

External control versus internal and administrative control: analysis of the supposed conflict of competency between the Nacional Council of Justice (CNJ) and the Federal Accounts Office (TCU)



Angerico Alves Barroso Filho

Federal Auditor of External Control of the TCU since 2004, lawyer and accountant, MBA in Corporate Management in Public Administration, Post-graduate degree in Law, State and Constitution, LL.M from Uniceub.

ABSTRACT

The purpose of this article is to discuss the conflict between the decisions of the CNJ and the TCU based on the main arguments used by each agency to defend the supremacy of the former over the later. The conflict has been characterized based on the premise that these decisions are of distinct natures, one derived from internal and administrative control, and the other, from external control. The debate has gained relevance, since the Council, when attributing to itself the title of a specific agency of control of the Judiciary, has ventured in the competency of breaching and ordering breach of the decisions of the Court of Accounts, which privilege – not prerogative – is not, in principle, supported by the Federal Constitution of 1988.

Keywords: CNJ; TCU; conflict of decisions.

1. INTRODUCTION

According to Luiz Armando Badin (2009, p. 1) Constitutional Amendment n. 45, of December 30, 2004, announced one of the most important aspects of Constitutional Reform of the Brazilian Judiciary: the creation of the National Council of Justice (CNJ). The measure has intended, among other, to overcome the hermetic nature that has undermined the public reputation of the institutions of Justice. The Council represented the idea of a more transparent, expedite, and



responsible Judiciary, notes Badin (2009). Created with the mission of ‘control of the administrative and financial performance of the Judiciary’ (Paragraph 4, Article 103-B of the Federal Constitution), the duties of the CNJ are to certify that Article 37 is complied with and to assess the legality of administrative acts practiced by members or agencies of the Judiciary, without prejudice to the competency of the Federal Court of Accounts – TCU (Item II of the aforementioned Paragraph 4).

The Legislative Branch shall exercise, with the aid of the TCU, pursuant to Article 70 and 71 of the Federal Constitution, the external control of Public Administration, and is further entitled to stay defective acts and contracts. There are situations in this context where decisions of the CNJ may conflict with those of the TCU, and vice versa, when their purpose is the invalidation or suspension of acts and administrative contracts, since both are entitled to the competency of controlling the financial and administrative performance of the agencies of the Judiciary. According to the constitutional wording, the performance of the CNJ should take place without prejudice to the competencies of the TCU. In this sense, how is the conflict between the decisions of both agencies to be solved? What is the position that should prevail in the case of divergent statements?

The aim of this article is confined to the analysis of the competencies of the agencies with regard to that which may cause the conflict of decisions. That is, the CNJ has, besides the control of administrative performance, among

other duties of correction and discipline, competencies that do not concur with those developed by TCU, and which are therefore not comprised within the focus hereof.

2. THE ADMINISTRATIVE CONTROLS, EXTERNAL AND INTERNAL, AND THE RESPECTIVE COMPETENCIES IN THE 1988 FEDERAL CONSTITUTION (CF/1988)

This topic commences with certain concepts presented objectively, and which are relevant for the development of the work: one is the control, which, according to Hely Lopes Meirelles (2009, pg. 671), ‘is the faculty of supervision, guidance and correction that a Branch, agency or authority exercises over the functional conduct of another’. Maria Sylvia Zanella Di Pietro (2014, pg. 809) defines ‘the control of Public Administration as the power of supervision and correction exercised upon it by the agencies of the Judiciary, Legislative and Executive Branches’, seeking the adherence of their practice to the legal system.

It is clear that both of the concepts developed by the authors focus on the aspects of surveillance and correction, as well as, to some extent, on hierarchical action of some agencies over others, and of one Branch over the other. Di Pietro mentions the existence of several criteria for the classification of control; one of them highlights the agency that exercises it, thus reference to administrative, legislative, and judicial is made. Meirelles (2009, pg. 676) discusses the administrative control, which is the control

of legality and merit – that the Public Administration exercises over its own activities, aiming at compliance with laws, in addition to criteria of the need for service and technical and economic requirements. It derives from the duty-power of self-control (*autotutela*), notes the author.

Di Pietro (2014, pg. 811) makes a similar description of administrative control, characterizing it as being of the internal type; and that is derived from the power of self-control (*autotutela*) that authorizes Public Administration to revise their own acts, as per the Supreme Federal Court (STF) Precedents 346 and 473, in line with Article 53 of Law no. 9,784, of January 29, 1999, which sets forth provisions in the scope of the Federal Administration.

Legislative control is exercised by the Legislative Branch within the limits defined in the 1988 Federal Constitution (CF/1988), addressing aspects of legality and public convenience, according to Meirelles (2009, pg. 708-709). Di Pietro (2014, pg. 823-825) characterizes it in two types: political, where decisions of the Public Administration are assessed including in relation to convenience and opportunity; and financial, where it is noticeable that the main elements to be controlled are the aspects of legality, legitimacy, cost-effectiveness, functional fidelity and fidelity to results of work programs.

Judicial control, in its turn, is the one exercised by agencies of the Judiciary over administrative acts practiced by Public Administration of all the branches, in accordance with Meirelles (2009, pg. 715). It is derived from the Rule of Law and is grounded, in Brazilian law, on the monopoly of the jurisdictional function (one jurisdiction) by the Judiciary, supplements Di Pietro (2014, p. 827).

The external control, according to Meirelles (2009, pg. 673-674), is characterized by actions of a Branch or independent constitutional agency over the administrative actions of other branches that are agents of the controlled act. In its turn, internal control is materialized in surveillance action directed to the practices of the Branch or Administration to which it belongs. It is contextualized within the structure of the monitored agency itself, and is the specialization of the administrative control, notes Evandro Martins Guerra (2005, pg. 93 and 262).

The foregoing concepts, which focus on the aim of the work, are thus illustrated: 1) administrative control occurs, for example, when the Federal Supreme Court (STF) and the Office of the General Counsel to the Federal Government (AGU) decide to annul administrative acts where benefits were granted to their respective servants, because they are defective; 2) The external control, or legislative control is exercised by the National Congress (CN), with the aid of the TCU, on the acts of the Executive Branch, and it is also the supervision carried out by the Court of Accounts on agencies of the Judiciary; 3) The internal control, in its turn, takes place by means of the audit carried out by the Federal Department of Internal Control on the Ministry of Finance; or when the CNJ performs inspections in another agency of the Judiciary. On scrutinizing CF/1988, there are several references made to the terms ‘internal control’ and ‘external control’, but not directly to the whole of the expression ‘administrative control’.

The term ‘external control’ is used to address two distinct themes, one with the content of account-





ing, financial, administrative supervision, under the responsibility of the legislative branch with the aid of specialized agencies of accounts; another in the sense of control over the police activity, under the responsibility of the Prosecutor's Office. The former is the meaning that is of interest to this work.

In Article 31, Paragraph 1, the wording sets forth that the supervision in the Municipality shall be exercised by the Legislative Branch, through external control, and by the internal control system of the Municipal Executive Branch¹. In the aforesaid paragraph, it has been established that this external control becomes effective with the aid of the Courts of Accounts of the States or the Councils of the Courts of Accounts of the Municipalities. Further, Articles 70 and 71 of CF/1988 mention, for the purpose of supervision within the Federal Government, the system of external control and internal control of each Branch². In the terms of the CF/1988, the National Congress conducts the external control in the strict sense, which is materialized with the aid of specialized agencies, such as the Courts and Councils of Accounts. In the broadest sense, the Judiciary also exerts external control, according to Guerra (2005, pg. 93).

According to Article 71, main paragraph, of CF/1988, the direct and indirect supervision of the Federal Government and of the entities of the administration, as to the legality, legitimacy, cost-effectiveness, implementation of subsidies and waiver of revenue shall be carried out by the National Congress, through external control, and by the system of internal control of each Branch.

