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The Independence of the external control of States

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Today, the main subject occupying the attention of Supreme Audit Institutions (SAIs) is independence. They stated this very clearly at the time of the Lima Declaration in 1977, but now it is the United Nations, within the framework of the resolution of 22nd December 2011², that is asking us to make it our watchword.

Why does an SAI need to be “independent”? Why is it constantly discussed time and again?

First of all, though, is it not impossible? Is there anything on this planet that is independent, apart from God – and He is in heaven...?

In truth, independence is an illusion. It is not an end in itself, a kind of splendid isolation: on the one hand, certain SAI models are very “dependent”, and on the other hand, SAIs necessarily work for others. There are two criteria that determine their mission:

- The requirement of working for a particular “client”, Parliament, or, since parliaments are not the only “client” in many countries, the wider sphere of the

“stakeholders”, that demands a certain “cooperation” between institutions.

- Among the stakeholders, the individual citizen’s concern is paramount: the SAI is his “shop window”, his agent, his guarantor.

As a first hypothesis, one could accept the argument that independence is impossible. But what does that then mean?

In fact, it is an objective with fleeting, but Oh! so essential, characteristics:

This objective has always to be confirmed, a sort of public ideal concerning institutions. Personally, I rather like the definition of the strategy for the SAI in Slovenia which we have just received: it says “to be independent at the highest possible level”. That’s what it is – an effort, a tension.

It is always fragile (a bit like the yoga position standing on your head – the ultimate position, but totally unstable), and it is fragile for two reasons:

- Being difficult to define, it is somewhat intangible, as we will see: it is a technical problem that is a subject of debate at the political level (or the opposite – a political

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problem which can have several technical loop-holes);

- Finally, it relies on each of us, and on one of the most intimate parts of our behaviour – courage...

The last item in this introduction concerning this crucial question is: can we go further in Europe than elsewhere?

Are we really at the highest level of SAI independence in Europe? It is a question of the state of our democracies and, in a less political sense, the effectiveness of our institutions. For it is relatively simple to say that, if our institutions are not really independent, then their recommendations will be irrefutably weakened and less credible, since they are not very objective. In the current crisis that we are experiencing, the question is worth asking, going well beyond the myriad of technical analyses that we hear on the complexity of the crisis.

Finally, leaving aside all official declarations – all reassuring, all egocentric (they are often *pro domo* defences) – one can understand why independence has to be won. There are thus two debates, shaped by both history and public management techniques, which can be taken into consideration: one, institutional and political; the other, functional and technical.

HOW HAS INDEPENDENCE APPEARED IN THE INSTITUTIONAL AND POLITICAL HISTORY OF CONTROL OF STATES?

The issue is democracy.

It was around the year 1000, with the emergence of modern States that the authorities decided to create a specialised institution for checking their finances. The reason for this was simple: the kingdom (or empire, depending on the region) extended way beyond the assets of the Royal Household.

In Europe, the Hundred Years' War between France and England was a major reason for the appearance of the nation State and, with it, the associated budgetary problems. In England, as early as 1215, the barons forced the king to share his power with the adoption of the Magna Carta. Kings, all advocates of absolute power, based on religious precepts and supported by Rome, saw themselves gradually being sidelined. Liberalism was born and, with it, the concept of modern individualism.

In 1689, the "Glorious Revolution" removed the King, *James II*, considered as too Catholic and too autocratic, who was forced to abdicate under parliamentary pressure. With the *Bill of Rights*, a parliamentary monarchy was established: the power of the king now definitively "limited" or "shared", which *John Locke* theorised the following year, justifying the limitation on such power in his *Two Treatises on Government*.

Henceforth, come what may, all power was vested in Parliament, the source of sovereignty, including the institution charged with auditing the accounts – the Exchequer. The forebears of the British National Audit Office (NAO) were clearly servants of Parliament – in effect, an assistant, an "office".

On the continent, France in particular would follow a radically different route with a much longer and more complicated gestation period. The sovereignty of the French State was slowly forged in the 12th and 13th centuries, as in England but, for several reasons that we will not go into here, it benefited the monarchy rather than the feudal society. The French kings were fighting not just the English, but also the Holy Roman Empire on a completely open territory. There was a constant threat of rupture. Caught in a vice, the French monarchy resisted the new liberties claimed by the barons, as it fought for some three centuries (from the 16th to the 18th) the Austro-Spanish Empire which encircled it.

