where managers have been given high degrees of autonomy and decision-making power.

Likewise, in the context of New Public Management (NPM), public managers should not be made responsible for complying with legal and administrative regulations because regulations have been eliminated (or minimized) and replaced by VFM targets[63]. In NPM, public managers are made responsible for reaching quantified targets, and this is verified through performance audits.

Hence, in order to send coherent signals to the public administration, it is necessary to identify the main characteristics of the public administration in which a specific SAI will operate. Then a SAI can decide whether it should conduct compliance or performance audits (and/or audits of good governance). This choice cannot be regarded as a decision between 'fighting against corruption', 'pursuing efficiency of the public administration', and 'pursuing fairness or equity in the public policies'. There is actually much more at play. As was mentioned in the introductory part of this chapter, all three public administration models and their corresponding types of audits pursue efficiency, honesty, and fairness of the public administration, but they also have severe caveats. Hence, choosing the public administration and type of audit that each specific society needs should be done in a case-by-case manner and at specific points in time. In this regard, INTOSAI's Lima Declaration stipulates that SAIs' audit objectives are of equal importance and that "it is for each supreme audit institution to determine its priorities on a case-by-case basis" (INTOSAI, Lima Declaration of

[62] See *Chapter 1: The Competing Models of Public Administration.*
[63] See *Chapter 1: The Competing Models of Public Administration.*

Guidelines on Auditing Precepts, Section 4.3).

### 3.5 The Role of Supreme Audit Institutions in Fighting Corruption

Different expectations exist regarding the role that corresponds to SAIs in fighting corruption. While the general public expects SAIs to identify corruption, most auditors regard their corruption-fighting role as indirect and secondary, limited to the persuasive effects that public audits may have (Dye, 2007; Khan, 2007; Power, 1996). Most representatives of SAIs that participated in INTOSAI's 1996 Seminar on Government Auditing thought that SAIs should not play any role in highlighting cases of corruption or, if anything, their role should be regarded only as indirect (INTOSAI, 1996). In 1998, representatives who participated in that year's INTOSAI's International Congress of Supreme Audit Institutions added that "the primary responsibility for the prevention and detection of corruption rests with the administrative authorities, the police, and other investigative institutions and cannot be counted among the main tasks of SAIs" (Borge, 1999: 8). Nonetheless, SAIs acknowledge their collaborative and preventive roles in curbing corruption through the following mechanisms: i) to oversee asset declarations of public servants; ii) to evaluate systems of internal control; iii) to exercise ex-ante control of public procurement; iv) to audit areas of high corruption risk (e.g., oversee privatization processes); v) to publicize corruption risks; and vi) to refer cases of corruption to public prosecutors (Alastair, 2008; Borge, 1999; Santiso, 2006). Since these mechanisms fall short of proving corruption, Khan (2007) proposes new auditing techniques in order to point out opportunities for corruption. These techniques include building inventory of corruption opportunities, applying a corruption opportunity test, and incorporating customer satisfaction surveys (Khan, 2007). However, identifying opportunities for corruption does not equal to identifying or demonstrating

corruption itself (much less demonstrating who has committed corruption).

Kayrak has made it clear that SAIs can identify various forms of corruption but cannot identify others. SAIs can identify false statements, purchasing for personal use, split purchasing in order to evade legal obligations and procedures, and use of invoices of non-existent companies; but SAIs cannot identify bribery, extortion, favoritism, conflict of interests, gift giving, graft, kickback, and laundering (Kayrak, 2008). In short "SAIs' ability to detect corruption would be limited to documents related to accounts of auditee" (Kayrak, 2008: 67). Hence, the role of SAIs in curbing corruption must be regarded as important but limited.

It is very important to note that the role of SAIs in curbing corruption should not be analyzed in isolation from other intra-state institutions of accountability because SAIs are most effective when they work within a system of accountability[64] or a well functioning National Integrity System (Pope, 2000; Dye and Stapenhurst 1998; Langseth et al., 1997)[65]. For this reason, several practitioners consider that SAIs should forward their findings to authorities more capable of investigating and identifying corruption, such as the police, the public prosecutor office, the public ministry, and anticorruption agencies (Alastair, 2008; Kayrak, 2008; Khan, 2007; Anderl, 1996). While this type of information exchange is either regulated or mandatory for some SAIs (e.g., Germany, India, Philippines, Sweden, and the U.K.) (Alastair, 2008; Borge 1999), most SAIs agree that this type of information exchange should be strengthened (INTOSAI, 2009).

The discussion regarding the role of SAIs in fighting corruption is not over. Dye

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[64] See: *Chapter 2.1: Conceptualizing Supreme Audit Institutions as Independent Intrastate Institutions of Accountability.*

[65] A national integrity system (NIS) aims at achieving sustainable development, rule of law and good quality of live. The NIS is composed of the following institutions: legislative, executive, judiciary, civil service, watchdog agencies (SAIs, ombudsman, police, anti-corruption agencies, public accounts committee), civil society, mass media, and international agencies (Pope, 2000: 36).

(2007) believes that SAIs should be able to identify corruption and proposes a wide range of actions for this purpose, such as establishing fraud auditing standards, supporting and cooperating with national antifraud agencies, encouraging ministries and public departments to create fraud control plans, and establishing forensic audit units. It is important to note that if SAIs were able to identify acts of corruption, it would make sense for this institution to prosecute civil servants directly, without having to rely on other intra-state institutions of accountability (or "watchdog agencies"). However, even if Dye's recommendations were implemented, it is still not clear how public audits might be able to identify corruption.

In this context, the study of SAIs of Latin American countries is important because some of these SAIs are mandated to prosecute civil servants (e.g., Bolivia, Chile, Ecuador, Guatemala, Panama, and Peru). While the prosecutorial mandate of these SAIs could be contributing to curbing corruption, there also exist the risks that: 1) SAIs may be encroaching on other institutions' mandates in order to obtain adequate proof of the commission of a crime, or 2) that SAIs are passing cases to the judiciary "on matters that initially appear suspicious [but that] may have reasonable explanations" (Kayrak, 2008: 67), making the involvement of judicial authorities unnecessary and undermining the public administration. In Peru, various commentators have repeatedly alleged that the latter situation occurs to the detriment of the Peruvian public administration, but without presenting evidence of their claim (Althaus 2014, Blume 2013, El Comercio 2013, Blume, 2009; Cillóniz, 2009; Du Bois, 2009; Kuckzynsky, 2009; Luna-Victoria, 2009; Prialé, 2009; Simon 2009; Teullet, 2009; Webb, 2009; Bullard, 2008). This dissertation contributes to the elucidation of this situation by analyzing 35 criminal processes in which the SAI of Peru (CGR) accused 194 civil

servants of committing 305 crimes[66].

[66] See: *Chapter 7.1: Evaluating CGR's Criminal Accusations Against Civil Servants.*

# PART II

# THE PERUVIAN PUBLIC ADMINISTRATION AND THE ACCOUNTABILITY ROLE OF THE SUPREME AUDIT INSTITUTION OF PERU

# CHAPTER 4

# CHARACTERIZING THE PERUVIAN PUBLIC ADMINISTRATION

## 4.1 Legal Framework of the Peruvian Public Administration

The Peruvian public administration follows the Modern Public Administration Model (MPA) but shares many problems that are common among public administrations in developing countries[67]. In Peru, all public institutions are hierarchically organized as specified in their corresponding Organic Laws[68] and every position's functional competence is established in the agency's Manual of Organization & Functions (MOF). As a general rule, the needs of permanent personnel are established in a Table of Allocation of Personnel (CAP) and every position should be incorporated in the Analytical Personnel Budget (PAP) in order to be filled[69]. In Peru, the public administration is highly regulated and governed by the Principle of Legality, which means that public servants can only act within their specified legal mandates (Article IV, Preliminary Title, Law 27444). Thus, public servants in Peru have a very reduced discretionary power to make the most cost-effective decisions and to adjust decisions to special or local circumstances[70].

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[67] See: *Chapter 1.1: The Modern Public Administration (MPA)* and *Chapter 1.4: Public Administration in Developing Countries.*

[68] Organic Laws rank the same as regular laws but their approval and modification requires a qualified majority in the Congress (50 percent plus 1 vote of legal number of members of Congress) instead of a simple majority (50% plus one vote of valid votes).

[69] Both of these administrative instruments (MOF and CAP) will be unified in the Chart of the Positions of the Institution (CPE) (Law 30057, Fourth Supplemental and Final Provision).

[70] See: *Chapter 1.5: Determining Civil Servants' Power of Discretion and Responsibilities*.

To say that in Peru there is a professional and competent public administration -as proclaimed by the MPA- would be misleading. The Peruvian public administration is composed of some 1,300,000 public workers who are regulated by various regimes (Velásquez, 2013). In July 2010, the National Authority of the Civil Service (SERVIR) compiled 138 legal-rank norms that regulated the public administration, but the applicability of these norms varies from public institution to public institution[71]. The most important regimes of the public service are: i) the new regime of the civil service; ii) the former regime of the civil service, which still applies to some 198,273 workers; iii) civil servants under regulations of the private sector, which applies to 85,796 workers; and iv) civil servants under administrative contract of services, which applies to 218,066 workers (Velásquez, 2013). Besides, there are special regimes for the judiciary, the diplomacy, the military, and the police.

The New Regime of the Civil Service (NRCS) was established by Law 30057 in July 2013. NRCS is important because it will unify the Former Regime of the Civil Service (Legislative Decree 276), the regime for public institutions under private sector regulations (Legislative Decree 728), and the Administrative Contract of Services (CAS) Regime (Legislative Decree 1057). NRCS is expected to apply to some 502,135 public servants when fully implemented, which should occur in six years (Law 30057, First Transitory and Complementary Provision).

Civil servants -regardless of their specific administrative regime- may commit three types of responsibilities: i) administrative responsibilities, which occur when breaching administrative regulations or commit administrative offenses; ii) civil responsibilities, which

[71] These norms can be divided in 83 laws and 55 other law-ranked nor SERVIR classifies these norms in two groups: i) Norms of General Regime, and ii) Norms of Special Careers. There are also some labor norms that apply to workers of the private sector and some public institutions.

occur when civil servants cause pecuniary damages to the State due to infringement of legal or administrative regulations; and iii) criminal responsibilities, which occur when civil servants commit a crime.

### 4.1.1 Administrative Responsibilities of Civil Servants

According to the Ninth Final Provision of the *Organic Law of the National System of Control & the Supreme Audit Institution* (hereinafter CGR's Organic Law)[72], civil servants commit administrative responsibilities when they violate administrative regulations (which are establish in their specific regimens) or when they underperform their administrative functions (for which public institutions should be required to predetermine objective benchmarks of efficiency). Both the NRCS and the former regime of the civil service establish that administrative disciplinary proceedings are conducted within each public institution. Nonetheless, civil servants have the right to appeal to SERVIR's Tribunal of the Civil Service[73].

In general, civil servants may be reprimanded, suspended or dismissed if they commit any of the following administrative offenses:

> The authorities of State agencies and civil servants, regardless of their employment or contractual arrangements, incur an administrative offense and thus, may be administratively sanctioned with reprimand, short-term suspension, long-term suspension or removal, depending on the gravity of the offense, recidivism, damage and intentionality of their acts, if:
> 1. To unreasonably refuse to receive applications, resources, statements, information or record issued on them.
> 2. Do not deliver to the authority, within the legal term, documents that should be decided or commented.
> 3. To unreasonably delay the submission of data, records or files that have

[72] Law No. 27785, Published in 23rd July 2002.

[73] SERVIR's Tribunal of the Civil Service was created by Legislative Decree 1023 (Article 17). It is an independent organ within the structure of the National Authority of the Civil Service (SERVIR) and, therefore, it is not related with CGR.

been requested to resolve a procedure or to produce a procedural act.
4. To solve a matter without proper motivation.
5. To run an act that is not ready for implementation.
6. Not to communicate, within the legal time, the grounds of abstention that may impede him to solve a matter.
7. To dilate compliance mandates or not to perform administrative decisions.
8. To somehow intimidate those wanting to raise an administrative complaint or contradict his decisions.
9. To act in overt illegality.
10. To distribute in any way or allow access to confidential information" (Law 27444, Article 239)

Since December 2010, there has been an alternative disciplinary administrative proceeding that is conducted under disciplinary organs of the Supreme Audit Institution of Peru (hereinafter CGR). Indeed, Law No. 29622 mandates CGR to sanction a public servant of any regime if a CGR audit report identifies that s/he has committed an administrative fault. However, the creation and implementation of CGR's administrative disciplinary organs is quite recent, and thus its impacts remain difficult to evaluate[74].

### 4.1.2 Civil Responsibilities of Civil Servants

Civil responsibility (liability) of public servants is defined by law as that which civil servants may incur when, in performing their duties, breach their functions and cause (by committing either fraud, inexcusable fault, or mild fault) an economic damage to the State agency in which they work (CGR's Organic Law, Ninth Final Provision). Thus, civil responsibility of public servants is intimately linked to the Principle of Legality as public servants' functions are specifically stipulated in every state agency's MOF or, in the case of temporary servants, in their administrative contract of services.

[74] CGR's Superior Tribunal of Administrative Responsibilities (STAR) was implemented in January 2013 and it started to exercise its punitive power in July 2013. See: *Chapter 5.5: CGR's Mandate to Conduct Administrative Disciplinary Proceedings.*

CGR's Organic Law further stipulates that civil responsibility caused by breaching administrative functions shall be considered and governed by the rules of contractual responsibility (CGR's Organic Law, Ninth Final Provision)[75]. In turn, contractual civil responsibility is regulated in articles 1314 to 1332 of the Civil Code of Peru (hereinafter C.C.)[76]. These norms clarify that civil responsibility includes both damages and loss of future earnings. Besides, fraud, inexcusable fault and mild fault, for which public servants may be considered responsible, shall be understood as follows:

> Fraud.- Proceed with fraud who deliberately does not fulfill his duties.
>
> Inexcusable fault.- Commits inexcusable fault he who does not execute his obligation due to severe negligence.
>
> Mild fault.- Acts with mild fault he who fails to show the ordinary diligence which is required by the nature of his obligations and which is appropriate to the circumstances of people, time and place." (Article 1318 to 1320 of the C.C.).

In this regard, the Civil Code of Peru clarifies that those who act with ordinary care are not responsible for non-performance, or for partial, late or defective compliance of an obligation (Article 1314 of C.C.). Also, there is no civil responsibility when breaching a contract -or when under-fulfilling an administrative mandate- is attributable to the public administration itself; for example, when the necessary conditions to fulfill an obligation have not been provided by the public administration (Article 1316 of C.C.) and also when

[75] Law No. 27785, Ninth Final Provision stipulates that the obligation to repair damages to the State is governed by the rules of contractual responsibility and those who cause economic damages are co-responsible in solidarity (for the full amount of damages). The corresponding civil action prescribes ten years after the events that generated the economic damages have passed. Do you mean a statute of limitations of ten years?

[76] Civil Code of Peru, Book 6 (Obligations), Section 2 (Effects of Obligations), Title 9 (Non-performance of obligations), Chapter 1 (General Provisions).

nonperformance is caused by unforeseeable circumstances or by *force majeure* (Article 1315 of C.C.).

### 4.1.3 Criminal Responsibilities of Civil Servants

Criminal responsibility is defined by law as that which public officials or servants incur when, in exercising their functions, commit an act or omission that is subject to criminal action[77]. Criminal acts that can only be committed by civil servants are established in articles 376 to 401 of the Criminal Code of Peru[78]. A total of 30 conducts have been stipulated as crimes that may be committed by civil servants. These conducts are classified in four sections, which have a basic criminal conduct and several criminal modalities. These sections are: i) Abuse of Authority (7 criminal conducts); ii) Concussion (5 criminal conducts); iii) Peculation (6 criminal conducts); and iv) Bribery & Corruption of Civil Servants (12 criminal conducts). In all these cases, the protected public good is the public administration. The Criminal Code of Peru also protects Public Faith (or legal certainty) by criminalizing various acts of forgery and misrepresentation. These latest crimes can be committed by both civil servants and non-civil servants[79].

The most important and common criminal conducts for which civil servants are accused by the Supreme Audit Institution (SAI) of Peru are:

Abuse of Authority, Modality of Arbitrary Act.-

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[77] Organic Law of the National System of Control & the Supreme Audit Institution, Law No. 27785, Final Provision Ninth.

[78] Articles 376 to 401 correspond to the Second Chapter (entitled "Crimes Committed by Civil Servants") of Title XVIII (Crimes Against the Public Administration) of the Second Book (Crimes) of the Criminal Code of Peru; which is in effect since April 1991.

[79] Crimes against Public Faith are typified in Title XIX of the Second Book of the Peruvian Criminal Code, in articles 427 to 439.

"The public official who, abusing their powers, commits or orders, to the detriment of anyone, any arbitrary act, shall be punished with imprisonment not exceeding two years.
When the facts arise from an enforced collection proceeding, the penalty will be not less than two nor more than four years." (Article 376, Criminal Code of Peru[80])

Abuse of Authority, Modality of Omission (Dereliction), Rejection or Delay to Perform Duties.-
"The public official who illegally omits, refuses or delays any act of his office, shall be punished with imprisonment not exceeding two years and thirty to sixty days' fine." (Article 377, Criminal Code of Peru)

Concussion.-
"The official or public servant who, abusing his position, compels or induces a person to give or promise unduly, for himself or for another person, a good or benefit, shall be punished by imprisonment of not less than two nor more eight years." (Article 382 of the Criminal Code of Peru)

Collusion.-
"The official or public servant who, in contracts, supplies, procurement, competitive bidding, auction or other similar transaction in which he is involved by virtue of his official position or by special commission, defrauds the State or a State agency, through collusion with stakeholders in the agreements, adjustments, settlements or supplies, shall be punished by imprisonment for not less than three nor more than fifteen years." (Article 384, Criminal Code of Peru[81])

Peculation.-
"The official or public servant who appropriates or uses in any manner, for himself or for another, assets whose perception, administration or custody are entrusted to him by virtue of his office, shall be punished with imprisonment of not less than two nor more than eight years.
It is an aggravating factor if the funds or effects were intended for welfare or social support programs. In these cases, the deprivation of liberty shall be not less than four nor more than ten years.
If the officer's negligence gives occasion to someone else to thieve funds or assets, he shall be punished with imprisonment not exceeding two years or community service for twenty to forty days. It is an aggravating factor if the funds or assets were intended for welfare or social support programs. In these cases, the imprisonment shall be not less than three nor more than five years." (Article 387, Criminal Code of Peru[82])

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[80] This criminal type was modified by Law No. 28165, in 1st October 2004.

[81] Collusion is a m*odality of Concussion.* This criminal type was modified by Law No. 26713, in 27th December 1996.

[82] This criminal type was modified by Law No. 26198, in 13th June 1993.

Embezzlement or Misuse of Public Funds (Modality of Peculation).-
"The official or public servant who uses the money or assets he administers in a way different from that to which they are intended, affecting the service or the entrusted functions, shall be punished by imprisonment for not less than one nor more than four years.
If the money or goods that he administers are intended to support social programs, development programs or welfare, and are given a different use, affecting the service or the entrusted functions, the imprisonment shall be not less than three years nor more than eight years." (Article 389, Criminal Code of Peru[83])

Passive Bribery.-
"The official or public servant who accepts or receives donation, promise or other advantage or benefit, for performing or omitting to perform an administrative act in violation of his obligations, shall be punished with imprisonment not less than five nor more than eight years and disqualification under subsections 1 and 2 of Article 36 of the Criminal Code.
The official or public servant who requests, directly or indirectly, a gift, promise or other advantage or benefit, for performing or omitting to perform an administrative act in violation of his obligations or as a result of having missed them, shall be punished by imprisonment of not less six nor more than eight years and disqualification under subsections 1 and 2 of Article 36 of the Penal Code.
The official or public servant who conditions his functional behavior to the giving or pledge of a donation or advantage, shall be punished by imprisonment of not less than eight nor more than ten years and disqualification under subsections 1 and 2 Article 36 of the Penal Code." (Article 393, Criminal Code of Peru)[84]

Inconsistent negotiation or taking undue advantage of his functional position.-
The official or public servant who improperly -directly or indirectly or by simulated act- gets interested for personal or third party profit, in any contract or transaction in which he is involved by virtue of his position, shall be punished by imprisonment of not less than four nor more than six years and disqualification under subsections 1 and 2 of Article 36 of the Penal Code." (Article 399, Criminal Code of Peru)[85]

Forgery of Documents.-

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[83] This criminal type was modified by Law No. 27151, in 7th July 1999.

[84] This illegal conduct correspond to the basic modality of bribery, which is also refer to as passive bribery. This article was modified by Law No. 28355, in 6th October1999.

[85] The crime "*Inconsistent negotiation or taking undue advantage of his functional position*" was originally typified in article 397 of the Criminal Code of Peru. This article has been modified twice, first in 1999 (Law No. 27074) and later in 6th October 2004 (Law 28355).

> "Whoever makes, in whole or in part, a false document or adulterates a real one that could give rise to rights and obligations or serve to prove a fact, with the purpose of using the document, shall be punished if its use can cause harm, with imprisonment of not less than two nor more than ten years and with thirty to ninety days-fine if it is a public document, public record, title or any other; and with deprivation of liberty for not less than two nor more than four years, and one hundred and eighty to three hundred sixty-five days of fine, if it is a private document.
> Anyone who uses a false or forged document as if it were legitimate, provided that their use can be harm, shall be punished, if any, with the same penalties. (Article 427, Criminal Code of Peru)
>
> Misrepresentation.-
> Whoever inserts -or causes to be inserted- in a public document, false statements concerning facts to be established with the document, in order to use it as if the statement was in line with the truth, shall be punished if the use of such document can cause a harm, with imprisonment of not less than three nor more than six years and one hundred and eighty to three hundred sixty-five days' fine.
> Whoever uses such document as if the content was accurate, so long as its use may cause harm, shall be punished with the same penalties. (Article 428, Criminal Code of Peru).

It should be added that penalties below or up to four years of imprisonment can be -and usually are- suspended by criminal courts, which means that a code of conduct is imposed on criminals so they do not need to be imprisoned. This benefit is stipulated in article 57 of the Criminal Code of Peru. Besides, civil servants that are found guilty of a crime may also be disqualified from joining the civil service and for serving the public administration under any labor regime. Disqualifications of civil servants are stipulated in article 36 of the Criminal Code and may also include disqualifications for exercising some political rights and civil rights (e.g., cancellation of permission to exercise a profession, cancellation of the authorization to carry firearms, deprivation of military or police degrees, etcetera).

### 4.2 Characterizing the Peruvian Public Administration: Deficiencies and Challenges

In Peru, the technical capacity of the public service is uneven. While there are some very prestigious public agencies (e.g., Central Bank, Ministry of Economy and Finances, National Institute of Antitrust and Intellectual Property, National Superintendence of Tax Administration, Ombudsman Office, etc.), most of the public administration is generally regarded as corrupt, inefficient, and incompetent. According to the Worldwide Governance Indicators (World Bank, 2013), Peru ranks in the 49th percentile of least-effective public administrations[86], in the 43rd percentile of most corrupt countries[87], and in the lowest 33rd percentile of countries abiding by the rule of law[88].

Lack of administrative capacity and unfulfilling legal and administrative regulations are usually connected problems. For example:

- In September of 1999 the local government of Sapillica (located in Ayabaca, Piura) initiated the construction of a "Sport Platform" without an approved technical file, without designating a Resident Engineer, and without fulfilling the minimum standards of construction. The work presented multiple technical problems due to the failure to fulfill these administrative regulations and lack of technical capacity. According to CGR in 2003 the costs for repairing the damages of the construction were S/. 24,057.37 (Peruvian soles).

- In 2000, Murrugarra, Chief of the Public Works and Developmental Division of District Municipality of Paramonga (located in the Province of Barranca, Lima), approved a technical file for the construction of a bridge and acted as resident engineer although he was an architect and not a civil engineer. Due to several deficiencies in the technical file (e.g., lack of soil studies, hydrology studies, and topographic studies) and lack of proper supervision by a competent professional, one of the bridge's structural supporting plates collapsed. According to CGR, the cost of damages was S/. 5,864.[89]

While enhancing the rule of law is one of the most important needs of the Peruvian public administration, it is also important to identify areas where strict obedience of the law

[86] It scores -0.16 points in a range from -2.25 to +2.25 points.
[87] It scores -0.39 points in a range from -2.25 to +2.50 points.
[88] It scores -0.61 in a rank from -2.25 to +2.50 points.
[89] The Judiciary found Murrugarra responsible for the damages but ordered him to pay S/. 1,633 (CGR, File No. 100-2002-CG).

may create unwanted results. The discretionary power of civil servants needs to be rethought in order to provide enough opportunities for cost-effective and community acceptable decisions[90]. For example:

- In December 2000, the Administrative Commission of the Touristic Thermal Springs of the Inca decided to repair its pools so it hired a resident engineer (civil engineer) and an inspector engineer (civil engineer). According to the regulations and due to the small amount of money involved in the project, CGR established that the Commission was only allowed to hire an inspector engineer and not a resident engineer and, therefore, it sued the commission's members for the salary paid to the resident engineer. CGR did not take into account the historical, cultural and touristic (economic) importance of the thermal baths for this particular local community.[91]

- From January 1999 to July 2000 the Tumbes Municipal Enterprise of Water and Sewer (EMFAPATUMBES S.A.) established cheaper tariffs than mandated by the Superintendence of Water (SUNASS). In August 2001, CGR sued the seven members of the public enterprise directory for S/. 81,898.59, which was the additional amount of money that should have been collected if the legal tariff had been applied. CGR did not take into account that: i) SUNASS tariffs are established for enterprises that provide 24-hour service and EMFAPATUMBES S.A. provided water for eight hours a day. By charging what was mandated by SUNASS clients would pay for a service that they did not receive; ii) reduced tariffs were targeted to the poor because it only applied to households with minimum water consumption[92].

As mentioned above, high turnover rate of public managers and policy makers has also prevented the Peruvian public service from developing a professional and stable public administration. This creates severe problems in both the delivery of services and the fulfillment of administrative regulations. For example:

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[90] See: *Chapter 1.5: Determining Civil Servants' Power of Discretion and Responsibilities*.

[91] CGR, File No. 268-2002-CG, Sub-file No. 284-2003.

[92] The Superintendency established a tariff of S/. 34.74 for water consumption below 20m3 and *EMFAPATUMBES S.A.* established 40% cheaper tariffs (S/. 20.95) for households located in shantytowns whose water consumption was below 12m3, and 25% cheaper tariffs (S/. 26.20) for households located in shantytowns whose water consumption was below 15m3. In this case the Judiciary found that *EMFAPATUMBES S.A.* had not suffered any damage yet because customers could receive a new invoice (CGR, File No. 111-2001-CG, Sub-file 117-2001).