Among the various duties of the Courts of Accounts in exercising external control, as provided for in

Article 71 of CF/1988 (note: as ancillary agency of the CN), we can highlight Items IX and X, which legitimize respectively the Courts of Accounts to 'sign the deadline for the agency or entity to adopt the measures necessary for the exact fulfilment of the law, should illegality be found' and to 'stay, if not met within the deadline, the execution of the challenged act, giving notice of the decision to the Chamber of Deputies and to the Senate'. These duties are further provided under Law n. 8,443, of July 16, 1992 (TCU Organic Law).

In Article 74, Item 4 and Paragraph 1 of CF/1988, the purpose of the internal control system to be maintained by each Branch has been outlined, among which, to support the external control in the exercise of its institutional mission, as well as to give notice to the TCU about any irregularity or illegality. For the system of internal control, CF/1988 has reserved in Item II, Article 74, among others, the competency to 'evidence the legality and assess the results, as to the efficacy and efficiency of budget, financial and assets management in agencies and entities of the Federal Administration, as well as investment of public funds by entities governed by private law'.

In the scope of the Executive Branch, according to Article 22 of Law n. 10,180, of February 6, 2001, the Federal Department of Internal Control and the National Audit Department of the Public Health System (Denasus) are comprised as central agencies within above-mentioned system; and besides these, the sectoral agencies. By operation of Article 75, of CF/1988 shall apply, as the case may be, the constitutional rules of the Federal Government referent to organization, composition and supervision of the Courts of Accounts

of the States and the Federal District, and of the Courts and Councils of Accounts of the Municipalities.

On the act of the transitional provisions of CF/1988³, in Paragraph 2, Article 16, the terms ‘external control’ are mentioned to address the accounting, financial, budgetary and assets supervision of the Federal District, which would be carried out by the Federal Senate, assisted by the Federal Court of Accounts of the Federal District, until the Legislative Chamber were installed. When referring to the duties of the CNJ, the CF/1988, in its Paragraph 4 and Item II of Article 103-B, qualifies it as of control of the administrative and financial performance of the Judiciary, which means to say that it is within the scope of the internal and administrative control. In this sense, the STF, on judging the Direct Action of Unconstitutionality (ADI) n. 3,367, defines it as typical internal control. In addition, it has been granted competency to comply with Article 37 and to assess the legality of the administrative acts practiced within the context of the aforesaid Branch.

The same article also qualifies it as of control of the financial and administrative performance of the Judiciary. In addition, competency is granted for it to comply with Article 37 and to assess the legality of the administrative acts practiced within the context of the aforesaid branch. In this sense, the STF, where judging the Direct Action of Unconstitutionality (ADI) n. 3,367, defines it as typical internal control. It can therefore be affirmed that it is comprised within the internal and administrative control. It should be noted, moreover, that, by means of Article 1 of Resolution n. 86, of September 8, 2009, the CNJ determined that the Courts within the Judiciary should create units or nuclei of internal control, regulating Article 74 of the Federal Constitution (CF).

3. CONFLICTS BETWEEN THE CNJ AND THE TCU DECISIONS

3.1 THE SUPPOSED CONFLICT OF COMPETENCY AS PER THE UNDERSTANDING OF THE TCU: PREVALENCE OF ITS DECISIONS

The event of conflict between decisions of the TCU and the CNJ has been verified with certain frequency in recent years, which issue has been debated at the Court of Accounts. In this sense, the vote that entailed Appellate Decision n. 8,890/2011-TCU- 1st Chamber⁴, reported by Justice Augusto Nardes, is the most referenced when dealing with this issue, where there is a clear defence of the prevalence of the Court’s decisions.

The main arguments used by the aforesaid justice to defend the prevalence of the TCU decisions to the detriment of those of the CNJ involve the following considerations:

1) the decisions of the TCU, in the exercise of external control, are binding upon all the administrative agencies and all the spheres of the Branches, while those of the CNJ are only binding upon the agencies under the jurisdiction at internal level of the Judiciary, save the STF;

2) to deny compliance with the determinations of the TCU, in order to follow those of the CNJ, renders meaningless the competencies derived from the National Congress, to whom the TCU is assistant in the exercise of external control;

3) The Nacional Council of Justice (CNJ) was created as a top agency of the Judiciary, along with other agencies of the internal control system of the three branches – whose mission is also to provide support to the external control -, for the exercise of control of the administrative and financial performance, though without prejudice to the TCU’s competencies;

4) ‘only by means of jurisdiction could the Administration [...] seek protection for their possible claim to deny compliance with the decisions of this Court of Accounts’, because, among other aspects, the TCU has, as stipulated in the CF/1988, similarities to the Brazilian Courts;

5) there are no divergencies (of the TCU) with the Nacional Council of the Prosecutor’s Office (CNMP), also created by Constitutional Amendment (EC) n. 45, of December 30, 2004, together with the Nacional Council of Justice (CNJ), in the sense of the former Council being entitled to disregard decisions of the accounts agency;

6) The CF/1988 assigned to the TCU competency to perform audits in administrative units of the three branches of the Federal Government (Item IV of Article 71);

7) the TCU can further sign a deadline for the correction of illegalities or to stay the execution of an act in the event of breach against a determination;

h) the TCU Organic Law reflects the constitutional competencies that have been conferred to the agency, highlighting the possibility of applying sanctions, which comprise from award in debt to designation of temporary freezing of assets;

8) the provisions of Item XVII and Paragraph 2 of Article 1 of Law n. 8,443, of July 16, 1992, confer to the TCU 'powers to assess and decide on inquiries regarding the application of the law on matters within its competency, which has a normative character and is binding upon all the administrative agencies of all the Branches of the Federal Government, included therein, obviously, the CNJ'.

The premise that summarizes the arguments is that the control of Public Administration is a typical activity under the responsibility of the National Congress (CN), exercised with the assistance of the TCU, as a consequence of the principle of separation of the branches and of the reciprocal control that must exist among them; which attribution cannot be ruled out in favour of the performance of internal and administrative control (or specific control). Moreover, the Court of Accounts has all the constitutional and legal mechanisms that would enable the exercise of its competencies.

3.2 THE SUPPOSED CONFLICT OF COMPETENCY IN THE UNDERSTANDING OF THE CNJ: PREVALENCE OF ITS DECISIONS

It can be noted, in several judgments, that the CNJ has established that its determinations shall prevail over those of the TCU⁵ in the event of contradiction between them. This position has its starting point in the appreciation of the Request for Measures (PP) n. 445⁶, a decision that guides the Council in the supposed conflict of competencies with the Court of Accounts.

The above-mentioned decision of the CNJ full bench, of July 7, 2006, reported by councillor Douglas Rodrigues, is articulated on two essential grounds: 1) On the inexistence of any hierarchy between the CNJ and the TCU – hence the impossibility of reciprocal imposition of decisions that are a priori contradictory -; 2) The fact that the Council is the top agency of the internal and administrative control of the Brazilian judicial apparatus, including in the exercise of administrative self-control (*autotutela*). Rapporteur Douglas Monteiro raises in his vote a fundamental question for the outcome of the supposed conflict of competencies

between the agencies: What would be the meaning of the exception expressed in Item II, Paragraph 4, of Article 103-B of the CF/1988, where it is provided that no loss to the competencies of the TCU may be entailed by the performance of the CNJ?

