

## ARE LOCAL GOVERNMENT CLERKS AN ADEQUATE INSTITUTIONAL TOOL AGAINST CORRUPTION?\*

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### Abstract

This paper examines the role of local government clerks in the fight against administrative corruption. Municipal clerks provide professional and specialised knowledge. We examine their initial tests and then look at the provision of their local positions. After we evaluate territorial, functional and organisational limitations in their performance and, finally, we refer to the formal and informal aspects that favour their independence.

Key words: local government clerks; corruption; state empowerment; free designation; legal report; local government clerks association.

## SÓN ELS SECRETARIS D'ADMINISTRACIÓ LOCAL UNA EINA INSTITUCIONAL ADEQUADA CONTRA LA CORRUPCIÓ?

### Resum

*El present treball examina el model institucional dels secretaris d'Administració local en la lluita contra la corrupció. Els secretaris d'Administració local aporten un saber professional i especialitzat que es certifica amb les proves d'habilitació. Analitzem després la provisió de llocs de treball. Valorem seguidament les limitacions territorials, funcionals i organitzatives de la seva actuació i, finalment, fem referència a aspectes formals i informals que afavoreixen la seva independència.*

*Paraules clau: secretaris d'Administració local; corrupció; habilitació estatal; lliure designació; informe jurídic; col·legi de secretaris.*

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## 1 Introduction and approach to the subject

### 1.1 Corruption as a concept. The matter of centralisation

The concept of administrative corruption has been accurately described since antiquity (Amenós, 2019: 373ff.). Simply put, it occurs when the authority or civil servant acting in a procedure receives goods or favours (usually of a monetary nature) either for themselves or a third party with whom they have some sort of relationship. For example, a political party whose favour is sought, a relative, friend, business partner, etc. A person takes the role of corrupter when he seeks the granting of rights, or the deferral of or exoneration from administrative (and even criminal) liabilities.

One idea that is shared across a great many doctrinal proposals and some recent legislative tendencies in certain sectors is centralisation as a formula by which to attack corruption.<sup>1</sup> This occurs, for instance, in urban planning, where the centralisation would especially affect local administrations, who hold relevant powers in this area of the legal framework. Along these lines, the instruments used to organise territory (usually supralocal plans that originate in the autonomous community government) progressively reduce the density of the local legal framework.<sup>2</sup> On another note, tools to centralise urban planning discipline are being proposed and approved.<sup>3</sup>

Another frequent statement<sup>4</sup> is that the vast number of small municipalities now recognised in Spain places us before an entire galaxy of weak administrations for whom it is relatively easy to fall into corrupt practices. Though it may seem a too-dire depiction, the truth is that stances in favour of centralisation and tight control over local governments enjoy broad consensus in this field.<sup>5</sup>

It is within this discussion framework that we must pose the question on local government clerks—civil servants with national qualification—as tools suited to fight corruption. We could call this instrument one of “soft centralisation”. It will be more precisely defined later in this article, but it can now be said that these are local employees selected by the Spanish state (the central authority, which is why reference is made to “national qualification”, a term that for some time was replaced in legislation by the words of “state qualification”). But first we will turn our attention to the relationship between civil service and corruption.

### 1.2 Civil service as a guardian. Especially, civil servants with national qualification

#### 1.2.1 General constitutional and legal provisions

It is usually considered that neutral, professionalised civil service is an optional guarantee against bribery and other bureaucratic perversions. Along these lines, the Spanish Constitution has generated a model of statutory civil service characterised by impartiality and objectivity (Amenós, 2019: 393).<sup>6</sup> This is manifested at the local administration level by the current version of Article 92, Law 7/1985 of 2 April, which regulates the framework for local government (LRBRL). This article states that, in general, job posts in local territorial governments and their autonomous bodies must be occupied by civil servants. Additionally, pursuant to Law

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1 (Amenós, 2019: 384).

2 It is often believed that the municipality’s vision “is myopic when looking at the territory in its entirety (and that) its body is too feeble to conceive, approve, sustain, implement and revise a general urban development plan, and any derived plans, if they exist” (Amenós, 2019: 386).

3 (Vaquer, 2018: 69).

4 (Parada, 2015: 25-96).

5 In fact, there is a long-standing tradition of strict doctrine that attributes regenerative properties to the centre, whose neutral distance facilitates a cleansing of contaminated local councils, so vulnerable to the pressures of local strongmen, influential citizens or castellans (on this, see Amenós, 2019: 384-385, where reference is made to the plays *The Inspector General*, by N. Gogol, and *An Enemy of the People*, by H. Ibsen). Obviously, and as discussed in the same work, the pro-centralising theories do not speak to fact that there can also be impure and very compelling interests that, using privileged channels, access the decision-making centre (with a view to corrupt). On this debate, see also Toscas (2008: 4), which refers to Capel (2008: 23).

6 This notwithstanding, as stated in the same text (Amenós, 2019: 392-393), in recent years a loss of rigidity in its configuration has been observed. This may have facilitated gains in effectiveness, but it has also been detrimental to the strict rules that ensure civil servant neutrality.

7/2007, of 12 April, of Basic Statute of Public Employees (EBEP), Article 92.3 of the LRBRL sets out the missions they must commit to:<sup>7</sup>

Exclusively, the exercise of duties that involve direct participation in exercising public powers or safeguarding the general interest.

The duties that involve the exercise of authority are also reserved for them.

Last, they are “generally” assigned responsibilities that, in the implementation of the LRBRL are given to civil servants for stronger guarantees of objectivity, impartiality and independence in their exercise.