The concept of absolute power, based on the theory of the king's divine right³, was established – this divine right was an ancient form of the theory of national interest.

With the 1789 Revolution, the absolute monarchy was finally overthrown. In this tumult, the Court of Accounts was effectively moved aside and attached to Parliament: it became a parliamentary accounting “office” as in England. The situation became increasingly complicated in France when the Parliament broke up into rival factions, resulting in the return of absolute power in the form of the Emperor *Napoleon*.

In 1807, he re-established the Court of Accounts, logically for his own benefit. During the 19th century, in the bloody struggle between the reactionaries and the partisans of radical republican change, the Court was permanently torn between the two powers. Republics have simply recognised this duality in their Constitutions, by placing the Court at the service of both Parliament and the Government. Torn between the King, or the President, and Parliament, neither serving the executive, nor being a parliamentary auxiliary, the Court remained “in the middle”, at equidistance.

The result of this rapid history of democracy is the invention of a new idea, that of external audit, alongside internal audit.

This story of two empires, the French and the English, has left a lasting mark on Europe and the history of the institutions in most of the countries. It demonstrates significant differences in the nature of the various auditing systems. There are three institutional positions that the SAIs can adopt: close to the head, be it royal or republican, close to Parliament, or in the middle.

Historically, SAIs everywhere first positioned themselves close to the supreme head. Today, a certain number of countries still

have such an organisation, in which the most important reports are first submitted to the “Executive” (the Government, the President or the King) before being submitted, where appropriate, to the National Assembly.

This type of organisation is considered as a means of general oversight, essential to the executive and as such indisputable, but which therefore cannot be described as an external audit bureau as it is incapable of breaking away from the supreme power of the Prince.

With the arrival of true democracy, sovereignty is handed to the people. Where should the SAI report? There are two possible situations:

- political correctness would suggest that the answer is to Parliament, the sovereign representative of the people. This is the parliamentary, or Westminster, model found in all English-speaking countries, but not exclusively.
- not having it report to Parliament implies a double denial, neither the monarch (King, Emperor or President), nor Parliament. This is the judicial model (all its members, whatever their number, are judges and appointed for life), also called the “equidistance” model, which has gradually emerged in France.

The story does not end here: comparative law recognises the existence of several variants, more or less mixed versions of the basic parliamentary or judicial models. These somewhat newly-arrived models seek to combine the advantages of the other two systems.

First among these “hybrids”, there are the “Courts of Accounts” or “Courts”, which are very close to Parliament, with two variants:

▶ The first is the mixed model (legislative and judicial side by side) with sanctioning powers. This is found in Spain, Portugal and Belgium, among others.

▶ The second is the mixed model without sanctioning powers. This model is often called

the “Council or Board” model. The SAI has a jurisdictional status (it is often called a Court or Tribunal), for the sake of independence, but has no jurisdictional power (the judges do not pass judgment nor do they sanction). This model exists, for example, in Germany and Luxembourg, and at the European Court of Auditors.

Secondly, for the record, there are also the “Courts” or “Inspectors”, in this case *close to the Executive*, in view of their considerable internal audit powers, notably found in Latin America⁴.

This brief overview certainly does not encompass the wide variety of models now available in the International Organisation of SAI (INTOSAI), that should probably be an interesting subject for further mapping, either by the “Value and benefits Working group” and/or by ambitious researchers...

What can we draw from these brief historical developments?

There are perhaps two conclusions that can be put forward.

The first is that external audit is intrinsically linked to the emergence of SAIs: the primordial institutional criterion of an SAI is that, in one way or another, it oversees the power in place from outside that power. In the Europe of today, it would seem that this is no longer up for debate. But the same is not true elsewhere: there are many countries outside Europe where there is no effective external oversight. Many SAIs are simply internal control mechanisms, often even ministerial controls.

The second is that, in this respect, the very definition of SAIs can be a problem.

The traditional definition of an SAI is based on three elements:

- There must be a law or some other formal act that officially mandates the institution,
- The institution must be “superior” (a

kind of ultimate control, exercised over finances and not over administration...)