The answer to the query is structured, according to the councillor, on the understanding that the CNJ's position must prevail to the detriment of the TCU, with grounds on the following premise:

1) The CNJ features as an agency of internal control of the Judiciary, and the TCU, of external control, i.e., they have distinct political domains and institutional purposes; 'there is no way of considering them as competitors or self-excluding, nor hierarchically linked, in the scope of their constitutional functions';

2) they have a similar hierarchical position in the spheres of the branches within which they are comprised; among other aspects, it is noteworthy that the STF is the natural court for judicial queries against the decisions adopted by them; the members of the TCU and the CNJ are equalled to Justices of the STJ;

3) the existence of conflicts between decisions of the CNJ and TCU does not reveal that they are insoluble; if this were so, it would denote 'severe and offensive systemic contradiction of the fundamental concept of legal security', which would contribute to the dissemination of legal uncertainty in the administration of the Judiciary;

4) according to the STF, the TCU⁷ would not have competency to impose the rectification of administrative acts upon the supervised agencies, which only can be done by the Administration according to STF Precedent 473, three precedents⁸ cited;

5) from the refusal of the agency to comply with the resolution of the TCU two consequences would emerge, namely: (i) the possibility, on the part of the interested party, of seeking support in the Judiciary to reverse an unfavourable decision of the TCU against it; (ii) the Court of Accounts could, in its turn, sanction the administrator on grounds of violation of the decision;

6) The STF granted effectiveness to independence and harmony between the Branches in view



of the supervision competencies of the National Congress (CN). The possibility of administrative control of decisions of the CNJ the TCU, which was not set forth in the constitutional text, ‘would represent clear and unacceptable fracture of the essential premises of harmony and independence among the branches’;

7) upon complying with the decisions issued by the CNJ, the administrative authorities of the Judiciary do not submit to the sphere of control of the TCU;

8) the CNJ, as hierarchically superior internal control agency, should entail the legal-logical effect of displacement of the jurisdiction competency for examining the matter;

Other decisions have been adopted with regard to the position established on PP n 445. The vote of councillor Antonio Umberto de Souza Junior, on assessing PP n. 200810000020521, must be noted. In his analysis, the councillor believes that the Federal Constitution brought unique performance spaces for the TCU, as for example, judging the accounts of the Judiciary’s administrators and assessing acts of personnel, and, for the CNJ, removing and reviewing administrative acts and applying disciplinary sanctions, neither of which being entitled to intervene in each other’s realm.

He notes that ‘the control of administrative actions exercised by the TCU is umbilically linked to the

control of public spending’, which conclusion has been reached based on the legal instruments it has available for asserting its competencies, such as signing a deadline for those responsible to adopt measures that are needed – but cannot remove or review an administrative act -, declaring a bidder’s lack of good standing, applying fines and imputing debts. He makes clear, however, that there is a limited space of concurrence of competencies that relate to the fields of staying acts and contracts, and examining the legality of staff admission acts. In these two realms, he believes that ‘conflicts of duties should be harmonized by the criterion of prevention, that is, by the validity of the statement on merits’.

Further noteworthy are the considerations councillor Marcelo Neves’ vote, in Inquiry n. 007136-29.2010.2.00.0000: acknowledges the existence of competition between the competencies of the CNJ and the TCU for supervising the financial and administrative performance of the Judiciary; though neither in the Constitution nor the infra-constitutional legal system does there exist, ‘clear limitation regarding this joint action that will objectively solve any deadlock that may arise, in the case of discrepant decisions derived from both agencies’. In this sense, the councillor believes that the criterion of specialization is the most appropriate to define who should have the last word when it comes to supervising the agencies of the Judiciary, with exception of the STF.

The central elements, used by the councillors to defend the primacy of the CNJ are grounded on the absence

of hierarchy between the Council and the TCU, and on the specialization of the agency (highest control agency of the Judiciary) in relation to the constitutional duties of the National Congress (CN) and the Court of Accounts. At the summit of this supremacy would be the administration's exercise of the power of self-control (*autotutela*).

3.3 THE UNDERSTANDING OF THE STF ON THE ROLE OF THE CNJ

On the trial of the Direct Action of Unconstitutionality (ADI) n. 3,367, proposed by the Brazilian Justices Association (*Associação dos Magistrados Brasileiros* – [AMB]) against the provisions of Constitutional Amendment (EC) n. 45, of December 30, 2004, the STF established constitutional frameworks for the CNJ's performance, which is the control of financial and administrative performance of the Judiciary and the fulfilment of the functional duties of the justices.

The AMB, when dealing with ADI n. 3,367, sought a declaration of unconstitutionality of the provisions of the EC n. 45, of December 30, 2004, which instituted the CNJ, based on the argument that the creation of the agency would breach the principle of separation of the branches – insofar as they would put the administrative, financial and budgetary autonomy of the courts at stake -, and likewise the federative covenant, upon submitting the Judiciary of the States to the supervision of the council within the scope of the Federal Government.

At various moments of the vote, Justice Cezar Peluso, rapporteur of the ADI n. 3367, puts forward considerations about the constitutional role of the CNJ, arguing that the creation of the agency does not offend the separation of the powers of the branches. In this aspect, he insinuates that the control exercised by CNJ is of intermediate level when compared to the authentic external control of budgetary, financial and accounting nature exercised by the CN, through the Federal Court of Accounts⁹. Further, when referring to the attribution of control of administrative and financial performance, the Justice emphasizes that this competency of the CNJ does not hinder the Judiciary's self-government. The agency is responsible for 'a top political role in relation to the refinement of the Judiciary's self-government, whose scattered bureaucratic structures preclude the outlining of a nationwide institutional and political strategy'.

In another excerpt of his vote, Justice Cezar Peluso affirms that the competency of the CNJ for reviewing the administrative acts of the lower courts, which



he considers as a power of internal control of constitutionality and legitimacy, does not conflict with the competency of external and posterior control attributed to the CN and to the Courts of Accounts, since the exercise of this power will be submitted to the process of refinement upon review of upper courts. His vote, which was forwarded for decision, was approved by majority. The difference, however, was restricted to the composition of the CNJ, when EC 45, of December 30, 2004, provided for members of other branches, entities or agencies that do not belong to the Judiciary. Otherwise, the other justices agreed upon the nature of internal administrative control of the CNJ.

3.4 CHARACTERIZATION OF CONFLICT OF DECISIONS BETWEEN THE CNJ AND THE TCU

It is no complex task to characterize the clash between the CNJ and the TCU decisions. In order to render the task objective the decisions of the former agency taken by the courts of the Judiciary in inquiry processes were elected, regarding compliance with decisions of the TCU that clashed with those of the Council.

In an inquiry¹⁰ formulated by the courts of the Judiciary, the full bench of the CNJ responds, in theory, to the questions on the application of legal and statutory provisions within the competency of the Council; this answer will have a general rulemaking character if approved by an absolute majority of the full bench of the CNJ. In a quick search at the website of the agency with the terms 'inquiry', 'TCU' and 'conflict', it was possible to identify four Requests for Measures (PP) conveying CNJ queries:

Table 1:

Inquiries formulated the CNJ by agencies of the Judiciary

PP n.	Subject
20081000027795 ¹¹	Divergence between the determination of the Federal Court of Accounts (TCU Appellate Decision n. 2981/2008 – 2nd Chamber) and the understanding signed by the National Council of Justice (PP n. 22694) regarding the work hours of the servants occupying the post of Judicial Analyst – Speciality: Medicine.
0004490-12.2011.2.00.0000 ¹²	Divergence between decisions of the CNJ and the TCU, on the correct application of the constitutional remuneration cap, in the event of amounts received from different branches and federated states. Decision: The conflict was not characterized.
0006065-55.2011.2.00.0000 ¹³	Divergence on payment to the justices of the bonus named VPNI GEL, authorised by the CNJ; and considered illegal, by the TCU, through Appellate Decision n. 8890/2011 of the 1st Chamber.
0007136-29.2010.2.00.0000 ¹⁴	Possibility of redistribution of servants in the scope of Regional Appellate Labour Courts. Decision of the TCU (Appellate Decision n. 2366/2010 – Full Bench) bans the removal of servants with the corresponding redistribution of vacant positions. The CNJ confirms this understanding.

Out of the four mentioned PPs, the CNJ ruled out the existence of divergent position with the TCU in two of them (in the second and fourth inquiries above). In the other two (first and third), it was recorded that the position of Council must prevail, in view of the constitutional authority to exercise specifically the control of the financial and administrative performance of the Judiciary, which determinations should be accepted to the detriment of those of the TCU.