- In 2001 and 2002 the National Office for Electoral Process (ONPE) did not present various tax-return forms to the office in charge. CGR characterized this situation as a lack of competence that had caused damage to ONPE. However, from the judicial file it appears that high staff rotation made it difficult for ONPE's new personnel to be aware of this specific task. In this particular case, ONPE's rightful to claim tax-returns had its origin in a donation from USAID. According to the judicial file, a new Head Officer of ONPE (Fernando Tuesta) was appointed in December 2000. In that month he appointed a new Manager of Administration and Finances (Ernesto Bustamante) -who was the person who requested a donation from USAID and who authorized ONPE's obligation to recollect and return to USAID all taxes spent with money from that donation. However, a few months later, in June 2001, Bustamante (and his secretary) quit ONPE and Iracema Lozano was appointed to this position. Lozano had not negotiated the agreement with USAID and was not aware that ONPE had to return money to USAID. Consequently, she did not present the corresponding tax-return forms to the office in charge (APCI)[93].

Salary regimes for elected public authorities and civil servants also pose severe problems to the public administration. These problems have received different treatment by CGR, which has presented civil lawsuits and criminal accusations indistinctly. The judiciary has been more homogeneous: it declared all criminal cases unsubstantiated but it declared civil responsibility (obligation to compensate economic damages) when civil lawsuits were presented[94]:

- In 2002 CGR sued Lino Ramos Llasac, member of the Municipality Council of Santiago, for having received improper payments in 1994 (an increase of payment that had not been approved by the Municipality Council itself and payments for assisting to Municipality Council's Ceremony Sessions). The Judiciary found Lino Ramos Llasac responsible for damages to the

[93] CGR considered that several civil servants were responsible for causing economic damage to ONPE. CGR presented three civil demands. Interestingly, these claims were filed against civil servants of different positions, which reveals that CGR was never aware which public servant(s) were really responsible for claiming the tax-returns. In two cases the Judiciary found that civil servants were not responsible for any damage because the money was kept within the State (in the tax revenue office) and therefore the State (the National Office for Electoral Process - ONPE) could not claim to have suffered any damage. In the third case the Judiciary found two civil servants to be responsible for the damages that ONPE had suffered (although this money should have been returned to USAID, which never claimed to have suffered any damage). The civil servants who were found responsible for economic damages to ONPE did not appeal the judicial sentence although they had the right to appeal (CGR, File No. 102-2003-CG).

[94] In general, the salary of civil servants should not exceed that of the President. However, some civil servants have been exempted from this limitation (e.g., The Auditor General, judges from the Supreme Court of Justice, high-rank officers of the Central Bank, etcetera).

municipality[95]. However, in a similar case CGR presented a criminal accusation (peculation) against the mayor and five council members of District Municipality of Buldibuyo. The Judiciary did not find the accused guilty[96].

- In 1995 Doralisa Tovar Torres, President of the Reorganizing Commission of the National University Guzmán y Valle, determined her own salary according to the former law for temporal contracts of services (SNP). To CGR her salary was illegal because her position was equivalent to that of a public university rector and, thus, her salary should have been equal to these servants. CGR sued Doralisa Tovar and the Judiciary found her responsible for damages to the State[97]. In a similar case that took place in 1997, the members of the Reorganizing Commission of the National University José Faustino Sanchez Carrión determined their own salaries according to the former law for temporal contracts of services (SNP). Again, CGR considered that these salaries were illegal because they should have been equal to those of the university authorities under the administrative career regime (Rector, Vice-Rector and Faculty Deans). CGR presented criminal accusations for peculation but the Supreme Court decided that these salaries were determined according to Law 26457 (Law that regulated the reorganizing process of public universities) and Art. 4 of Law 26614, which stipulated that presidents of reorganizing commissions have complete attributions and competences to emit the norms and resolutions that were required. According to the Supreme Court of Justice this norm included the possibility to establish the salary of the Commission's members because Law 23733 (Law of Universities) had been left without effects.

Finally, the public administration of Peru is always at risk of being used for politicization and clientelistic purposes[98]. This has been repeatedly identified by CGR. For example:

- In the year 2000 the Transitory Council of Regional Administration "La Libertad" (CTAR – La Libertad[99]) paid for: i) a commemorative lunch for the graduating students of University Orrego; ii) renting a place for celebrating the graduation of the students of Technological Institute of the North, and a

[95] CGR, File No. 077-2004-CG (Sub-file No. 222-2004).
[96] CGR, File No. 189-2002-CG (Sub-file No. 217-2002).
[97] CGR, File No. 263-2001-CG. The author did not receive from CGR the Judicial Order in which Tovar was found responsible for having caused economic damages to the State. Nonetheless, this result is clearly established in the Supreme Court of Justice's resolution that rejects Tovar's appeal resource to void the judicial process.
[98] Politicization is a common characteristic of public administrations of developing countries. See: *Chapter 1.4: Public Administration in Developing Countries.*
[99] CTARs were institutions that preceded Regional Governments. Executive-presidents of CTARs were appointed by the central government (Executive). Nowadays Regional Governors are elected by the citizenry.

celebration for the students of University César Vallejo at "El Mochica Restaurant", making a total of S/. 6,893.00. The Judiciary found that these expenses were not related with the objectives (legal mandates) of this type of public institutions and that Víctor Melendez Campos, the Executive President of CTAR – La Libertad had a personal interest in these expenses because he was the "Godfather" of the graduating proms at those educational centers. This is a clear case of political clientelism.[100]

- Some local governments have been identified as using public funds to sponsor community feasts (i.e., pay for musicians, fireworks, and -sometimes- alcohol), prom parties and trips for high school students. Since these expenses are not expressly included among competences of local municipalities, CGR has sued those public authorities who authorized them. However, the Judiciary has found that these expenses can be regarded as "promotion of culture and art". This type of expense is controversial because it occurs in impoverished districts that have much more urgent and notorious needs. Nonetheless, district and provincial municipalities of richer urban areas occasionally also sponsor cultural activities and, in these cases, these expenses are usually widely accepted.[101]

[100] CGR, File No. 238-2001-CG.

[101] CGR, Files No. 282-2003-CG, No. 342-2003-CG, and No 073-2000-CG. The two first cases correspond to civil lawsuits and the latest one to a criminal accusation. The reason for issuing a criminal accusation was that public funds were obtained through a bank loan for "public investments" and therefore, CGR alleged that in that case the accused committed the crime of embezzlement (misuse of public funds). In this case the Judiciary declared that the criminal action had already expired.

# CHAPTER 5

# THE ACCOUNTABILITY ROLE AND MAIN FEATURES OF THE SUPREME AUDIT INSTITUTION OF PERU (CGR)

In Peru, the system of control is composed of: i) the Supreme Audit Institution of Peru (CGR[102]), ii) the offices responsible for undertaking *internal audits* in the institutions in which they operate, and iii) private independent societies of audits that are contracted to provide specialized audit services (CGR's Organic Law, Article 13)[103]. According to the Constitution, CGR "is the superior organ of the National System of Control" (Constitution of Peru, Article 82). This chapter analyzes CGR's main characteristics, its organizational features, and its various mandates.

## 5.1 The Independence of the Comptroller General: An Appointment System that Creates a Mantle of Suspicion

CGR was created in 1929 as a Westminster SAI, following the recommendations that

[102] In Spanish *Contraloría General de la República del Perú*.

[103] It should be noted that although all public institutions should have an internal audit office this mandate has not yet been fulfilled, especially in low-budget municipalities. It is also important to mention that CGR's Organic Law established in its Article 19 that the heads of these internal audit offices should be appointed and can be removed by CGR. Law No. 28557 modified this article in June, 2005, in order to clarify that head auditors of internal audit offices belong to CGR and, thus, these servants can be reassigned by CGR to other public institutions. Hence, internal audit offices in Peru are not strictly internal. Furthermore, Law No. 29555, from 13 July 2010, has modified Article 19 of CGR's Organic Law again, stating that not only the heads of these offices but all the employees that work within these units will progressively become part of CGR. Hence, in the future the system of control is expected to be composed of only CGR, the private companies hired by CGR to provide specialized audit services, and the internal audit offices of those sectors to which Law No. 29555 is not applicable (i.e., the health sector, the education sector, the diplomatic service, the police, and the military forces).

U.S. economist Edwin Kemmerer was making at that time to other Latin American governments (i.e., Bolivia, Chile, Colombia, and Ecuador) but without the same degree of independence and power (Drake, 1989). In its first stage, CGR was an administrative branch of the Ministry of Finance and was mandated to conduct financial audits (CGR website). By 1964, CGR became an independent institution and incorporated within its organization the previous Court of Accounts (*Tribunal Mayor de Cuentas*), a colonial SAI with a long tradition of conducting audits of compliance and enforcing legal and administrative regulations (Law No. 14816). However, the independence of CGR soon became an illusion for two reasons. Firstly, because the Comptroller General of the Republic (head of CGR) was appointed by the President of the Republic with no intervention of the Congress (Law No. 14816, article 69) and, secondly, because the tenure of the Comptroller General of the Republic was five years, matching the tenure of the President of the Republic (Law No. 14816, article 69).

In the 1970s, the Comptrollers General were appointed by the dictators that governed during that decade. Dictators General Juan Velasco (1968 – 1975) and General Francisco Morales Bermúdez (1975 - 1980) appointed members of the army to this position, specifically General Óscar Vargas (from 1971 to 1972 and also from 1976 to 1977), General Guillermo Schorth (1974), General Leoncio Pérez (1975), and General Luis Montoya (1978-1980). Independence was null during this period.

The 1979 Constitution of Peru recognized CGR as an autonomous organism, but it established that the Comptroller General would be nominated by the President of the Republic and designated by the Senate (Constitution of 1979, Article 146). This appointment system has been replicated in the current Constitution of Peru (1993), but it should be criticized

because it allows for too much influence from the Executive[104]. Besides, the 1979 and 1993 constitutions of Peru did not sufficiently extend the tenure of the Comptroller General and fixed it at seven years, despite the fact that longer mandates are associated with higher levels of independence and a stronger institutionalization of public organizations. Hence, the time of tenure remains problematic because it does not guarantee CGR's independence from other organs of the State, particularly the Executive[105]. This scenario suggests that the lack of independence of the Peruvian Comptroller General is a structural problem that relates to a bad institutional design. In the best-case scenario, the appointment system of the Peruvian Comptroller General creates suspicions among the citizenry and this situation undermines CGR's legitimacy.

Due to these problems in the appointment system of the Comptroller General, democratic regimes have remained unable to guarantee sufficient levels of independence and legitimacy of this authority. For example, Miguel Angel Cussianovich Valderrama was appointed Comptroller General for the period 1980-1987 although he was from the same political party as former President Fernando Belaúnde (1980-1985)[106]. The same happened in 1987, when Luz Aurea Saenz Arana was appointed Comptroller General in spite of being from the same political party as President Alan García (1985-1990)[107]. Regarding the presidential regime of Alberto Fujimori, a Commission of the Congress chaired by MP Javier

[104] A SAI's independence from the Executive remains doubtful when the President participates in the election of the Comptroller General. This type of appointment system has also been criticized in various African countries (Wang and Rakner, 2005).

[105] Since the time tenure of the President in Peru is five years the Comptroller General cannot become truly independent from the Executive. By contrast, in Chile the tenure of the Comptroller General (eight years) always doubles the tenure of the President (four years without possibility of reelection) (Constitution of Chile, Articles 25 and 98). In the U.S.A., the tenure of the Comptroller General (15 years) is almost four times more than the tenure of the President. Even if the President of the U.S.A. is reelected the tenure of the Comptroller General almost doubles the President's first and second regimes altogether (Section 303 of the Budget and Accounting Act of 1921, as modified by Public Law 96-226 – APR 3, 1980).

[106] See: Ortiz (2009).

[107] See: Sifuentes (2008).

Diez Canseco issued a *"General Report: Analysis of the Corruption at CGR during the 1990's"*, in which the authors claimed that:

> [W]hat was important was the paralysis of effective actions of control during the regime of Víctor Caso Lay [Comptroller General from 1993 to 2000]. Hence, the key issue was not a diminishment of the legal mandate but the recurrent omission of taking actions in cases of corruption. This is corroborated by the large quantity of audits of entities of lower importance (such as municipalities), leaving aside the most important, which were the focus of corruption: privatizations, Ministry of Defence, Sunat [National Superintendence of Taxes], and Sunad [National Superintendence of Customs]. (Peru. Congreso de la República, n.d.: 6)

Likewise, during Alejandro Toledo's presidential regime, the Congress appointed Genaro Matute as Comptroller General (2001-2008), despite the fact that Matute and President Toledo had both been professors at the same university (the Graduate School of Business Administration, *Escuela Superior de Administración de Negocios - ESAN*). A different situation occurred in 2008, when the government did not have a majority in Congress and was unable to form a majority coalition. Under such conditions, the Congress did not appoint the President's candidate and the ruling party was forced to negotiate with opposition parties in order to appoint Fuad Khoury as Comptroller General (2009-2016).

It is necessary to stress that CGR's independence from the Executive should be absolute because its main role is to audit the Executive's expenditures[108]. Hence, it is important to both extend the tenure of the Comptroller General and to remove the Executive's participation in her appointment. In order to be consistent with the Peruvian legal system, I

[108] Independence of general-auditors is crucial. Bazerman, Lowestein, and Moore ran an experiment with professional auditors who were asked to evaluate the accounting of five reports. When auditors were told to assume that they worked for the private company being audited the probability of attesting full compliance with regulations was 30% higher than when auditors were told they worked for a third company that was evaluating the possibility of making business with the audited company. Bazerman et al. concluded that: "even the suggestion of a hypothetical relationship with a client distorts an auditor's judgments" (as quoted by Schelker, n.d.: 8).

consider plausible adopting the appointment system of the Ombudsman of Peru: with no participation from the Executive and by agreement of two-thirds of the members of the Congress. This process of appointment by a *qualified majority* of members of the Congress – in combination with an extended mandate of the Comptroller General- would oblige the ruling party to negotiate with opposition parties and to choose a truly independent and competent professional[109]. This will increase the incentives to appoint the most qualified and impartial candidate for this position.

### 5.2 CGR's Organizational and Personnel Characteristics

CGR is headed by the Comptroller General and the Deputy, and it is composed of a Superior Tribunal of Administrative Responsibilities (STAR), a General Secretariat and External Affairs Office, and four management offices, namely the Central Management Office of Finances and Administration, the Central Management Office of Planning and Management Control, the Central Management Office of Quality, and the Central Management Office of Operations[110]. CGR's personnel is composed of managers, professionals, and support officers (which includes the former group of technicians). As Table No. 5.1 shows, CGR's staff has increased significantly since 2009, when the current Comptroller General was appointed, jumping from a total of 1,126 workers to 1,935 workers in 2012 (an increase of 71.85%). In the same period the number of managers jumped by 29.31% and the number of professionals (mostly auditors) jumped by 82.13%. These numbers

[109] The independence of the first and second Ombudsmen (Jorge Santistevan de Noriega and Beatriz Merino) has rarely been questioned -or perhaps not at all. Furthermore, after the mandates of the first and second Ombudsman the Congress was unable (or unwilling) to appoint a new Ombudsman in a reasonable period of time. This situation did not diminish the independence and performance of the Ombudsman Office, which was then headed by the Ombudsman's Deputy, Walter Albán Peralta from 2001 to 2005 and by the Ombudsman's Deputy, Eduardo Vega from March 2011 to present.

[110] CGR (2013) Informe de Gestión de la CGR 2012, 19.

show the importance given to CGR at this moment.

**Table No. 5.1**
**CGR's Personnel**

| CGR's Personnel | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|
| Management | | | | | 58 | 58 | 67 | 73 | 75 |
| Professional | 1011 | 981 | 950 | 900 | 921 | 884 | 995 | 1328 | 1610 |
| Technician | 110 | 113 | 147 | 201 | | | | | |
| Support | 44 | 40 | 48 | 47 | 185 | 184 | 161 | 219 | 250 |
| Total | 1165 | 1134 | 1145 | 1148 | 1164 | 1126 | 1223 | 1620 | 1935 |

Source: CGR[111].

## 5.3 CGR's Mandate to Undertake Financial, Compliance, and Performance Audits

The 1993 Peruvian Constitution stipulates that:

> The General Account of the Republic, alongside the audit report of the Comptroller General of the Republic (CGR), shall be sent by the President of the Republic to Congress every year, with the deadline of August 15th of the year following the execution of the budget (Article 81)
>
> [CGR] supervises the legality of the State's budget execution, of the operations concerning the public debt, and of the acts executed by the institutions subjected to control. (Article 82)
>
> The law assigns resources in order to satisfy the logistic requirements of the Military Forces and the National Police. Such funds have to be used exclusively for institutional objectives, under the control of the authority indicated by law. (Article 170, emphasis added)

Thus, CGR has the constitutional mandate to undertake *financial-accounting audits* of: a) the General Account of the Republic; b) the State's budget execution; and c) public debt operations. Likewise, CGR has the constitutional mandate to conduct *compliance audits*

[111] CGR, Informe de Gestión 2004, p. 18; CGR, Informe de Gestión 2005, p. 18; CGR, Informe de Gestión 2006, p. 16; CGR, Informe de Gestión 2007, p. 16; CGR, Informe de Gestión 2008, p. 17; CGR, Informe de Gestión 2009, p. 10; and CGR, Informe de Gestión 2012, p. 21.

regarding the administrative acts of all public institutions, including the military, the Congress, and the Judiciary[112]. There are 3,347 public institutions under control of CGR (CGR, 2013: 9). CGR's actions of control should observe the principles of universality, integrity, functional autonomy, technical character, due process of control, efficacy, efficiency, economy, opportunity, objectivity, materiality, selectivity, presumption of legality, access to information, secrecy, publicity, citizen's participation, and flexibility (Article 9 of CGR's Organic Law).

The Constitution of Peru (1993) does not mandate CGR to undertake *audits of performance*. In fact, the Constitution of 1993 removed from CGR's functions "to over-see the execution of the management and the use of public goods and resources", as was stipulated in Article 146 of former Peruvian Constitution (1979). Indeed, when discussing and drafting the current Peruvian Constitution, Blanco Oropeza, Constituent-Legislator and President of the Budgeting Commission for drafting the Constitution of 1993, stated that:

> [Regarding CGR's mandate in the draft version of the Constitution of 1993], it is established, that its main function is to oversee the execution of the budget, in the same manner in which it is considered in the 1979 Constitution. However, supervising the management and the use of public goods and public resources is no longer receiving Constitutional character because history has demonstrated that civil servants -in public entities under this type of control- are more concerned about CGR than in making decisions. Such cases took place many times in public enterprises that administered resources from the State and this causes completely inoperative situations, which delays executive actions that any enterprise should take. (Fonseca, 2008: 27).

However, several articles of the CGR's Organic Law mandate CGR to conduct performance audits:

Article 6:

[112] For a definition of financial-accounting audits and compliance audits see: *Chapter 2.3: The Role of Supreme Audit Institutions: Typology of Audits.*

> Governmental control relates to the supervision, oversight and verification of the acts and the results of the public management, in attention to the degree of efficiency, efficacy, transparency, and economy in the use of resources and goods from the State, as well as the fulfillment of legal norms, policies, and plans of action, evaluating the systems of administration, management, and control, with the objective of its improvement by adopting preventive and corrective actions. (Emphasis added)
>
> Article 10:
> The action of control is the essential tool of the System [of Control] by which the personnel, throughout the application of norms, processes and principles, verify and evaluate objectively and systematically the acts and results produced by the entity in the management and execution of the resources, goods and institutional operations. (Emphasis added)
>
> Article 15:
> The System of Control has the following competences:
> b) To promote the modernization and improvement of the public management, by optimizing the systems of management and exercising the governmental control […]
>
> Article 22:
> CGR has the capacity to:
> s) Sanction the necessary norms to articulate the processes of control with the plans and national programs, in order to visualize globally its fulfillment, generating the information to issue general recommendations to the Legislative and to the Executive about the administration of public resources in relation to planned objectives and achieved objectives, as well as to provide technical assistance to the Congress of the Republic in matters that relate to its functional competence. (Emphasis added)
> x) To exercise the control of performance of the budget execution, formulating recommendations that promote reforms in the administrative systems of the entities under control. (Emphasis added)

Moreover, it could be argued that CGR's Organic Law places more importance on *performance audits* than on *audits of compliance*. Indeed, Article 9.r of CGR's Organic Law stipulates that:

> Article 9:
> The principles that regulate the exercise of governmental control are:
> r) Flexibility, according to which, when exercising the control, priority shall be given to the fulfillment of the planned goals rather than to those omissions in formalisms that do not affect the validity of the operation under supervision,

nor determine relevant aspects of the final decision.

However, CGR conducts many more compliance audits than performance audits. In 2012, CGR undertook five financial audits, six performance audits, and 99 audits of compliance (CGR, 2013: 25). In 2011, CGR undertook three financial audits, six performance audits, and 124 audits of compliance (CGR, 2012: 29)[113].

**Table No. 5.2**
**Type of Audits Conducted by CGR**

| Type of Audit | 2011 | | 2012 | |
|---|---|---|---|---|
| | Number of Audits | Percentage | Number of Audits | Percentage |
| Financial Audits | 3 | 2.26% | 5 | 4.55% |
| Performance Audits | 6 | 4.51% | 6 | 5.45% |
| Compliance Audits | 124 | 93.23% | 99 | 90.00% |
| Total | 130 | 100.00% | 110 | 100.00% |

Source: Author[114]

CGR undertakes mostly *ex-post audits*. This goes along with the managerial perspective that inspires CGR's Organic Law. According to *"General Report: Analysis of the Corruption at CGR during the 1990's"*, issued by a Commission of the Peruvian Congress:

> [The ex-ante process] as a procedural regulation, has been severely criticized in recent decades. For instance, neoliberalism has considered it the realm of the bureaucratic and control act, as it assumes an illegal intention from the authority, who before executing [an administrative act] is obliged to request authorization from an outside organism. According to this perspective and in the opinion of Hernando de Soto, the ex-ante procedure is a pillar of the excessive bureaucratization of the national apparatus of the State and a heavy burden inherited from the Hispano-American colonial past. In opposition to the ex-ante control, it has been argued that the ex-post control is more modern

[113] CGR uses the terms "financial audits", "management audits" (which correspond to "performance audits"), and "special examinations". The latter category corresponds to audits of compliance and are defined by CGR as: "those (audits) that examine the compliance with legal provisions that relate to the allocation and use of budgetary resources, and which investigate complaints comprising process of selection (of private bidders), public debt, and contracts for public management, among others" (CGR, 2012: 35)

[114] Table 5.2 has been elaborated using data from CGR's Annual Report of 2012, p. 25; and CGR's Annual Report of 2011, p. 29.

> because it assumes that the authority proceeds with good faith (bona fide) and the ex-post control will supervise it. (Congreso de la República, n.d.: 3)

However, some ex-ante controls have been established in CGR's Organic Law. These include: a) authorizing acts that relate to public debt,[115] and b) authorizing the execution and payment of public works that were not originally included in the public budget[116]. CGR's further competences have also been assigned by its Organic Law[117]. CGR's mandate include the following services:

**Table No. 5.3**
**CGR's Services of Control**

| | CGR's SERVICES OF CONTROL |
|---|---|
| 1 | Special Actions (Briefs) |
| 2 | Audit to the National Account of the Republic |
| 3 | Financial-Accounting Audits |
| 4 | Audits of Management (Performance) |
| 5 | Ex-ante evaluations of public works added to the public budget |
| 6 | Ex-ante evaluations of secret acquisitions for military reasons |
| 7 | Ex-ante evaluations of public debt operations |
| 8 | Evaluations to the accountability reports submitted by the head of public institutions |
| 9 | Oversight of the audits undertaken by internal audit offices |
| 10 | Following up the implementation of corrective measures and recommendations |
| 11 | Control of Environmental Management and Cultural Heritage |
| 12 | Quick Actions |
| 13 | Control of public macro-policies |
| 14 | Control of agreements for improving the quality of public management (agreements celebrated by public entities and the Ministry of Finance) |
| 15 | Actions of control undertaken jointly with internal audit offices |

[115] Peruvian Constitution (Article 82) and CGR's Organic Law (Articles 22.j and 22).
[116] See: CGR's Organic Law, article 8.
[117] See: CGR's Organic Law, articles 22.c, 22.g, 22.i, 22.i, 22.n, 22.ñ, 22.p, 22.q, and 22.t.

| | |
|---|---|
| 16 | Control of operations with participation of internal audit offices |
| 17 | Oversight of public contracts |
| 18 | Oversight of the management of emergency situations |
| 19 | Participation in the citizens' oversight of social programs |
| 20 | Audit of Affidavits of Incomes, Goods and Rents |

Source: CGR[118].

However, CGR does not carry on all these actions every year. This is well illustrated in Table 5.4, although unfortunately CGR uses a slightly different terminology:

**Table No. 5.4**
**CGR's Actions of Control: 2008 and 2012**

| | Services of control | 2008 | | 2012 | |
|---|---|---|---|---|---|
| | | Number | Percentage | Number | Percentage |
| 1 | Actions of Control | 402 | 11.06% | 359 | 14.09% |
| 2 | Special Actions (Briefs) | 0 | 0.00% | 2 | 0.08% |
| 3 | Answers to Claims (denounces) | 2,091 | 57.51% | 1,428 | 56.04% |
| 4 | Ex-ante evaluations to public works added in the public budget | 46 | 1.27% | 58 | 2.28% |
| 5 | Ex-ante evaluations to public debt operations. | 207 | 5.69% | 117 | 4.59% |
| 6 | Ex-ante evaluations to secret acquisitions for military reasons | 0 | 0.00% | 1 | 0.04% |
| 7 | Oversee processes of selecting and executing contracts, public works, and others | 719 | 19.77% | 447 | 17.54% |
| 8 | Oversee Environmental Management: Quality of the Air | 0 | 0.00% | 13 | 0.51% |
| 9 | Oversee Operations: Health, Food Programs, Neighborhood Security | 0 | 0.00% | 83 | 3.26% |
| 10 | Macro-administrative Control | 9 | 0.25% | 7 | 0.27% |
| 11 | Consolidated Report: verification of compliance with austerity measures | 12 | 0.33% | 2 | 0.08% |
| 12 | Audits of Affidavits of Incomes, Goods and Rents. | 150 | 4.13% | 31 | 1.22% |
| | Total | 3,636 | 100.00% | 2,548 | 100.00% |

Source: Author[119].

[118] CGR, Informe de Gestión 2008, p. 20.
[119] Table 5.4 has been elaborated using data from CGR, Informe de Gestión 2008, p. 22; and CGR, Informe de Gestión de la CGR 2012, p. 32.