- The 8 principles from INTOSAI’s ISSAI 10 must be respected.

These three criteria should guide our approach.

Obviously, we need a water-tight approach, as there is a risk that debate on independent control may lead to interminable yet vague discussions, which would be ironic for institutions which are supposed to be the guarantors of accuracy and rigour.

Yet, this generic consensual approach requires some thought.

The existence of a law refers to the first principle of ISSAI 10, which we will come back to.

The notion of “superior” control is ambiguous – what does “superiority” mean? It is a political notion, since it is relative: what is superior is naturally such in relation to something inferior. This position is based on a value judgment. In fact, independence is a superior position, but the reverse is not necessarily true: that which is superior is not necessarily independent... This criterion is thus fragile

A functional approach using the 8 principles merits much longer discussion.

THE FUNCTIONAL APPROACH

The eight pillars of independence are: status, resources, appointments, planning, access to information, communication of results, publication and monitoring of recommendations. Several of these pillars seem to go without saying, and few SAIs would confess to any weakness in this sensitive area.

But what is the reality?

The functional approach is based on freedom.

Using a functional approach avoids debate on the various models.

As these models are inherited, it is possible (and even necessary) to assess them, as they can evolve, but we have to live with it. These organisations specific to each country, the products of the history of our different societies, compel us follow a different route and ask a different, more functional question: that of freedom.

Where we come from and how we work today are of little importance. What is essential, given the difficulties that we face, the demands of the various departments that request our services, and the need to be accountable to citizens, is to be able to justify having the necessary means to achieve the highest possible objectives in the most effective and independent way. It is the future and not just the past that needs to guide us.

And that future is defined in fact, and in law, by a single criterion: freedom. As soon as independence is established as the cornerstone for SAIs, it is freedom which is at stake, and which needs to guide us.

- Freedom to be: the status
- Freedom to act: the resources
- Freedom to lead and to manage: appointments
- Freedom to oversee: in fact, this is the freedom to programme
- Freedom to investigate: in fact, this is the free access to information
- Freedom to communicate: communicating the results
- Freedom to publish: publication
- Freedom to recommend: follow-up of recommendations

However, an immediate problem arises: since freedom can be self-proclaimed, it needs to be audited itself, as appearances cannot be allowed to hide the truth.

Although the eight pillars of independence are essential, they must not be just pious hopes, or simple declarations, empty formal texts, devoid of any substance. The models

handed down by history are substantial entities: they are heavy to bear, but the criteria are threatened by the superficiality of words: they can be empty. Here as elsewhere, the truth is now in the details. This is where perhaps Europe can go that step further.

Whatever the model, independence must be precise for it to be real.

We can therefore question each of these criteria with an open mind.

■ Freedom to be or status

It is better if this is backed up by the Constitution, a law or a well-established tradition, but is that enough? It is completely formal.

In this area, the absence of any subordination of SAIs is paramount. The best system is one devoid of dependence, or one accountable to citizens, naturally, which refers to the structures of the models. The subordination of the *Public Accounts Committee* is only acceptable if, as the British established a few centuries ago, its head is different from that of the parliamentary majority. Indeed, dependence on Parliament is not a guarantee of independence in itself: the party system needs to be balanced; otherwise there is a dictatorship by the majority. And, finally, being subordinate to the Head of State is only acceptable if the Head of State has no power, i.e. a representative or ceremonial Head of State.

■ Freedom to act or resources

In fact, this point is not clear: what is real financial independence? What is the amount allocated, according to which organisation, what profiles are required for recruiting, what level of equipment, installation, etc.? And these resources should not be easily modifiable. All this needs to be studied very closely.

■ Freedom to lead and to manage appointments and the organisation

This may be technical but it is fundamental. It involves several aspects.

The absence of any conflict of interest con-

cerning appointments is of the utmost importance:

- who is appointed?

For the majority of Europe's SAIs, it is impossible to be appointed to responsible positions after having been a member of a government or of a political party. Where this is possible, a minimum period or restrictive conditions are imposed.

- who appoints?

The most ironclad system is that of a pluralist approach: recruitment, confirmation (by Parliament on a consensual basis), and appointment (by the Head of State in Cabinet session).