It can be noted that the CNJ uses the speciality – it is special, internal, in relation to the external – as main argument to defend a higher position in the conflict of resolutions with the TCU. A fact that calls attention is that in both the decisions where the CNJ released the agencies from complying with the resolutions of the TCU, the Council issued an understanding, in the sense of granting or extending rights, in the opposite direction of the position of the Court of Accounts, whose tendency was to restrict or repeal.

3.5 THE DUTIES OF THE CNJ AND THE RESPECT IN RELATION TO THE DECISIONS OF THE TCU: CHARACTERIZATION OF THE PREJUDICE AND THE PROPOSAL OF ANALYSIS

It has been demonstrated in previous paragraphs that the CNJ has been ruling out the competency of the TCU to assess the legality and legitimacy of acts of agencies of the Judiciary, as well as to determine the correction of illegalities. The conclusion cannot be otherwise once the CNJ, when summoned to manifest, by the courts of the Judiciary, responds in the sense that its decisions must be met to the detriment of those issued by the TCU, if they have distinct or even opposite

courses of action. Moreover, in the vote which entailed the decision in the above-mentioned PP n. 445, councillor Douglas Ribeiro records that the Judiciary's administrators, who follow the guidelines established by the CNJ, are not subject to the sphere of control of the TCU.

In order to promote a proper analysis on the matter, the path to be followed starts with the confrontation between the main arguments used by each of the agencies to defend their supremacy in the conflict of decisions. There is no intention of analysing all of them, but only those that are substantial in order to sustain one position or the other. In this sense, the discussion will be directed based on two queries below.

First, in view of the CNJ considering itself as an agency of internal control, which affirmation, supported by the understanding of the STF in ADI n. 3,367; what kind of internal control is this, in the constitutional context, that can rule out decisions of external control to which it should, a priori, provide support? Secondly, are the speciality and the absence of hierarchy to which the CNJ refers legal arguments that are sufficient to rule out the powers of external control, which are grounded on the principle of separation of the powers of the branches, the state functions acting as a system of brakes and counterweights?

The probable consequence of endowing the CNJ with powers to rule out the decisions of the National Congress (CN) and of the TCU follow below.

3.5.1 The nature of internal control exercised by the CNJ and the power of self-control (*autotutela*)

As previously reported, EC n 45, of December 30, 2004 has attributed to the CNJ the control of the financial and administrative performance of the Judiciary,



which the STF named as internal control (ADI n. 3,367-DF). In this sense, by express constitutional provision, it has powers to assess the legality of administrative acts and even invalidate them, without prejudice to the competencies of the TCU.

Albeit top agency of the administrative control of the Judiciary, it is important to note that the CNJ is substantially an agency of internal control, as established by the STF. In this sense, for comparative purpose, which treatment is given by the internal control system of the Executive Branch to the decisions of the TCU?

Before objectively dealing with these issues, it is important to highlight that despite the constitutional competency to evidence the legality and assess the results, as to the efficacy and efficiency of budget, financial and assets management of agencies and entities of the Federal Administration, in that which refers to the Executive and Legislative Branches, authority to give orders has not been granted to the internal control system, nor can such system breach TCU decisions, moreover as a result of the express provision that they should give support to the external control on exercising the institutional mission.

Guerra clarifies the issue. He asserts that for the fact of composing the Public Administration, the internal control itself shall be subject to the external control's supervision, for analysis of the 'system, general survey, verification of compliance with the governing principles of control' (2005, pg. 263).

It must be noted that, in the scope of Executive and Legislative Branches, and in the relationship with the Public Administrator, the internal control can only

suggest the adoption of measures, recommending the correction of directions, the practice or nonpractice of acts, without having powers to annul administrative acts or contracts practiced/signed by the manager. It is certain that, in the event of breach of the formulated recommendation, and, subsequently, once loss caused to the national treasury has been characterized, on grounds of illegal conduct, this may result in the filing for special accounts rendering, as well as administrative proceedings for assessment of discipline.

Again, the CNJ, is an agency of internal control, as characterized by Clémerson Merlin Cléve and Bruno Meneses Lorenzetto¹¹, and, as such, to it should apply the constitutional rules on the internal control system. It is also noteworthy that to both – the Council and the Federal Secretariat of Internal Control, within, for example, the Executive Branch, – the legality of the acts practiced in the context of their respective competency areas must be verified.

However, there is a fundamental difference, the CNJ can invalidate, in terms of the CF/1988, the defective acts that have been practiced, while the systems of internal control of the Executive and Legislative Branches can only make recommendation to managers. A crucial aspect, would this distinction be enough for the Council to issue orders for the other agencies of the Judiciary to breach the decisions of the TCU?

Note that the CNJ authorizes the violation of decisions of the TCU, using the supplementary argument that it has the power to directly invalidate the decisions of the agencies of the Judiciary, in the exercise of

self-control (*autotutela*), while the latter would not have this competency. It is the exercise of the so-called administrative control, to which Di Pietro and Meirelles refer, by means of which the Public Administration may revise their own acts, invalidating them, as the case may be.

There is, no doubt, misunderstanding in the interpretation of the Council, since the exercise of the power of self-control (*autotutela*), has always been the prerogative of the entire Public Administration to review their own acts. This, however, is no justification in order that, within the context of the Executive and Legislative Branches, the determinations of the TCU should not be fulfilled. Moreover, it must be made clear that the possibility of the CNJ invalidating acts, placing itself in the condition of a manager or co-manager, on publishing acts of management, reinforces, in fact, the need for submission of its decisions to external control.

It must be noted, in another sense, that the TCU is authorized by both CF/1988 and Law n. 8,443, of July 16, 1992, to sign a deadline for the agency or entity to adopt the necessary measures for the exact fulfilment of the law, if illegality be found, as well as to stay, if not complied with, the execution of a contested act. Thus, the power of self-control (*autotutela*), applicable the entire Public Administration, cannot be used as a joker in order to rule out the decision of the TCU when it conveys a determination to the Judiciary.

Finally, if the CNJ, as agency of internal control, has jurisdiction to rule out the decisions of the TCU, it is necessary to redefine the roles outlined in the CF/1988 for the system of control of Public Administration, which, until the creation of the above-mentioned Council, was

composed by the structures of the internal control system and by external control, and compliance is due, in the administrative scope, with the provisions established by the latter. This means that the power of the management of the Council, allied to the character of internal control, rather than rendering it immune, makes it more susceptible to the requirements of external control.

In summary, the CNJ is therefore a typical internal control agency, with an essential distinction; that is the possibility of invalidating the acts performed by other agencies of the Judiciary, which attributes to it a character of management or co-management agency. This distinction, however, does not attribute exceptional powers to have the TCU's decisions breached, on the contrary (again: the effect is diverse), because, if it were valid in general (should self-control [*autotutela*], suffice for such), it would authorize the entire Administration to breach the decisions of the Courts of Auditors, which, in practice, does not take place. Therefore, the disconnection of CNJ's understanding with the effective legal system is clear.

3.5.2 Speciality associated to the idea of the inexistence of hierarchy between CNJ and the TCU as opposed to the principle of separation of the powers of the branches

The criterion of speciality¹² is another central argument in the decisions of the CNJ to rule out the TCU's competency. In some votes it is affirmed that by reason of exercising the control, specifically, of the administrative and financial performance of the Judiciary,



the decisions of the Council shall have precedence over the Court of Accounts.

Used emphatically, the criterion of the CNJ's speciality is the backbone on confronting the decisions of the TCU. It assumes indisputable importance – the jewel of the favourable hermeneutics – the arguments used in the various votes formulated by councillors. Hence the opportunity of the following question: does the criterion effectively have enough force to counteract the picture of the duties of the CN – the TCU as ancillary agency -, as outlined in the CF/1988?

The criterion of speciality, along with the chronological and hierarchical order, is the rule used to solve contradictions on applying the rule, notes Rogerio Delatorre (2008, pg. 8). Such criterion, according to the author, enables the solution of the conflict in favour of the special rule, which rules out the general one. Since we are referring specifically to Item II, Paragraph 4, of Article 103-B of CF/1988 – which provides on the duties and powers of the Council, is it correct to affirm that such constitutional provisions, which establish the competencies of the CNJ are special in relation to the duties of the National Congress (CN) and of the TCU?