CGR does not have the technical capacity to audit all 3,347 public institutions under its control every year (CGR, 2013: 9). Hence, it is the Comptroller General who decides which public entities will be audited (Article 9.l of CGR's Organic Law). This decision is taken in consideration of the level of risk of misdeeds. In general, risks of misdeeds are high when: a) a public institution deals with large amounts of money, or b) the decision making power is highly concentrated in the hands of a few authorities and/or there are deficiencies in the mechanisms of internal control. Generally speaking, when dealing with the first type of risk, CGR audits public institutions that belong to the Central Government, and when tackling the second type of risk it usually audits local governments (because decisions are concentrated in the hands of a few officers and because local governments, despite legal regulations, do not always have internal audit offices). Both of these criteria justify auditing regional governments, because in these organizations the decision-making is quite concentrated and because regional governments spend significant amounts of money due to the decentralization reform carried on in 2000s.

CGR cannot be criticized for not auditing central government agencies sufficiently or for auditing only local governments (see Table 5.5). Although 130 actions of control directed at local governments represent 65.66% of CGR's total actions of control, the proportion of central government agencies under control (11.25%) is actually much bigger than the proportion of local governments under control (5.90%). This finding confirms that CGR undertakes a double-standard risks-assessment, one that privileges auditing central government agencies and a second one that privileges auditing local municipalities.[120]

[120] CGR's prioritization of control in 2008 shows similar results.

**Table No. 5.5**
**Prioritization of Control by CGR in 2012**

| | Number of Institutions | Actions of control | | Audit Reports | |
|---|---|---|---|---|---|
| Central Government | 320 | 36 | 11.25% | 57 | 17.81% |
| Regional Governments and Deconcentrated Organisms | 574 | 23 | 4.01% | 40 | 6.97% |
| Local Governments | 2204 | 130 | 5.90% | 250 | 11.34% |
| Public Enterprises | 249 | 9 | 3.61% | 12 | 4.82% |
| Total | 3347 | 198 | 5.92% | 359 | 10.73% |

Source: Author[121]

## 5.4 CGR's Mandate to Prosecute Civil Servants

Since the Peruvian Congress passed Law No. 14816 in 1964, CGR has been mandated to pass judgements about accounts, to identify the administrative responsibilities of civil servants who authorize contracts or purchases without observing legal or regulatory requirements, to request the suspension or disqualification of civil servants who breach legal or administrative regulations, and to initiate judicial actions when statements of accounts are rejected. These mandates have not varied significantly. Thus, CGR has long being conducting compliance audits, initiating administrative disciplinary proceedings, presenting civil lawsuits, and presenting criminal accusations[122].

### a) CGR's Prosecutorial Mandate: Civil Lawsuits and Criminal Processes

CGR's prosecutorial mandate includes the possibility to present both civil lawsuits and criminal accusations (CGR's Organic Law, articles 22.d and 22.o), as well as to participate

[121] Table 5.5 has been elaborated using data from CGR's Annual Report of 2012, pp. 9, 33 - 34.
[122] CGR is also mandated to conduct performance and financial audits but it undertakes few audits of these types. See Table 5.2.

actively during the corresponding judicial processes (again, civil and criminal). Civil lawsuits are filed against civil servants who are deemed to have caused economic damages whilst breaching legal or administrative regulations. The civil process aims at determining if there exists a civil responsibility according to the rules explained in Chapter 4[123].

CGR's criminal accusations are presented against civil servants who are deemed to have committed a crime, which includes cases of corruption and other illegal activities (e.g., abuse of authority, forgery of documents, misrepresentation, etcetera)[124]. CGR's accusations are presented to the Public Ministry and it is the public prosecutor (*fiscal* in Spanish) who has the authority to accuse a person before the Judiciary. Hence, the role of the Public Ministry's public prosecutor is to defend the system of legality and the role of CGR's public procurator is to defend the interests of the State (i.e., it is the State's lawyer). However, according to Public Ministry's Resolution No. 011-2002-MP-FN [125], public prosecutors should prioritize denunciations formulated by CGR. Thus, CGR's accusations are not like other accusations. Moreover, when a CGR public procurator presents a criminal accusation, it reminds public prosecutors (Public Ministry) about their obligation to prioritize CGR's accusations. It also reminds them that not fulfilling this obligation constitutes an administrative fault. Besides, CGR's audit findings are characterized as "pre-constituted evidence" in a judicial proceeding (CGR's Organic Law, article 15.f). Therefore, public prosecutors are in practice compelled to accuse civil servants every time they receive an accusation filed by a CGR public procurator.

**b) The Role of the Comptroller General in CGR's Prosecutorial Activity**

The main role of any SAI is to conduct public audits. In the case of CGR, audit reports

[123] See: *Chapter 4.1.2: Civil Responsibilities of Civil Servants.*
[124] See: *Chapter 4.1.3: Criminal Responsibilities of Civil Servants.*
[125] Approved by Resolución Fiscalía de la Nación Nº 1344-2002-MP-FN, from 22nd July 2002.

include findings about civil and criminal responsibilities. These audit reports are approved by the Comptroller General, who -at that moment- "authorizes" CGR's Public Procurator to file civil claims and/or criminal accusations.

Given CGR's hierarchical structure, the CGR's Public Procurator is in practice ordered or instructed (and not simply "authorized") to initiate judicial proceedings. This means that the CGR's Public Procurator does not have, in practice, the authority to disregard judicial cases even if s/he considers them to be unsubstantiated or flimsy. S/he cannot change the imputations made in the audit report either. This seems quite problematic, first because CGR's Public Procurator Office did not participate in the auditing process, and second because this office has a heavy caseload (Table 5.6) and, thus, it should concentrate all its efforts in those cases where CGR has higher possibilities to win.

**Table No. 5.6**
**CGR's Public Procurator Office:**
**Judicial Caseload**

| Year | Number of New Judicial Processes | Number of New Criminal Processes | Number of New Civil Processes | Number of Judicial Processes Concluded | Case Load by the End of the Year |
|---|---|---|---|---|---|
| 2005 | 332 | 226 | 106 | 19 | 1,465 |
| 2006 | 207 | 129 | 78 | 34 | 1,637 |
| 2007 | 197 | 143 | 54 | 61 | 1,664 |
| 2008 | 254 | 182 | 72 | 119 | 1,799 |
| 2009 | 241 | 182 | 59 | 93 | 1,947 |
| 2010 | 146 | 50 | 96 | 127 | 1,961 |
| 2011 | 83 | 39 | 44 | 104 | 1,940 |
| 2012 | 149 | 60 | 89 | 219 | 1,870 |
| **Average** | **201** | **126** | **75** | **97** | **1,785** |

Source: Author[126].

[126] This table has been elaborated with information from: CGR, Informe de Gestión 2005, p. 29-30; CGR, Informe de Gestión 2006, p. 26; CGR, Informe de Gestión 2007, p. 25-26; CGR, Informe de Gestión 2008, p. 25-26; and CGR, Letter No. 01087-2013-CG/SGE (issued by CGR's General Secretary, Carla Salazar Lui Lam).

### 5.5 CGR's Mandate to Conduct Administrative Disciplinary Proceedings

Administrative disciplinary proceedings correspond to breaches of legal or administrative regulations and do not suppose that corruption has been identified or committed[127]. Administrative and judicial proceedings can be initiated simultaneously because these proceedings aim at determining different type of responsibilities.

Prior to 2013, administrative disciplinary proceedings were conducted only by the state agencies in which civil servants worked. To CGR, lack of impartiality in these processes caused impunity and it was an impediment for fighting corruption (CGR, 2012; CGR, 2010; CGR, 2007b). Legal changes have been made recently in response to CGR's concerns. Since December 2010, Law No. 29622 mandates CGR to conduct administrative proceedings and to sanction civil servants who commit administrative faults if these infractions are identified in a CGR audit report. This mandate has been regulated by Supreme Decree No. 023-2011-PCM (17th March 2011), which establishes 47 administrative infractions subject to administrative sanctions. Sanctions include: i) temporary suspension from a public servant's position for a period of 30 to 360 days in cases of severe infractions; ii) disqualification from the public service for a period of one to two years in cases of severe infractions; and iii) disqualification from the public service for a period of two to five years in cases of very severe infractions (Article 15 of Supreme Decree No. 023-2011-PCM). The disciplinary process undertaken by CGR has been regulated in detail. There is a CGR Instructive Organ in charge of investigating and establishing the administrative responsibility of civil servants; a CGR Disciplinary

[127] See: *Chapter 4.1.1: Administrative Responsibilities of Civil Servants.*

Organ[128] in charge of dismissing cases or imposing sanctions; and a CGR Superior Tribunal of Administrative Responsibilities (STAR) in charge of resolving appeals over resources. Resolutions of STAR can be appealed to the Judiciary[129]. In January 2013, CGR's disciplinary organs were finally implemented and CGR's STAR started to exercise its punitive power in July 2013 (CGR website). Hence, as mentioned above, it is still too early to evaluate the impacts that CGR's administrative disciplinary processes may have in curbing corruption and/or in enhancing the rule of law within the public administration.

[128] In Spanish: *Órgano Sancionador*.
[129] The disciplinary process under the SAI must also fulfill the requirements and guarantees established in the Law of the General Administrative Process (Supreme Decree No. 023-2011-PCM, Article 4).

# PART III

# EVALUATING CGR's PROSECUTORIAL ACTIVITY

# CHAPTER 6

# CGR's INEFFICIENCIES IN AUDITING THE PUBLIC ADMINISTRATION AND PROSECUTING CIVIL SERVANTS

CGR's main function is to audit the public administration and to issue audit reports where it identifies administrative, civil and criminal responsibilities. The last two types of responsibilities are considered economic damages to the State and it is CGR's mandate to initiate judicial proceedings in order to obtain economic compensation and criminal justice. This chapter shows: a) that CGR's operation costs are higher than the economic damages it is able to identify through audits; b) that CGR's recoveries through judicial proceedings are insignificant compared to CGR's 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 for having caused any economic damages to the State and/or not guilty of having committed any criminal activities.

## 6.1 CGR's Inefficiencies at Auditing the Public Administration

CGR's core function is to audit the public administration. It then issues an audit report that can be of the *administrative type* if it identifies administrative or functional responsibilities, or the *special type* if it identifies civil or criminal responsibilities. The next table shows the proportion of audit reports of administrative and special types since 2006. It should be noted that for an average of 248 audits, there are 120 reports of special type

(48.38%). In other words, if a State agency is audited by CGR, then civil servants face high probabilities of being regarded as responsible for having committed a crime or having caused pecuniary damages to the State. These civil servants will be later prosecuted by CGR.

**Table No. 6.1**
**Types of Audit Reports**

| Year | Number of CGR's Ex-Post Audits | Number of CGR Audit Reports | Number of Reports of Administrative Type | % of Reports of Administrative Type | Number of Reports of Special Type | % of Reports of Special Type |
|---|---|---|---|---|---|---|
| 2006 | 462 | 239 | 124 | 51.88% | 115 | 48.12% |
| 2007 | 389 | 275 | 139 | 50.55% | 136 | 49.45% |
| 2008 | 402 | 326 | 152 | 46.63% | 174 | 53.37% |
| 2009 | 36 | 103 | 37 | 35.92% | 66 | 64.08% |
| 2010 | 61 | 192 | 88 | 45.83% | 104 | 54.17% |
| 2011 | 188 | 280 | 195 | 69.60% | 85 | 30.40% |
| 2012 | 198 | 359 | 199 | 55.43% | 160 | 44.57% |
| **Average** | **248** | **253** | **133** | **50.83%** | **120** | **49.17%** |

Source: Author[130]

CGR's audit reports of the administrative type make two types of observations: a) *observations of administrative responsibilities* for non-compliance with administrative regulations and b) o*bservations of important aspects,* which are observations of managerial processes and do not imply responsibilities of any kind. When CGR makes these two types of observations, then the total amounts of money involved in the administrative operations are classified as *"amounts observed"*. If CGR makes observations of administrative

[130] This table has been elaborated with information from: CGR, Informe de Gestión 2006, pp. 22-25; CGR, Informe de Gestión 2007, pp. 21-25; CGR, Informe de Gestión 2008, pp. 21-25; and CGR, Letter No. 01087-2013-CG/SGE (issued by Carla Salazar Lui Lam, General Secretary of CGR). Regarding year 2009, CGR informed that 36 reports were of administrative type; however, 37 reports have been considered to be of this type in order to avoid inconsistencies.

responsibilities, then it initiates administrative disciplinary proceedings[131].

Likewise, CGR's audit reports of special type also make observations of two types: *observations of criminal responsibilities* (for committing a crime) and *observations of civil responsibilities* (for having caused economic damages to the State). When CGR makes an observation of civil or criminal responsibilities, then the total amount of money involved in the administrative operation is classified as "economic damage to the State" and CGR initiates judicial proceedings in order to recover all pecuniary losses. The next table shows the amounts of money classified as both "amounts observed" and "economic damages to the State".

**Table No. 6.2**
**CGR's Amounts of Money Observed and Economic Damages Identified**

| Year | CGR' Observed Amounts of S/. | CGR' Observed Amounts of US$ | CGR's Economic Damages Identified in S/. | CGR's Economic Damages Identified in US$ |
|---|---|---|---|---|
| 2004 | 1,769,980,217.00 | 182,981,395.00 | 139,047,499.00 | 0.00 |
| 2005 | 775,547,419.00 | 23,156,121.00 | 56,047,279.00 | 0.00 |
| 2006 | | | 61,471,834.00 | 5,457,381.00 |
| 2007 | 243,226,587.00 | 702,386.00 | 18,098,969.00 | 0.00 |
| 2008 | 795,343,542.00 | 1,138,764.00 | 97,973,051.00 | 238,655.00 |
| 2010 | 8,820,442,095.00 | 0.00 | 176,479,190.00 | 0.00 |
| **Average** | **2,480,907,972.00** | **41,595,733.20** | **91,519,637.00** | **949,339.33** |

Source: Author[132]

It is important to stress that the amount of money that CGR identifies each year as

[131] Since economic damages to the State have not being produced or identified, then administrative proceedings do not aim at recovering any money. See: *Chapter 5.5: CGR's Mandate to Conduct Administrative Disciplinary Proceedings.*

[132] This table has been elaborated with information from: CGR, *Informe de Gestión 2004*, p. 21; CGR, *Informe de Gestión 2005*, p. 29; CGR, *Informe de Gestión 2006*, p. 25; CGR, *Informe de Gestión 2007*, p. 24; CGR, *Informe de Gestión 2008*, pp. 24-25; and CGR, *Informe de Gestión 2010*, p. 36. CGR's Annual Reports of 2009, 2011 and 2012 failed to indicate the amounts of "money observed" and "economic damages". This information was requested to CGR several times (Letters No. 005-2013-LEGW, No. 006-2013-LEGW, and No. 007-2013-LEGW, from 17-06-2013, 12-08-2013, and 19-09-2013) but it was not provided.

*economic damage to the State* is less than CGR's running costs. This means that even if CGR was able to recover all the amounts of money it claims to identify as damages to the State, it would is still be losing money due to CGR's operation costs. Hence, it would be more profitable to simply shut down CGR than to spend money on recovering the amounts of money it claims to identify as damages to the State.

**Table No. 6.3**
**CGR's Budget Spent in Relation to the Damages it Identifies**

| Year | CGR's Budget Spent (in S/.) | Total Economic Damage Identified by CGR (in S/.) | CGR's Losses due to Operation Costs (in S/.) |
|---|---|---|---|
| 2004 | 149,990,990.00 | 139,047,499.00 | 10,943,491.00 |
| 2005 | 155,752,000.00 | 56,047,279.00 | 99,704,721.00 |
| 2007 | 173,085,000.00 | 18,098,969.00 | 154,986,031.00 |
| 2010 | 204,915,000.00 | 176,479,190.00 | 28,435,810.00 |
| **Average** | **170,935,747.50** | **97,418,234.25** | **73,517,513.25** |
| **Percentage** | **100.00%** | **56.99%** | **43.01%** |

Source: Author[133]

Hence, CGR is inefficient at auditing the public administration. In fact, the real situation is worse than what Table 6.3 shows, because CGR is not able to recover judicially all the money it claims as economic damages suffered by the State.

[133] This table has been elaborated with information from: CGR, *Informe de Gestión 2004*, pp. 14-21; CGR, *Informe de Gestión 2005*, pp. 19-30; CGR, *Informe de Gestión 2007*, pp. 17-26; and CGR, *Informe de Gestión 2010*, p. 13-36. CGR's Annual Reports of 2009, 2011 and 2012 failed to indicate the amounts of money classified as "economic damages". This information was requested from CGR several times (Letters No. 005-2013-LEGW, No. 006-2013-LEGW, and No. 007-2013-LEGW, from 17-06-2013, 12-08-2013, and 19-09-2013) but it was not provided.

## 6.2 CGR's Inefficiency at Prosecuting Civil Servants

### a) High Rate of Cases Lost in the Judicial Process

As has been mentioned above, CGR's audit reports of special type can be divided into *Audit Reports of Civil Responsibilities* and *Audit Reports of Criminal Responsibilities*. On average, each of them accounts for slightly more than 20% of the total number of CGR's audit reports, although percentages have not been constant in the last few years. These reports justify filing civil lawsuits and/or criminal accusations.

**Table No. 6.4**
**CGR's Audit Reports of Special Type**

| Year | Number of CGR Audit Reports | Number of Reports of Civil Responsibilities | Reports of Civil Responsibilities in percentage | Number of Reports of Criminal Responsibilities | Reports of Criminal Responsibilities in percentage |
|---|---|---|---|---|---|
| 2009 | 103 | 31 | 30.10% | 35 | 33.98% |
| 2010 | 192 | 46 | 23.96% | 58 | 30.21% |
| 2011 | 280 | 49 | 17.50% | 36 | 12.86% |
| 2012 | 359 | 97 | 27.02% | 63 | 17.55% |
| **Average** | **234** | **56** | **23.88%** | **48** | **20.56%** |

Source: Author[134]

CGR's ratio of winning cases in the Judiciary is quite low. As Table 6.5 shows, CGR loses more cases than it wins.

[134] This table has been elaborated with information provided for this research by CGR. See: *Annex 2 - Letter No. 01087-2013-CG/SGE, issued by CGR's General Secretary, Carla Salazar Lui Lam*.

**Table No. 6.5**
**Results of CGR's Prosecutorial Activity**
**(As Reported by CGR)**

| Year | Number of Judicial Processes Concluded | Cases Won by CGR | | Cases Lost by CGR | |
|---|---|---|---|---|---|
| 2005 | 19 | 10 | 52.63% | 9 | 47.37% |
| 2006 | 34 | 7 | 20.59% | 27 | 79.41% |
| 2007 | 61 | 29 | 47.54% | 32 | 52.46% |
| 2008 | 119 | 40 | 33.61% | 79 | 66.39% |
| 2009 | 93 | 40 | 43.01% | 53 | 56.99% |
| 2010 | 127 | 41 | 32.28% | 86 | 67.72% |
| 2011 | 104 | 40 | 38.46% | 64 | 61.54% |
| 2012 | 219 | 70 | 31.96% | 149 | 68.04% |
| **Average** | **97** | **35** | **37.51%** | **62** | **62.49%** |

Source: Author[135].

CGR fails at prosecuting civil servants at a rate of 62.49% of judicial processes. This situation is even worse for the criminal cases, for which CGR has a failure rate of 76.46% (see next table). Besides, this information is rather optimistic because it is based on CGR's annual reports and CGR does not differentiate between civil lawsuits that are declared fully to have grounds and civil lawsuits that are declared partially to have grounds.

[135] This table has been elaborated with information from: CGR, Informe de Gestión 2005, pp. 29-30; CGR, Informe de Gestión 2006, p. 26; CGR, Informe de Gestión 2007, pp. 25-26; CGR, Informe de Gestión 2008, pp. 25-26; and CGR, Letter No. 01087-2013-CG/SGE from Carla Salazar Lui Lam, General Secretary of CGR.

**Table No. 6.6**
**Judicial Result of Civil and Criminal Cases**
**(As Reported by CGR)**

| Year | Criminal Cases Concluded | Criminal Cases Won by CGR | | Criminal Lost Cases by CGR | | Civil Cases Concluded | Civil Cases Won by CGR | | Civil Cases Lost by CGR | |
|---|---|---|---|---|---|---|---|---|---|---|
| 2005 | 16 | 7 | 43.75% | 9 | 56.25% | 3 | 3 | 100.00% | 0 | 0.00% |
| 2006 | 27 | 6 | 22.22% | 21 | 77.78% | 7 | 1 | 14.29% | 6 | 85.71% |
| 2007 | 20 | 3 | 15.00% | 17 | 85.00% | 41 | 26 | 63.41% | 15 | 36.59% |
| 2008 | 81 | 18 | 22.22% | 63 | 77.78% | 38 | 22 | 57.89% | 16 | 42.11% |
| 2009 | 45 | 4 | 8.89% | 41 | 91.11% | 48 | 36 | 75.00% | 12 | 25.00% |
| 2010 | 82 | 22 | 26.83% | 60 | 73.17% | 45 | 19 | 42.22% | 26 | 57.78% |
| 2011 | 63 | 13 | 20.63% | 50 | 79.37% | 41 | 27 | 65.85% | 14 | 34.15% |
| 2012 | 180 | 48 | 26.67% | 132 | 73.33% | 39 | 22 | 56.41% | 17 | 43.59% |
| **Average** | **64** | **15** | **23.54%** | **49** | **76.46%** | **33** | **20** | **59.54%** | **13** | **40.46%** |

Source: CGR[136].

**b) CGR Does Not Provide Value for Money**

Although CGR claims that it wins 59.54% of civil lawsuits and about 23.54% of the criminal cases, the actual amount of money that the Judiciary orders to pay back to the State is not even close to these percentages. Unfortunately, CGR does not have data regarding the amounts of money recovered in the Judiciary[137]. For this research, I calculated the amounts of money recovered in all civil lawsuits included in CGR's Annual Report of 2008. In this sample of 34 civil lawsuits, CGR claimed S/.1'687,569.04 (about US$565,000) and it recovered S/. 229,941.94, or 13.63% of the claims.

[136] This table has been elaborated with information from: CGR, Informe de Gestión 2005, pp. 29-30; CGR, Informe de Gestión 2006, p. 26; CGR, Informe de Gestión 2007, pp. 25-26; CGR, Informe de Gestión 2008, pp. 25-26; and CGR, Letter No. 01087-2013-CG/SGE from Carla Salazar Lui Lam, General Secretary of CGR.

[137] CGR's Letter No. 01087-2013-CG/SGE, issued by General Secretary of CGR, Carla Salazar Lui Lam (Annex 2).

**Table No. 6.7**
**CGR's Recoveries Through Civil Lawsuits**

| Type of Case | Number of Cases | Total amount of money claimed | Amount of money recovered | Average money claimed | Average Amount of money recovered | Amount of money recovered (in percentage) |
|---|---|---|---|---|---|---|
| With grounds | 12 | S/150,830.01 | S/151,240.36 | S/12,569.17 | S/12,603.36 | 100.27% |
| With partial grounds | 8 | S/159,431.78 | S/78,701.58 | S/19,928.97 | S/9,837.70 | 49.36% |
| Groundless | 14 | S/1,377,307.25 | S/0.00 | S/98,379.09 | S/0.00 | 0.00% |
| **Total** | **34** | **S/1,687,569.04** | **S/229,941.94** | **S/49,634.38** | **S/6,763.00** | **13.63%** |

Source: Author[138]

Likewise, in a sample of 35 criminal cases, CGR accused 194 civil servants of committing a crime but the Judiciary found that only three of them were guilty. Furthermore, the Judiciary ordered these three servants to pay very small amounts of money (about US$10,000 among the three of them). Hence, according to this sample, the amount of money recovered through criminal litigation is negligible[139]. Actual recoveries are even smaller because civil servants do not always comply with court orders. Besides, CGR does not participate in the judicial processes to execute judicial court orders because it claims that these judicial processes should be carried out by the specific State agencies that suffered the economic damages[140].

The next table utilizes CGR's recovery ratio of 13.63% in civil lawsuits and it compares CGR's economic recoveries with CGR's running expenses. The result is that CGR's recoveries through judicial litigation account for less than 2% of CGR's own running expenses.

[138] This table has been elaborated based on the 34 civil cases reported to have ended in 2008. For disaggregated information see: *Annexes, Table No. A.8.*
[139] See Chapter 7.2.1 for information on the methodology and representativeness on this sample.
[140] CGR, Letter No. 01087-2013-CG/SGE, issued by Carla Salazar Lui Lam, General Secretary of CGR.

**Table No. 6.8**

**CGR's Budget Spent in Relation to the Amounts of Money Recovered**

| Year | CGR's Budget Spent (in S/.) | Money Claimed in Civil Cases (in S/.) | Amount of Money Expected to be Recovered in the Judiciary (13.63%) | Money Expected to be Recovered as Percentage of CGR's Budget Spent |
|---|---|---|---|---|
| 2007 | 173,085,000.00 | 46,832,345.82 | 6,383,248.74 | 3.69% |
| 2008 | 166,078,000.00 | 5,765,337.54 | 785,815.51 | 0.47% |
| 2009 | 163,369,000.00 | 31,152,021.53 | 4,246,020.53 | 2.60% |
| 2010 | 204,915,000.00 | 13,584,180.99 | 1,851,523.87 | 0.90% |
| 2011 | 280,231,000.00 | 7,926,136.01 | 1,080,332.34 | 0.39% |
| 2012 | 345,170,000.00 | 30,432,298.64 | 4,147,922.30 | 1.20% |
| Average | 222,141,333.33 | 22,615,386.76 | 3,082,477.21 | 1.39% |

Source: Author[141]

**c) CGR Prosecutes Civil Servants Unnecessarily**

CGR does not keep records regarding: i) the number of people found responsible for damages to the State by the judiciary, ii) the number of people found not responsible for damages to the State, iii) the number of people declared guilty of committing a crime, and iv) the number of people declared not guilty of committing a crime[142]. Nonetheless, CGR keeps records of the numbers of civil servants sued and accused by CGR:

[141] This table has been elaborated with information on budget expenditure from: CGR, *Informe de Gestión 2007*, p. 17; CGR, *Informe de Gestión 2008*, p. 18; CGR, *Informe de Gestión 2009*, p. 11; CGR, *Informe de Gestión 2010*, p. 13; CGR, *Informe de Gestión 2011*, p. 124; CGR, *Informe de Gestión 2012*, p. 20. Information on amounts of money claimed by CGR through civil lawsuits has been provided by CGR in Letter No. 01087-2013-CG/SGE, issued by General Secretary of CGR, Carla Salazar Lui Lam.