### *1.2.2 Local civil servants with national qualification: concept*

The regulation of certain specific local civil servants, those with national qualification, can be contextualised within the framework here described. The regulatory origins are in Article 92 of the LRBRL, which lays down the public duties necessary in any local government, and stipulates that the administrative responsibility in relation to them is reserved for these civil servants. These duties are:

- a) Secretariat, including official attestation and mandatory legal counselling.
- b) Monitoring and internal follow-up of economic-financial and budgetary management, in addition to accounting, treasury and tax collection tasks.

Drawing from these bases, a number of specialities are called for in large-population municipalities (outlined in Title X of the Law) and for the cities of Madrid and Barcelona. That said, to understand in detail how these public servants are to be organised, we must turn our attention to Royal Decree 128/2018, of 16 March, regulating the legal system for local administration civil servants with national qualification. Article 2.1 thereof reads:

“1. The following shall be necessary public roles in any Local Government, the responsibility for which is reserved for civil servants of the Local Administration with national qualification:

- a) Secretariat, including official attestation and mandatory legal counselling.
- b) Treasury and Comptroller, including monitoring and internal follow-up of economic-financial and budgetary management, in addition to accounting, treasury and tax collection tasks.
- c) Secretariat and Comptroller, to which the duties of official attestation and obligatory legal counselling are assigned, in addition to those of monitoring and internal follow-up of economic-financial and budgetary management, as well as accounting, treasury and tax collection management.”<sup>8</sup>

This is to say that the job posts to be filled in local governments must include these duties in their descriptions. Further, the posts covering them must be held by these civil servants who are selected by the Spanish central administration. We will take a closer look at all of this later in this article, but for now it is a good light by which to guide the first steps of our journey. Still, it must be remembered that these employees can also perform other duties, as long as it is so established in the legal framework.<sup>9</sup>

The aforementioned royal decree also includes an interesting provision in its Article 2.3, in an attempt to link the duties of these civil servants with principles of major relevance at that time.

“3. Civil servants of the Local Administration with national qualification shall be charged with the duties necessary, within their scope of activity, to guarantee the principle of transparency and the principles of budgetary stability and economic-financial sustainability.”

<sup>7</sup> For more on this, see Amenós (2019: 393).

<sup>8</sup> Where budgetary matters are concerned, Art. 213 of Royal Legislative Decree 2/2004, of 5 March, must be borne in mind. It approved the consolidated text of the Law on Local Finance Administration, on the economic-budgetary control (according to the draft present in Royal Legislative Decree 2/2004). On another note, the doctrinal description of all these duties can be found in Rivero (2015: 382ff.).

<sup>9</sup> Art. 2.4 of the Royal decree 128/2018.

It goes without saying that this is something of a vague notion that positions qualified civil servants as the leading players to ensure adherence to the relevant principles of transparency, and budgetary and economic-financial stability. Logically, this makes for a clear and direct link between their activities and the fight against corruption.

### 1.2.3 Disorientation and crisis. Rebirth?

The system of civil servants with national qualification, built up in Spain over a long, gradual accumulation process not exempt from conflict, has seen blurred considerably over recent decades. Although it has not been decided to do away with them once and for all, their duties have been pared down, and certain developments have distorted their image of objectivity and neutrality. Their cohesiveness has been further undermined with a specific set of regulations for the municipal governments of large cities. Truth be told, the LRBRL did not abolish them in 1985,<sup>10</sup> and the Constitutional Court did not rule them to be a form of supervision contrary to local autonomy. But lawmakers have regulated their service conditions inconsistently.<sup>11</sup> For a time, they were more concerned with the distribution of powers among these civil servants between the Spanish central state and the autonomous communities than with the solidity and coherence of their governing system.<sup>12</sup> It bears mentioning that these erratic movements were compensated with the reinforcement of the figure of the comptroller as of enactment of Law 27/2013, of December 27, on the rationalisation and sustainability of the local administration (LRSAL), an option implemented and even strengthened with Royal Decree 128/2018. We will thoroughly discuss all of these topics in this study.

Nonetheless, as concerns the topic at hand—local government clerks and the fight against corruption—reference must be made to a true doctrinal rebirth. Thus, in the key work of Capdeferro (2016: 308ff.) a close analysis is made on the role of local government clerks in the fight against the aforementioned blight. Fuentes (2015: esp. 17ff.) speaks with enthusiasm about the “democratic regeneration” role that these civil servants have naturally taken on. Criminal law doctrine also criticised the weakening of these civil servants, in the belief that they were a fundamental tool against any illegal perversions in administrative activity (Cardona, 2017).<sup>13</sup> Nonetheless, and despite the positive view taken of this group of civil servants, there are many arguments that would stand in favour of them being done away with, or having them configured as merely decorative officials.

However, this article is not about the debate on their constitutionality,<sup>14</sup> comprehensive reform or even elimination, but rather the premises that can justify their maintenance based on the role that, generally speaking, these civil servants are considered to have played in the fight against corruption phenomena. It

10 From a historic standpoint, mention can be made of the elimination, in the last quarter of the 20<sup>TH</sup> century, of two bodies of local civil servants with national qualification that had been relatively significant in certain areas: deposit takers and band conductors. For more on this, see Martínez Marín (1999: 192).

11 Variations can be plainly seen by examining the different regulations approved over a relatively short period of time. Regarding this, I refer to the single repealing provision of Royal Decree 128/2018.