The expressions used in the vote of Deputy Ms Zulaiê Cobra, which entailed the approval of EC n. 45, of December 30, 2004, help to clarify the role idealised for the CNJ by the Legislative Branch. To such is attributed the superior directional function of the bench, besides ensuring compliance with the principles relating to the Public Administration, with correctional and disciplinary functions. No reference whatsoever has been made, in the entire vote, to the impact of the institution of the Council on the duties of the TCU, moreover since express protection has been established for the competencies of the Court of Accounts¹³.

Highlighting this issue even further: it can be noted, from the opinion of the aforesaid deputy, that the legislator did not at any time suggest the possibility of conflict between the duties of the CNJ and of the Legislative Branch by means of the TCU. The reason for this is that the role that each one should perform was clear, one as a directional, administrative, internal control agency; the other, exercising external control. The constitutional role of internal and external controls is unmistakable and has long since been outlined.

It must be noted that on the assumption that the CN is the holder of external control, the legislator has opted to limit the competencies of the CNJ in that which would cause prejudice to the exercise of the duties of the TCU, ancillary agency of the CN. This was



not by chance: it would make no sense to protect or limit the competencies of the CN in favour of an agency, albeit constitutional, from another Branch. This action would represent an attribution of exceptional force to the Judiciary, and not in accordance with the principle of separation of the powers of the branches, which is based on mutual subjection among themselves. In fact, if the legislator intended that the competencies of the National Congress (CN) and of the TCU should be minimized with the creation of the CNJ – which is actually taking place in practice – instead of being preserved they would have been restricted with express provisions.

Paulo Roberto Gouvêa Medina (2011, pg. 4-6) mentions the importance of the principle of separation of the powers of the branches, with the aim of ensuring the interdependence among them, which means the observation of boundaries between the territories reserved for each one's predominant performance of the functions they specialize in, hence the relevance of observing the criterion of functional-organic adequacy.¹⁴ For the author (2011, pg. 11), the principle of separation of the powers changed and became more flexible, with each branch – executive, legislative and judicial – extending its competencies, on performing roles that are not typically theirs. However, he recognizes that the essence of aforesaid principle remains unchanged, since it constitutes 'the cornerstone of a Constitution of the Rule of Law'.¹⁵ The statement is important to make clear that 'the excessive expansion of any of the Branches or constitutional institutions' goes against the effectiveness of the above-mentioned principle and does not harmonize with the Rule of Law.

José Joaquim Gomes Canotilho (2000, pg. 250) characterizes two dimensions of the principle of separation of the powers of the branches, which are complementary: the negative one, as a division, control and limit of power, which serves to protect the legal-subjective sphere of individuals, and to avoid concentration of power; the positive one, as ‘constitutionalization, order, and organization of power of the State, inclined towards decisions that are functionally efficient, and materially just’, constituting itself as a ‘relational scheme of competencies, tasks, functions, and responsibility of the constitutional agencies of sovereignty’.

Romeo Felipe Barcellar Filho and Daniel Wunder Hachen (2011, pg. 5-6) affirm that the separation of the branches in the contemporary constitutional State takes place along with interdependence and mutual subjection. Note that the exercise of statutory power by the CNJ should not overtake the law in the formal sense, hence the consideration that some of the published rules are unconstitutional, by advancing on the role of the legislator.

In the vote which entailed the decision in ADI n. 3,367, Justice Cezar Peluso ensures the elevated position of the principle of separation of the branches in the CF/1988. The state structure formulated by the members of the constitutional convention guaranteed independence in the exercise of typical functions, providing, in addition, ‘assignments, many of which of reciprocal control, and forming together [...] a true system of integration and cooperation, preordained as to ensure a dynamic balance between the agencies, in the benefit of the ultimate goal, which is the guarantee of freedom’. This political architecture constitutes, in accordance with said Justice, the natural expression of the principle of separation of the Branches.

Gilmar Ferreira Mendes and Paulo Gustavo Gonet Branco (2014, pg. 817) note that the tripartition of powers is one of the most invoked nuances in direct action of unconstitutionality when defending constitutional and infra-constitutional rules. They mention, among other cases, the judgment of the STF for the unconstitutionality of the creation of an agency in the Executive Branch, which purpose was ‘the function of dictating parameters and assessments of the functioning of justice’, reiterating that the mechanisms of reciprocal control, of brakes and counterweights are only legitimate if they correspond to the Constitutional provision.

The external control of the Public Administration, as a typical activity of the CN, exercised with the support of the TCU, should not succumb in view of the alleged absence of hierarchy among the agencies, or by reason

of the implementation of the CNJ criterion of specialty: the principle of separation of the powers is a pillar of the rule of law and, in this sense, any interpretation on the competencies of the above-mentioned Council must take place respecting the role, functions, the functional organizational system established in the Constitution itself¹⁶. In the figures below, one can note the scope of the competencies of the National Congress (CN) and of the TCU, before and after the creation of the CNJ, with the publication of EC n. 45, of December 30, 2004, on applying the interpretative perspective of the Council:

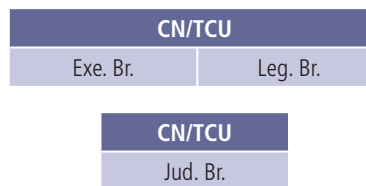
Figure 1:

Surveillance competence of the CN and the TCU before the creation of the CNJ¹⁷



Figures 2 e 3:

Surveillance competence of the CN and of the TCU, and of the CNJ Brazilian State after the creation of the latter¹⁸



It must be noted that the competencies of the CN and the TCU have been negatively affected with the suppression of the surveillance powers over the Judiciary. This suppression has been constructed based – solely – on the interpretation of constitutional provisions performed by the Council.

The absence of a rule that places the decision of the CNJ in a position higher than that of the Court of Accounts; despite constituted as an agency of internal and administrative control, and the objective criterion that preserves the competencies of the TCU, set forth under the constitution itself, besides the normative and jurisprudential arsenal that is the foundation for the performance of the court of accounts; it does not inhibit the Council, on the contrary, it is used as a force to invoke power, restructuring the constitutional picture of the Brazilian State.

It is worth mentioning the excerpt of the vote of Councillor Antonio Umberto de Souza Junior, quoted

above, in which he proposes the prevention for the definition of which agency would be competent to decide on the matter (the CNJ or the TCU). The conflicts, according to councillor, should be resolved in favour of the first one that made the statement on the merits; however, it must be made clear that this rule does not rely on normative support. It is a mistake to consider that the agencies have the same role, and that their decisions have the same force; they are obviously located in distinct branches with equally distinct competences; one of internal and administrative control; the other, of external control. This is exactly what makes them effectively different, although they may act, in one fraction of their competencies, on the same target.

Otherwise, it must be noted that the principle of separation of the branches, as well as the resulting reciprocal control, would be clearly minimized, in the event of the position of the CNJ prevailing. The Judiciary would be strengthened before the other branches, on relying on its own controlling agency, ruling out the scrutiny of the CN, in the exercise of external control. As a hypothesis, it must be noted that an illegal act committed by the Office of the General Counsel to the Federal Government (AGU) would be subject to administrative control (manager) and to the internal control of the Executive Branch (Federal Secretariat of Internal Control); such an act would be subject to the scrutiny of the external control of the CN and the TCU, and, furthermore, to the jurisdiction of the Judiciary.

In its turn, the same act, if practiced by an agency of the Judiciary – following the position defended by the

Council – it would only be submitted to the Council itself and to the Judiciary in the exercise of jurisdiction. It is known that the CNJ is mostly composed of members of the branch itself, which makes it sensitive to corporative appeals. Therefore, such situation is weird, where the principle of separation of branches may serve as a mechanism of opacity, of protection against the exercise of supervision which, as typical function, is under the responsibility of the CN. Moreover, the driving force which led to the approval of EC No 45, of December 30, 2004 was seeking totally different results and, among other, to provide greater transparency to the Judiciary.