[142] See: *Annex 2 - Letter No. 01087-2013-CG/SGE, issued by CGR's General Secretary, Carla Salazar Lui Lam*.

**Table No. 6.9**

**Total Number of Civil Servants Sued or Accused by CGR**

| Year | Civil Servants accused in criminal processes | Civil Servants sued in civil processes |
|---|---|---|
| 2005 | 1,500 | 422 |
| 2006 | 940 | 313 |
| 2007 | 1,009 | 91 |
| 2008 | 1,229 | 267 |
| 2009 | 1,249 | 256 |
| 2010 | 613 | 180 |
| 2011 | 121 | 221 |
| 2012 | 255 | 334 |
| **Average** | **865** | **261** |

Source: CGR[143]

Since CGR does not keep records regarding the way its work impacts in the public administration, the next table calculates such impacts based on the findings of a sample of 34 civil lawsuits and 35 criminal cases[144]. Of 82 civil servants sued by CGR, 28 (34.15%) were found responsible for having caused civil damages to the State and 54 (65.85%) were found not responsible for having caused any civil damage to the State. In the 35 criminal processes, 194 civil servants were accused of committing a crime, three (1.55%) were found guilty, and 191 (98.45%) were found not guilty. These percentages have been used in the next table.

[143] This Table consolidates two tables elaborated by CGR for this research (Table IV.3 and IV.5 from CGR, Letter No. 01087-2013-CG/SGE, issued by General Secretary of CGR, Carla Salazar Lui Lam).

[144] For the methodology and representativeness of these samples see: *Chapter 7: Evaluating CGR's Prosecutorial Activity And Exploring Its Impact in the Public Administration of Peru.*

**Table No. 6.10**

**Civil Servants Calculated to Have Been Found Not Responsible for Causing Economic Damages and Not Guilty of Committing Criminal Activities**

| Year | Civil Servants accused in criminal processes | Calculated to Have Been Found Guilty | Calculated to Have Been Found Non-Guilty | Civil Servants Sued in Civil Processes | Calculated to Have been Declared Responsible | Calculated to Have been Declared Non-Responsible |
|---|---|---|---|---|---|---|
| 2005 | 1,500 | 23 | 1,477 | 422 | 144 | 278 |
| 2006 | 940 | 15 | 925 | 313 | 107 | 206 |
| 2007 | 1,009 | 16 | 993 | 91 | 31 | 60 |
| 2008 | 1,229 | 19 | 1,210 | 267 | 91 | 176 |
| 2009 | 1,249 | 19 | 1,230 | 256 | 87 | 169 |
| 2010 | 613 | 10 | 603 | 180 | 61 | 119 |
| 2011 | 121 | 2 | 119 | 221 | 75 | 146 |
| 2012 | 255 | 4 | 251 | 334 | 114 | 220 |
| **Average** | **865** | **13** | **851** | **261** | **89** | **172** |

Source: Author.

It is outrageous to know that CGR each year sues about 172 civil servants who are not responsible for having caused economic damages to the State. The case of civil servants who face unsubstantiated criminal trials is even worse. It is devastating for the civil servants morale to know that about 851 innocent -or presumably innocent- civil servants are accused each year of committing a crime. CGR appears to be completely unconcerned about the severe inconveniences that civil servants -and the public administration at large- face due to its undue criminal accusations and civil lawsuits. These inconveniences include personal stress, diminished social reputation, costs of legal representation, and time spent in judicial proceedings. While most of these problems are difficult to calculate, the next two tables show the length of civil and criminal processes.

**Table No. 6.11**

**Length of Civil and Criminal Processes**[145]

| Criminal Processes (number) | Length Term Criminal Processes (Average) | Civil Lawsuits (number) | Length Term Civil Lawsuits (Average) |
|---|---|---|---|
| 35 | 38.23 months (1,147 days) | 34 | 39.65 months (1,190 days) |

Source: Author.

**TABLE No. 6.12**

**Length of Civil Processes According to the Results of the Processes**[146]

| Cases with grounds (12 cases) | Cases with partial grounds (8 cases) | Groundless cases (14 cases) | Total/Average (34 cases) |
|---|---|---|---|
| 34 months (1,025 days) | 29 months (889 days) | 50 months (1502 days) | 39 months (1,190 days) |

Source: Author.

While civil processes take on average three years three months (or 1,190 days) to be solved by the judiciary, civil servants who are not responsible for having caused any damage to the State will face longer judicial processes. On average, these non-responsible civil servants face judicial processes that last four years two months (or 1,502 days). Hence, all the other associated costs and problems of being sued by CGR (e.g., social prestige, economic costs of litigation, time lost in judicial activities, etc.) will be borne by civil servants during this length. The fact that groundless civil cases take longer periods of time to be decided is not

[145] For disaggregate information of this table, see: *Annexes, Table No. A.3 and Table No. A.7.*
[146] For disaggregate information of this table, see: *Annexes, Table No. A.7.*

just a coincidence. The next chapter identifies how CGR presents unreasonable appeals that prolong the length of these trials.

# CHAPTER 7

# EVALUATING CGR's PROSECUTORIAL ACTIVITY AND EXPLORING ITS IMPACT IN THE PUBLIC ADMINISTRATION OF PERU

CGR's prosecutorial mandate includes the possibility to present both civil lawsuits and criminal accusations, as well as to participate actively during the corresponding judicial processes[147]. Civil lawsuits are filed against civil servants who are deemed to have caused economic damages to the State due to breaches of legal and administrative regulations. Criminal accusations are presented against civil servants who are deemed to have committed a crime. Accordingly, this chapter is divided in two sections: firstly, it analyzes 35 criminal processes initiated by a CGR criminal accusation; secondly, it analyzes 34 civil processes initiated by a CGR civil lawsuit.

## 7.1 Evaluating CGR's Criminal Accusations Against Civil Servants

### 7.1.1 Methodology and Sample of CGR's Criminal Accusations

It is difficult to assess CGR's criminal prosecutorial activity because CGR does not report -does not even keep records- about the number of people accused of criminal activities, the number of people found guilty by the Judiciary, and the amounts of money recovered in judicial processes.[148]

In order to analyze CGR's criminal litigation, I asked CGR to release all 81 judicial

[147] This mandate is stipulated in articles 22.d and 22.o of CGR's Organic Law. See: *Chapter 4.1.2: Civil Responsibilities of Civil Servants, Chapter 4.1.3: Criminal Responsibilities of Civil Servants,* and *Chapter 5.4: CGR's Mandate to Prosecute Civil Servants.*

[148] See: *Annex 2 - Letter No. 01087-2013-CG/SGE, issued by CGR's General Secretary, Carla Salazar Lui Lam*.

files reported to have concluded during 2008. CGR informed me that 84 processes had actually concluded that year.[149] However, this sample was reduced to 35 criminal files for the following reasons: a) 26 criminal processes were not initiated by CGR; b) one criminal process was too lacking in information (CGR, File No. 303-2004-CG); and c) 22 processes were concluded during the 1990s. Despite the fact that CGR reported these 84 processes to have concluded in 2008, most processes had actually concluded in previous years (only two files concluded in 2008). The most outdated processes are excluded from this study. This study reflects CGR's prosecutorial activity during a considerable length of time. The criminal processes studied in this paper were all initiated between 2000 and 2005 (one file in 2000, seven files in 2001, seven files in 2002, eight files in 2003, seven files in 2004, and five files in 2005) and concluded between 2002 and 2008.

The 35 criminal files under study contain 64 independent criminal cases, but three of them have been discarded because important information was missing (CGR, Files No. 189-2002-CG, No. 194-2002-CG, and No. 036-2003-CG).[150] Hence, this study is based on 35 judicial files that contain 61 criminal cases, in which 194 civil servants have been accused of committing 305 crimes[151]. The most frequent accusations are collusion (81 accusations), peculation (58 accusations), abuse of authority in the modality of omission to perform duties (57 accusations), abuse of authority in the modality of arbitrary act (31 accusations), embezzlement (22 accusations), forgery of documents (22 accusations), and inconsistent

[149] I asked for CGR's 81 judicial files in December 2010. CGR informed that 84 files had actually concluded in 2008 but refused to disclose them (Letter No. 00216-2011-CG/SGE, from 25th March 201, Letter No. 0487-2011-CG/SGE, from 5th July 2011, and Letter No. 00519-2011-CG/SGE, from 15th July 2011). After several appeals CGR granted my request (Letter No. 00915-2011-CG/SGE, from 4th November 2011), but because it was a large amount of documents CGR released them in 12 different installments, the last one being from 12th April 2013.

[150] Independent criminal cases are not related to each other. These cases are grouped into one single file (criminal process) because some of the accused civil servants and the victim (the government office) are the same. Theoretically, accumulating these cases allows judges to assess better the criminal personality of those who are found guilty.

[151] See: *Annexes, Table No. A.1.*

negotiation or taking undue advantage of his functional position (19 cases). Four other types of crimes total 15 accusations.

### 7.1.2 Analysis of CGR's Criminal Accusations Against Civil Servants[152]

CGR's prosecutorial activity is extremely intense but extremely futile. CGR adopts an over-prosecutorial stance because it prosecutes in excess and without diligence. Over-prosecuting civil servants consists of trying to identify corruption where it does not exist or cannot be clearly established, and thus accusing civil servants under flimsy grounds that will later be dismissed by the judiciary. This occurs with most of CGR's accusations and, consequently, 98.03% of CGR's accusations are dismissed.

In the 35 files studied here, CGR accused 194 civil servants of committing 305 crimes, but only three (1.55%) of them were found guilty of committing six crimes (1.97%) (CGR, Files No. 197-2001-CG and No. 036-2003-CG)[153]. 12 other civil servants were found guilty by the Criminal Judge but not guilty by the Court of Appeals or by the Supreme Court of Justice (hereinafter SCJ). Most civil servants were found not guilty by both the Criminal Judge and the Court of Appeals. In some cases judges did not even open criminal processes or interrupted them before court hearings because accusations were either presented out of time or charges were too inconsistent and vanished during the first stages of the criminal process. Even these decisions were appealed by CGR, which brought 12 judicial processes to the SCJ. The Peruvian SCJ dismissed all cases appealed by CGR; in nine processes it confirmed that civil servants were not guilty, in two processes it confirmed that Public Ministry's withdrawals of accusations were sustained, and in one process it confirmed that the criminal accusation had already expired.

[152] See: García (2014).
[153] See: *Annexes, Table No. A.2.*

For the most part, CGR's prosecutorial activity causes no imprisonment of civil servants. However, in four cases the judiciary dictated preventive orders of imprisonment against nine civil servants (CGR, Files No. 249-2002-CG and No. 040-2003-CG). Although these orders were rare and all of them were revoked by the Courts of Appeals, preventive orders of detention represent a considerable risk against civil servants' right to freedom and a tremendous disincentive to joining the civil service. Even when preventive orders of detention are not dictated, civil servants under trial are usually prohibited to leave the country during the length of the process. On average each process takes more than three years (38 months), but long processes take more than five years[154].

Most of CGR's prosecutorial activity falls in the following categories: a) CGR criminalizes civil servants for exercising their administrative discretion or decision-making powers; b) CGR criminalizes civil servants who failed to fulfill administrative tasks (instead of initiating the corresponding administrative disciplinary process); c) CGR accuses civil servants by presuming them guilty (without adequate and sufficient proof); d) CGR accuses civil servants even when facts do not amount to a crime; and e) CGR prioritizes criminal processes instead of seeking compensation through civil proceedings. Other cases that illustrate CGR's over-prosecutorial activity are less common. For example, in one case CGR accused a dead person and requested the judiciary to forbid him to leave the country during the criminal process (File No. 448-2003-CG). Also eloquent of CGR's over-prosecutorial activities are its multiple but sterile appeals to the Supreme Court of Justice which -as mentioned before- were groundless. The next subsections analyze CGR's over-prosecutorial activity in detail.

[154] See: *Annexes, Table No. A.3.*

**a) Accusing civil servants for exercising their administrative discretion**

Accusing civil servants for exercising or adopting technical decisions, administrative discretion or decision-making power is a common pattern of CGR's prosecutorial standings. This situation poses severe negative incentives for decision-makings and may end-up paralyzing the public administration. In 15 cases (24.59%), CGR accused civil servants for exercising their administrative discretionary power[155]. These cases include, for example, accusing civil servants for interpreting legal stipulations in a manner CGR's auditors did not agree with (CGR, Files No. 050-2001-CG, No. 143-2001-CG, No. 072-2002-CG, and No. 343-2002-CG); accusing civil servants for qualifying bidders using a criteria CGR's auditors did not agree with (CGR, Files No. 143-2001-CG, No. 249-2002-CG, and No. 438-2003-CG); and accusing civil servants who adopted managerial decisions that CGR's auditors did not agree with (CGR, Files No. 072-2002-CG, No. 340-2002-CG, No. 448-2003-CG, No. 352-2004-CG, No. 261-2005-CG, and No. 132-2005-CG). These accusations usually incentivize interpreting administrative regulations in their narrowest and more legalistic perspectives. Some of these accusations are based on the presumption that interactions between civil servants and private companies are intrinsically corrupt, which is a common presumption of Weberian public administrations (Hood, 1995)[156].

The following cases illustrate in more detail how CGR accuses civil servants for having exercised their power of discretion:

- In a public bid that took place in April 1999, five civil servants of the Provincial Municipality of Chiclayo decided to buy garbage trucks from the second cheapest bidder because the cheapest bidder was disqualified as it did not fulfill one of the requirements of the Bidding Rules (i.e., that trucks should have power steering). However, the cheapest bidder offered to install "original

[155] See: *Annexes, Table No. A.4.*
[156] See: *Chapter 1.1: The Modern Public Administration (MPA).*

kits to convert the mechanism" and CGR considered that this "conversion kit" should have been regarded as fulfilling 80% of this requirement (i.e., penalizing with two points less that specific item). In 2001, CGR accused these civil servants of collusion, and it was in 2007 that the Supreme Court of Justice declared them not guilty (CGR, File No. 143-2001-CG-Case1).

- In 1990 the Provincial Municipality of Chiclayo fired 28 blue-collar workers because they did not reach the minimum requirements for working in the public administration. These workers presented a judicial claim and the judge declared that their dismissals were illegal. She ordered the municipality to rehire these workers and to compensate them for the time they did not receive their salaries. Later, the Constitutional Tribunal confirmed that the municipality should rehire these workers but kept silent about their salaries. In 1998 the municipality rehired these 28 workers and paid them for their non-received salaries. On September 2001, CGR accused ten civil servants of Peculation and Abuse of Authority in the modality of Arbitrary Act for having paid these workers their non-received salaries. CGR founded its accusation on the fact that the Constitutional Tribunal did not order the making of any payment. The Judiciary dismissed CGR's criminal accusations in 2007 (CGR, File No. 143-2001-CG-Case2).

- In January 1999, the Provincial Municipality of Arequipa (PMA) entered into a cooperation agreement with National University San Agustín of Arequipa (UNSA). Prof. Ludeña Bellido was designated to provide logistical support to PMA, which he did for three years. Although economic compensations were not stipulated in PMA-UNSA's agreement, this professor received some economic compensation from PMA. On May 2003, CGR accused authorities of UNSA and PMA of Peculation and Abuse of Authority in the Modality of Arbitrary Act because economic compensations were outside the law. In September 2007, the Supreme Court of Justice declared that civil servants were not guilty because PMA-UNSA's agreement did not establish how to cover running expenses (which UNSA's professors incurred for carrying out projects, mobilizing to PMA, having lunch at the PMA campus, and other expenses which -according to the SCJ- should be covered by PMA and not by UNSA's professors). Besides, the SCJ found that PMA acted according to law (correctly, valid and fair) when authorizing payments to UNSA's professors because they provided services for PMA's benefit. Finally, regarding the accusation of having received double salary from the government, SCJ declared that this fact would not characterize more than an administrative irregularity (if anything at all, because SCJ clarified that due to the specific circumstances this was also open to discussion) and it does not characterize a criminal behavior (CGR, File No. 343-2002-CG).

**b) Accusing civil servants for infringing administrative regulations**

CGR's over-prosecutorial activity is also evidenced when it initiates criminal

proceedings against civil servants who breach administrative regulations. CGR has repeatedly stated that administrative faults characterize circumstantial evidence of criminal behaviors: "The public administration is regulated by administrative rules; rules that not only aim to order but also to prevent the commission of crimes, constituting thereby norms of control of the legality of civil servants' acts. Therefore administrative infractions, analyzed as a whole, are not just simple infractions but traces left in the commission of crimes; they constitute crime evidence" (CGR, Files No. 343-2002-CG, No. 036-2003-CG, No. 438-2003-CG, No. 175-2004-CG, No. 409-2004-CG, and No. 261-2005-CG).[157] Although CGR's allegations are founded in principles recognized by the Weberian public administration, it would be very exceptional to accept that administrative faults can amount to sufficient proof of criminal activities. Thus, administrative faults should be dealt with, in general, in the corresponding administrative disciplinary processes. However, in at least 13 cases (21.31%), CGR alleged administrative infractions in order to prove a crime[158]. These cases include accusations against civil servants who did not follow bidding processes properly (CGR, Files No. 143-2001-CG, No. 065-2002-CG, No. 192-2002-CG, No. 193-2002-CG, No. 040-2003-CG, and No. 217-2003-CG); who did not request a financial warranty to a bidder that was awarded with a public contract (CGR, Files No. 197-2001-CG, No. 040-2003-CG, and No. 217-2003-CG); who authorized upfront payments beyond legal stipulations (CGR, Files No. 140-2001-CG, No. 143-2001-CG, No. 192-2002-CG, No. 314-2002-CG, No. 040-2003-CG, and No. 217-2003-CG); and who did not impose fines to providers that delivered public goods late (CGR, Files No. 140-2001-CG, No. 193-2002-CG, No. 314-2002-CG, No. 040-2003-CG, No. 217-2003-CG, and No. 254-2003-CG). Other administrative infringements relate to

[157] These expressions are found in several files because sometimes CGR uses templates when accusing civil servants.
[158] See: *Annexes, Table No. A.5.*

managerial decisions that were taken against administrative regulations (CGR, Files No. 065-2002-CG, No. 189-2002-CG, No. 254-2003-CG, No. 075-2005-CG, and No. 345-2005-CG).

Lack of competence in the Peruvian public administration and too much rigidity in its law of public contracts & acquisitions explains many of these administrative infringements. Besides, the Peruvian public administration faces too many constraints that CGR does not account for. For example, a social environment that tolerates lateness makes it difficult for public managers to impose fines for delays. Doing so could put at risk their pool of providers, especially when this is composed of small and medium enterprises. In any case, administrative infringements should be sanctioned through administrative disciplinary processes and cannot justify criminal accusations *per se*.

The following cases illustrate in more detail how CGR accuses civil servants of committing criminal activities who have just infringed on administrative regulations:

- In 2002, CGR accused a former Mayor of Provincial Municipality of Puno of collusion. This mayor concluded three contracts with a company that would provide metal structures for a provincial bus station. As CGR pointed out, these three contracts all had the same purpose, and thus the provider should have been selected through an open bid and only one contract should have been agreed to. Although in this case there is a clear infringement of the Law of Public Acquisitions, the Court of Appeals stated that the crime of collusion has two elements that had not been proved: "A) the concerting element, which means to agree with the interested part, in an illegal and surreptitious manner (...) [and] B) the economic damage [to an State agency]" (CGR, File No. 065-2002-CG).

- When CGR audited the construction of two health centers in remote rural areas of Hualgayoc (Cajamarca), it detected that: a) there had not been a Committee to select the best offer; b) these health centers were constructed without knowledge of the Ministry of Health; c) upfront payment was 7.7% higher than stipulated by administrative regulations; and d) at the moment of the onsite inspection neither of these public works had been concluded. CGR accused the former Mayor of Hualgayoc of collusion and abuse of authority in the modality of Arbitrary Act. In this case, CGR did not prove any colluding act between the Mayor of Hualgayoc and representatives of the enterprise that constructed these health centers. The Supreme Court of Justice noted that "from the assessment of the facts and evidence in the process, it is clear that there is no

sufficient evidence to prove the criminal responsibility of the accused Gerardo Oyarzabal Quijada; the accounting expert report (...) shows that the payment was made (...) in the amount agreed in the contract (...) therefore there has not been any financial damage determined; also such public works are now completed and working (...) in this case the elements of the criminal type stipulated in Article 387 of the Criminal Code have not been met, nor the exercise of an arbitrary act (...) and much less any agreement with the construction company (...) because it [did] exist a Bidding Committee and the bid was awarded in accordance with the law." (CGR, File No. 192-2002-CG).

- In 1993, the Municipality Council of Comas (Lima) approved a loan to members of the Municipality Council who wished to buy a self-defense gun. In 1995, CGR accused these servants of Abuse of Authority in the Modality of Arbitrary Act because this loan was not included in the budget and therefore it violated article 46 of the Law of the Budget. The Judge declared that the criminal action had already expired. (CGR, File No. 104-1995-CG)

**c) Accusing civil servants without adequate proof and by presuming them guilty**

In some cases CGR accuses civil servants without adequate proof and by presuming them guilty. This is a common case in CGR's accusations of collusion because it always fails to prove the colluding act[159]. In some of these cases CGR limits itself to the following statement: "It should be noted that crimes against the public administration, unlike other crimes, are the most difficult to prove, especially when it comes to proving bribes, illegal collusion with third parties, and illegitimate interest in certain operations. It is unlikely, almost impossible, that there are receipts of payments or documents of understandings" (CGR, Files No. 343-2002-CG, No. 036-2003-CG, No. 320-2003-CG, and No. 261-2005-CG).

Failure to prove the act of collusion is especially harmful to the civil service given that this type of accusations makes 26.55% of CGR's criminal accusations. The following

[159] The crime of collusion is established in Article 384 of the Criminal Code of Peru in the following terms: "The official or public servant who, in contracts, supplies, procurement, competitive bidding, auction or other similar transaction in which is involved the by virtue of his official position or by special commission, defrauds the State or a State agency, throughout collusion with stakeholders in the agreements, adjustments, settlements or supplies, shall be punished by imprisonment for not less than three nor more than fifteen years." (Emphasis added).

examples illustrate this situation:

- On 25th June, 2003, CGR accused a mayor and two municipality civil servants of District Municipality of San Juan (Cajamarca) of collusion for a series of irregularities in the acquisition of two tipper trucks (Volvo) and one pickup truck (Toyota). CGR calculated that these vehicles had been overpriced by US$ 48,853.00 and it founded its accusation in the following administrative infractions: a) none of the accused civil servants had professional expertise related to the goods to be bought and therefore they shouldn't have been appointed as members of the Acquisition Committee; b) due to the total amount of money involved, the Acquisition Committee should have followed an open bid process instead of an acquisition by invitation process (i.e., inviting three possible providers); c) the "price of reference" was established without a market study of possible providers, current market prices, and different prices according to the year of fabrication; d) the stipulated payment conditions were against the Law (100% at the moment of signing the contract); e) lack of details in the Bidding Rules determined that bidders presented their offers without enough technical detail; and f) an economic warranty was not requested from the winning company.

  Although in this case there were a series of administrative infringements, CGR did not prove the colluding act between the accused civil servants and the representatives of the enterprise. Hence, on 15th November 2004 the Judge decided that the presumption of innocence had not been distorted (CGR, File No. 040-2003-CG).

- In 2002, CGR accused several civil servants of District Municipality of Magdalena (Cajamarca) of collusion because it found a series of administrative infringements in the public bid and construction of a Municipal Sport & Recreational Area (e.g., advance payments were made beyond legal stipulations, the municipality did not impose a fine for receiving the public work late, some items stipulated in the public work were not constructed). CGR did not prove the act of collusion between the accused civil servants and the contractor, and thus the Supreme Court of Justice noted that administrative infractions should be dealt with in the corresponding administrative disciplinary proceeding. It also stressed that: "everyone is considered innocent until judicially declared responsible…the analysis of the evidence produced during the judicial process shows that there is no sufficient, reliable, appropriate and objective evidence of the criminal responsibility of the defendants" (CGR, File No. 193-2002-CG).

**d) Accusing civil servants of conduct that does not characterize a crime**

CGR's over-prosecutorial activity is also evidenced when CGR's alleged facts do not meet all the elements of a crime. This is a common situation when CGR accuses civil servants

of committing abuse of authority. These crimes are composed of two concurrent elements: 1) a civil servant acts arbitrarily or omits to perform duties, and 2) a civil servant damages a citizen or a group of citizens[160]. However, CGR never alleges -much less proves- that civil servants have the intention of damaging a specific person or group of people. In most cases there is not even a single person that is damaged or that can be damaged. Hence, CGR just tries to criminalize any detachment from a civil servant's mandate and, by doing this, it equates administrative infractions with criminal acts. (See: CGR, Files No. 082-2001-CG, No. 143-2001-CG, No. 065-2002-CG, 192-2002-CG, No. 194-2002-CG, No. 314-2002-CG, No. 343-2002-CG, No. 217-2003-CG, No. 320-2003-CG, No. 448-2003-CG, and No. 175-2004-CG). This situation is illustrated in the following cases:

- In 2004, CGR accused six civil servants of the Regional Hospital of Ica of Abuse of Authority in the modality of Omission to Perform Duties for not having solved a water contamination problem (worms and fecal coliforms) caused by old pipes that had not been replaced in time. The Public Ministry withdrew its accusation considering that the problem had already been solved, that administrative deficiencies were caused by high levels of personnel rotation, that there was no intentionality to not perform duties, and that lack of resources had impeded civil servants from changing water pipes. In October 2005 the Court of Appeals declared that there were no merits to continue with the criminal process (CGR, File No. 175-2004-CG).

- In May 2001, CGR accused a civil servant of Abuse of Authority (in the modality of Arbitrary Act) and Collusion for having authorized various private companies to export 2,319 species of wildlife. During the judicial process it was demonstrated that authorizations were given in accordance with Departmental Resolution No. 082-99, and that this civil servant decided to extend the right of exporting animals because these were hunted before the entrance into effect of the legal disposition that forbade exporting wildlife animals. In this case the Supreme Court of Justice decided that: "it is not accredited with suitable proof that the defendant is guilty of the offenses

[160] In Peru, the crime of abuse of authority in the modality of arbitrary act is typified in Article 376 of the Criminal Code in the following terms: "The public official who, abusing their powers, commits or orders, to the detriment of anyone, any arbitrary act, shall be punished with imprisonment not exceeding two years (...)" (emphasis added); and the crime of abuse of authority in the modality of omission (dereliction), rejection or delay to perform duties is established in Article 377 of the Criminal Code as follows: "The public official who illegally omits, refuses or delays any act of his office, shall be punished with imprisonment not exceeding two years and thirty to sixty days' fine." (Emphasis added).

relating to this prosecution [...] is not established in the records the presence of the objective elements of the crimes ascribed to the defendant, let alone any criminal intention" (CGR, File No. 050-2001-CG).