12 The specialised doctrine even spoke of a certain return to the 19<sup>TH</sup> century, of backward steps from a professionalised, meritocratic civil service for local government clerks and comptrollers (Toscas, 2008: 5). The main idea of this school of thought is “deactivation”, combined with other parallel measures, such as the dismantling of the former Local Government Inspection and Consultancy Service.

13 Toscas (2008: 2) also writes in a laudatory tone that municipal local government clerks have prevented the “Marbella-isation” (TN: alludes to urban planning corruption rampant in the Spanish coastal city of Marbella in the 1980-90s under developer and mayor Jesus Gil y Gil) in the management of urban planning. The same author also underscores the role played by local council local government clerks as delegates to their local electoral boards, which has enabled facilitation and achievement of clean political voting management (2008: 7).

In the same way, Toscas (2008: 2) notes the interest of political and administrative science, and even cinema (to wit, the harsh local political conflict portrayed by director José Luis Garci in his film *Luz de Domingo*, released in 2007) in the topic of the social history of the Administration.

14 As is known, the Constitution recognises the autonomy of local authorities for the management of their own interests (Art. 137 and 140 of the SC). Fanlo Lorás (1990: 257) described the different facets of autonomy, and referred to its institutional content as an “exercise under one’s own responsibility of the realm of public duties entrusted by lawmakers”. With this preliminary consideration we can interpret Art. 6 of the European Charter of Local Self-Government, which establishes the:

“Appropriate administrative structures and resources for the tasks of local authorities.

1. Without prejudice to more general statutory provisions, local authorities shall be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management.

2. The conditions of service of local government employees shall be such as to permit the recruitment of high-quality staff on the basis of merit and competence; to this end adequate training opportunities, remuneration and career prospects shall be provided.”

is true that a pure and simple removal of this set of civil servants does not appear to be on today's political agenda. Further, Royal Decree 128/2018 clarified and robustly organised this group. This is our diagnosis, at least in comparing this law with the legislative patches and flip-flops that have been enacted from the very beginning of the democratic transition.<sup>15</sup>

Cessation was, in fact, the option that the LRBRL determined for the municipal band conductors. The same denouement was decided for local deposit takers. This path was also begun in Italy by the *Legge 7 agosto 2015, n. 124, Deleghe al Governo in materia di riorganizzazione delle amministrazioni pubbliche*. In Article 11.1 b) 4) it opened the door to a future repeal of the *segretari comunali e provinciali* figure. The impact of this regulation has been studied in depth by Fuentes (2015). This is an interesting precedent, because local government clerks were given a relevant role in corruption prevention within the framework of the so-called "Severino Law". This was a sweeping piece of Italian legislation that granted significant power to administrative mechanisms to prevent illegal conduct (this was *Legge 6 novembre 2012, no. 190*, which laid down the *disposizioni per la prevenzione e la repressione della corruzione e dell'illegallità nella pubblica amministrazione*). In short, and<sup>16</sup> for the time being, local government clerks have been lumped into a larger group of *dirigenti degli enti locali* and are configured not only as the monitors of legality, but also coordinators of administrative activity and veritable local managers. According to Fuentes (2015: 30) in the Italian legal framework this role is close to that of the US's ethics officer.<sup>17</sup>

In our view, there are three elements that must be highlighted as the assets of local government clerks in the fight against urban planning corruption:

- Existence of specialised professional knowledge.
- Effective prestige in the activity carried out.
- Consciousness of independence.

We will now take a more in-depth look at each.

## 2 Specialised professional knowledge

### 2.1 Local government clerks' preparation is first ensured through a proper selection procedure

#### 2.1.1 Hypothesis of autonomous recruitment

Theoretically, the basic legislation on civil service (and its implementing rules in each autonomous community) could call for programmes and precise requisites for the different civil servant groupings (levels, specialities, etc.) coupled to mandatory legal counselling. It seems clear that this legal counselling is a duty that involves the direct or indirect participation in the exercise of official authority or the safeguarding of general interests (Article 9.2 EBEP). In fact, within the framework of the aforementioned legislation, local governments can carry out recruitment of civil servants to legal counselling.

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It must be indicated that the Article only refers to high-quality selection, but it could be understood that this selection must be made by the local authorities themselves. But the most authorised doctrine (Martínez Marín, 1999: 222) states that this precept can co-exist with the system of nationally qualified civil servants if the principles of merit and competence are ensured. In fact, as will be shown throughout this article, there has been an attempted quadrature of the circle, between ensuring merit and competence—covered by the Spanish central state—and several tools that bring the decision on provision closer to local governments.

In short, over all these years, the Constitutional Court has upheld the constitutionality of there existing qualified civil servants, and has considered their regulation to be within the constitutional terms of civil service, which the Spanish central state has the power to set. In fact, the content of these governing terms is two-fold, as they appear in the Spanish legislation on civil service and also in the local system legislation (in this realm, the terms have also been attributed to the Spanish central state). On this matter, I refer to Fuentetaja (2015: 421ff.).

<sup>15</sup> In 1975, there began a system marked by exceptionality, diversity, disorientation and constant mutation.

<sup>16</sup> According to Fuentes (2015: 29-30).

<sup>17</sup> Fuentes (2015: 13) writes that an ethics officer is "a public manager—usually the same person as the advising counsel to the government or organisation—whose chief responsibility is to improve the ethical actions of the organisation and ensure compliance with applicable law in the area of public integrity."