From a political point of view, appointment by simple majority in Parliament, which is the general rule in Europe, would seem to be less protective than election by a qualified majority, (for example, a two-thirds majority).

The length of office is another sensitive point. If this is too short, or followed by appointment to a subsequent post in another employment, independence is fragile. If this is too long, routine or collusion can take hold.

The possibility of one or more of the senior officers in an SAI being "dismissed" must be exceptional, and well guided by a consensual and rigorous procedure. The immunity of senior officers must be guaranteed at the highest possible level, unless they have the status of magistrates.

It is even better if these rules can be extended to their deputies, members of the board of directors, and even to the audit officers themselves.

■ Freedom to oversee: in fact this is the freedom to programme

Again, this requires close attention. What is the SAI's relationship with Parliament: subordination or not? How can the level of self-censorship exercised by the SAI be measured?

Three points need to be recognised:

First, an SAI which is not able, beyond

what Parliament and other stakeholders ask of it, to freely investigate whatever it considers appropriate cannot be considered as independent.

Secondly, such possibility must be subject to a guaranteed and verified consensual decision, whether taken individually or collectively. Neither the authoritarianism of an individual nor the collusion of a group can be accepted.

Thirdly, this must be carried out alongside compulsory mandates, but with sufficient scope to allow a proper investigation to take place.

In addition, contrary to what one might expect, the organisation of SAIs internal structures is an important issue. The aim of an SAI is to produce the most objective possible observations based on professional methodologies.

Two mechanisms need to be checked. Whether the final decision rests with a single head or not, it would seem indispensable to define consensual positions. The type of work undertaken (financial audit, performance audit, routine audit, ability to hand down sanctions with or without judgments) needs to be guaranteed.

■ Freedom to investigate or free access to information

Numerous sectors are exempt from control by SAIs in many countries. People would say that this is not the case in Europe, but can we be sure? For example, do the European SAIs have access to public accounts on time and as they are in order to carry out their work?

The last three "official" characteristics of independence – communicating results, their publication and follow-up of recommendations – need also to be free of any influence.

But why stop here? Personally, I would gladly add another: the freedom to hand out sanctions. What are our recommendations worth if they have no real effect?

And finally, who inspects the inspector? Yes,

a vast subject, which could bring the carefully constructed “independence” crashing down. All these freedoms should not create an uncontrollable monster, clad in the bullet-proof arrogance of an inspector. All the requirements that the SAI demands of others need first and foremost to be applied to the SAI itself. What is the value of an SAI that is not itself exemplary? How can an SAI give lessons to others if it does not follow the rules itself? There is therefore a need to develop check and balance mechanisms, a sort of counterweight within the power of the SAI, which implies accountability.

There is, however, no obvious practical solution. “Peer-to-peer” auditing is rarely sufficient and is more a matter of diplomacy than inspection. Although it can bring to light certain problems in a given case, it will never have the compelling force of an audit. International references such as the IDI “framework for performance measurement” are yet to be tested, and are based on a quantitative “score” mechanism which has little to say about quality.

Should the SAIs open their doors to other inspectors? To private firms? To parliamentary committees? Will they one day be required to “certify” their auditors in the use of ISSAI standards? This is a real issue, which once again holds infinite variations (for example, the Public Prosecutor’s Department, in jurisdictional SAIs, guarantees a form of quality control).

Can we possibly put forward some proposals in this area today?

As we can see, this is a subject for debate and questioning. As we are neither professors nor, even less so, philosophers, what can we do? After discussion, is there room for action?

HOW TO MOVE FORWARD?

Three questions naturally come to mind to finish.

The first question is slightly provocative: is the status of our European SAIs beyond reproach?

The first response would clearly be positive, but the problem with this issue is that, leaving aside the reassuring solemn declarations, a very thorough audit is needed to certify such independence.

We should be wary of polling the general public: even though classified as independent, their relevance is undermined by the level of understanding of the average person concerning the functioning of organisations.

The more one analyses the subject, the more one realises the difficulty, often shrouded in the mystery of self-righteous speeches and perfect texts. The analysis needs to go to the heart of the institutions’ functioning, and manage the inevitable risk of intrusion, to determine the real level of independence.