- In 1998, the Provincial Municipality of Huancavelica spent a certain amount of money on running expenses (i.e., oil, taxes, salaries, etc.) instead of investing it in maintenance of garbage trucks. In 2001, CGR accused four civil servants of embezzlement, as money had been deviated from its corresponding destination. The Criminal Court declared these civil servants innocent and the Supreme Court of Justice confirmed -in December 2005- that: "the crime of embezzlement has not occurred because the existence of one of the elements of the criminal type has not been demonstrated -laid down in Article 389 of the Penal Code-, which is the 'damage of the service'; given that there are no records of claims, complaints, observations, requests or any administrative act questioning or incriminating the provision of services, thus, it is not accredited any injury, which is required by the criminal type. The conduct of the persons under trial has not affected the services of housekeeping (…)" (CGR, File No. 140-2001-CG).

**e) Accusing civil servants of committing crimes instead of presenting civil lawsuits**

CGR's preference for accusing civil servants instead of suing them for causing economic damages also illustrates CGR's over-prosecutorial standing. CGR prefers to prosecute servants rather than present civil lawsuits even though it has a better success rate in civil proceedings. Indeed, while 34.15% of civil servants sued are found responsible for causing economic damages to State agencies[161], only 1.55% of servants are found guilty of committing a crime. Moreover, when similar cases have been presented in civil and criminal processes, the former have been shown to be more successful (e.g., CGR, File No. 072-2002-CG vs. No. 263-2001-CG; File No. 217-2003-CG vs. No. 311-2004-CG; and File No. 343-2002-CG vs. No. 140-2004-CG). Accusations of collusion and peculation would be more successful if CGR presents civil lawsuits because CGR would not have to prove the existence of a colluding act or who the person who appropriated the missing public goods is, which are usually the elements of collusion and peculation that CGR repeatedly fails to prove.

[161] See: *Annexes, Table No. A.6.*

The following examples illustrate how similar cases have different results when CGR sues civil servants for economic damages instead of accusing them of committing a crime[162].

- CGR accused two professors of the National University San Agustín of Arequipa (UNSA) of Peculation because -among other things- they received double salary (one from UNSA and another from the Municipality of Arequipa). The Supreme Court of Justice declared that this situation does not constitute a crime (CGR, File No. 343-2002-CG). By contrast, when President of CTAR - Huancavelica (former Regional Government of Huancavelica) was sued for receiving double salaries (one from the government payroll and the second one from the United Nations Development Program - UNDP), the judge found CGR's claim to have grounds and ordered this civil servant to pay back all the economic damages suffered by the State (CGR, File No. 140-2004-CG).

- From 1998 to 2000, members of the Reorganizing Committee of National University J. F. Sánchez Carrión determined their own salaries. CGR accused these civil servants of Peculation because their salaries were above what was stipulated for Principals and Vice-Principals of public universities (which according to CGR corresponded to members of reorganizing committees). In 2005 the Supreme Court of Justice declared that the University Law was not into effect for universities under reorganization and that Presidents of Reorganizing Committees had power to dictate norms of any type, including payments for members of the reorganizing committees (CGR, File No. 072-2002-CG). By contrast, in a similar case that occurred in National University Guzmán y Valle, CGR sued the President of the Reorganizing Committee for economic damages (civil lawsuit) and the Supreme Court of Justice found this civil servant responsible for damages to the State (CGR, File No. 263-2001-CG).

### 7.1.3 Root-causes of CGR's Excessive Prosecutorial Activity in Criminal Processes

CGR has failed at accusing civil servants of committing crimes due to an excessive or over-prosecutorial activity that may be causing severe negative effects in the public administration (i.e., hindering the efficiency and decision-making of the public administration). The root-causes of this over-prosecutorial activity are difficult to identify. One possible explanation could be that, until 2013, lack of available, credible, and

[162] See also: *Chapter 7.2.2 section a) "Characteristics of most civil lawsuits declared to have grounds by the Judiciary: CGR civil lawsuits are declared to have grounds or partially-to have grounds if civil servants obtained a personal benefit for themselves"*.

independent administrative disciplinary proceedings forced CGR to resort to judicial claims in an attempt to avoid administrative impunity. This explanation should be discarded. Firstly, if CGR sought to replace administrative disciplinary proceedings then it would have resorted to civil lawsuits and not to criminal proceedings (which are far more severe). This has not been the case. CGR's criminal accusations outnumber civil lawsuits. For example, in 2005, 2007, 2008, and 2010 CGR initiated a total of 647 criminal processes and 282 civil processes. Secondly, CGR has continued to accuse as many civil servants as before the legal amendment that mandates CGR to conduct administrative disciplinary proceedings. In fact, from January to May 2013 CGR initiated 39 criminal processes and for similar periods of years 2010 to 2012 it initiated, on average, 28 criminal processes (CGR website)[163]. Lastly and more importantly, lack of credible administrative disciplinary proceedings can never justify accusing a person of committing a crime by presuming guilt without adequate proof.

A second explanation of CGR's over-prosecutorial activity relates to unrealistic expectations regarding its anti-corruption role. As was mentioned before, there exist high social expectations on SAIs to curb corruption despite the fact that SAIs' anti-corruption role should be regarded as secondary (Khan, 2007; Borge, 1999). While SAIs of most countries can oppose popular expectations regarding their anti-corruption role, in Peru these social expectations have been legitimized by CGR's prosecutorial mandate. More importantly, CGR itself has assumed it has a prominent anti-corruption role to play (CGR, 2013; CGR, 2012; CGR, 2010; RPP, 2010; CGR, 2007b) and it devotes considerable resources undertaking

[163] For 2013 CGR only reported criminal accusations from January to May. Thus, it has been considered the first five months to be reported each year. For 2012 CGR reported to have initiated 22 criminal processes in January, February, April, May, and June. For 2011 CGR reported to have initiated 17 criminal processes in January, March, May, July, and August. For 2010 CGR reported to have initiated 46 criminal processes in January, February, April, May, and July.

compliance audits in an attempt to identify corruption and to prosecute civil servants[164]. According to its website, CGR "exerts a fundamental role in the fight against corruption by supervising the proper and transparent use of public resources, by exercising its mandate of preventing and detecting wrongdoing and/or criminal offenses, (…) ". The Comptroller General Annual Report of 2012 adds "since the beginning of our mandate we emphasized our strong commitment to safeguarding the proper use of the state's resources and to fight against corruption (...)" (CGR, 2013:5).

Due to CGR's prosecutorial mandate and self-proclaimed corruption fighting role, it is necessary to stress that audits of compliance aim at demonstrating that legal and/or administrative regulations have been breached and, consequently, that civil servants have committed administrative faults. Compliance audits provide enough merits to demonstrate administrative faults but will generally fall short of demonstrating the commission of crimes. This is precisely what happens with CGR's criminal accusations that are based on the findings of compliance audits. To illustrate this we can refer to several cases in which CGR identifies that public works -or acquisition of public goods- have been overpriced but do not prove that a crime has been committed (i.e., that overpricing is consequence of collusion between civil servants and private contractors). Nor does it demonstrate who the civil servants are who committed the crime and under which circumstances (e.g., CGR, Files No. 065-2002-CG, No. 192-2002-CG, No. 193-2002-CG, No. 249-2002-CG, No. 040-2003-CG, and No 261-2005-CG). This is neither a failure of compliance audits nor a failure of CGR's auditing role. It is the failure of the CGR's prosecutorial mandate. Indeed, it is the role of auditors to identify overpricing but it is not their role to inquire about private conducts, to conduct police investigations, to conduct criminal interrogations, and to collect all the necessary proofs

[164] See Table 5.2.

regarding the commission of a crime. Of course it can be argued that CGR could be empowered to assume that role, but this would only transform a specialized auditing institution into an anti-corruption agency. If CGR undertakes this path it would not differ much from the already existing Anti-Corruption Public Procurator Office albeit, perhaps, that it would be more independent.

A third -and concurrent- explanation is that CGR's over-prosecutorial standing and its extremely inefficient performance is caused by CGR's own rationality, which corresponds to that of the Weberian model of public administration and the Roman legal tradition in which CGR is embedded[165]. CGR's rationality is characterized by its narrow and rigid interpretation of the principle of legality combined with a broad interpretation of what characterizes a crime. Thus, to CGR, any transgression of administrative regulations (i.e., any administrative infraction) characterizes either the crime of *abuse of authority in the modality of arbitrary act* or the crime of *abuse of authority in the modality of dereliction* (i.e., omission to perform duties)[166]. CGR basis its position by arguing that civil servants "[have] a position of guarantors, caretakers of the correct course of the public administration in the area of their mandates, whether conducting their behaviors and activities according to the rules and regulations or keeping the public interest out of threats or injuries that may come from other civil officials, civil servants or third parties [...] In crimes against the public administration the legal interest protected is not the public administration itself but the State's interest in protecting the normal, orderly and legal functions [...] In short, the legal interest protected by criminal law is public authorities' and civil servants' performance according to their official

[165] See: *Chapter 1.1: The Modern Public Administration (MPA).*

[166] The crime of abuse of authority in the modality of arbitrary act is typified in article 376 of the Criminal Code of Peru. The crime of abuse of authority the modality of dereliction is typified in article 377 of the Criminal Code. See: *Chapter 4.1.3: Criminal Responsibilities of Civil Servants.*

duties and ensuring the good institutional image. What is special about the crimes against the public administration is therefore a violation of official duties and the violation of the government's trust [...]" (CGR, Files No. 343-2002-CG, No. 036-2003-CG, No. 381-2004-CG, No. 425-2004-CG, No. 075-2005-CG, No. 261-2005-CG).[167] This expanded interpretation of what constitutes criminal behaviours leads to the inconsistent, inconsequential and sterile accusations that characterize CGR's accusations against civil servants. In conclusion, accusations for exercising discretionary power, accusations for infringing administrative regulations, and accusations by presuming that civil servants are guilty are only the natural consequence of CGR's self-perception of its own role as the guarantor of administrative regulations, CGR's narrow interpretation of the principle of legality, and CGR's expanded interpretation of what constitutes a crime.

### 7.2 Evaluating CGR's Civil Lawsuits Against Public Servants

Civil responsibility -or liability- of public servants is established in the Law of the System of Control & the Supreme Audit Institution of Peru (hereinafter CGR's Organic Law). This type of liability is legally defined as that which civil servants incur when, in performing their duties, breach their functions and cause (by committing either fraud, inexcusable fault, or mild fault) an economic damage to the State agency in which they work[168]. Public servants' functions are stipulated in the Law of Administrative Procedures (Law 27444), the Frame Law of Public Workers (Law 28175), every State agency's Organizational Manual of

[167] These expressions are found in several files because CGR uses templates when accusing civil servants. Other expressions with similar meaning can be found in Files No. 073-2000-CG, No. 072-2002-CG, No. 438-2003-CG, No. 175-2004-CG, No. 272-2005-CG, and No. 345-2005-CG.

[168] Organic Law of the National System of Control & the Supreme Audit Institution, Law No. 27785, Ninth Final Provision. See: *Chapter 4.1.2: Civil Responsibilities of Civil Servants.*

Functions, and in each contract of administrative services[169]. Thus, liability of civil servants is intimately linked to administrative regulations and the Principle of Legality.

CGR's civil lawsuits should be clearly differentiated from CGR's corruption fighting role. Incurring civil responsibility implies causing economic damages to the State as result of infringing on administrative regulations. These acts do not imply or suppose that someone has committed a crime.

### 7.2.1 Methodology for the analysis of CGR's civil lawsuits

In order to analyze CGR's civil lawsuits against public servants, I asked CGR for all civil processes that were reported to have ended in 2008. According to CGR's Annual Report of 2008, that year the judiciary concluded 38 civil cases. To CGR, 22 cases (57.89%) received favorable judicial decisions and 16 (42.10%) received non-favorable decisions. It should be noted that CGR did not discriminate cases with grounds from cases that have partial grounds. Besides, CGR did not report the number of civil servants sued in these 38 judicial processes, the amount of money claimed, and the amount of money recovered. CGR's lack of information reflects its relative lack of interest to understand how its civil lawsuits affect the public administration and its absolute lack of interest to provide a VFM service.

Upon making the request for this research, CGR's General Secretary, Carla Salazar Lui Lam, stated that in 2008 the judiciary concluded 37 civil cases (and not 38)[170]. However, three cases were not initiated by CGR but by other public institutions. Thus, this research studies the 34 CGR's civil lawsuits that were reported to have finished in 2008. It should be noted,

[169] Employees under contract of administrative services are expected to be incorporated in the civil service career. Accordingly, the Frame Law of Public Workers (Law 28175) will be void when the Law of the Civil Service (Law 30057) is fully implemented, which is expected to occur in 2019. See: *Chapter 4.1: Legal Framework of the Peruvian Public Administration*.

[170] Letter No. 00216-2011-CGR/SG, from 25th March 2011.

however, that only eight of these processes actually ended in that year. The other processes ended in 2007 (11 cases), 2006 (six cases), 2005 (five cases), 2004 (two cases), 2003 (one case), 2002 (one case), and 2001 (one case). It should also be noted that in one case CGR provided an incomplete judicial court order (CGR File No. 263-2001-CG) and in another two cases CGR did not inform whether the judicial court orders provided were final or if these had been appealed (CGR Files No. 343-2003-CG and No. 100-2002-CG). For the first of these cases, it has been assumed that the judiciary declared CGR's claim to have grounds (and not partial grounds) and for the later two cases it has been assumed that court orders sent by CGR were final (not appealed).

### 7.2.2 Analysis of CGR's Civil Lawsuits Against Civil Servants

From the 34 civil lawsuits under study, the judiciary declared 12 cases to have grounds (35.29%), eight cases to have partial grounds (23.43%), and 14 cases groundless or non-admissible (41.18%)[171]. Besides, in these 34 civil lawsuits CGR sued 82 civil servants but only 28 (34.15%) of them were found responsible for having caused economic damages to the State[172]. In other words, two out of every three civil servants sued by CGR are found to be not responsible for having caused any damage to the State. The fact that 65.85% of civil servants sued by CGR are found not responsible for damages to the State poses severe questions regarding the impact that CGR has on the public administration. Hence, it is necessary to raise a word of concern because unnecessary civil lawsuits may undermine civil servants' morale, may impact negatively on the public servants' willingness to make decisions, and may create

[171] Cases with grounds are those in which all public servants sued by CGR are found responsible for the total amount of money claimed by CGR. Cases with partial grounds refer to cases were: a) not all civil servants sued were found responsible but at least one was; and b) civil servants were not found responsible for the total amount of money claimed by CGR. Non-admissible cases are those in which the Judiciary declared that "cannot be processed".

[172] See: *Annexes, Table No. A.6.*

adverse incentives to joining the civil service. These would definitely create a high risk of paralysis in the decision-making of the public administration[173].

While CGR keeps an over-prosecutorial stance in criminal processes[174], this is not clearly the case in CGR's civil lawsuits. Indeed, close to 60% of CGR's civil claims are declared to have grounds or partial grounds. Besides, CGR's civil lawsuits are sometimes very complex and do not usually present a straightforward solution or clear applicability of the norms. The following subsections analyze: a) the characteristics of most civil lawsuits declared to have grounds; b) the characteristics of most civil lawsuits declared to be groundless; c) the characteristics of CGR's economic claims and its impact in the judiciary, and d) CGR's over-procedural activity in civil litigation[175].

**a) Characteristics of most civil lawsuits declared to have grounds by the Judiciary: CGR civil lawsuits are declared to have grounds or partial grounds if civil servants obtained a personal benefit for themselves**

An overwhelming majority of civil servants who breach administrative regulations in order to obtain personal benefits for themselves are found responsible for causing economic damages to the State. There are 10 cases of these characteristics: seven cases were declared to have grounds, two cases were declared to have partial grounds, and one case was declared groundless[176]. The seven cases declared to have grounds are statistically important because

[173] See also: *Table 6.10: Civil Servants Calculated to Have Been Found Non-Responsible for Causing Economic Damages and Non-Guilty of Committing Criminal Activities.*

[174] See: *Chapter 7.1: Evaluating CGR's Criminal Accusations Against Civil Servants.*

[175] There are not significant differences between CGR's civil lawsuits against civil servants from central government and CGR's civil lawsuits against civil servants from local governments. CGR's civil lawsuits also present similar levels of success in Lima and other provinces.

[176] The most salient characteristic of the groundless case is that the civil servant who obtained a personal benefit for himself had arguably not infringed any administrative regulation but taken advantage of a legal loophole. See: CGR, File No. 248-2003-CG, Leg. 047-2004 (Footnote 185).

these represent the majority of cases that the judiciary declared to have grounds (7 out of 12; or 58.33%)[177].

The fact that 90% of the cases where civil servants obtained personal benefits for themselves were declared either to have grounds or to have partial grounds demonstrates that criminal accusations of peculation (which made up about 20% of CGR's total accusations, all later dismissed by the judiciary) would have better results if only CGR sued civil servants for economic damages to the State instead of accusing them of committing a crime[178].

Cases declared to have grounds because civil servants obtained personal benefits from the economic damages to the State include: three cases of council members who received economic compensation for town-council meetings that were never carried out (CGR, File No. 077-2004-CG[179]); one case in which the president of a university reorganizing committee determined her own salary beyond legal stipulations (CGR, File No. 263-2001-CG)[180]; one case of a civil servant who received double salary -one from the payroll of the regional government and another one from UNDP- (CGR, File No. 140-2004-CG)[181]; one case in which a civil servant made an official trip sponsored by District Municipality of Villa El Salvador (Lima) but without proper authorization from the town-council and without presenting a final report of results (CGR, File No. 342-2003-CG); and one case of a civil servant who paid the bill of his private telephone with public resources of the District Municipality of Miracosta (Cajamarca) (CGR, File No. 117-2003-CG).

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[177] See: *Annexes, Table No. A.10.*

[178] See: *Chapter 7.1.2 section e): Accusing civil servants of committing crimes instead of presenting civil lawsuits.*

[179] In one of these cases the economic compensation was reduced from S/. 7,669.00 to S/. 6,760.00, but the court order is not clear on the reason for this decision (CGR, File No. 077-2004-CG - Leg. 215-2004).

[180] This case is very similar to a CGR criminal accusation of peculation. This case is explained in more detail in: *Chapter 7.1.2 section e): Accusing civil servants of committing crimes instead of presenting civil lawsuits*.

[181] This case is very similar to a CGR criminal accusation of peculation. This case is explained in more detail in: *Chapter 7.1.2 section e): Accusing civil servants of committing crimes instead of presenting civil lawsuits*.

The following case should be highlighted because it illustrates how personal benefits can be the most important element for declaring a civil lawsuit to have grounds:

- In January 2002, CGR sued Víctor Meléndez Campos, former President of CTAR - La Libertad (ex-Provincial Government), and Medardo Ortega Ayala, former Administrative Manager of CTAR La Libertad. According to CGR, these two civil servants caused S/. 6,893.00 of damages to the State for authorizing expenditures that were not related to the objectives of the institution, namely: i) a banquet for graduating students of University Antenor Orrego in the touristic restaurant "El Mochica" (for S/. 2,950.00); ii) a closing ceremony for students of University César Vallejo in the touristic restaurant "El Mochica" (for S/. 2,750); iii) subsidizing an event in Golden Green Hostel for students from the North Institute of Technology (for S/. 1,193.00). This case was first declared to have grounds and both civil servants were ordered to pay economic compensation. However, the Court of Appeal decided that these expenditures were made because Meléndez Campos, former President of CTAR – La Libertad, was "Godfather" of the students who were entertained. Hence, the Court of Appeal decided that these expenditures should be compensated by Meléndez Campos alone and not by Ortega Ayala (CGR, File No. 238-2001-CG).

  Despite the fact that in this case both civil servants were sued by CGR and both had caused an economic damage to the State by authorizing improper expenditures, the determining factor for establishing civil responsibility of only one of them was the answer to the following question: who was the civil servant who actually obtained a personal benefit from this economic damage to the State?

**b) The characteristics of most civil lawsuits declared groundless by the Judiciary: CGR sues civil servants for exercising their discretionary power**

There are 10 cases where CGR sued civil servants for exercising their power of discretion. Eight cases were declared groundless, one case was declared to have partial grounds, and one case was declared to have grounds[182]. The most salient element of the case with grounds was the fact that the civil servant obtained an economic benefit from using his power of discretion[183].

[182] See: *Annexes, Table No. A.11.*

[183] In this case the Director General of Internal Government (National Police), Miguel Pajares, issued a Directoral Resolution that established an allowance to the policemen who oversaw or witnessed private

The fact that in eight out of 14 groundless cases (57.14%) civil servants were basically sued for exercising their power of discretion is important because this shows that groundless civil lawsuits can be significantly reduced if CGR stops suing civil servants for this reason. In five cases this situation is remarkably clear. In two cases, civil servants used their power of discretion in a more contestable manner[184]. In the remaining case, a civil servant exercised his power of discretion for his own economic benefit[185].

The following cases are very important to illustrate how technical decisions are discussed in civil lawsuits and how CGR sues civil servants for exercising their power of discretion:

- In 2001, Provincial Municipality "Padre Abad" (Pucallpa) constructed a pedestrian walkway alongside River Aguaytía's Bay. In 2005, CGR sued the Mayor of "Padre Abad", the resident civil engineer and the inspector civil engineer because 796m² of tiles were not used, and thus should not have been bought. This was considered damage to the State for S/. 34,489.47 (about US$11,000). During the judicial proceedings these three civil servants indicated that a flood that occurred in the midst of the construction damaged

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lotteries and ruffles. This resolution was issued in accordance with a Ministerial Resolution that authorized this type of expenditures (in order to reimburse policemen for transportation costs and a job done out of the office hours), but Miguel Pajares appointed himself to oversee lotteries and ruffles. This case was declared to have grounds based on the fact Miguel Pajares authorized payments for his own benefit (CGR, File No. 248-2003-CG, Leg. 051-2004).

[184] In these two cases local authorities subsidized both local festivities (i.e., a band of musicians, fireworks, sport materials, and sometimes beer) and school trips to students who graduated from public high schools. In these cases the judiciary found that these types of expenses are legally justified because municipalities are competent to promote culture (CGR, Files No. 282-2003-CG and 268-2002-CG). However, in a third case the judiciary considered that municipalities are not competent to authorize such superfluous expenses and declared the case to have partial grounds (CGR, Files No. 311-2004-CG). It is my opinion that expending public resources on local festivities falls within local authorities' power of discretion because such decisions can be included in the category of "promoting cultural activities". However, these superfluous expenditures should also be criticized as these show a very poor judgement from local authorities, especially when these occur in poor areas. Furthermore, these expenditures should be closely monitored in order to prevent political clientelism.

[185] The facts of this case are similar to one explained above but this case had a different outcome (see: *CGR, File* No. 248-2003-CG, Leg. 051-2004*; Footnote No. 183)*. As in the previous case, the Director General of Internal Government (National Police), César A. Morgan Alcalde, issued a Directoral Resolution that established an allowance to policemen who oversaw or witnessed private lotteries and ruffles and, then he appointed himself to undertake such activities. This civil case was declared to have grounds based on the fact that Mongan's resolution was issued in accordance with a Ministerial Resolution that authorized this type of expenditures in order to reimburse policemen for transportation costs and a job done out of office hours. However, unlike the case above, the fact that Morgan Alcalde benefited himself from these allowances was not taken into consideration by the Court (CGR, File No. 248-2003-CG, Leg. 047-2004).

these tiles. In April 2007 the judiciary declared this case groundless because it was adequately proved that there was a natural disaster of considerable intensity, that tiles were damaged because of the flood (as it was indicated in the Notes of Progress and Events), that all the unused tiles remained stored in the Municipality warehouse, that the acquisition of new tiles was made according to legal stipulations, and that the public work was concluded. The judge "reached the conviction that acquisitions of materials for the conclusion of this public work were justified" (CGR, File No. 167-2005-CG).

- In March 2001, a former mayor of Baños del Inca (Cajamarca) and three civil servants of the Touristic Resort "Baños del Inca" hired two civil engineers (a resident engineer and an inspector engineer) for the maintenance of the resort's thermal baths. This public work cost S/. 281,509.02 (about US$ 93,000). According to CGR's civil lawsuit, in 2003, public works that cost less than S/. 900,000 (about US$ 300,000) needed only an inspector engineer and not a resident engineer. CGR based this position on CGR's Resolution No. 195-88-CG (from 1988). Hence, CGR sued the four civil servants who hired the resident engineer. It alleged that his payments were unnecessary (S/. 6,460.00 or about US$ 2,150). In the judicial proceedings these civil servants argued: a) that their decision of hiring two civil engineers was taken to guarantee the proper execution of the public work; b) that their decision was taken after the Internal Audit of Office of Provincial Municipality of Cajamarca said it did not conflict with any administrative norm; c) that CGR's invoked administrative norm was neither attached to CGR's civil lawsuit nor available in CGR's office in Cajamarca province; and d) that there were no damages to the State because the thermal baths were repaired and more people were using the resort (which represented economic benefits). In May 2007, the judiciary declared this case groundless because of the following two reasons: a) the Touristic Resort "Baños del Inca" did not have a civil engineer on its payroll, and thus it was necessary to hire a resident civil engineer, and b) the Touristic Resort "Baños del Inca" did not suffer any economic damage and, by contrast, this public work had created economic benefits (CGR, File No. 268-2002-CG).

- In 1996 the Lima Municipality Administration of Road-Tolls Enterprise (EMAPE) modified the design of a public work in order to avoid expropriating some land from the Jockey Club of Peru. According to CGR, this increased the cost of the public work by S/. 509,367.66 (about US$ 170,000), and thus in June 1999, CGR sued 11 civil servants for that amount of money. In the judicial proceedings some civil servants alleged that such modification to the public work design "intended to avoid -as much as possible- expropriating private property of third parties because this could paralyse the public work and would increase its costs (because the value of that land was S/. 1'248,000.00; some US$ 415,000)". The judiciary declared this case groundless because the administrative decision was taken in order to avoid affecting the property of third parties. (CGR, File 056-99-CG)[186].

[186] In this case the decisions of the judiciary (Judge Court Order from 9-11-2000 and Sentence of the Court of

- In August 2001, CGR sued seven civil servants of the water and sewage public enterprise EMFAPATUMBES because they authorized water supply fees that were below administrative stipulations prescribed by the Superintendence SUNASS. CGR claimed that the State suffered economic damages for S/. 81,898.59. In the judicial proceedings, these civil servants claimed that EMFAPATUMBES was not providing 24 hours of service and, thus, they could not charge fees for a service that was not provided. Furthermore, they claimed that the Superintendence SUNASS regulated this type of situations in 1999 (Resolution No 1179-99-SUNASS). In July 2008, the judiciary decided that although an economic damage to the State had occurred EMFAPATUMBES could still charge its costumers for the service that was provided at that time (CGR, File No. 111-2001-CG).