### 2.1.2 Selection process

But as we will observe later on, job posts devoted to mandatory legal counselling are reserved for civil servants with national qualification. The Spanish central state takes responsibility for this qualification, granting these civil servants its seal of approval, and now regulates the selection procedure described in Article 19 and subsequent of Royal Decree 128/2018. In summary, it can be said that holding a formal university degree is a requisite for accession to the civil service bodies or categories classified in sub-group A1, as articulated by the EBEP.<sup>18</sup> The Ministry of the Treasury and Public Service (in Spanish, MHFP) has the responsibility of approving the governing terms and selection programmes, as well as the designation of selection boards. The National Institute of Public Administration (in Spanish, INAP) has powers for the management and conduct of selection processes.<sup>19</sup>

The procedure is divided into two phases. The first consists of passing a competitive exam. Applicants who pass are appointed as probationary civil servants. The second phase involves taking and passing a course at the INAP or the institutes or schools for civil servants of the autonomous communities, whenever there is an agreement along these lines.<sup>20</sup>

Applicants officially accede to the civil service through one of three sub-groups for these civil servants: secretariat comptrollers, secretariat and treasury comptrollers. That said, it must be noted that internal promotion is possible from the sub-group of secretariat comptrollers to that of secretariat and/or treasury comptrollers.<sup>21</sup>

As can be seen, the system is based on a classic competitive exam that includes written and oral tests on the syllabus, in addition to practical problem-solving.<sup>22</sup>

Without a doubt, pursuant to Article 100.2 of the LRBRL, the Spanish central state can establish the basic rules, minimum programmes and degrees required for a competitive exam to be sat by a class of civil servants devoted to the legal advising of local governments. As is shown, there has been a historic preference to centralise these formalities. This has guaranteed high-quality selection and facilitated access by Spaniards<sup>23</sup> from diverse parts of the country (surely less interested in a given local civil service posting, despite the hypothetical possibilities for later mobility).

### 2.1.3 Appointment and determination of the first posting

The same appointment ruling brings about the assignment of the first posting by the MHFP (after consulting with autonomous communities), taking into account applications and vacancies. A comprehensive record of local government civil servants with national qualification is created, listing the items that affect their administrative careers.<sup>24</sup> Once the first posting has been assigned, the civil servant—if they wish—will enter the future rounds for provision systems (merit-based competition, free designation, etc.).

## 2.2 Knowledge is multiplied with the possible geographic mobility of these civil servants and if present, later training

### 2.2.1 Job posting provision systems. Especially, the merit-based competition

The definitive appointment is made with the assignment of the first posting. This provision is completed with the rule according to which the normal provision system is merit-based competition. This consideration aside, at this time, the role of the destination municipality and the autonomous community become determinant.

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18 Art. 18 of Royal Decree 128/2018.

19 Art. 19.2 of Royal Decree 128/2018.

20 Art. 19.3 of Royal Decree 128/2018.

21 These processes are regulated in Art. 21 of Royal Decree 128/2018. Additionally, there are terms for access to the higher category within the same sub-step, either through a merit-based competition or proficiency tests (Art. 20 of said royal decree).

22 The terms also call for a complementary translation test.

23 Spanish nationality is a requisite for accession, according to Art. 19.1 of Royal Decree 128/2018.

24 Art. 23 of Royal Decree 128/2018.

The regulatory royal decree sets the terms for the so-called “ordinary competition” as the standard formula, and furthermore, a “unitary competition” as a subsidiary mechanism.<sup>25</sup> The local authority (specifically, its president) is responsible for calling the ordinary competition on an annual basis. In recent years, there has been constant concern among Spanish lawmakers for the determination of the merits that are to come into play in the competition. The regulations now in force stipulate the following:

General merits of mandatory assessment, determined by the Spanish government. This assessment stands for at least 80% of the total.

Merits for autonomous community specialities, which the communities set and can stand for up to 15% of the total assessment.

Merits for local government specialities.

As shown, here there begins a phase of inter-administrative cooperation, in which a number of autonomous decisions are to be coordinated. The presence of a *local profile* has often fallen under criticism, as the figure of a local government clerk would be closer to an ordinary legal advisor than to a supervisory role. Though in the case of an autonomous community, the peculiarity of autonomous community law could be invoked, a requirement of local or provincial specialities is harder to defend.<sup>26</sup> Article 34 of Royal Decree 128/2018 states that these merits are directly related with the characteristics of the job post, and with the basic and advanced training courses attached to them. Provisions allow an interview to be required, with the purpose of clarifying any part of the content stated. This further reinforces the double-sided nature of the relationship; impartial control and, at the same time, creation of a framework of trust between the local government clerk and the local government (expressed, as seen, in a certain configuration of the job posts). The above-described scenario can be modulated taking into account that the assessment jury, technical in its composition (including its president) is appointed by the local authority and has an even number of members, one of whom can be optionally appointed by proposal of the autonomous community.<sup>27</sup>

This article will not address the unitary competition managed by the MHFP, which, as shown, has a complementary nature (if, for example, despite the existence of openings, a local call has not been arranged). It cannot be ignored that both competitive exams and, later on, the competition procedure are complex operations that often cause delays and imbalances (also bearing in mind that there can be many reasons for passivity in the acting administrations). For this reason, we must now look to other job post provision systems that, because of the indicated circumstances, are often put into motion.