This is surely not an impossible task for independent auditors, experienced and skilled in the public sector, and also well aware of the particular country’s history.

In the end, it is perhaps conceivable to establish a valuation system with triple As and triple Bs, etc.

The second, more abstract, question: is it feasible to create a summary of the best criteria, and arrive at the ideal SAI for the 21st century?

Is such a summary possible? It would mean taking each criterion and defining the best possible level... Are we capable of establishing, for each criterion, the highest point of independence, in a rigorous and pluralist debate?

This politico-judicial question is important for the Republic in the 21st century: is it a monster or an ideal? We cannot yet provide an answer.

It can also be very practical: there is a risk of confusing roles. For example, that politically influenced institutions give lessons to the others, or that SAIs handling internal controls tell the others how to go about external inspections.

The Euro Sai seminar on Independence of 28 March 2014, in Budapest, was the first occasion where an attempt was being made to establish such an inventory. INTOSAI envisages this as part of the “Value and benefits of SAIs” working group, which has begun discussion but is far from ready. France is part of this debate.

And what does the young Euro Sai members’ “YES Congress” say? It says that this is certainly one of the challenges for the next ten years. It assumes all the requirements of independence with some additional conditions. The younger generation believes that this task will be carried out in a difficult political climate, with pressure from political parties little disposed to publish the observations and unlikely to favour transparency. Our young colleagues’ intuition has probably highlighted another of the key challenges to be faced in the years ahead.

The roadmap: how should we proceed?

There is no reason to think that independence and freedom are impossible to achieve. There are already several avenues open to us.

First, we can revise the constitution. The status of SAIs is not cast in stone. SAIs can therefore make proposals themselves, even more easily since the current crisis provides an opportunity to improve our position and our procedures.

France has modified its terms of reference on five occasions in the past dozen years: with the organic law of 1st August 2001 concerning the State; then the law of 2005 concerning the social security system when several national reports were imposed; with the constitutional revision in June 2008 which conferred a mission to evaluate public policies; with the law of December 2011 which limited ministerial prerogatives in the field of non-respect of public finances; and finally with the program law at the end of 2012 which created the High Committee on Public Finances.

Other countries have followed this route.

Secondly, the reform of SAI governance is often only limited by the extent of our own courage. Work on standards and audit types, on human relations and the creation of performance indicators, on audit rules and ethics, on quality, etc., are all our responsibility.

Such initiatives lie in an initial self-assessment. The only thing that is holding us back is our own caution.

Finally, peer reviews are a good start, with a major difficulty however: we are in uncharted waters. This should not be confused with those reviews that we have all made during the establishment of an inexperienced SAI, where we were able easily to establish what was missing. The problem regards not only SAIs “in development”, but also and maybe as crucially those that are well established. Yet, unfortunately, the tools are very poor, since we need to go beyond generalities.

This type of review requires new essential work on research, emulation, communication, and dissemination.

In conclusion, the key point in the independence issue today is movement. Self-satisfaction or, worse, refusal, are clearly a bad sign for independence. Although the roadmap is there, it needs to compel us to engage with the legislative authorities of each country in order to obtain the widest possible terms of reference to show our ability to assess and inform the public debate knowledgeably.

There are those who will say that this is a political question beyond our competence. To those people, we should ask just one question: is the public organisation of society, over which we have the right of audit, not part of our responsibility? Politics does not always imply politicians. It is not a matter of ideology, but rather a matter of building the best possible public regulation in the time of crisis we are experiencing.

Who and what can impede this debate and impetus?

NOTES

- ¹ The views and opinions expressed in the lecture are those of the author.
- ² United Nations Resolution A/66/209: „the SAIs can accomplish their tasks objectively and effectively only if they are independent... SAIs [must] ensure that public administration is more effective and more efficient....” Cf.: also the SAI Lima Declaration.
- ³ For Richelieu, „the fundamental foundation of happiness in a State is the establishment of God’s reign”, and the King is God’s representative on Earth, and he, the cardinal, is the servant.
- ⁴ In Chile, the court is a special organisation with a single judge (*el subcontralor*); in Peru, the judge is the *Contralor*, but only for the first level of sanctions.