As was mentioned for criminal cases[187], prosecuting civil servants for exercising administrative power of discretion creates severe negative incentives for the decision-making of the public administration. In the above cases the underlying question is: what type of message is CGR sending to civil servants who adopt legal, technical or managerial decisions? The message is clear: that they will be sued if CGR's auditors do not agree with the technical decisions they adopt. This creates lot of uncertainty in the civil service. It undeniably induces civil servants to avoiding decision-makings and, therefore, it creates a risk of paralysis in the public administration.

**c) The economic characteristics of CGR's civil lawsuits with and without grounds**

CGR tends to request civil compensations that exceed real damages to the State. In the 34 civil lawsuits under study, CGR claimed to have suffered a damage of S/.1'687,569.04, but the Judiciary only recognized damages for S/. 229,941.94; which represents only 13.63% of

Appeals from 26-06-2002) were not provided by CGR. However, CGR provided an internal Informative Sheet which summarizes the grounds for declaring this case groundless.

[187] See: *Chapter 7.1.2 section a): Accusing civil servants for exercising their administrative discretion.*

what CGR had claimed[188]. In other words, 86.37% of the money claimed by CGR is not recovered by the Judiciary.

The average amount of money claimed by CGR is S/. 49,634.38, but there are notorious differences between cases with grounds and groundless cases. The average amount of money claimed by CGR in cases with grounds is S/. 12,569.17, the average amount of money claimed in cases with partial grounds is S/. 19,928.97, and the average amount of money claimed in groundless cases is S/. 98,379.09. The Judiciary seems keen to find civil servants responsible for causing economic damages to the State when the amounts of money involved are not too large and, therefore, reasonable to be paid back by civil servants. Another factor that explains why civil lawsuits are generally declared groundless when large amounts of money are involved is that legal representatives of the civil servants have a much better knowledge of the law and are more careful in the litigation proceedings.

**Table No. 7.1**

**Money Claimed and Money Recovered by CGR Through Civil Lawsuits**

| Type of Case | Number of Cases | Amount of Money claimed by CGR (in soles) | Amount of Money Recovered by CGR (in soles) | Average amount of money claimed by CGR (in soles) | Average amount of money recovered by CGR |
|---|---|---|---|---|---|
| Grounded | 12<br>35.29% | S/150,830.01<br>8.94% | S/151,240.36 | S/12,569.17 | S/12,603.36 |
| Partially-grounded | 8<br>23.53% | S/159,431.78<br>9.45% | S/78,701.58 | S/19,928.97 | S/9,837.70 |
| Non-grounded | 14<br>41.18% | S/1,377,307.25<br>81.61% | S/0.00 | S/98,379.09 | S/0.00 |
| **TOTAL** | **34<br>100.00%** | **S/1,687,569.04<br>100.00%** | **S/229,941.94<br>13.63%** | **S/49,634.38** | **S/6,763.00<br>13.63%** |

Source: Author.[189]

[188] See: *Table No. 7.1* and *Annexes, Table No. A.8.*
[189] For disaggregated information of CGR recoveries through civil lawsuits see: *Annexes, Table No. A. 8.*

It is also important to note that public administrators must make decisions that sometimes involve millions of dollars. In this context, exercising discretion can cause significant economic losses because such decisions are made with limited information and sometimes in short periods of time. The judiciary seems to be more aware of this situation than CGR. All four cases where the amount of money claimed by CGR was equal or more than S/. 147,067.13 (about US$ 50,000) were declared groundless by the Judiciary and in all of them civil servants had arguably exercised their power of discretion. These cases include: i) modifying the design of a public work in order to avoid confiscating private property (CGR, File No. 056-99-CG[190]); ii) a discussion regarding the price of fallow land sold to a construction development company (CGR, File No. 082-1998-CG); iii) authorizing public expenditures for local festivities (CGR, File No. 268-2002-CG[191]); and iv) modifying an important contract of irrigation and making payments for such modifications (CGR, File No. 330-2002-CG[192]). What's more, from the ten cases where the largest amounts of money were claimed by CGR, nine cases were declared groundless and the remaining one was declared to have partial grounds (and in this case the economic damage was significantly reduced by the judiciary, from S/.61,219.41 to S/. 17,419.00) (CGR, File No. 416-2004-CG).

**d) The over- prosecutorial activity of CGR in judicial proceedings declared groundless**

The over-prosecutorial activity of CGR is also reflected in unnecessary appeals during the judicial proceedings. For example, CGR requested the Supreme Court of Justice (SCJ) to void six of the 14 judicial processes that had been previously declared "groundless". The SCJ found all these cases "groundless" or "unable to proceed" and, thus, in five of these six cases

[190] See: *Chapter 7.2.2 section b): The characteristics of most civil lawsuits declared groundless by the Judiciary: CGR sues civil servants for exercising their discretionary power.*
[191] See: *CGR, File No. 268-2002-CG (Footnote No. 184).*
[192] The Judiciary did not discuss the grounds of this case because there was an arbitration clause.

it imposed a fine on CGR for presenting unnecessary appeals[193]. These fines are imposed by SCJ in order to disincentivize and punish unnecessary litigation. These appeals took on average 10 additional months (304 days) to be solved, and thus these judicial lawsuits were some of the longest ones to be decided; with an average length of four years five months[194].

In one case CGR's prosecutorial activity was close to surpassing any reasonable limit. In CGR's File No. 056-99-CG there is an internal Information Sheet in which a member of the CGR Public Procurator Office proposed to study the possibility to continue the judicial process despite the fact that the Supreme Court of Justice had already reached a final decision.

### 7.2.3 Root-causes of CGR's Relative Failure in Suing Civil Servants

CGR recovers only 13.63% of the money it claims through civil proceedings. In terms of value for money this represents a total failure of CGR's civil lawsuits. Besides, two out of three civil servants sued by CGR are found not responsible for causing damages to the State. This represents, on average, 172 non-responsible civil servants sued every year by CGR. Most of these servants are sued for exercising their power of discretion.

The root-cause of CGR's failure in suing civil servants cannot be inferred from the judicial files. I believe that organizational features may influence the decisions of CGR's prosecutors. As explained above, when the Comptroller General of the Republic authorizes CGR's public procurators to present civil lawsuits, these authorizations are –given CGR's hierarchical structure- taken in practice as orders or instructions that stop public procurators from discarding cases that they may consider groundless or flimsy. Besides, CGR's public

[193] The total amount of these fines was 13 Units of Reference for Proceedings (URP). In 2013, 1 URP was set at S/. 370.00. Thus, the total amount of these fines was S/. 4,810 (about US$ 1,723.67)

[194] See: *Table No. 6.14: Length-Term of Civil Processes According to the Results of the Processes* to verify how groundless civil lawsuits take much longer periods of time than cases with grounds or partial grounds.

procurators do not even participate in the auditing process. In the end, civil lawsuits are filed even when the possibility to present a civil claim has already expired[195].

Another possible cause of this failure lies in the Peruvian legislation. Indeed, the Ninth Final Provision of CGR's Organic Law establishes that civil servants are responsible for the economic damages they cause to the State by not performing or underperforming their duties intentionally (by "*dolo*") or unintentionally (either by acting with severe fault or by acting with mild fault)[196]. This allows CGR to present civil lawsuits even when civil servants commit minor mistakes. As has been demonstrated in the previous sections, this situation is easily extended to cases where civil servants simply commit administrative infractions or exercise their administrative power of discretion.

[195] See: *Chapter 5.4 section b): The Role of the Comptroller General in CGR's Prosecutorial Activity.*
[196] See: *Chapter 4.1.2: Civil Responsibilities of Civil Servants.*

## CONCLUSIONS & RECOMMENDATIONS

CGR does not provide value for money services. Every year CGR's running operation costs (on average S/. 170'935,747.50) are higher than the economic damages it identifies in its audit reports (on average S/. 97'418,234.25). Moreover, CGR's recovery ratio judicially is very low: 13.63% of money claimed through civil lawsuits and less than 1% claimed in criminal cases. Consequently, CGR recovers in the judiciary less than 2% of its own running costs[197].

CGR does not fulfill its accountability role, it does not contribute significantly to curbing corruption, and it impacts very negatively on the public administration because its prosecutorial activity disincentivizes the decision-makings of civil servants. Every year, 65.85% of civil servants sued by CGR are found not responsible for having caused any economic damage to the State. This represents, on average, 172 civil servants sued unnecessarily by CGR. CGR's criminal accusations have an even poorer success rate. Every year more than 98% of civil servants accused by CGR are found not guilty of having committed a crime. This represents, on average, 851 innocent or presumably innocent civil servants[198]. Even if these servants have committed a crime, CGR fails to prove their crimes. CGR's prosecutorial activity has failed because of its over-prosecutorial stance, its over-

[197] See: *Table No. 6.8: CGR's Budget Spent in Relation to the Amounts of Money Recovered.*
[198] See: *Table No. 6.10: Civil Servants Calculated to Have Been Found Not Responsible for Causing Economic Damages and Not Guilty of Committing Criminal Activities.*

reliance on compliance audits, its organizational design, and important deficiencies in the Peruvian law of the civil responsibility of civil servants[199].

This section contains three policy recommendations. Firstly, a recommendation to redefine CGR's role in fighting corruption. The object of this recommendation is to stop accusing civil servants by presuming them guilty without adequate proof and, at the same time, to develop a system of accountability that should be more efficient in prosecuting criminals and in curbing corruption. Secondly, two alternative legal recommendations to redefine the liability rules for civil servants. The object of these recommendations is to safeguard civil servants' power of discretion and to incentivize the decision making of the public administration. Thirdly, a NPM policy recommendation to improve CGR's contribution to enhancing the efficiency of the public administration.

**1. Redefining CGR's Accountability Role Within a System of Accountability**

Accountability is best defined as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences" (Bovens, 2007: 450). Accountability forums can be divided in intra-state institutions of accountability and extra-state institutions of accountability (Mainwaring, 2003)[200]. To be effective, institutions of accountability must work within a system or network of accountability (Mainwaring 2003; O'Donnell, 1998a)[201], which in turn, should be part of a National Integrity System (Pope,

[199] See: *Chapter 7.1.3: Root-causes of CGR's Excessive Prosecutorial Activity in Criminal Processes* and *Chapter 7.2.3: Root-causes of CGR's Relative Failure at Suing Civil Servants.*

[200] Mainwaring (2003) divides institutions of accountability in: i) intra-state institutions of accountability and ii) electoral accountability (or, synonymously, accountability to voters).

[201] See: *Chapter 2.1: Conceptualizing Supreme Audit Institutions as Independent Intrastate Institutions of Accountability.*

2000; Dye and Stapenhurst 1998; Langseth et al., 1997)[202]. Thus, institutions of accountability need to perform their tasks efficiently, to cooperate with each other, and to articulate their work in order to expand their impact. For example, it has been proven that if SAIs release their audit reports during an electoral year, then citizens incorporate this information in their electoral choices (Pereira, et al., 2009; Ferraz and Finan, 2008)[203]. In general, institutions of accountability should be articulated in such a manner that, at the end, the public administration is incentivized to improve its efficiency and the judiciary is able to punish delinquents.

SAIs are intra-state institutions of accountability specialized in auditing (not in proving corruption[204]). Hence, the accountability task of SAIs is to conduct public audits in order to: i) promote efficiency of the public administration (through audits of performance), ii) to verify the accuracy of government financial statements (through financial audits), and iii) to verify that procedures that govern financial spending have been properly followed (through audits of compliance)[205]. Secondary functions of SAIs should follow from their main tasks. For example, a SAI's secondary functions may include initiating disciplinary administrative proceedings when civil servants breach administrative regulations. A SAI's secondary functions may also include presenting civil lawsuits when civil servants cause economic damages to the State by breaching administrative regulations[206].

In carrying on their auditing tasks SAIs may identify possible traces of corruption. In such situations SAIs have three options: i) to ignore these signs of corruption, ii) to present

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[202] See: *Chapter 1.5: Determining Civil Servants' Power of Discretion and Responsibilities*.
[203] See: *Introduction.*
[204] See: *Chapter 3.5: The Role of Supreme Audit Institutions in Fighting Corruption.*
[205] See: *Chapter 2.3 The Role of Supreme Audit Institutions: Typology of Audits.*
[206] However, this secondary function could be removed in order to avoid unintended consequences and/or due to institutional considerations. See: *Chapter 1.5: Determining Civil Servants' Power of Discretion and Responsibilities*.

criminal accusations if it has a prosecutorial mandate, and iii) to transfer or communicate these traces of corruption to those institutions of accountability that specialize in anti-corruption and/or crime prosecution (i.e., public prosecutors, anti-corruption agencies). In the first scenario, lack of communication between SAIs and other intra-state institutions of accountability diminishes the possibility of obtaining adequate redress to misdeeds and to sanctioning corruption in the judiciary. In the second scenario, SAIs will probably fail at proving corruption because public audits are not adequate mechanisms for proving criminal acts[207]. Indeed, performance audits do not identify individual responsibilities because these audits focus on administrative systems; and financial and compliance audits are conducive to identifying administrative infringements, and therefore will generally fall short of proving corruption. For example, SAIs may identify that public constructions are overpriced and that bidding processes breached administrative regulations. While these facts are possible traces of corruption, corruption itself has not been proven. To prove corruption it is necessary to establish very clearly which civil servants have received a bribe (or any other type of personal benefits) from the winning bidder. In the third scenario SAIs work within a well-functioning system of accountability, a system that increases the possibilities of sanctioning criminals[208].

While a SAI's audit findings are not conducive to proving corruption, these could point out traces of corruption to other institutions of accountability. However, in the case of CGR, its prosecutorial mandate impedes this SAI from working within a system of accountability and to transfer its work to those intrastate institutions of accountability that specialized in anti-corruption (i.e., the anti-corruption public procurator office). Hence, in order to establish an integrated and well-functioning system of accountability in Peru, the Congress should remove CGR's prosecutorial mandate and, instead, it should mandate CGR

[207] See: *Chapter 3.5: The Role of Supreme Audit Institutions in Fighting Corruption.*
[208] See: *Chapter 1.5: Determining Civil Servants' Power of Discretion and Responsibilities*.

to transfer its findings to an independent public prosecutor office – and to the Public Ministry – if such findings contribute to identifying and/or proving a crime (García, 2014). This will allow CGR to improve its connections with other institutions of accountability and, more importantly, it will contribute to strengthening the system of accountability as a whole. In so doing, the Congress should also strengthen the independence of other institutions of accountability, especially the judiciary and the anti-corruption public procurator office (i.e., the National Integrity System).

Since audits of compliance are conducive to proving administrative irregularities, SAIs have a very important role to play in enhancing the rule of law by initiating administrative disciplinary proceedings. Moreover, independent and credible administrative disciplinary proceedings have an important indirect role in curbing corruption. For example, if a SAI detects overpricing, and this can be attributed to breaches of administrative regulations, then administrative responsibilities can be determined and penalties should be imposed, including dismissals and disqualifications from the civil service. In short, CGR can create limited but important beneficial effects in curbing corruption without the need to wait for a judicial court order.

In the Peruvian case, CGR has been recently empowered to conduct credible and independent administrative disciplinary processes. This may have a strong prophylactic effect in the public administration. However, CGR needs to abandon its sterile and inconsequential impetus for suing and accusing civil servants. Instead, administrative reprimand of negligence, low-performance, and opaque or suspicious decisions promise to be a better strategy for both enhancing the efficiency of the public administration and curbing corruption.

**2. Modifying the Liability Rules for Civil Servants**

The Peruvian legislation on civil responsibility of civil servants leads to an excess of civil litigation against civil servants. This situation poses a heavy burden on the public administration as it disincentives decision-making and hinders the morale of the public administration. Peruvian legislators need to internalize the idea that "by expanding the circumstances under which public officials may be sued or may be held personally liable in damages, these decisions may well produce less compensation, less deterrence of illegality, less vigorous decision making, less loss spreading, less moral affirmation, and less equity than a legal regime expanding governmental liability and restricting official liability" (Schuck, 1980: 285).

In Peru it is necessary to strengthen the public administration's authority, efficiency, and morality. While several actions should be taken in order to achieve these ends, Peruvian legislators should also consider the need to modify current liability rules for civil servants. There are at least two alternative venues to fulfill this purpose.

One option is to enact a law on Statutory Rights of Civil Servants or to include such statutory provisions in the current Law of the Civil Service. The object of this legislation would be to protect civil servants from nuance litigations, and thus to fuel the decision making of the public administration. In Peru such statutory legislation has never existed. Thus, it would be convenient to review civil servants' legal protections in other countries, especially in those countries where such statutory conditions have been widely developed. This is the case of civil servants in the United States. In its current system (developed by both legislation and the jurisprudence of the Supreme Court of Justice), federal civil servants are completely excluded from *common law civil lawsuits* since the enactment of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (also known as the Westfall Act) (Giannatasio, 2005; Lee, 1996). Nonetheless, U.S. civil servants are made responsible

for the damages they cause if they violate someone's constitutional rights. In these cases civil servants still enjoy a *qualified immunity* that protects them from nuisance claims (Giannatasio, 2005; Lee, 2004; Rosenbloom, 2003 and 1980)[209]. This comprehensive statutory framework enables public servants to exercise their power of discretion, to make difficult decisions with little information, and to adopt second-best policy alternatives without being afraid of future claims. It also guarantees the recruitment of highly qualified personnel into the public service because stricter liability rules would be a disincentive for these professionals to join the civil service[210].

A second option is to modify the Ninth Final Provision of CGR's Organic Law, which stipulates that public servants are civilly responsible when they cause economic damages to the State if, in performing their duties, they breach their functions by committing either fraud, inexcusable fault, or mild fault. As has been mentioned above, holding civil servants responsible for "committing mild fault" is a very extreme burden that has caused much of CGR's unnecessary civil litigation[211]. Hence, if the Peruvian Congress cannot agree on passing a comprehensive *Statutory Rights of the Civil Servants,* it should at least modify CGR's Organic Law in order to remove civil servants' obligation to compensate economic damages to the State caused by acting with mild fault. This option is perhaps more practical, given its readiness and consistence with the Roman legal tradition[212].

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[209] Historically, the protection of civil servants in the United States was a consequence of the Sovereign Acts doctrine, which is recognized by the United States Constitution and enunciates that sovereign states cannot be made responsible for their acts –unless they accept to be made responsible (Bruno, 2012; Roberts, 1999; Reynolds, 1968).

[210] If introducing such statutory provisions in the Peruvian legal system it would be necessary to clarify that civil servants will be held civilly responsible for economic damages caused to the State with the purpose of obtaining a personal benefit for themselves or third parties.

[211] See: *Chapter 7.2.2 Analysis of CGR's Civil Lawsuits Against Civil Servants* and *Chapter 7.2.3: Root-causes of CGR's Relative Failure at Suing Civil Servants.*

[212] For example, the Spanish Law of Public Administrations stipulates that civil servants can only be made responsible for the economic damages they cause if they acted with *dolo* (intention) or severe negligence (Law 30/1992, Article 145.3; as modified by Law 4/1999, Article 1.39).

Behind the decision between establishing a Statutory Rights of the Civil Servants and modifying the Organic Law of CGR lies the discussion regarding the degree of discretionary power that civil servants should have[213]. This discussion cannot continue to be postponed because the Peruvian public administration is currently suffering from severely inadequate regulations. Besides, the outcome of this discussion may have profound consequences in the decision-making of the public administration and, therefore, in furthering the development of the country.

**3. CGR Should Prioritize Audits of Performance over Audits of Compliance**

In order to improve the efficiency of the public administration, CGR could gradually change its focus from conducting compliance audits to conducting performance audits. This managerial change would be relatively consistent with CGR's organizational structure because most Westminster Supreme Audit Institutions privilege performance audits[214].

It should be noted that this policy recommendation needs careful implementation and imposes high risks of failure. Firstly, audits of performance have strong caveats of their own[215]. Secondly, for CGR to change its focus from audits of compliance to audits of performance, it may be necessary to reform the entire Peruvian public administration and to adopt NPM policies consistently, broadly and deeply (including deregulating the public administration and placing more decision-making power in civil servants)[216]. For these reasons, such comprehensive policy reform would demand strong political will and may be

[213] See: *Chapter 1.5: Structuring Administrative Discretion and Liability Rules Against Civil Servants.*
[214] CGR is hybridly modeled because it is headed by a single Comptroller General as any SAI that follows the Westminster model; but it also incorporates an independent administrative tribunal within its structure. See: *Chapter 2.2: Organizational Models of Supreme Audit Institutions.*
[215] See: *Chapter 3.2: The Accountability Role of SAIs in the Paradigm of New Public Management: Focusing on Performance Audits.*
[216] See: *Chapter 1.2: The New Public Management (NPM).*

claimed to be inadequate given the legalistic tradition of the Peruvian public administration, the poor levels of professionalism and honesty in the public administration, and the high levels of social distrust against civil servants[217]. Nonetheless, I believe that CGR could change its focus from audits of compliance to audits of performance as long as this process is carried on gradually and carefully monitored. If well implemented, performance audits will definitely provide more value for money to CGR's services. To succeed, CGR will need to bear in mind at all moments that the purpose of performance audits is not to point fingers and to place blame on civil servants, but to discover inefficiencies in order to contribute to the public administration in its administrative learning process.

[217] See: *Chapter 4.2: Characterizing the Peruvian Public Administration: Deficiencies and Challenges* and *Chapter 1.4: Public Administration in Developing Countries.*

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**ANNEXES**

**ANNEX 1**

**Disaggregated Information of**

**35 Criminal Processes and 34 Civil Processes Against Peruvian Civil Servants**

## TABLE No. A.1

## NUMBER OF CGR'S ACCUSATIONS AGAINST CIVIL SERVANTS AND NON-CIVIL SERVANTS IN 35 CRIMINAL FILES (61 CASES)

| No. | File Number | Case Number | Sub-File | Number of Civil Servants Accused | Number of Accusations to Civil Servants | Number of Non-Civil Servants Accused | Accusations to Non-Civil Servants |
|---|---|---|---|---|---|---|---|
| 1 | 143-2001-CG | 1 | Leg. 135-2001 | 18 | 6 | 1 | 1 |
| | | 2 | Leg. 135-2001 | | 18 | | |
| | | 3 | Leg. 135-2001 | | 10 | | |
| | | 4 | Leg. 135-2001 | | 10 | | |
| | | 5 | Leg. 135-2001 | | 1 | | |
| 2 | 194-2002-CG | 2 | Leg. 202-2002 | 3 | 6 | 0 | |
| 3 | 192-2002-CG | 1 | Leg. 195-2002 | 1 | 2 | 0 | |
| 4 | 050-2001-CG | 1 | Leg. 045-2001 | 1 | 2 | 0 | |
| 5 | 065-2002-CG | 1 | Leg. 116-2002 | 7 | 3 | 3 | 8 |
| | | 2 | Leg. 116-2002 | | 2 | | |
| | | 3 | Leg. 116-2002 | | 12 | | |
| 6 | 197-2001-CG | 1 | Leg. 159-2001 | 2 | 2 | 0 | |
| | | 2 | Leg. 159-2001 | | 2 | | |
| 7 | 249-2002-CG | 1 | Leg. 218-2002 | 9 | 5 | 0 | |
| | | 2 | Leg. 218-2002 | | 4 | | |
| 8 | 193-2002-CG | 1 | Leg. 194-2002 | 3 | 3 | 0 | |
| 9 | 261-2005-CG | 1 | Leg. 184-2005 | 2 | 2 | 0 | |
| 10 | 040-2003-CG | 1 | Leg. 131-2003 | 4 | 3 | 0 | |
| | | 2 | Leg. 131-2003 | | 2 | | |
| | | 3 | Leg. 131-2003 | | 3 | | |
| 11 | 140-2001-CG | 1 | Leg. 136-2001 | 6 | 3 | 1 | 1 |
| | | 2 | Leg. 136-2001 | | 4 | | |
| 12 | 343-2002-CG | 1 | Leg. 079-2003 | 4 | 8 | 0 | |
| 13 | 381-2004-CG | 1 | Leg. 284-2004 | 2 | 2 | 0 | |
| 14 | 129-2001-CG | 1 | Leg. 130-2001 | 11 | 14 | 0 | |
| 15 | 272-2005-CG | 1 | Leg. 195-2005 | 1 | 2 | 0 | |
| 16 | 072-2002-CG | 1 | Leg. 107-2002 | 3 | 3 | 0 | |
| | | 2 | | | 3 | | |
| | | 3 | | | 3 | | |
| | | 4 | | | 3 | | |
| 17 | 059-01-CG | 1 | Leg. 073-2001 | 2 | 2 | 0 | |
| | | 2 | | | 2 | | |
| | | 3 | | | 1 | | |
| 18 | 082-2001-CG | 1 | Leg. 083-2001 | 2 | 2 | 0 | |
| | | 2 | | | 4 | | |

(Continue in next page)

| No. | File Number | Case Number | Sub-File | Number of Civil Servants Accused | Number of Accusations to Civil Servants | Number of Non-Civil Servants Accused | Accusations to Non-Civil Servants |
|---|---|---|---|---|---|---|---|
| 19 | 448-2003-CG | 1 | Leg. 077-2004 | 2 | 2 | 0 | |
| 20 | 425-2004-CG | 1 | Leg. 265-2004 | 1 | 1 | 0 | |
| 21 | 175-2004-CG | 1 | Leg. 118-2004 | 6 | 6 | 0 | |
| 22 | 438-2003-CG | 1 | Leg. 019-2004 | 5 | 5 | 0 | |
| 23 | 345-2005-CG | 1 | Leg. 301-2005 | 7 | 7 | 0 | |
| 24 | 340-2002-CG | 1 | Leg. 033-2003 | 2 | 2 | 0 | |
| 25 | 075-2005-CG | 1 | Leg. 083-2005 | 5 | 5 | 0 | |
| 26 | 073-2000-CG | 1 | Leg. 035-2000 | 3 | 3 | 0 | |
| 27 | 189-2002-CG | 1 | Leg. 217-2002 | 7 | 4 | 0 | |
| | | 2 | | | 6 | | |
| 28 | 132-2005-CG | 1 | Leg. 161-2005 | 5 | 5 | 0 | |
| 29 | 036-2003-CG | 1 | Leg. 058-2003 | 7 | 2 | 0 | |
| | | 2 | | | 7 | | |
| 30 | 217-2003-CG | 1 | Leg. 228-2003 | 26 | 24 | 0 | |
| | | 2 | | | 3 | | |
| | | 3 | | | 7 | | |
| | | 4 | | | 7 | | |
| | | 5 | | | 4 | | |
| | | 6 | | | 2 | | |
| | | 7 | | | 5 | | |
| 31 | 314-2002-CG | 1 | Leg. 086-2003 | 5 | 2 | 1 | 1 |
| | | 2 | | | 4 | | |
| 32 | 320-2003-CG | 1 | Leg. 332-2003 | 5 | 6 | 0 | |
| 33 | 254-2003-CG | 1 | Leg. 340-2003 | 5 | 10 | 2 | 2 |
| 34 | 409-2004-CR | 1 | Leg. 279-2004 | 15 | 15 | | |
| 35 | 352-2004-CG | 1 | Leg. 252-2004 | 7 | 7 | | |
| **Total** | | **61** | | **194** | **305** | **8** | **13** |

Source: Author[218].

