

Burren Law School
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“Prosecuting the Misuse of Power and White Collar Crime”

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Introduction

The purpose of this brief paper is to provide basic information about mechanisms to control the use of public power and more specifically, how judicial power can be used to counteract criminal behaviour. The paper will be divided into two sections the first will deal with the Spanish judicial structures and the second will outline the Spanish experience in the fight against corruption.

1. Structure of the Spanish judicial system.

The Spanish judicial system is very similar to that found in France, Portugal and Italy. It has some important aspects of the inquisitorial judicial system but also has many aspects of the adversarial system found in English speaking countries.

One of the main aspects of the inquisitorial judicial system is the use of what is called the “Juez de Instruction”, which in English might be called an Examining Magistrate or investigating judge. In the Spanish system this judge has responsibility for controlling the police and directing investigations at the initial stage. Under the law an important role of this judge is to guarantee the rights of citizens under investigation and at the same time to carry out the investigation. During this phase of the investigation there is also the possibility for the lawyers for the person being investigated to challenge the actions being taken.

After the investigation stage the Juez de Instruction hands the case over to a trial judge if he thinks there is case to be answered. There is no equivalent in the Irish legal system.

The law governing the investigation of crime can basically be traced back to 1882 even though there have been many changes in the meantime. Those changes over the years have introduced more and more of the adversarial legal system into what is essentially an inquisitorial model. These changes have insured that when trials take place they must be oral in nature and that the judge does not intervene too much to moderate the argument between the prosecution and the defence. In day to day practice the judge takes the role of protects the rights of the citizens and more and more delegates the question of investigation to the judicial police and special prosecutors.

Those investigating the allegations must look for powers from the judge before they can take any actions this is of course is subject to the right of appeal and challenge the more important decisions of the judge in a more important court.

Although the initiation of various investigations may be different ultimately they all end in judicial investigation and all the information gathered in a criminal investigation must be brought to the attention of the investigating judge. Allegations of criminal acts can be initiated through the police or a prosecutor but must always be given to the judge neither the police nor the prosecutor can take any actions that affect the fundamental rights or citizens (e.g. intercepting telephone calls or other forms of communication, searches of properties or the taking of biological samples) although it is possible for a person under investigation can be detained for 72 hours before taking any of these actions which can affect fundamental rights it is necessary to have oversight by a judge of instruction.

The Spanish experience in the fight against corruption.

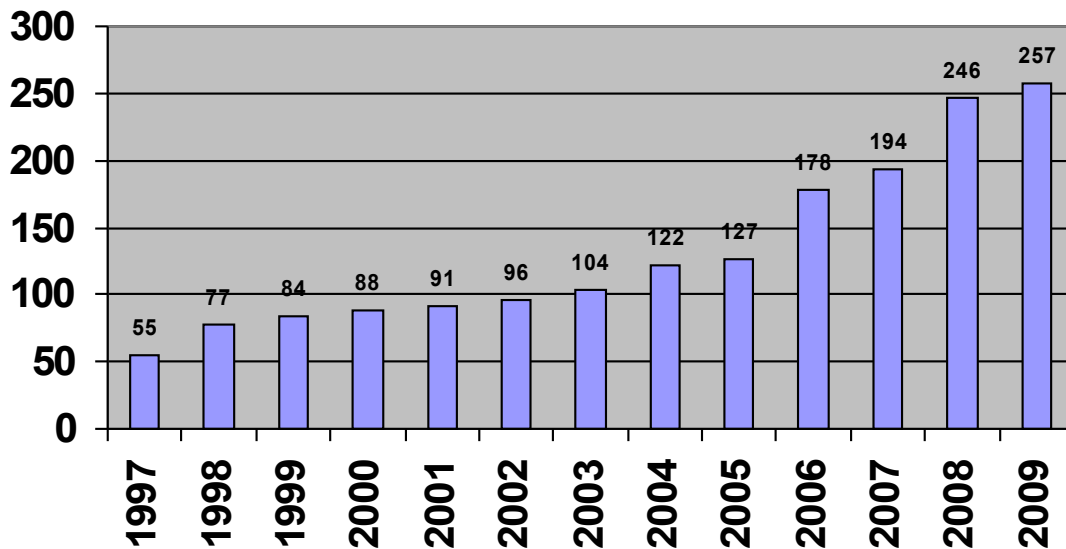
In Spain in recent years there has been a great improvement in the fight against political corruption.