As already known, Article 27 of the regulatory royal decree establishes that the normal provision system is by merit-based competition. Nonetheless, on an exceptional basis, job posts can be covered by free designation. Before turning our discussion to this peculiar system, we must remember that the regulations also establish other mechanisms. First, job exchanges, but also provisional appointments, accumulation of postings in different municipalities by a single qualified civil servant, service commissions, acting and temporary appointments. Given their importance, temporary postings will be discussed under 3.2.1.

### 2.2.2 Free appointment

As shown, Spanish law has proven effective in ensuring the training and background of qualified local civil servants with an accession exam (and later course) and by imposing a certain percentage—80%—for general merits. It could be said that this is the extent of its work. It would not be unreasonable to think that large municipal governments would be able to organise recruiting processes attractive enough to draw a broad geographic sample of interested applicants. The law, however, has not given them authority to do so. What the law has authorised them to do is use (optionally) the free appointment system, once the competitive exams (and subsequent course) are taken. Curiously, to set a limit, the same threshold was used as in cases for

25 V. Art. 28ff. of Royal Decree 128/2018.

26 It must also be borne in mind that the general merits assess matters associated with seniority, progress and consolidation, as well as academic degrees, basic and advanced training and even prior services (Art. 32 of the regulatory royal decree).

27 Art. 39 of Royal Decree 128/2018.



certain revenue collection transfers (Article 111 of Royal Legislative Decree 2/2004, of 5 March, approving the Law on Local Finance Administration). Additionally, the LRBRL itself specifies certain items further.

In short, the provincial or autonomous community capitals, municipalities with populations of 75,000 inhabitants and up, provincial councils, metropolitan areas, *cabildos* (Canary Islands), *consells insulars* (Balearic Islands) and the cities of Ceuta and Melilla all benefit from the free appointment option. This notwithstanding, the Spanish central state reserves authorisation to use free appointment when it comes to qualified civil servants assigned as treasury comptrollers (in the framework of reinforcement and a stronger relationship between this figure and the general Spanish administration).<sup>28</sup>

Pundits have expressed their concern regarding the reduced supervision role that could come with free appointment.<sup>29</sup> Along these lines, Article 47 of Royal Decree 128/2018 establishes certain guarantees for dismissal from free-appointment postings. First, a statutory report from the Spanish central administration must be handed down in the case of civil servants with comptroller, treasury and revenue collection roles (whose protective bond with the Spanish central administration is stronger than that of the local government clerk, as has been shown). Second, it must be pointed out that any dismissal must be properly grounded, and refer to the civil servant's professional performance (Article 47.4 of Royal Decree 128/2018). Last, by means of compensation, the terms call for mandatory appointment of the dismissed civil servant to a post of the same group of rightholders, and no more than two levels below the post he was dismissed from, with a specific bonus standardised for this class of posts.

Therefore, it is easy to see that this is a scenario marked by delicate balance, in which personal ethics must play a fundamental role, in light of the weakness of the institutional framework. We will return to this topic at a later point in the article (section 4, *infra*). In conclusion, it has been made patently clear that the regulation is meant to ensure an initial source of these civil servants' prestige: their training and preparation. That said, and starting from these governing terms, a specific selection is allowed based partially on a relationship of trust (to wit, through the specific local merits weighted in an interview, and the appearance of free appointment).

### 3 Prestige expressed in the performance of work

#### 3.1 Introduction. Job posting and assignment, and reservation of duties

As we already know, job posts that include official attestation and mandatory legal counselling have been reserved for local government clerks. The posts are featured on the relevant list or organisational instrument belonging to each local government, which must comply with basic Spanish state regulations. The starting point, as shown, is the Spanish central state's distrust in this post being covered effectively, and with high quality, by the local government (even though the local government would be applying the public service legislation in force).

That notwithstanding, prestige must obviously be brought out in the day-to-day operations. The first issue that must be observed is that the reserved job posts may have different or complementary duties, as long as they are compatible with those belonging or inherent to the position.<sup>30</sup> Here there is a certain nostalgia for regulations that historically attributed human resources and general services management to the local government clerk. Today, these tasks are covered by the mayor's office, pursuant to the basic legislation on local government. Theoretically, the provision of supplementary duties is suitable, and aims to make the most of the assets that exist in the form of civil servants qualified through administrative mechanisms. This could actually compromise the legal counselling, which has a bias that makes it different (often limiting) from executive tasks (which tend to be expansive and creative). However, it is indubitable that ways can be found to combine these two fields through the lens of a renewed outlook on the job post.<sup>31</sup>

28 To comprehend the reinforcement of the economic-financial comptroller, see Art. 4 of the Royal Decree 128/2018 and, especially, Royal Decree 424/2017, of 28 April, regulating the legal system for internal supervision of local public sector institutions.

29 Capdeferro (2016: 157-158). The author writes that this is completed with local governmental decisions that impact the setting for posts in the Secretariat of the assignment allowance, special allowance and productivity allowance.

30 Art. 6 of Royal Decree 128/2018.

31 The combination of management, and simultaneously, legal compliance supervision tasks is a delicate, recurrent issue in the study of these civil servants (for more on this see Martínez Marín, 1999: 2016). Martínez Marín (1999: 211) also states that, the

## 3.2 Territorial, functional and organisational limitations

### 3.2.1 Territorial limitations. Modulation of large municipal governments and the situation in small municipalities

In the foregoing section, we have observed a possible restriction on the effectiveness of the legal supervision duties performed by the local government clerk if their office accumulates tasks that, while formally compatible, may at times be disruptive. However, aside from this expansion of roles (which is merely optional) it would seem likely to find Spanish local governments staffed by local government clerks carrying out their delicate mission to the fullest extent. But that is not quite the case. The reader must bear in mind a number of limitations.