[218] This table has been elaborated with information of 35 criminal files included in CGR's Annual Report of 2008. For the methodology and representativeness of this sample see: *Chapter 7.1:* Evaluating CGR's Criminal Accusations Against Civil Servants.

## TABLE No. A.2

## NUMBER OF CIVIL SERVANTS FOUND GUILTY

| No. | File Number | Case Number | Sub-File | Number of Civil Servants Accused | Number of Civil Servants Found Guilty | Number of Accusations to Civil Servants | Number of Grounded Accusations |
|---|---|---|---|---|---|---|---|
| 1 | 143-2001-CG | 1 | Leg. 135-2001 | 18 | 0 | 6 | 0 |
| | | 2 | Leg. 135-2001 | | 0 | 18 | 0 |
| | | 3 | Leg. 135-2001 | | 0 | 10 | 0 |
| | | 4 | Leg. 135-2001 | | 0 | 10 | 0 |
| | | 5 | Leg. 135-2001 | | 0 | 1 | 0 |
| 2 | 194-2002-CG | 2 | Leg. 202-2002 | 3 | 0 | 6 | 0 |
| 3 | 192-2002-CG | 1 | Leg. 195-2002 | 1 | 0 | 2 | 0 |
| 4 | 050-2001-CG | 1 | Leg. 045-2001 | 1 | 0 | 2 | 0 |
| 5 | 065-2002-CG | 1 | Leg. 116-2002 | 7 | 0 | 3 | 0 |
| | | 2 | Leg. 116-2002 | | 0 | 2 | 0 |
| | | 3 | Leg. 116-2002 | | 0 | 12 | 0 |
| 6 | 197-2001-CG | 1 | Leg. 159-2001 | 2 | 2 | 2 | 2 |
| | | 2 | Leg. 159-2001 | | | 2 | 2 |
| 7 | 249-2002-CG | 1 | Leg. 218-2002 | 9 | 0 | 5 | 0 |
| | | 2 | Leg. 218-2002 | | 0 | 4 | 0 |
| 8 | 193-2002-CG | 1 | Leg. 194-2002 | 3 | 0 | 3 | 0 |
| 9 | 261-2005-CG | 1 | Leg. 184-2005 | 2 | 0 | 2 | 0 |
| 10 | 040-2003-CG | 1 | Leg. 131-2003 | 4 | 0 | 3 | 0 |
| | | 2 | Leg. 131-2003 | | 0 | 2 | 0 |
| | | 3 | Leg. 131-2003 | | 0 | 3 | 0 |
| 11 | 140-2001-CG | 1 | Leg. 136-2001 | 6 | 0 | 3 | 0 |
| | | 2 | Leg. 136-2001 | | 0 | 4 | 0 |
| 12 | 343-2002-CG | 1 | Leg. 079-2003 | 4 | 0 | 8 | 0 |
| 13 | 381-2004-CG | 1 | Leg. 284-2004 | 2 | 0 | 2 | 0 |
| 14 | 129-2001-CG | 1 | Leg. 130-2001 | 11 | 0 | 14 | 0 |
| 15 | 272-2005-CG | 1 | Leg. 195-2005 | 1 | 0 | 2 | 0 |
| 16 | 072-2002-CG | 1 | Leg. 107-2002 | 3 | 0 | 3 | 0 |
| | | 2 | | | 0 | 3 | 0 |
| | | 3 | | | 0 | 3 | 0 |
| | | 4 | | | 0 | 3 | 0 |
| 17 | 059-01-CG | 1 | Leg. 073-2001 | 2 | 0 | 2 | 0 |
| | | 2 | | | 0 | 2 | 0 |
| | | 3 | | | 0 | 1 | 0 |
| 18 | 082-2001-CG | 1 | Leg. 083-2001 | 2 | 0 | 2 | 0 |
| | | 2 | | | 0 | 4 | 0 |

(Continue in next page)

| No. | File Number | Case Number | Sub-File | Number of Civil Servants Accused | Number of Civil Servants Found Guilty | Number of Accusations to Civil Servants | Number of Grounded Accusations |
|---|---|---|---|---|---|---|---|
| 19 | 448-2003-CG | 1 | Leg. 077-2004 | 2 | 0 | 2 | 0 |
| 20 | 425-2004-CG | 1 | Leg. 265-2004 | 1 | 0 | 1 | 0 |
| 21 | 175-2004-CG | 1 | Leg. 118-2004 | 6 | 0 | 6 | 0 |
| 22 | 438-2003-CG | 1 | Leg. 019-2004 | 5 | 0 | 5 | 0 |
| 23 | 345-2005-CG | 1 | Leg. 301-2005 | 7 | 0 | 7 | 0 |
| 24 | 340-2002-CG | 1 | Leg. 033-2003 | 2 | 0 | 2 | 0 |
| 25 | 075-2005-CG | 1 | Leg. 083-2005 | 5 | 0 | 5 | 0 |
| 26 | 073-2000-CG | 1 | Leg. 035-2000 | 3 | 0 | 3 | 0 |
| 27 | 189-2002-CG | 1 | Leg. 217-2002 | 7 | 0 | 4 | 0 |
| | | 2 | | | 0 | 6 | 0 |
| 28 | 132-2005-CG | 1 | Leg. 161-2005 | 5 | 0 | 5 | 0 |
| 29 | 036-2003-CG | 1 | Leg. 058-2003 | 7 | 1 | 2 | 2 |
| | | 2 | | | 0 | 7 | 0 |
| 30 | 217-2003-CG | 1 | Leg. 228-2003 | 26 | 0 | 24 | 0 |
| | | 2 | | | 0 | 3 | 0 |
| | | 3 | | | 0 | 7 | 0 |
| | | 4 | | | 0 | 7 | 0 |
| | | 5 | | | 0 | 4 | 0 |
| | | 6 | | | 0 | 2 | 0 |
| | | 7 | | | 0 | 5 | 0 |
| 31 | 314-2002-CG | 1 | Leg. 086-2003 | 5 | 0 | 2 | 0 |
| | | 2 | | | 0 | 4 | 0 |
| 32 | 320-2003-CG | 1 | Leg. 332-2003 | 5 | 0 | 6 | 0 |
| 33 | 254-2003-CG | 1 | Leg. 340-2003 | 5 | 0 | 10 | 0 |
| 34 | 409-2004-CR | 1 | Leg. 279-2004 | 15 | 0 | 15 | 0 |
| 35 | 352-2004-CG | 1 | Leg. 252-2004 | 7 | 0 | 7 | 0 |
| **Total** | | **61** | | **194** | **3** | **305** | **6** |
| **Percentage** | | | | **100%** | **1.55%** | **100%** | **1.97%** |

Source: Author[219].

[219] This table has been elaborated with information of 35 criminal files included in CGR's Annual Report of 2008. For the methodology and representativeness of this sample see: *Chapter 7.1:* Evaluating CGR's Criminal Accusations Against Civil Servants.

## TABLE No. A.3

## LENGTH-TERM OF CRIMINAL PROCESSES

## (DISAGGREGATED INFORMATION)[220]

| No. | File Number | Case Number | Sub-File | Date of SAI's Accusation | Date Case Finished | Time of Criminal Process (days) |
|---|---|---|---|---|---|---|
| 1 | 143-2001-CG | 1 | Leg. 135-2001 | 2001-09-17 | 2007-05-30 | 2081 |
| | | 2 | Leg. 135-2001 | | | |
| | | 3 | Leg. 135-2001 | | | |
| | | 4 | Leg. 135-2001 | | | |
| | | 5 | Leg. 135-2001 | | | |
| 2 | 194-2002-CG | 2 | Leg. 202-2002 | 2002-10-25 | 2004-10-22 | 728 |
| 3 | 192-2002-CG | 1 | Leg. 195-2002 | 2002-10-04 | 2005-08-24 | 1055 |
| 4 | 050-2001-CG | 1 | Leg. 045-2001 | 2001-05-17 | 2006-11-14 | 2007 |
| 5 | 065-2002-CG | 1 | Leg. 116-2002 | 2002-05-31 | 2007-07-05 | 1861 |
| | | 2 | Leg. 116-2002 | | | |
| | | 3 | Leg. 116-2002 | | | |
| 6 | 197-2001-CG | 1 | Leg. 159-2001 | 2001-11-07 | 2006-06-28 | 1694 |
| | | 2 | Leg. 159-2001 | | | |
| 7 | 249-2002-CG | 1 | Leg. 218-2002 | 2002-12-07 | 2006-01-19 | 1139 |
| | | 2 | Leg. 218-2002 | | | |
| 8 | 193-2002-CG | 1 | Leg. 194-2002 | 2002-10-14 | 2007-07-26 | 1746 |
| 9 | 261-2005-CG | 1 | Leg. 184-2005 | 2005-06-06 | 2008-09-05 | 1187 |
| 10 | 040-2003-CG | 1 | Leg. 131-2003 | 2003-06-25 | 2004-12-06 | 530 |
| | | 2 | Leg. 131-2003 | | | |
| | | 3 | Leg. 131-2003 | | | |
| 11 | 140-2001-CG | 1 | Leg. 136-2001 | 2001-09-07 | 2005-12-15 | 1560 |
| | | 2 | Leg. 136-2001 | | | |
| 12 | 343-2002-CG | 1 | Leg. 079-2003 | 2003-05-09 | 2007-07-03 | 1516 |
| 13 | 381-2004-CG | 1 | Leg. 284-2004 | 2004-11-16 | 2007-03-22 | 856 |
| 14 | 129-2001-CG | 1 | Leg. 130-2001 | 2001-08-23 | 2005-07-07 | 1414 |
| 15 | 272-2005-CG | 1 | Leg. 195-2005 | 2005-06-09 | 2007-04-09 | 669 |
| 16 | 072-2002-CG | 1 | Leg. 107-2002 | 2002-05-07 | 2005-10-27 | 1269 |
| | | 2 | | | | |
| | | 3 | | | | |
| | | 4 | | | | |
| 17 | 059-01-CG | 1 | Leg. 073-2001 | 2001-06-06 | 2005-05-31 | 1455 |
| | | 2 | | | | |
| | | 3 | | | | |
| 18 | 082-2001-CG | 1 | Leg. 083-2001 | 2001-07-13 | 2006-11-09 | 1945 |
| | | 2 | | | | |

(Continue in next page)

[220] It is considered the length-term of criminal files instead of criminal cases. In general all cases within a file have the same duration.

| No. | File Number | Case Number | Sub-File | Date of SAI's Accusation | Date Case Finished | Time of Criminal Process (days) |
|---|---|---|---|---|---|---|
| 19 | 448-2003-CG | 1 | Leg. 077-2004 | 2004-02-27 | 2006-10-19 | 965 |
| 20 | 425-2004-CG | 1 | Leg. 265-2004 | 2004-11-15 | 2005-03-31 | 136 |
| 21 | 175-2004-CG | 1 | Leg. 118-2004 | 2004-05-21 | 2005-10-28 | 525 |
| 22 | 438-2003-CG | 1 | Leg. 019-2004 | 2004-01-14 | 2006-01-23 | 740 |
| 23 | 345-2005-CG | 1 | Leg. 301-2005 | 2005-09-30 | 2006-10-30 | 395 |
| 24 | 340-2002-CG | 1 | Leg. 033-2003 | 2003-02-28 | 2008-04-02 | 1860 |
| 25 | 075-2005-CG | 1 | Leg. 083-2005 | 2005-02-21 | 2005-03-07 | 14 |
| 26 | 073-2000-CG | 1 | Leg. 035-2000 | 2000-05-03 | 2002-10-29 | 909 |
| 27 | 189-2002-CG | 1 | Leg. 217-2002 | 2002-11-27 | 2006-06-23 | 1304 |
| | | 2 | | | | |
| 28 | 132-2005-CG | 1 | Leg. 161-2005 | 2005-04-29 | 2007-06-11 | 773 |
| 29 | 036-2003-CG | 1 | Leg. 058-2003 | 2003-03-28 | 2007-06-07 | 1532 |
| | | 2 | | | | |
| 30 | 217-2003-CG | 1 | Leg. 228-2003 | 2003-09-03 | 2007-11-07 | 1526 |
| | | 2 | | | | |
| | | 3 | | | | |
| | | 4 | | | | |
| | | 5 | | | | |
| | | 6 | | | | |
| | | 7 | | | | |
| 31 | 314-2002-CG | 1 | Leg. 086-2003 | 2003-05-21 | 2005-12-23 | 947 |
| | | 2 | | | | |
| 32 | 320-2003-CG | 1 | Leg. 332-2003 | 2003-10-13 | 2007-04-02 | 1267 |
| 33 | 254-2003-CG | 1 | Leg. 340-2003 | 2003-10-16 | 2007-01-08 | 1180 |
| 34 | 409-2004-CR | 1 | Leg. 279-2004 | 2004-11-30 | 2006-09-26 | 665 |
| 35 | 352-2004-CG | 1 | Leg. 252-2004 | 2004-11-03 | 2006-09-28 | 694 |
| **Total** | | **61** | | **Average Time-Lenght (in days):** | | **1147** |

Source: Author[221].

[221] This table has been elaborated with information of 35 criminal files included in CGR's Annual Report of 2008. For the methodology and representativeness of this sample see: *Chapter 7.1:* Evaluating CGR's Criminal Accusations Against Civil Servants.

## TABLE No. A.4

## CASES WHERE CGR ACCUSED CIVIL SERVANTS FOR EXERCISING THEIR POWER OF DISCRETION

| No. | File Number | Case Number | Sub-File |
|---|---|---|---|
| 1 | 143-2001-CG | 1 | Leg. 135-2001 |
| 2 | | 2 | Leg. 135-2001 |
| 3 | 050-2001-CG | 1 | Leg. 045-2001 |
| 4 | 249-2002-CG | 1 | Leg. 218-2002 |
| 5 | | 2 | Leg. 218-2002 |
| 6 | 261-2005-CG | 1 | Leg. 184-2005 |
| 7 | 343-2002-CG | 1 | Leg. 079-2003 |
| 8 | 072-2002-CG | 2 | Leg. 107-2002 |
| 9 | | 3 | |
| 10 | | 4 | |
| 11 | 448-2003-CG | 1 | Leg. 077-2004 |
| 12 | 438-2003-CG | 1 | Leg. 019-2004 |
| 13 | 340-2002-CG | 1 | Leg. 033-2003 |
| 14 | 132-2005-CG | 1 | Leg. 161-2005 |
| 15 | 352-2004-CG | 1 | Leg. 252-2004 |
| | | | |
| OTHER CASES WHERE POWER OF DISCRETION WAS ALSO AN ISSUE | | | |
| No. | File Number | Case Number | Sub-File |
| 1 | 175-2004-CG | 1 | Leg. 118-2004 |
| 2 | 345-2005-CG | 1 | Leg. 301-2005 |
| 3 | 075-2005-CG | 1 | Leg. 083-2005 |
| 4 | 189-2002-CG | 2 | Leg. 217-2002 |
| 5 | 320-2003-CG | 1 | Leg. 332-2003 |
| 6 | 254-2003-CG | 1 | Leg. 340-2003 |

Source: Author[222].

[222] This table has been elaborated with information of 35 criminal files included in CGR's Annual Report of 2008. For the methodology and representativeness of this sample see: *Chapter 7.1:* Evaluating CGR's Criminal Accusations Against Civil Servants.

## TABLE No. A.5

## CASES WHERE CGR ACCUSED CIVIL SERVANTS FOR INFRINGING ADMINISTRATIVE REGULATIONS

| No. | File Number | Case Number | Sub-File |
|---|---|---|---|
| 1 | 143-2001-CG | 4 | Leg. 135-2001 |
| 2 | | 5 | Leg. 135-2001 |
| 3 | 192-2002-CG | 1 | Leg. 195-2002 |
| 4 | 065-2002-CG | 1 | Leg. 116-2002 |
| 5 | | 2 | Leg. 116-2002 |
| 6 | 193-2002-CG | 1 | Leg. 194-2002 |
| 7 | 140-2001-CG | 1 | Leg. 136-2001 |
| 8 | 345-2005-CG | 1 | Leg. 301-2005 |
| 9 | 075-2005-CG | 1 | Leg. 083-2005 |
| 10 | 189-2002-CG | 2 | Leg. 217-2002 |
| 11 | 217-2003-CG | 3 | Leg. 228-2003 |
| 12 | | 7 | |
| 13 | 254-2003-CG | 1 | Leg. 340-2003 |

Source: Author[223].

[223] This table has been elaborated with information of 35 criminal files included in CGR's Annual Report of 2008. For the methodology and representativeness of this sample see: *Chapter 7.1:* Evaluating CGR's Criminal Accusations Against Civil Servants.

## TABLE No. A.6

## CIVIL LAWSUITS REPORTED ENDED IN

## CGR's ANNUAL REPORT OF 2008 (34 CASES)

| Type of Case | Number of Cases | Number of Civil Servants Sued | Civil Servants Found Responsible of Damages | Civil Servants Found Non-Responsible of Damages | Damage claimed by CGR (in soles) | Damage recognized by the Judiciary (in soles) |
|---|---|---|---|---|---|---|
| With grounds | 12<br>35.29% | 16<br>19.51% | 16 | 0 | S/150,830.01<br>8.94% | S/151,240.36 |
| With partial grounds | 8<br>23.53% | 17<br>20.73% | 12 | 5 | S/159,431.78<br>9.45% | S/78,701.58 |
| Groundless | 14<br>41.18% | 49<br>59.76% | 0 | 49 | S/1,377,307.25<br>81.61% | S/0.00 |
| **TOTAL** | **34**<br>**100.00%** | **82**<br>**100.00%** | **28**<br>**34.15%** | **54**<br>**65.85%** | **S/1,687,569.04**<br>**100.00%** | **S/229,941.94**<br>**13.63%** |

Source: Author.[224]

[224] This Table has been elaborated with information of all 34 cases reported ended in CGR's Annual Report of 2008. For the methodology and representativeness of this sample see: *Chapter 7.2: Evaluating CGR's Civil Lawsuits Against Public Servants.*

## TABLE No. A.7
## LENGTH-TERM OF CIVIL PROCESSES

| | | | | | |
|---|---|---|---|---|---|
| **CASES WITH GROUNDS** | | | | | |
| 1 | 077-2004-CG | (Leg. 222-2004) | 2004-09-21 | 2007-11-30 | 1,165 |
| 2 | 248-2003-CG | (Leg. 051-2004) | 2004-02-27 | 2006-10-10 | 956 |
| 3 | 117-2003-CG | (del 1 al 28) | 2003-08-01 | 2006-09-04 | 1,130 |
| 4 | 325-2003-CG | | 2003-12-16 | 2007-06-20 | 1,282 |
| 5 | 140-2004-CG | 108-2004 | 2004-05-13 | 2004-12-23 | 224 |
| 6 | 077-2004-CG | 213-2004 | 2004-09-21 | 2007-03-14 | 904 |
| 7 | 576-2005-CG | Leg. 059-2006 | 2006-02-01 | 2007-11-29 | 666 |
| 8 | 105-1999-CG | Leg. 032-1999 | 1999-10-20 | 2001-04-05 | 533 |
| 9 | 268-2002-CG | Leg. 283-2003 | 2003-08-12 | 2007-05-10 | 1,367 |
| 10 | 263-2001-CG | | 2002-04-15 | 2008-05-29 | 2,236 |
| 11 | 342-2003-CG | (del 1 al 30) | 2003-11-03 | 2006-07-03 | 973 |
| 12 | 116-2002-CG | (del 1 al 26) | 2002-09-24 | 2005-02-09 | 869 |
| | **Average** | **(12 cases)** | | | **1,025** |
| **CASES WITH PARTIAL GROUNDS** | | | | | |
| 1 | 077-2004-CG | (Leg. 215-2004) | 2004-09-21 | 2006-10-10 | 749 |
| 2 | 416-2004-CG | (Leg. 070-2005) | 2005-02-16 | 2008-01-16 | 1,064 |
| 3 | 238-2001-CG | (del 1 al 55) | 2002-01-04 | 2005-02-08 | 1,131 |
| 4 | 102-2003-CG | 2 | 2003-08-13 | 2007-08-29 | 1,477 |
| 5 | 105-2003-CG | | 2003-10-09 | 2007-07-12 | 1,372 |
| 6 | 311-2004-CG | 238-2004 | 2004-10-12 | 2005-08-15 | 307 |
| 7 | 311-2004-CG | 237-2004 | 2004-10-12 | 2005-08-22 | 314 |
| 8 | 100-2002-CG | | 2002-04-04 | 2004-02-27 | 694 |
| | **Average** | **(8 cases)** | | | **889** |
| **GROUNDLESS CASES** | | | | | |
| 1 | 201-2002-CG | | 2002-01-03 | 2007-07-24 | 2,028 |
| 2 | 192-2002-CG | (Leg. 133-2003) | 2003-07-14 | 2006-11-06 | 1,211 |
| 3 | 268-2002-CG | (284-2003) | 2003-09-23 | 2007-05-28 | 1,343 |
| 4 | 268-2002-CG | 295-2003 | 2003-09-23 | 2008-03-03 | 1,623 |
| 5 | 282-2003-CG | (del 1 al 303) | 2003-09-18 | 2007-07-04 | 1,385 |
| 6 | 167-2005-CG | 220-2005 | 2005-06-09 | 2006-12-28 | 567 |
| 7 | 330-2002-CG | (del 1 al 199) | 2003-09-10 | 2008-04-08 | 1,672 |
| 8 | 056-99-CG | 22-99 (A4) | 1999-06-14 | 2002-08-13 | 1,156 |
| 9 | 082-1998-CG | A4 | 1998-08-31 | 2003-10-21 | 1,877 |
| 10 | 102-2003-CG | 001-A4 | 2003-07-18 | 2008-01-31 | 1,658 |
| 11 | 102-2003-CG | (Leg. 195-2003) | 2003-07-18 | 2008-05-29 | 1,777 |
| 12 | 082-2003-CG | | 2003-08-27 | 2005-07-07 | 680 |
| 13 | 111-2001-CG | (117-2001) | 2001-08-31 | 2008-07-17 | 2,512 |
| 14 | 248-2003-CG | 047-2004 | 2004-02-26 | 2008-05-20 | 1,545 |
| | **Average** | **(14 cases)** | | | **1,502** |
| **TOTAL** | | | | | |
| | **Average** | **(34 cases)** | | | **1,190** |

Source: Author[225].

[225] This Table has been elaborated with information of all 34 cases reported ended in CGR's Annual Report of 2008. For the methodology and representativeness of this sample see: *Chapter 7.2: Evaluating CGR's Civil Lawsuits Against Public Servants.*

## TABLE No. A.8

## DISAGGREGATED INFORMATION ON AMOUNTS OF MONEY RECOVERED BY CGR IN 34 CIVIL LAWSUITS

| No. | File | Sub-File | Amount of money claimed by CGR | Amount order to pay to the State (Soles S/) | Percentage |
|---|---|---|---|---|---|
| **Cases with grounds** | | | | | |
| 1 | 077-2004-CG | (Leg. 222-2004) | S/20,692.00 | S/21,092.00 | 101.93% |
| 2 | 248-2003-CG | (Leg. 051-2004) | S/3,125.00 | S/3,125.00 | 100.00% |
| 3 | 117-2003-CG | (del 1 al 28) | S/12,696.68 | S/12,696.68 | 100.00% |
| 4 | 325-2003-CG | | S/13,014.75 | S/13,014.75 | 100.00% |
| 5 | 140-2004-CG | 108-2004 | S/14,754.67 | S/14,764.67 | 100.07% |
| 6 | 077-2004-CG | 213-2004 | S/9,400.00 | S/9,400.00 | 100.00% |
| 7 | 576-2005-CG | Leg. 059-2006 | S/5,289.58 | S/5,289.58 | 100.00% |
| 8 | 105-1999-CG | Leg. 032-1999 | S/9,035.00 | S/9,035.00 | 100.00% |
| 9 | 268-2002-CG | Leg. 283-2003 | S/10,417.00 | S/10,417.00 | 100.00% |
| 10 | 263-2001-CG | | S/24,958.00 | S/24,958.00 | 100.00% |
| 11 | 342-2003-CG | (del 1 al 30) | S/19,531.33 | S/19,531.33 | 100.00% |
| 12 | 116-2002-CG | (del 1 al 26) | S/7,916.00 | S/7,916.35 | 100.00% |
| | **Subtotal** | **(12 cases)** | **S/150,830.01** | **S/151,240.36** | **100.27%** |
| | **Average** | | **S/12,569.17** | **S/12,603.36** | **100.27%** |
| **Cases with partial grounds** | | | | | |
| 1 | 077-2004-CG | (Leg. 215-2004) | S/7,669.00 | S/6,760.00 | 88.15% |
| 2 | 416-2004-CG | (Leg. 070-2005) | S/61,219.41 | S/17,419.00 | 28.45% |
| 3 | 238-2001-CG | (del 1 al 55) | S/18,941.12 | S/6,893.00 | 36.39% |
| 4 | 102-2003-CG | 2 | S/19,851.85 | S/19,851.85 | 100.00% |
| 5 | 105-2003-CG | | S/22,500.00 | S/22,500.00 | 100.00% |
| 6 | 311-2004-CG | 238-2004 | S/10,106.40 | S/2,144.00 | 21.21% |
| 7 | 311-2004-CG | 237-2004 | S/13,280.00 | S/1,500.00 | 11.30% |
| 8 | 100-2002-CG | | S/5,864.00 | S/1,633.73 | 27.86% |
| | **Subtotal** | **(8 cases)** | **S/159,431.78** | **S/78,701.58** | **49.36%** |
| | **Average** | | **S/19,928.97** | **S/9,837.70** | **49.36%** |

(Continue in the next page)

| No. | File | Sub-File | Amount of money claimed by CGR | Amount order to pay to the State (Soles S/) | Percentage |
|---|---|---|---|---|---|
| **Groundless Cases** | | | | | |
| 1 | 201-2002-CG | | S/32,000.00 | S/0.00 | 0.00% |
| 2 | 192-2002-CG | (Leg. 133-2003) | S/26,930.50 | S/0.00 | 0.00% |
| 3 | 268-2002-CG | (284-2003) | S/6,460.00 | S/0.00 | 0.00% |
| 4 | 268-2002-CG | 295-2003 | S/147,067.13 | S/0.00 | 0.00% |
| 5 | 282-2003-CG | (del 1 al 303) | S/14,297.40 | S/0.00 | 0.00% |
| 6 | 167-2005-CG | 220-2005 | S/34,489.47 | S/0.00 | 0.00% |
| 7 | 330-2002-CG | (del 1 al 199) | S/165,133.80 | S/0.00 | 0.00% |
| 8 | 056-99-CG | 22-99 (A4) | S/509,367.66 | S/0.00 | 0.00% |
| 9 | 082-1998-CG | A4 | S/262,800.00 | S/0.00 | 0.00% |
| 10 | 102-2003-CG | 001-A4 | S/1,156.93 | S/0.00 | 0.00% |
| 11 | 102-2003-CG | (Leg. 195-2003) | S/26,322.96 | S/0.00 | 0.00% |
| 12 | 082-2003-CG | | S/24,057.37 | S/0.00 | 0.00% |
| 13 | 111-2001-CG | (117-2001) | S/81,898.59 | S/0.00 | 0.00% |
| 14 | 248-2003-CG | 047-2004 | S/45,325.44 | S/0.00 | 0.00% |
| | **Subtotal** | **(14 cases)** | **S/1,377,307.25** | **S/0.00** | **0.00%** |
| | **Average** | | **S/98,379.09** | **S/0.00** | **0.00%** |
| | **TOTAL** | **(34 CASES)** | **S/1,687,569.04** | **S/229,941.94** | **13.63%** |
| | **AVERAGE** | | **S/49,634.38** | **S/6,763.00** | **13.63%** |

Source: Author[226].