Some data:

In the last two years 19 mayors have been arrested in alleged crimes of corruption. These have come from various political parties. In November 2009 the Chief State Prosecutor informed the Spanish Parliament that a total of 594 proceedings were taken against political appointees or those in political positions. He also reported that the special anti corruption prosecutors have been more and more active in these matters. This section is designed for complex investigations and they have their own sections within the Guardia Civil and the National Police and special support from the ex revenue section and the public service divisions dealing with the auditing of the public funds.

The following table outlines the increase of the number of cases taken by this special anti corruption section in recent years.

■ **ASUNTOS JUDICIALES de la FISCALIA ESPECIAL**



What are the factors that have improved the fight against political and economic corruption?

I think that in Spain three factors have been very important.

1. Legal changes
2. Changes in the new types of investigation
3. Changes in the operational methods

1. Legal Changes

- a. The law for prevention of money laundering 2003: this has permitted greater control of the flow of money by obliging banks, notarios and lawyers to make reports of suspicious operations and to facilitate the provision of information.
- b. The law governing the prosecution ministry 2007: this created and developed a special prosecutor in the fight against corruption, large scale economic crime and organised crime.
- c. The law dealing with criminal inducement 2003 and 2006: this provides measuring for the investigation and provisional measures about assets and the creation of speedy intervention.
- d. The penal code 2003: this widened the application of the law against money laundering the taking advantage of the profits derived from crime.

2. Changes in ways of intervening and collaborating with an investigation

- a. There now exists a method for exchanging of information between various financial entities and for the control of money laundering. A new agency SEPBLANC (service for the prevention of money laundering) links the Spanish Central Bank and the special unit of investigation which has improved investigations into financial matters.
- b. There is now a flow of information between notarios which facilitates the investigation of the movement of capital for illegal purposes.
- c. It is possible to access information and there is a much tighter control in relation to the investigation of fraud dedicated to the prosecution of large scale tax avoidance.
- d. The special police unit dedicated to economic crimes has been an important factor in the increase in the detection and prosecution of corruption.
- e. The specialisation within the ministry of a special anti corruption unit in different parts of the country has produced results.

3. Changes in operational management

The following changes have been effective:

- a. The judicial investigation is much more intense and extensive.
- b. Conducting prior investigations, before the formal judicial investigation phase, makes the judicial phase more effective.
- c. In the judicial phase the full use of options (eg phone tapping, synchronised arrests of suspects etc) have been valuable in obtaining better evidence.
- d. The possibility of “fragmenting” cases i.e. having different elements dealt with separately which avoids the problem of a complex case falling apart because a difficulty in one area.
- e. Better international cooperation.

Case Example:

SEPBLAC receives news that there have been strange or suspicious financial dealings and they communicate this to the police.

- The police contact the Prosecutor and this triggers their investigation which obtains information from banks, land registries etc.
- If there are indications that the suspect is a person in politically appointed position but is managing large amounts of money through a family business or bank account, the prosecutor solicits judicial permission to intercept the communications of the accused.

- From this point the judge supervises the operation and, logically, the investigation proceeds in secret.
- If there is sufficient *prima facie* evidence to justify eg a house search, to see if there are documents pertaining to illegality or possibly illegally obtained money.
- The judge authorises the arrest and detention of suspects. They are interrogated and this may result in further urgent investigations. The judge will be informed of all developments.
- The judge will then question the suspects and, later, witnesses.
- The judge will decide at this stage, based on the pleadings of the Prosecutor what further measures to take eg detention of suspects, surrendering of passports, prohibit travel etc, as well as take charge of the suspect's assets.
- At this stage the matter is into the public domain and the suspects, through their lawyers, can argue their case eg suggests other witnesses to be called or expert reports.
- The judge can end the investigation and dismiss the allegations or prepare a case to be submitted to a trial judge.
- In the case of the latter the Prosecutor then prepares the evidence to be presented at the trial. The lawyers for the accused prepare a written defence.
- The Judge then sends the case to the trial judge.
- This judge will then conduct the trial which will determine guilt or innocence.
- Appeal can be made to a separate court.

Conclusions

From my limited knowledge of the Irish experience in investigating it seems that the Spanish approach to investigating suspected political corruption has certain advantages over the Irish system which might have avoided some of the key problems associated with the Tribunals in Ireland. Firstly we have two different judicial processes (1) a judicially controlled investigation and (2) then the formal trial, which avoids the problem of tribunals carrying out dual functions.

The other advantage in the Spanish system is that the process is a criminal one from the outset, which avoids the problem that the Irish tribunals have that the evidence of criminality unearthed by the tribunals cannot be transferred to a criminal trial which results in the need for a separate criminal investigation. That problem cannot arise in Spain.

Go raibh mile maith agaibh.

Muchimos Gracias