First, we will examine the territorial restrictions. There are two types: those of the “high range” (municipalities with large populations) and those of the “low range” of inframunicipalism. In the first case, we have already shown how large municipal governments can optionally decide on free appointment among applicants with state qualification.

Even so, Title X of the LRBRL takes it a step further and breaks up the post of local government clerk in so-called “large-population municipalities”.<sup>32</sup> In these cases, legislation no longer refers to a municipal government clerk, but rather to a secretary general of the plenary (who advises this body and its commissions on the legal matters laid down by Law) and a support body for the government council and for its secretary councillor, the office-holder being appointed from among local administration civil servants with national qualification (Article 126.4 LRBRL). To top it off, the law calls for there to exist an administrative body responsible for legal assistance to the mayor’s office, the local government council and management bodies, whose head is appointed and separated by the local government council from among local government civil servants with national qualification. Alternatively (and this is the fissure that now draws our attention) this head can be chosen from among Spanish ordinary civil servants, those of autonomous communities or local governments (who hold law degree and meet other general requisites).

But if, as illustrated, qualified civil servants have a fragmented presence in municipalities with large populations, they have even less impact when facing the drama of inframunicipalism so present in Spain.<sup>33</sup> The shared sustenance of the local government clerk was already a classic example of collaboration among local governments, and has even been used to justify the merging of municipalities. Along these lines, there are several exceptions and modulations to the general system based on population criteria. For example, the possible assignment of the duties now under analysis to an ordinary civil servant of a single local government, in the case of territorial bodies below those of a municipality, and with populations of less than 5,000 inhabitants,<sup>34</sup> the shared sustenance through a grouping of the local government clerk’s office<sup>35</sup> or a pure and simple exemption in the case of local governments with populations of fewer than 500 inhabitants and budgets of less than 200,000 euros.<sup>36</sup> Therefore, it is clear that above and below these limits, there are a number of exceptions and variations in the distribution of qualified civil servants throughout the territory.

The true map of qualified civil servants can now be completed by making reference to so-called “temporary” civil servants, a figure used to distorting excess, and that is now regulated by Article 53 of Royal Decree 128/2018. As has been shown, the selection and provision process for these job posts is complex. It takes a concerted effort among different administrations, and can even be tied up by passive attitudes arising from

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larger the municipal government, the more important the legal attestation, legal counselling and comptroller duties. The smaller the municipality, the more predominance there is of management tasks over the foregoing. On this topic, I refer to Soto Valle (1999). I am forever grateful to leading local government clerk Juan Ignacio Soto Valle for the long conversations we have had on the essence of this group of professionals, and the actions taken to advocate its proper regulation.

32 On this matter, I refer to Art. 121.1 of the LRBRL. In short, these are municipalities with populations of over 250,000 inhabitants, and provincial capitals with populations of over 175,000 people. There are other cases, but they depend on the decisions of the autonomous community legislative branch.

33 For more on the relationship between the municipal map and the fight against urban planning corruption, see Amenós (2019: 387-389).

34 Additional fifth provision of Royal Decree 128/2018.

35 Agreed by the autonomous community, according to Art. 9.2 of Royal Decree 128/2018.

36 Art. 10 of Royal Decree 128/2018.

any number of motivations.<sup>37</sup> Within such a frame, temporariness has been a relevant provision formula. The qualifying condition, which must be entered into record, is an impossibility of ordinary provision. The proposal comes from the local government, which has to respect the principles of equality, merit, capacity and publication. Appointment is the responsibility of the autonomous community. Curiously, it must be noted that this community can configure a list of applicants that would work on a supplementary basis if the local government did not propose a civil servant it had previously selected. In the same vein, Article 15.1 of Royal Decree 353/2011, of 11 March, approving the General Statutes for the Associative Organisation of Clerks, Comptrollers and Treasurers of the Local Administration<sup>38</sup> establishes that temporary civil servants who carry out duties that correspond to their qualified colleagues, are entitled to register with professional associations.<sup>39</sup>

### 3.2.2 Functional limitations. A fragmented activity

As is known, the local government clerk is no longer responsible for preparing the notices of illegality, with the subsequent presentation to the civil governor of the municipal government agreement reached and his report.<sup>40</sup> Now it is a matter of specific development of their role in favour of the municipal government they serve. As we know, this role covers official attestation and obligatory legal counselling. That is why we refer to a fragmented, specific activity. Local government clerks do not do everything. This clarification may seem unnecessary. But it is all too relevant in light of the fact that frequently, and predicated by a long historical tradition, the local government clerk is called as a witness or even indicted in criminal trials regarding affairs in which they have neither taken part, nor are allowed to by law.

Now is not the time to describe the specific area represented by official attestation and mandatory legal counselling. The legislation does so in a very specific way in Article 3 of Royal Decree 128/2018. That said, it is useful to indicate a few of the expressions most closely related with corruption prevention.

For example, official attestation includes the preparation of the topics to be included on the agenda of plenary sessions, the government council and any other collegiate body of the local government in which binding agreements are adopted.<sup>41</sup> Additionally, the clerk sends a copy or record of the minutes and agreements of the local government decision-making bodies to the general Spanish administration and that of the autonomous community. In a similar vein, the clerk is responsible for maintaining and safeguarding the register of interests of local government members.