[226] This Table has been elaborated with information of all 34 cases reported ended in CGR's Annual Report of 2008. For the methodology and representativeness of this sample see: *Chapter 7.2: Evaluating CGR's Civil Lawsuits Against Public Servants.*

## TABLE No. A.9
## CIVIL SERVANTS FOUND RESPONSIBLE IN CIVIL LAWSUITS

| No. | File | Sub-File | Number of civil servants sued by CGR | Number of civil servants found responsible | Number of civil servants declared non-responsible |
|---|---|---|---|---|---|
| **CASES WITH GROUNDS** | | | | | |
| 1 | 077-2004-CG | (Leg. 222-2004) | 1 | 1 | 0 |
| 2 | 248-2003-CG | (Leg. 051-2004) | 1 | 1 | 0 |
| 3 | 117-2003-CG | (del 1 al 28) | 1 | 1 | 0 |
| 4 | 325-2003-CG | | 2 | 2 | 0 |
| 5 | 140-2004-CG | 108-2004 | 1 | 1 | 0 |
| 6 | 077-2004-CG | 213-2004 | 1 | 1 | 0 |
| 7 | 576-2005-CG | Leg. 059-2006 | 1 | 1 | 0 |
| 8 | 105-1999-CG | Leg. 032-1999 | 1 | 1 | 0 |
| 9 | 268-2002-CG | Leg. 283-2003 | 2 | 2 | 0 |
| 10 | 263-2001-CG | | 1 | 1 | 0 |
| 11 | 342-2003-CG | (del 1 al 30) | 1 | 1 | 0 |
| 12 | 116-2002-CG | (del 1 al 26) | 3 | 3 | 0 |
| | **Subtotal** | **(12 cases)** | **16** | **16** | **0** |
| **CASES WITH PARTIAL GROUNDS** | | | | | |
| 1 | 077-2004-CG | (Leg. 215-2004) | 1 | 1 | 0 |
| 2 | 416-2004-CG | (Leg. 070-2005) | 3 | 3 | 0 |
| 3 | 238-2001-CG | (del 1 al 55) | 2 | 1 | 1 |
| 4 | 102-2003-CG | 2 | 4 | 2 | 2 |
| 5 | 105-2003-CG | | 3 | 1 | 2 |
| 6 | 311-2004-CG | 238-2004 | 1 | 1 | 0 |
| 7 | 311-2004-CG | 237-2004 | 2 | 2 | 0 |
| 8 | 100-2002-CG | | 1 | 1 | 0 |
| | **Subtotal** | **(8 cases)** | **17** | **12** | **5** |
| **GROUNDLESS CASES** | | | | | |
| 1 | 201-2002-CG | | 3 | 0 | 3 |
| 2 | 192-2002-CG | (Leg. 133-2003) | 1 | 0 | 1 |
| 3 | 268-2002-CG | (284-2003) | 4 | 0 | 4 |
| 4 | 268-2002-CG | 295-2003 | 1 | 0 | 1 |
| 5 | 282-2003-CG | (del 1 al 303) | 7 | 0 | 7 |
| 6 | 167-2005-CG | 220-2005 | 3 | 0 | 3 |
| 7 | 330-2002-CG | (del 1 al 199) | 1 | 0 | 1 |
| 8 | 056-99-CG | 22-99 (A4) | 11 | 0 | 11 |
| 9 | 082-1998-CG | A4 | 2 | 0 | 2 |
| 10 | 102-2003-CG | 001-A4 | 3 | 0 | 3 |
| 11 | 102-2003-CG | (Leg. 195-2003) | 2 | 0 | 2 |
| 12 | 082-2003-CG | | 3 | 0 | 3 |
| 13 | 111-2001-CG | (117-2001) | 7 | 0 | 7 |
| 14 | 248-2003-CG | 047-2004 | 1 | 0 | 1 |
| | **Subtotal** | **(14 cases)** | **49** | **0** | **49** |
| **TOTAL** | | | | | |
| | **Total** | **(34 cases)** | **82** | **28** | **54** |
| | **Percentage** | | **100.00%** | **34.15%** | **65.85%** |

Source: Author.

**TABLE No. A.10**

**CGR's CIVIL LAWSUITS: CASES WERE CIVIL SERVANTS OBTAINED PERSONAL BENEFITS FOR THEMSELVES**

| No. | FILE | SUB-FILE |
|---|---|---|
| **CASES WITH GROUNDS** | | |
| 1 | 077-2004-CG | (Leg. 222-2004) |
| 2 | 248-2003-CG | (Leg. 051-2004) |
| 3 | 117-2003-CG | (del 1 al 28) |
| 4 | 140-2004-CG | 108-2004 |
| 5 | 077-2004-CG | 213-2004 |
| 6 | 263-2001-CG. | |
| 7 | 342-2003-CG | (del 1 al 30) |
| **CASES WITH PARTIAL GROUNDS** | | |
| 1 | 077-2004-CG | (Leg. 215-2004) |
| 2 | 238-2001-CG | (del 1 al 55) |
| **GROUNDLESS CASE** | | |
| 1 | 248-2003-CG | (Leg. 047-2004) |

Source: Author[227].

[227] This Table has been elaborated with information of all 34 cases reported ended in CGR's Annual Report of 2008. For the methodology and representativeness of this sample see: *Chapter 7.2: Evaluating CGR's Civil Lawsuits Against Public Servants.*

## TABLE No. A.11

## CGR's CIVIL LAWSUITS AGAINST CIVIL SERVANTS WHO EXERCISED THEIR ADMINISTRATIVE POWER OF DISCRETION

| No. | FILE | SUB-FILE |
|---|---|---|
| **CASE WITH GROUNDS** | | |
| 1 | 248-2003-CG | (Leg. 051-2004) |
| **CASE WITH PARTIAL GROUNDS** | | |
| 1 | 311-2004-CG | 238-2004 |
| **GROUNDLESS CASES** | | |
| 1 | 268-2002-CG | (284-2003) |
| 2 | 268-2002-CG | 295-2003 |
| 3 | 282-2003-CG | (del 1 al 303) |
| 4 | 167-2005-CG | 220-2005 |
| 5 | 056-99-CG | 22-99 (A4) |
| 6 | 082-1998-CG | A4 |
| 7 | 111-2001-CG | (117-2001) |
| 8 | 248-2003-CG | 047-2004 |

Source: Author[228].

[228] This Table has been elaborated with information of all 34 cases reported ended in CGR's Annual Report of 2008. For the methodology and representativeness of this sample see: *Chapter 7.2: Evaluating CGR's Civil Lawsuits Against Public Servants.*

**ANNEX 2**

**Letter No. 01087-2013-CG/SGE**

**(Issued by CGR's General Secretary, Ms. Carla Salazar Lui Lam)**

LA CONTRALORÍA
GENERAL DE LA REPÚBLICA

**OFICIO Nº 01087-2013-CG/SGE** Jesús María, 11 de noviembre de 2013

Señores
**Luis García Westphalen e Ingerborg Westphalen R. de García**
Ricardo Palma N° 869 - Departamento 403 - Ingerborwestphalen@Hotmail.Com
**Miraflores/Lima/Lima**

**ASUNTO** : Respuesta a solicitud de acceso a la información

**REF.** : a) Carta N° 005-2013-LEGW, Exp. N° 08-2013-25413 de 17 de junio de 2013
b) Carta N° 006-2013-LEGW, Exp. N° 08-2013-33926 de 12 de agosto de 2013
c) Carta N° 007-2013-LEGW , Exp. N° 08-2013-39750 de 19 de setiembre de 2013

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Tengo el agrado dirigirme a ustedes, con relación a sus documentos de la referencia, mediante los cuales solicitan información respecto a los productos promovidos por este Ente Superior de Control, entre el período 2004 al 2012, con relación a los siguientes temas:

I. Acciones e informes de control posterior
II. Observaciones resultantes de informes de control de la CGR
III. Monto observado y daño económico identificado en los informes de control posterior
IV. Número de procesos judiciales y funcionarios involucrados
V. Número de procesos concluidos y número de procesos perdidos y ganados por la CGR
VI. Monto reclamado por la vía judicial y monto recuperado hasta la fecha (junio 2013)
VII. Monto de dinero reclamado y recuperado en procesos judiciales iniciados 2004 a 2012
VIII. Número de funcionarios públicos encontrados culpables y/o con responsabilidad civil en los procesos judiciales concluídos del 2008 al 2012 y en procesos iniciados del 2004 al 2008

Al respecto, conforme a lo informado por las unidades orgánicas correspondientes, hago de su conocimiento que la información solicitada no se encuentra protegida por el principio de reserva de control gubernamental, establecido en el artículo 9°, literal n) de la Ley N° 27785, Ley Orgánica del Sistema Nacional de Control y de la Contraloría General de la República, así como en ninguna de las excepciones señaladas en los artículos 15°, 16° y 17° del Texto Único Ordenado (TUO) de la Ley N° 27806, Ley de Transparencia y Acceso a la Información Pública; motivo por el cual se procede a atender lo peticionado, según detalle en Anexo 01.

De otro lado, cabe precisar que la información solicitada y detallada en Anexo 02, no puede ser

proporcionada debido a que este Organismo Superior de Control no cuenta con dicha información, conforme a lo dispuesto en el artículo 13° del TUO de la citada Ley Nº 27806.

Es propicia la ocasión para renovarle las muestras de mi especial consideración y estima.

Atentamente,

CONTRALORÍA GENERAL DE LA REPÚBLICA
Secretaría General y Asuntos Externos

/jc

**Carla Salazar Luí Lam**
Secretaría General y Asuntos Externos

LA CONTRALORÍA
GENERAL DE LA REPÚBLICA

**ANEXO 01 AL OFICIO N°01087 -2013-CG/SGE**

**DE LA INFORMACIÓN A SER ENTREGADA**

**I. Con relación al Cuadro No. 1:**

La información se ha obtenido del Sistema de Control Gubernamental (Fecha de corte de información: 24.06.2013).

1. El número de "Acciones de Control Posterior" de CGR de los años 2009 y 2012

| Año | Nro. Acciones de Control Posterior CGR |
|---|---|
| 2009 | 36 |
| 2012 | 198 |

2. El número de "Informes de Control Posterior" de CGR de los años 2009 y 2012

| Año | Nro. Informes de Control Posterior CGR |
|---|---|
| 2009 | 103 |
| 2012 | 359 |

3. El número de "Informes de Tipo Administrativo" de los años 2009 y 2012

| Año | Nro. Informes Tipo Administrativo CGR |
|---|---|
| 2009 | 36 |
| 2012 | 199 |

4. El número de "Informes Especiales" de los años 2009 y 2012

| Año | Nro. Informes Especiales CGR |
|---|---|
| 2009 | 66 |
| 2012 | 160 |

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5. El número de "Informes de responsabilidades civiles" de los años 2009 al 2012

| Año | Nro. Informes de Responsabilidades Civiles CGR |
|---|---|
| 2009 | 31 |
| 2010 | 46 |
| 2011 | 49 |
| 2012 | 97 |

6. El número de "Informes de responsabilidades penales" de los años 2009 al 2012

| Año | Nro. Informes de Responsabilidades Penales CGR |
|---|---|
| 2009 | 35 |
| 2010 | 58 |
| 2011 | 36 |
| 2012 | 63 |

**II. Con relación al Cuadro No. 2:**

La información se ha obtenido del Sistema de Control Gubernamental (Fecha de corte de información: 24.06.2013)

1. El número de observaciones de aspectos importantes de los años 2009 al 2012

| Año | Nro. Observaciones CGR |
|---|---|
| 2009 | 384 |
| 2010 | 432 |
| 2011 | 924 |
| 2012 | 847 |

2. El número de observaciones de responsabilidades administrativas de los años 2009 al 2012

| Año | Nro. Observaciones de Responsabilidades Administrativas |
|---|---|
| 2009 | 197 |
| 2010 | 207 |
| 2011 | 496 |
| 2012 | 452 |

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3. El número de observaciones de responsabilidades penales de los años 2009 al 2012

| Año | Nro. Observaciones de Responsabilidades Penales |
|---|---|
| 2009 | 60 |
| 2010 | 76 |
| 2011 | 40 |
| 2012 | 67 |

4. El número de observaciones de responsabilidades civiles de los años 2009 al 2012

| Año | Nro. Observaciones de Responsabilidades Civiles |
|---|---|
| 2009 | 40 |
| 2010 | 51 |
| 2011 | 57 |
| 2012 | 100 |

5. El número de "Funcionarios Involucrados" en las observaciones de CGR de los años 2009, 2011 y 2012

| Año | Nro. de Funcionarios Involucrados en Observaciones |
|---|---|
| 2009 | 754 |
| 2011 | 1668 |
| 2012 | 1756 |

6. Se precise si el número de "funcionarios involucrados" referido en el Informe de Gestión de CGR del 2010 (759 personas) considera únicamente a los funcionarios involucrados en los informes de CGR o también a los informes provenientes de otros órganos del SNC.

Al respecto, cabe precisar que el número de funcionarios involucrados y reportado en el Informe de Gestión de la Contraloría General de la República, correspondiente al año 2010, el cual asciende a un total de 793 funcionarios, corresponde solo a informes emitidos por la CGR, mas no a los emitidos por los Órganos de Control Institucional ni por las Sociedades de Auditoría.

**III. Con relación al Cuadro No. 3:**

Al respecto, la información disponible solicitada de "Monto observado y daño económico", se ha obtenido del Informe Anual de Gestión May.2009 – Abr.2010.

| Período | Monto Observado | | Daño Económico | |
|---|---|---|---|---|
| | S/. | US $ | S/. | US $ |
| May.2009 – Abr.2010 | 5,380´458,338 | 225,951 | 68´210,500 | 12,681 |

**IV. Con relación al Cuadro No. 4:**

La información ha sido obtenida del Sistema de Procuraduría Pública de la CGR.

1. Número de procesos judiciales iniciados en los años 2009, 2011 y 2012

| Año | Nro. Procesos Judiciales Nuevos |
|---|---|
| 2009 | 241 |
| 2011 | 83 |
| 2012 | 149 |

2. Número de procesos penales iniciados en los años 2009, 2011 y 2012

| Año | Nro. Procesos Penales Nuevos |
|---|---|
| 2009 | 182 |
| 2011 | 39 |
| 2012 | 60 |

3. Número de funcionarios acusados penalmente en los años 2005 al 2009, 2011 y 2012

| Año | Nro. de Funcionarios Públicos Acusados Penalmente |
|---|---|
| 2005 | 1500 |
| 2006 | 940 |
| 2007 | 1009 |
| 2008 | 1229 |
| 2009 | 1249 |
| 2011 | 121 |
| 2012 | 255 |

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4. Número de procesos civiles iniciados en los años 2009, 2011 y 2012

| Año | Nro. Procesos Civiles Nuevos |
|---|---|
| 2009 | 59 |
| 2011 | 44 |
| 2012 | 89 |

5. Número de funcionarios demandados civilmente en los años 2005 al 2009, 2011 y 2012

| Año | Nro. de Funcionarios Públicos Demandados Civilmente |
|---|---|
| 2005 | 422 |
| 2006 | 313 |
| 2007 | 91 |
| 2008 | 267 |
| 2009 | 256 |
| 2011 | 221 |
| 2012 | 334 |

6. Número de procesos judiciales concluidos en los años 2009 al 2012

La información que se muestra a continuación es independiente de la fecha de inicio del proceso. (Fecha de corte de información: 31.12.2012)

| Año | Nro. Procesos Judiciales Concluidos |
|---|---|
| 2009 | 93 |
| 2011 | 104 |
| 2012 | 219 |

7. Número de casos en trámite al 31 de diciembre de los años 2009 al 2012

| Año | Procesos Judiciales en Trámite |
|---|---|
| 2009 | 1,947 |
| 2010 | 1,961 |
| 2011 | 1,940 |
| 2012 | 1,870 |

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**V. Con relación al Cuadro No. 5:**

1. Número de procesos judiciales concluidos en los años 2009 al 2012

La información que se muestra a continuación es independiente de la fecha de inicio del proceso. (Fecha de corte de información: 31.12.2012)

| Año | Nro. Procesos Judiciales Concluidos |
|---|---|
| 2009 | 93 |
| 2010 | 127 |
| 2011 | 104 |
| 2012 | 219 |

2. Número de procesos judiciales ganados por la Contraloría General de la República en los años 2009 al 2012

| Año | Procesos Judiciales Favorables a CGR (cantidad) |
|---|---|
| 2009 | 40 |
| 2010 | 41 |
| 2011 | 40 |
| 2012 | 70 |

3. Número de procesos judiciales perdidos por la Contraloría General de la República en los años 2009 al 2012

| Año | Procesos Judiciales Desfavorables a CGR (cantidad) |
|---|---|
| 2009 | 53 |
| 2010 | 86 |
| 2011 | 64 |
| 2012 | 149 |

4. Número de procesos penales concluidos en los años 2009 a 2012

La información que se muestra a continuación es independiente de la fecha de inicio del proceso. (Fecha de corte de información: 31.12.2012)

| Año | Procesos Penales Concluidos (cantidad) |
|---|---|
| 2009 | 45 |
| 2010 | 82 |
| 2011 | 63 |
| 2012 | 180 |

5. Número de procesos penales ganados por la Contraloría General de la República en los años 2009 al 2012

| Año | Procesos Penales Favorables a CGR (cantidad) |
|---|---|
| 2009 | 4 |
| 2010 | 22 |
| 2011 | 13 |
| 2012 | 48 |

6. Número de procesos penales perdidos por la Contraloría General de la República en los años 2009 a 2012

| Año | Procesos Penales Desfavorables a CGR (cantidad) |
|---|---|
| 2009 | 41 |
| 2010 | 60 |
| 2011 | 50 |
| 2012 | 132 |

7. Número de procesos civiles concluidos en los años 2009 al 2012

La información que se muestra a continuación es independiente de la fecha de inicio del proceso. (Fecha de corte de información: 31.12.2012)

| Año | Procesos Civiles Concluidos (cantidad) |
|---|---|
| 2009 | 48 |
| 2010 | 45 |
| 2011 | 41 |
| 2012 | 39 |

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8. Número de procesos civiles ganados por Contraloría General de la República en los años 2009 al 2012

| Año | Procesos Civiles Favorables a CGR (cantidad) |
|---|---|
| 2009 | 36 |
| 2010 | 19 |
| 2011 | 27 |
| 2012 | 22 |

9. Número de procesos civiles perdidos por Contraloría General de la República en los años 2009 al 2012

| Año | Procesos Civiles Desfavorables a CGR (cantidad) |
|---|---|
| 2009 | 12 |
| 2010 | 26 |
| 2011 | 14 |
| 2012 | 17 |

**VI. Con relación al Cuadro No. 6:**

La información ha sido obtenida del Sistema de Procuraduría Pública de la CGR.

1. Monto reclamado por vía judicial en los años 2007 al 2009

| Año | Dinero Reclamado por Vía Judicial | |
|---|---|---|
| | Soles (S/.) | (US$) |
| 2007 | 99,195,832.10 | 1,959,972.93 |
| 2008 | 37,076,656.53 | 0.00 |
| 2009 | 103,547,698.68 | 32,574.92 |

3. Monto reclamado por vía judicial en los años 2010 al 2012 (sin indicar los montos recuperados debido a que muchos procesos judiciales iniciados esos años deben encontrarse aún en trámite)

| Año | Dinero Reclamado por Vía Judicial | |
|---|---|---|
| | Soles (S/.) | (US$) |
| 2010 | 55,707,815.15 | 4,403,000.00 |
| 2011 | 21,101,593.27 | 598,862.56 |
| 2012 | 43,216,449.39 | 0.00 |

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**VII. Con relación al Cuadro No. 7:**

La información ha sido obtenida del Sistema de Procuraduría Pública de la CGR.

1. El monto de dinero reclamado en procesos penales en los años 2007 al 2012

| Año | Dinero Reclamado en Procesos Penales | |
|---|---|---|
| | Soles (S/.) | (US$) |
| 2007 | 52,363,486.28 | 1,959,972.93 |
| 2008 | 31,311,318.99 | 0.00 |
| 2009 | 72,395,677.15 | 32,574.92 |
| 2010 | 42,123,634.16 | 4,403,000.00 |
| 2011 | 13,175,457.26 | 598,862.56 |
| 2012 | 12,784,150.75 | 0.00 |

3. El monto reclamado en los procesos civiles iniciados en los años 2007 al 2012

| Año | Dinero Reclamado en Procesos Civiles | |
|---|---|---|
| | Soles (S/.) | (US$) |
| 2007 | 46,832,345.82 | 0.00 |
| 2008 | 5,765,337.54 | 0.00 |
| 2009 | 31,152,021.53 | 0.00 |
| 2010 | 13,584,180.99 | 0.00 |
| 2011 | 7,926,136.01 | 0.00 |
| 2012 | 30,432,298.64 | 0.00 |

5. El monto de dinero reclamado en procesos penales y civiles en los años 2010 al 2012 (sin indicar los montos recuperados)

| Año | Dinero Reclamado en Procesos Penales | | Dinero Reclamado en Procesos Civiles | |
|---|---|---|---|---|
| | Soles (S/.) | (US$) | Soles (S/.) | (US$) |
| 2010 | 42,123,634.16 | 4,403,000.00 | 13,584,180.99 | 0.00 |
| 2011 | 13,175,457.26 | 598,862.56 | 7,926,136.01 | 0.00 |
| 2012 | 12,784,150.75 | 0.00 | 30,432,298.64 | 0.00 |

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LA CONTRALORÍA
GENERAL DE LA REPÚBLICA

**ANEXO 02 AL OFICIO N°01087-2013-CG/SGE**

**DE LA INFORMACIÓN QUE NO PUEDE SER PROPORCIONADA**

**A.-** Respecto a los numerales 1 y 2[1] del ítem III, cabe señalar que este Organismo Superior de Control cuenta con el monto observado y el daño económico (perjuicio económico), correspondiente al período May.2009-Abr.2010 (ver Anexo 01). En cuanto a los períodos Ene-Abr.2009, 2011 y 2012, cabe señalar que no se cuenta con dicha información toda vez que la misma no consta en los Informes de Gestión de la Contraloría General de la República correspondiente a dichos años.

**B.-** Referente a los ítems VI (numeral 2[2]), VII (numeral 2 y 4[3]) y VIII (numeral 1 al 4[4]), la Contraloría General de la República no cuenta en su Base de Datos con un registro y/o reporte que permita cuantificar el monto que se haya recuperado de los procesos judiciales por año (2004 al 2009) y número total por año (2004 al 2012) de personas condenadas o absueltas o respecto a las que se ha dispuesto el pago de una indemnización.

Cabe señalar que la información remitida con Oficio N° 00486-2010-CG/SGE, a que se hace referencia por los solicitantes, está referido al monto del dinero ordenado a pagar por el Poder Judicial, mas no al monto recuperado.

Lo antes expuesto obedece a que la Procuraduría Pública de la Contraloría General de la República, ejerce únicamente la representación procesal de toda entidad auditada en la que como resultado de una acción de control se hubiera encontrado, por parte de la Contraloría General de la República, daño económico para la entidad auditada o la presunción de ilícito penal por los funcionarios de la entidad auditada; correspondiéndole a ésta última en su condición de entidad agraviada apersonarse al proceso para intervenir en la ejecución de sentencia, toda vez que el monto de dinero por recuperar le corresponde como entidad perjudicada.

En consecuencia, y estando a lo dispuesto en el artículo 13° del Texto Único Ordenado de la Ley Nº 27806, Transparencia y Acceso a la Información Pública; no es posible atender la solicitud en los extremos antes detallados.

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[1] *1) Monto observado en los informes de control posterior de CGR (sin incluir otros órganos del sistema nacional de control) en soles y dólares, en los años 2009, 2011 y 2012.*
*2) Daño económico identificados en los informes de control posterior de CGR (sin incluir otros órganos del sistema nacional de control) en soles y dólares, en los años 2009, 2011 y 2012.*

[2] *2) Monto que hasta la fecha (junio 2013) se ha recuperado de los procesos judiciales iniciados en los años 2004 al 2009.*

[3] *2) El monto de dinero recuperado al 31 de setiembre de 2013 en los procesos penales iniciados en los años 2004 al 2009.*
*4) El monto de dinero recuperado al 32 de setiembre de 2013 mediante los procesos civiles iniciados en los años 2004 al 2009.*

[4] *1) Número de funcionarios públicos encontrados culpables y número de funcionarios públicos absueltos de los procesos penales concluidos del 2008 al 2012.*
*2) Número de funcionarios públicos encontrados culpables y número de funcionarios públicos absueltos de los procesos penales iniciados del 2004 al 2008.*
*3) Número de funcionarios públicos a los que no se encontró responsabilidad civil en los procesos civiles concluidos del 2008 al 2012.*
*4) Número de funcionarios públicos encontrados civilmente responsables (de daño y perjuicios) de los procesos civiles iniciados del 2004 al 2008.*

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