In fact, it is never too much to repeat that the STF, on the judgment of ADI n. 3,367, ruled out the argument of the AMB (*Associação dos Magistrados Brasileiros*) – of offense to the principle of separation of the branches, both in relation to the creation of the CNJ, as in relation to the composition of the Council defined in EC N 45, of December 30, 2004. There would be offense to the aforesaid principle, according to the Association, due to the presence, at the CNJ, of councillors of other agencies or branches, which was rebutted by the Constitutional Court. The same principle used by the AMB to try to bar the creation of the CNJ, or erect barriers to foreign advisers to the Judiciary, is now used as the foundation for opacity before of external control of the CN and TCU.

In view of the foregoing, if the position of the CNJ prevails, the Judicial Branch leaps from a position of independence and autonomy, to, within the limit, immunity against control other than by members of the branch itself, which places it in a distinctive and privileged position, clearly contradictory to the principle of separation of the branches. It is inconceivable that the CN, on such opportunity (approval of the PEC no. 45, December 30, 2004), would raise such hypothesis, waiving their typical duties.

3.5.3 The consequences of ruling out external control of the Judiciary by reason of the performance of the CNJ

As a consequence of the performance of external control, reaching all those responsible for public funds, the decisions of the TCU, in formal inquiries, or by reason of surveillance, serves as a guide for the administrative management, where the Agency, on assessment of concrete cases, does not specifically impose to its jurisdiction specific adjustments to the law.

The TCU, acting *ex officio*, or upon provocation, conducts audits, judges accounts, assesses the legality and legitimacy of acts, agreements, etc., which are opportunities





it has to mould the administrative practices, seeking an ideal of uniformity in the context of the controlled environment, intentionally or as a result of the work carried out.

It has been characterized to date that the CNJ understands that there is competition¹⁹ of competencies with the TCU, and that the decisions of the Council must prevail over those of the Court of Accounts. This is the central aspect and entails consequences: in the event of the position of the CNJ prevailing, the possibility opens for breaking the standardizing and ideal potential that external control exercises where the supervision of administrative management in all the branches is under its competence.

In practice, it enables specific interpretations of law that can only be demanded in the courts of the Judiciary, which means, for example, in personnel management, that rights may or not be granted/confirmed to servants or justices differently from those granted in the other branches. It must be noted that the decisions of the CNJ do not reach the Supreme Court. Can the National Council of the Public Prosecutor's Office (CNMP), in view of the competence similar to the CNJ set forth in EC No 45, of December 30, 2004, demand for itself the non-interference of the TCU in matters on which the Council has already manifested?

Thus, as a hypothesis, any right granted within the framework of the Judicial Branch, and of the Public Prosecutor's Office, with the supervenience of decisions of acquiescence of the CNJ and the CNMP, and questioned by the TCU, would remain untouchable in administrative agencies under the control of such

Councils, but could be suspended at the STF, and at the Legislative and Executive Branches.

Also hypothetically, within the scope of the Federal Justice, is granted a benefit that the CNJ understood as legal; however, this right was deemed illegal by the TCU. In the context of the Public Prosecutor's Office, this right was not granted, nor within the Federal Executive Branch. The hypotheses are several, and the impeachment of the standardizing potential of law in the administrative sphere, carried out by external control, causes extremely negative impacts, usually with a high financial cost for society. It is obvious that it will always be possible to seek a final judgment, but external control duties that are typical of the CN and TCU are being extracted.

But the lack of administrative uniformity, as a result of ruling out the competencies of external control, can occur not only between branches, or between the branches and the and the Public Prosecutor's Office, and vice versa, it may become effective even within the Judiciary itself, when the TCU has decided on the issue, and conflicting decision by the CNJ follows.

In the vote which entailed the decision on PP n. 0000431-44.2012.2.00.0000, the rapporteur councillor, Jefferson Kravchychyn affirms that it is not the CNJ who shall manifest, nor even intervene in view of the decision of the TCU, which determined, through Appellate Decision n. 3159/2010 – 1st Chamber²⁰, to the Regional Appellate Labour Court (TRT) of the 23rd Region, to extinguish the wage portion (VPNI-Locality) of the remuneration of justices who met certain requirements. Differently, the

CNJ accepts payment in certain situations, having published Administrative Statement (EA) n. 4/2006²¹.

The example makes clear the clash of decisions between the agencies, though, the focal point, the possibility of different understandings coexisting within the Judicial Branch. It must be noted that the determination of the TCU was directed to the TRT of the 23rd Region, in relation to which the councillor Jefferson Kravchychyn abstained from interfering; while other courts, in theory, could carry on fulfilling the aforementioned Administrative Statement.

3.6 THE SOLUTION OF THE SUPPOSED CONFLICT OF COMPETENCIES TO BE DECIDED BY THE STF

The solution of the supposed conflict of competence takes place, as defended by the councillors of the CNJ, in votes where they appreciate the issue, with the proposition of their own actions within the scope of the Judiciary²². In its turn, the TCU believes that the Council cannot breach, nor order breach against determinations of the Court of Accounts. In this sense, the Council and other judicial agencies submitted to it in the administrative aspect should have as a premise to observe the decisions of external control and, as a result, in the event of disagreement, seek judicial relief.

Therefore, it is urgent that the STF should consider the issue and define the extension of the powers of the CNJ and the limit of its performance in comparison with the role of the CN and the TCU, in the exercise of external control. In this judgment the possibility of the Council having the decision of the TCU breached implies a decrease in the force of the CN, triggering damages to the balance among the Branches, insofar as the Judiciary renders itself immune to surveillance external to the management.

The opportunity for the STF to settle the divergence is conveyed in the Writ of Mandamus (MS) n. 31,556-DF²³, in which the TCU questions the decision of the CNJ that determined to the Federal Regional Court of the 2nd Region the adoption of four daily work hours for servants occupying the post of Judicial Analyst – Specialized Medicine Support, contrary to the position of the Court of Accounts. The Writ of Mandamus reported by Luiz Fux has been concluded for the rapporteur since February 26, 2015.

4. CONCLUSION

This article has aimed at raising discussion on the conflict between the decisions of the CNJ and the

TCU, since the Council, based on interpretations that are exclusively native, have advocated for themselves the power to breach and have the decisions adopted within the scope of external control breached, especially in the cases where the former deliberated on the matter.

CF/1988 is clear in the sense that the competencies of the CNJ should be exercised without prejudice to those of the TCU. The member of the constitutional convention, upon approving EC n. 45, of December 30, 2004, did not consider the possibility of conflict of competencies between the Council and the Court of Accounts, for the reason that each one acts within a functional-organic space that is demarcated by CF/1988; one is an agency of internal and administrative control; the other, of external control.

Note: there is not, on the contrary to that which the CNJ defends, conflict of competency between the agencies. Each one acts within the space that the constitutional powers entrusted them. That which exists are areas of common performance, though, as internal and administrative control, the decisions of the Council must abide by those adopted by the TCU. Can the Public Administrator, at its own discretion, breach decisions of the Court of Accounts? Can an agency of the internal control system not abide by the determinations of the TCU? Why would the CNJ, on exercising the role of internal and administrative control, be authorised?

Nor does the argument that the CNJ is an agency of specific control of the Judiciary help in ruling out the competencies of the CN and the TCU, since this would put an end to the principle of separation of the branches, based on which each branch prevails within the exercise of its typical function, and reciprocal control.

To think differently would mean to attribute to the CNJ, a constitutional agency, though, even as such, internal and administrative, such musculature and force that would suffice to render immune the Judiciary, to which the control exercised by the CN and by the TCU is linked, a privilege, rather than prerogative, incompatible with the idea of a republic and Rule of Law²⁴.