Without any doubt, the traditional supervision task has centred on preparation of legal reports. In this duty, the wisdom inherent to this echelon of civil servants is called to most clearly express itself.<sup>42</sup> In short, the Law sets out four criteria to require the preliminary report: (1) request by the president or a third of the local government members; (2) specific provision of a legal or regulatory precept requiring it; (3) matters requiring a qualified majority for their approval; and (4) further, in a number of cases specifically described by the regulatory royal decree (among which are the approval or modification of ordinances and regulations and the approval, modification or repeal of agreements and management instruments on urban planning). In addition, regulations call for the requirement of reports presented in the *viva voce* in the sessions of collegiate bodies, legal counselling on authority visits and meetings and assisting the president in preparing the budget.<sup>43</sup>

<sup>37</sup> For more on this, see Martínez Marín (1999: 204).

<sup>38</sup> We will give more consideration to professional association matters in section 4, *infra*.

<sup>39</sup> The special application of the principles of equality and merit to temporary personnel selection have been explored in depth by Ramió (2016:160-161).

<sup>40</sup> Martínez Marín (1999: 169) states that the suppression of notices of illegality that came about with Royal Decree-Law of 5 January 1981 made it possible to keep this aspect out of the debate on unconstitutional supervision of local governments.

<sup>41</sup> Although it is not their normal area of activity, and local government clerks have sufficient formal mechanisms to take action in case allegedly illegal activities are detected (including, if necessary, filing a report with the Prosecutor's Office), it could be useful in the future to have recourse to whistle-blower protection laws, now in development at the European and Spanish levels. The presence of the local government clerk in so many formalities within procedures often provides them with a overarching view of how their municipality operates. For more on this, see Pérez Monguió (2019).

<sup>42</sup> As can be imagined, this is no easy job, especially in light of our legal framework's chaotic situation. With respect to this, it could be useful to consult Chacón's classic work and especially the considerations contained in its prologue (Chacón, 1983: 7-9).

<sup>43</sup> Despite its length, we believe it appropriate to transcribe the full text of Art. 3.3 of Royal Decree 128/2018, on the extent of the legal counselling mission:

The local government clerk's legal report, as its name indicates, originates in an inexorable limitation: local government clerks do not investigate the facts; rather, they receive them and from then on, indicate the applicable legislation. In their case, the legal maxim "da mihi factum, dabo tibi ius" (give me the facts, and I will give you the law) would be fully applicable. This is a relevant qualification. For example, in the case of land appraisals, which local government clerks are not qualified to supervise (except for any formal defects in the calculation or any missing documents) and that give rise to many procedural misunderstandings. In this area, Capdeferro (2019) gave a number of indicators that could serve as warning signs in cases of municipal planning corruption. For example, pure and simple omission, ambiguity, contradiction with other reports by the same author, a change in the pattern of report issuance or a change in the subject issuing them (for example, the criteria normally followed change and, pursuant to the law, reports are no longer requested from the local government clerk in a certain area), unusual expediency, and the writing of a report despite the presence of a conflict of interests.

### 3.2.3 Organisational problems

Until now we have given a formal view of local government clerks' duties, and the effects that their supervision could have on potential situations of corruption. But it is obvious that the legal provisions must be compared with the actual day-to-day of a local council. The main complaint of these civil servants is the lack of time to solve the multiple fronts on which their judgement is requested. If local government clerks are supervisors, it is likely that certain more sinister stakeholders will do everything in their power to keep

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"3. The duties of mandatory legal counselling shall include:

- a) The issue of preliminary reports on any matter for which they are ordered by the President of the local government, or when a third of the government's members so requests it, with sufficient time prior to the celebration of the session in which the relevant matter is to be discussed. Said reports must indicate the legislation applicable in each scenario, and its suitability to the agreements under consideration.
- b) The issue of preliminary reports whenever there is a legal or regulatory precept so requiring it.
- c) The issue of preliminary reports in the case of matters whose approval requires an absolute majority of the legal number of local government members or any other qualified majority.
- d) Preliminary reports shall be issued in any of the following scenarios:
  1. Approval or modification of governing ordinances, regulations and statutes of autonomous agencies, corporate entities, foundations, associations, consortia or other public agencies associated with the local government.
  2. Adoption of agreements for the exercise of the actions necessary for the defence of local government's rights and property, as well as ruling on investigation proceedings regarding the situation of the rights and properties said governments are presumed to own, if no record of ownership exists, in the effort to determine their rightful owner.
  3. Ex-officio review procedures on local government actions, except for those belonging to the realm of tax administration.
  4. Resolution of administrative appeals when, the nature of the matters makes this necessary, except when they are lodged within processed cases regarding violations of local ordinances, traffic and road safety violations, or if they are appeals against tax administration actions.
  5. When any of the notices or challenges set forth in Articles 65 to 67 of Law 7/1985 of 2 April, regulating the Local Government Framework are filed against acts of the local government.
  6. Approval or modification of lists of job posts and personnel catalogues.
  7. Approval, modification or repeal of urban planning agreements and instruments.
- e) Inform during sessions of collegiate bodies that they attend, and whenever expressly summoned to do so by the presiding officer, on legal aspects of the matter under discussion, with the aim of cooperating in the legal correctness of any decision to be made. If in the debate there has arisen any new matter whose legality could be called into question, the local government clerk may ask the president to be allowed to take the floor in order to act as legal counsel to the local government.
- f) Accompany the President or other local government members for the signing of deeds, and should they request it, their visits to authorities or attendance at meetings, to provide legal counsel.
- g) Assist the local government President, and the Comptroller, in preparing the budget, for procedural and formal, not material, purposes.
- h) Issue reports when so required by sector legislation."

those clerks from informing on certain activities. But if seen in a more natural, realistic light, the truth is that municipal governments logically do not overlook the presence of a civil servant who, as is known, has special qualifications (which is why they are qualified). In fact, it has been noted that, the larger the local government, the more important the official attestation and legal counselling duties are. The smaller they are, the more management tasks take predominance over the former.<sup>44</sup> Here there originates the problem of how they organise their work and the possibility for them to benefit from a support structure.