NOTES

- 1 Article 31. The supervision of the municipality shall be exercised by the Municipal Legislative Branch, through external control, and by the internal control systems of the Municipal Executive Branch, in the terms of the law.
Paragraph 1. The external control of the Municipal Chamber shall be exercised with the aid of the Courts of Accounts

of the States or the Councils or Courts of Accounts of the Municipalities, where these exist.

- 2 Article 70. The accounting, financial, budgetary, operational and asset supervision of the Federal Government and of the entities of the direct and indirect administration, as to the legality, legitimacy, cost-effectiveness, implementation of subsidies, and waiver of revenue, shall be exercised by the National Congress, through external control, and by the system of internal control of each Branch. [...] Article 71. The external control, under the responsibility of the National Congress, shall be exercised with the aid of the Federal Court of Accounts, which shall: [...]
- 3 Acts of the transitional constitutional provisions: Article 16 [...] Paragraph 2 The accounting, financial, budgetary, operational and assets supervision of the Federal District, for as long as the Legislative Chamber is not installed, shall be exercised by the Federal Senate, through external control, assisted by the Federal Court of Accounts of the Federal District, as provided under Article 72 of the Constitution.
- 4 Resolution adopted within the context of the TC-021.286/2011-TCU-1st Chamber, where the possibility of subsidies payment maintenance along with the bonus called VPNI-Locality or VPNI GEL was judged.
- 5 Examples: PP n.0004490-12.200810000027795, 2011.2.00.0000, 0006065-55.2011.2.00.0000 and 0007136-29.2010.2.00.0000.
- 6 Synopsis of the decision where PP n. 445 was judged: SYNOPSIS: 1. NATIONAL COUNCIL OF JUSTICE (CNJ) AND FEDERAL COURT OF ACCOUNTS (TCU). PUBLICATION OF DISSONANT AND CONTRADICTORY NORMATIVE GUIDELINES. FORM OF OVERCOMING CONFLICT. The publication, by the CNJ and the TCU, of contradictory normative guidelines regarding same legal-administrative issues, each of these agencies within the legitimate exercise of their constitutional competencies, does not point to severe systemic contradiction, but evidences the result of the natural and complex process of supervision of the Public Administration acknowledged in the constitutional text. Once no hierarchy exists among the agencies involved, since they are linked to distinct fractions of political power, there is no possibility of reciprocal imposition of any of the guidelines delivered, and for any parties that may be interested, direct access to the Judiciary is ensured in any event for the protection of their interests (CF/1988, Article 5, XXXV). Since, however, the CNJ features as the top agency in administrative control of the Brazilian judicial apparatus, of internal nature, its decisions must be complied with by the courts, moreover since they derive from the exercise of administrative self-control (autotutela) (Precedent 473/STF).
- 7 The TCU judged illegal the acts of retirement of servants and supposedly ordered the courts of the Judiciary to rectify them, which, according to councillor Douglas Ribeiro, the STF signalled negatively to the intention of the Court of Accounts.
- 8 The above-mentioned precedents are: MS 23665, Rapporteur Maurício Corrêa; CC 6987, Rapporteur Justice Sepúlveda Pertence; CJ 6975, Rapporteur Justice Néri da Silveira.
- 9 Excerpt of Justice Cezar Peluso's vote: 'Here, the doubt is less weighty. Assisted by the courts of accounts, the Legislative Branch has always held higher powers for supervising the courts as to budgetary, financial and accounting activities (Articles 70 and 71 of the Constitution of the Republic), without this authentic external control of the Judiciary being regarded, at any time and seriously, as incompatible with the system of separation and independence of the Branches, but as a mechanical part of the brakes and counterweights. And this framework also suggests a dilemma: either the power of intermediate control over the financial and administrative performance of the Judiciary, attributed to the National Council of Justice, does not affront the independence of the Branch, or it will be forcible to admit that the Judiciary has never been an independent Branch among us!'
- 10 Provision of Internal Regulations of the CNJ: Article 89. The Full Bench will decide on inquiries, in theory, of general interest and repercussion as to the doubt raised in the application of legal and statutory provisions concerning matters within its competency. Paragraph 1 The inquiry should contain the precise indication of its object, be formulated articulately, and be accompanied by the relevant documentation, as the case may be. Paragraph 2 The response to the inquiry, when rendered by an absolute majority of the Full Bench, has a general rulemaking character. Article 90. The inquiry can be assessed by the Rapporteur monocratically, when the matter has already been expressly regulated in Administrative Resolution or Enunciation, or has been the object of definitive pronouncement of the Full Bench or of the Supreme Federal Court.
- 11 Clève and lorenzetto characterize the CNJ as an agency of internal control, as follows: 'For this reason, the CNJ can be observed from the normative perspective in the description of its competencies, or even, in the materialization of their correctional role. The CNJ must jointly exercise the internal control of the Judiciary and ensure the preservation of its autonomy in the confrontation with the other Branches, which also means the consideration of autonomic sphere of the courts'.



12 See below excerpts of synopses: 1) 2. The CNJ exercises the control, specifically, of the financial and administrative performance of the Judiciary. Excepting the Supreme Federal Court, all the Courts must abide by the determinations issued by the CNJ. Therefore, the Federal Council of Justice (CJF), shall, in the case of conflict of attributions, follow the guidelines of the CNJ, and not of the TCU' (Inquiry n. 0006065-55.2011.2.00.0000, rapporteur Tourinho Neto, June 5, 2012); 2) 'The conflict of competencies between the TCU and the CNJ for administrative-financial control of the government is settled by the criterion of speciality, and the competence of the CNJ prevails when referring specifically to the administrative and financial control of the Judiciary'. (Inquiry n.0007136-29.2010.2.00.0000 – Rapporteur. Councillor Marcelo da Costa Pinto Neves – 119th Session – j. 01/25/2011 – DJ – and n. 17/2011 on January 27, 2011, pg. 23).

13 Excerpt of the vote of Ms Zulaiê Cobra, whereby is entailed the approval of EC n. 45, December 30, 2004: 'In this regard the creation of the National Council of Justice (Conselho Nacional da Magistratura), whose composition seeks to reflect the various agencies of the Judiciary of the Federal Government and the States. Further proposed is the presence of members of the Public Prosecutor's Office, of lawyers and citizens, the latter of which chosen by joint committee of the National Congress, the Nation's highest representative instance. Popular participation is thus ensured, welcoming, albeit with modifications, several amendments accordingly tabled before the Commission. To the above-mentioned Council is attributed the role of the

superior directional agency of the bench, who must ensure the autonomy of the Judiciary, besides ensuring compliance with the principles relating to the Public Administration, with disciplinary and correctional powers.'

14 Medina, in this passage, discusses the interference of the Judiciary in the establishment, by the Executive Branch, of public policies. He argues that such Branch does not intrude on the Public Administration daily routine.

15 The expression 'cornerstone of a constitution of the State of Law' is attributed, by the author, to Paulo Bonavides.

16 This refers to the principle of fairness or functional conformity described by Francisco Gilney Bezerra de Carvalho Ferreira. By this principle, 'it is established that the constitutional interpretation cannot reach an outcome that subverts or disturbs the organizational scheme established by the Constitution. That is, the implementation of constitutional norms may not imply a change in the structure of distribution of powers and exercise of the competencies constitutionally established'.

17 As a measure of simplification, we chose not to represent the Prosecutor's Office in the figure.

18 As a measure of simplification, we chose not to represent the Prosecutor's Office and the Public Defender's Office in the figure.