The regulatory royal decree takes certain steps to facilitate clerks' daily work. For example, Article 3.4 of the regulatory royal decree stipulates that the "issuance of the local government clerk's report may consist of a note of compliance with regard to the report issued by the local council's services, and that form part of the case file as legal reports".

In the same manner, Article 2 of the same royal decree states that the local government clerk has the authority over the services performed for the duties assigned to them, without prejudice to the powers of the government bodies in organisational matters. Article 15 even allows for the possibility of local governments creating other job posts reserved to qualified civil servants that have duties of immediate cooperation and support for the local government clerk.

Last, it must be stated that it would not make sense for the local government clerk to be a solo artist in the fight for the respect of legality and transparency. Their work can only be understood, as indicated in the legislation and doctrine, inside a system of integrity with an interdisciplinary, multidimensional nature.

#### **4 Independence thanks to legal mechanisms and the cohesion and defensive action of members of the civil service group**

Thus far, we have focused on the training of the local government clerk as a prior element, and within their specific activity, as a means of exploring their role as watchdogs against corruption. One of their key assets is obviously their status as civil servants, and the protection the legal framework provides for them as such. Nonetheless, it is a special statute, in which a number of administrations (specifically, local, autonomous, and general Spanish) must cooperate. In fact, for the past 40 years the regulatory history of the body of local government clerks has been shaped by the patrimonial appropriation or fight for the control of job post provision by the three administrations in dispute.<sup>45</sup> Every legislative change rebalances the managing roles of the three actors. Although this often generates distortion and doubt, it may also have a healthy effect in reinforcing the independence of these civil servants. It could be considered a peculiar form of checks and balances that make an opportunity out of the problems derived from the complex coordination of the three levels.

All that has been said is rendered concrete in the disciplinary arrangements (regulated in Article 61 and following of Royal Decree 128/2018). In it, the local government, autonomous community and MHFP divvy up the powers to open proceedings and impose penalties (basically, with qualifications, along the same tripartite lines, with minor violations under the authority of the local government, serious offences under that of the autonomous community, and very serious offences, the Spanish state administration). It is true, however, that local governments' authority on this point has come under criticism at times, as from a supervision standpoint, the watched would be qualified to punish the watchman.<sup>46</sup>

Yet for the local government clerks as a group, and in general for clerks with national qualification, independence and respect for their work have often been achieved through the strength of their associations. Though it was once mandatory for them to belong to their professional association, it is now voluntary. But qualified civil servants have made use of this through the channels now identified in Royal Decree 353/2011, of 11 March, approving the General Statutes for the Associative Organisation of Clerks, Comptrollers and Treasurers of the Local Administration. The work of the Official Association of Clerks, Comptrollers and Treasurers of the Local Administration (COSITAL) has been truly active in advocacy for the profession in

44 (Martínez Marín, 1999: 211).

45 This is the central thesis of Martínez Marín (1999).

46 According to the survey highlighted by Capdeferro (2016: 160-161).



years of constant regulatory change. Special note must be taken of the Code of Professional Ethics approved at the 6th COSITAL Assembly, held in Salamanca from 12 to 14 May 2005. This is a fore-running document within a context of progressive advancement for these codes in Spain.<sup>47</sup>

## 5 Final considerations

We began this article by exploring the local government clerks' adequacy as institutional mechanism suited to the fight against corruption. Their positive role has been highlighted by specialists, but we have reviewed their governing system to study its main shortcomings and potential.

To begin with, national qualification ensures the presence of high-quality civil servants in municipalities. This notwithstanding, the specific provision of reserved job postings shows a number of fissures that call into question the favourable origins that have been referred to: the relevant presence of free appointment (despite the supervisory role still taken by these civil servants), differentiated territorial distribution, abuse of the "temporary civil servant formula", etc. On another note, the local government clerk is not an omniscient authority on local management or the preparation of the local government's decisions. To the contrary, the regulations assign specific, concrete duties to them; duties that are fragmentary with respect to the whole of local government action. These are not, however, simple tasks and, further, their prestige and preparation may justify, either *ex lege* or *de facto*, an augmented management role.

In the face of an often-incoherent regulatory landscape, on occasion the simple elimination of this group has been proposed. This is not for reasons of constitutionality (it is not a supervision that impinges on local autonomy) but for operational reasons, and the simplification of the institutional framework (in other words, that each Administration should simply recruit their personnel pursuant to legal requisites). Although it is true that the presence of three administrations at different times in the professional career of these civil servants is disruptive, it can be positively applied for effective independence. On another note, the peculiar associational vitality of official associations of local government clerks, comptrollers and treasurers has facilitated the defence of the civil servants' statute at times of rapid regulatory change, and has even brought about interesting innovations (for example, the Code of Professional Ethics, approved in 2005).

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<sup>47</sup> On the role of codes of ethics and behaviour in the urban planning sector, see Capdeferro (2016: 351ff.).



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