- 19 Term used by councillor Douglas Monteiro in the trial of PP n 445.
- 20 Two of the provisions of Appellate Decision n 3159/2010-TCU-1st Chamber: 9.2.2. To promote, within 15 days, the extinguishment of the VPNI-Locality remuneration portion of justices who had no right to earn the compensatory portion at the time Law n 11.143/2005 was published.; 9.2.3 To promote, within 15 days, the extinguishment of the VPNI-Locality remuneration portion of justices who had no right to earn the compensatory portion at the time Law n 11.143/2005 was published, substituting the aforementioned VPNI by compensatory portion due, after considering the gradual absorption on account of the increases granted for subsidizing the justices after the year 2005;
- 21 Administrative Statement (EA) n.4/2006 of the CNJ: "The justices of the Federal Government, who joined before the issue of Provisional Measure n. 1.573/96 and who meet the requirements of Article 17 of Law n. 8.270/1991, combined with Article 65, X, of Supplementary Law n. 35/79 (LOMAN), and Decree n. 493/92, besides the subsidy amount, are entitled to receiving the transitory advantage of Special Locality Bonus (GEL) as personal nominally identified advantage (VPNI), while they remain in office at the courts located in border areas or locations which living conditions so justify, and the total revenue amount is limited to the amount of the remuneration cap, according to Item I of Article 5 of Resolution n. 13 of the CNJ".
- 22 See below the excerpt of the vote of the rapporteur councillor, Jefferson Kravchychyn, on PP n. 0000431-44.2012.2.00.0000: "Possible questioning on the divergence of the established guidelines must be settled in court", addressing the divergence between decisions of the CNJ and of the TCU.
- 23 MS 31.556-DF, reported by Justice Luiz Fux, has been concluded for the rapporteur since February 26, 2015.
- 24 Paulo Roberto Gouvêa Medina (2011) quotes Paulo Bonavides, for whom the principle of separation of the branches is one of the 'unbreakable stones of the constitutional building' or "the cornerstone of a constitution of the Rule of Law'.

REFERENCES

- BACELLAR FILHO, R. F.; HACHEM, D. W. The relations among the Branches of the Republic in the contemporary Brazilian State: authorized and nonauthorized transformations (As Relações entre os Poderes da Republica no Estado Contemporâneo Brasileiro). Public Interest, Belo Horizonte, v. 13, n. 70, pg. 37-73, Nov./Dec. 2011. Available at: <<http://bit.ly/2v9g7ia>>. Access on: Aug. 18,2017.
- BADIN, L. A. The National Council of Justice: cornerstone of the Constitutional Reformation of the Judiciary (O Conselho Nacional de Justiça: Pedra Angular da Reforma Constitucional do Judiciário). Brazilian Magazine of Constitutional Studies, Belo Horizonte, year 3, n. 9, pg. 27-39, Jan./Mar. 2009. Available at: http://bidforum.com.br/bidBiblioteca_periodico_pdf.aspx?i=56996&p=14. Access on: Aug. 18, 2017.
- BRAZIL. The National Council of Justice. Inquiry n.0007136-29.2010.2.00.0000. 2010. Available at: <<http://bit.ly/2uZfWH2>>. Access on: Aug. 18, 2017.
- ___ The National Council of Justice. Request for Measures (PP) n. 445 2006. Available at: <<http://bit.ly/2waa95r>>. Access on: Aug. 18, 2017.
- ___ The National Council of Justice. Request for Measures (PP) n. 200810000020521. 2008. Available at: <<http://bit.ly/2waewx9>>. Access on: Aug. 18,2017.
- ___ The National Council of Justice. Resolution n. 86 of September 8, 2009. Provides on the organization and operation of units or nuclei of internal control at the Courts, regulating the technical guidelines, the principles, concepts and rules which are necessary to its integration. Federal Official Gazette, Executive Branch, Brasília, DF, Sept. 17. 2009. Item 1, pg. 87. Available at: <<http://bit.ly/2wYj5sg>>. Access on: Aug. 18, 2017.
- ___ Constitution of the Federative Republic of Brazil, of 1988. Federal Official Gazette, Brasília, DF, Oct. 5. 1988. Available at: <<http://bit.ly/1dFiRrW>>. Access on: Aug. 18, 2017.
- ___ Constitutional Amendment n.45, of December 30, 2004. Amends provisions of Articles 5, 36, 52, 92, 93, 95, 98, 99, 102, 103, 104, 105, 107, 109, 111, 112, 114, 115, 125, 126, 127, 128, 129, 134 e 168 da Federal Constitution, and adds Articles. 103-A, 103B, 111-A and 130-A, among other provisions. Federal Official Gazette, Brasília, DF, Dec. 31. 2004. Item 1, pg. 9. Available at: <<http://bit.ly/2w9FGnT>>. Access on: Aug. 18, 2017.
- ___ Law n. 8,443 of Jul. 4, 1992. Organic Law of the TCU. Provides on the Organic Law of the Federal Court of Accounts, among other provisions. Federal Official Gazette, Executive Branch, Brasília, DF, Jul. 17. 1992. Item 1, pg. 9449. Available at: <<http://bit.ly/2idjoMe>>. Access on: Aug. 18, 2017.

____. Law n. 9,784 of Jan. 4, 1999. General Law of the Administrative Proceeding; Law of the Federal Administrative Process. Regulates the administrative proceeding in the context of the Federal Public Administration. Federal Official Gazette, Executive Branch, Brasília, DF, Feb. 1. 1999. Item 1, pg. 1. Available at: <<http://bit.ly/2idFWfR>>. Access on: Aug. 18, 2017.

____. Law n. 10,180 of Feb. 6, 2001. Organizes and regulates the Systems of Federal Planning and Budget, of Federal Financial Management, Federal Accounting Management, and of Internal Control of the Executive Branch, among other provisions. Federal Official Gazette, Executive Branch, Brasília, DF, Feb. 1. 2001. Item 1, pg. 2. Available at: <<http://bit.ly/2w9JmpN>>. Access on: Aug. 18, 2017.

_____. Federal Supreme Court Direct Action of Unconstitutionality n. 3.367-1/DF. 2006. Available at: <<http://bit.ly/2wYQqml>>. Access on: Aug. 18, 2017.

_____. Federal Court of Accounts. Appellate Decision 8,890 /2011: 2011. Available at: <<http://bit.ly/2xbNiDb>>. Access on: Aug. 18, 2017. Jan

CANOTILHO, J. J. G. Constitutional Law and Theory of Constitution (Direito constitucional e teoria da constituição). 7th edition. São Paulo: Almedina, 2003.

CLÈVE, C. M.; LORENZETTO, B. M. The National Council of Justice and the Constitution (O Conselho Nacional de Justiça e a Constituição). Public Interest, Belo Horizonte, v. 17, n. 92, pg. 15-36, Jul./Aug. 2015.

DELATORRE, R. Legal contradictions and intertemporal law. Public Interest (Antinomias jurídicas e direito intertemporal.), Interesse Público IP Belo Horizonte, v. 10, n. 50, pg. 103-122, Jul./Aug. 2008. Available at: <<http://bit.ly/2wi6Dqb>>. Access on: Aug. 18, 2017.

DI PIETRO, M. S. Z. Administrative Law. 27. ed. São Paulo: Atlas, 2014.

FERREIRA, F. G. B. C. Considerations on the instrumental principles of constitutional hermeneutics. Legal Content (Considerações acerca dos princípios instrumentais de hermenêutica constitucional. Conteúdo Jurídico), Brasília, DF, Jan 3, 2014. Available at: <<http://bit.ly/2uPeN90>>. Access on: Aug. 18, 2017.

GUERRA, E. M. External and internal controls of public administration (Os controles externo e interno da administração pública). 2. ed. Belo Horizonte: Forum, 2005.

MEDINA, P. R. G. Jurisdiction and separation of powers (Jurisdição e separação de poderes). Magazine of the Attorney-General's Office of the Municipality of Juiz de Fora, year 1, n. 1, Jan./Dec. 2011. Available at: http://bidforum.com.br/bidBiblioteca_periodico_pdf.aspx?i=75695&p=41. Access on: Aug. 18 2017.

MEIRELLES, H. L. Brazilian Administrative Law (Direito administrativo brasileiro). 35. ed. São Paulo: Malheiros, 2009.

MENDES, G. F.; BRANCO, P. G. G. Course of Constitutional Law (Curso de direito constitucional). 9. ed. São Paulo: Saraiva, 2014.