

# The Constitutional Jurisdiction over the Authority of the Courts of Accounts in light of Constitutional Hermeneutics



**Lorena Lyra**

Master's student in Constitutional Law in the Law Postgraduate program at Universidade Federal do Ceará (PPGD / UFC). Public Management specialist and Bachelor of Laws from the Law School at Centro Universitário Estácio do Ceará. External Control Analyst at the Court of Accounts of the State of Ceará.



**Mayara de Andrade Santos Travassos**

Master's student in Constitutional Law in the Law Postgraduate program at Universidade Federal do Ceará (PPGD/UFC). Criminal Law specialist from Damásio de Jesus and Tax Law specialist from Universidade Anhanguera. Bachelor of Laws from Universidade de Fortaleza-UNIFOR. Lawyer.

**ABSTRACT**

The Courts of Accounts are institutions with powers directly granted by the Federal Constitution, hence, their prerogatives have come to be analyzed by the Supreme Federal Court. The purpose of this paper is to analyze the contradiction present in decisions of the Federal Supreme Court on the powers of those Courts described in items I (examine accounts) and II (evaluate accounts) of Article 71 of the Federal Constitution, as well as on the effects of the decisions of the Courts of Accounts for electoral purposes (ineligibility under subitem “g” of item I of Article 1 of Supplementary Law No. 64, dated May 18, 1990, with the wording given by Supplementary Law No. 135, dated June 4, 2010, known as Clean Slate Law – “*Lei da Ficha Limpa*”).

For this, the methodology is the analysis of bibliography, and court precedents. In the end, it is concluded that the Federal Supreme Court issued a decision on an Extraordinary Appeal that was contrary to another previous decision of the same court in a concentrated constitutional review, as well as contrary to the literal text of the law under discussion. With such decision the Federal Supreme Court interfered with the constitutional authority of the Courts of Accounts and created a kind of “jurisdictional prerogative” for mayors who act authorizing expenditures. In addition, this discrepancy also arose from the moment the Supreme Federal Court abandons the Doctrine of Determinant *Ratio Decidendi*, thus setting inconsistent precedents in the interpretation of some cases, generating instability in the judicial system.



**Keywords:** Courts of Accounts; Constitutional Jurisdiction; Doctrine of Transcendent Determinant *Ratio Decidendi*; Federal Supreme Court.

## 1. INTRODUCTION

The duty of every public manager to render accounts is established in the constitutional text and does not represent an end in itself, nor has it entered the Brazilian legal system in isolation, but in support of a set of other relevant constitutional principles, such as republicanism, and the separation of powers.

In this sense, the Federal Constitution (BRASIL, 1988) created the control and audit systems, which include the Courts of Accounts, independent bodies that exercise external control in aid to the Legislative Branch, which is the holder of such control. These Courts of Accounts received from the original constitution-making power the exclusive power to examine and evaluate the accounts of public administrators.

Among the authorities of the Courts of Accounts are those of elaborating, in each electoral year, the relation of administrators with accounts evaluated irregular in irreversible decisions, and forwarding such list to the electoral courts, which use the information to decide on the ineligibility of the candidates to the elections. These prerogatives of the Courts of Accounts make them linked, albeit indirectly, to the Brazilian electoral system, which is why their constitutional powers were analyzed by the Supreme Federal Court (STF).

This paper, using the methodology of bibliographical analysis, and of case law, briefly presents the duty to render accounts and the constitutional role of the Courts of Accounts. It subsequently examines the contradiction existing in decisions of the Federal Supreme Court on the powers of those Courts described in items I (examine accounts) and II (evaluate accounts) of Article 71 of the Federal Constitution, as well as on the effects of the decisions of the Courts of Accounts for electoral purposes (ineligibility set forth in subitem “g” of item I of Article 1 of Supplementary Law No. 64, dated May 18, 1990, with the wording given by Supplementary Law No. 135, dated June 4, 2010, known as Clean Slate Law – “*Lei da Ficha Limpa*”) (BRASIL, 1990, 2010).

In the end, it is concluded that the Supreme Federal Court issued a decision on an Extraordinary Appeal that was contrary to another previous decision of the same court in a concentrated constitutional review, as well as contrary to the literal text of the law under discussion. With such decision the Supreme Federal Court interfered with the constitutional authority of the Courts of Accounts and created a kind of “jurisdictional prerogative” for mayors who act authorizing expenditures.

## 2. THE DUTY TO RENDER ACCOUNTS AND THE CONSTITUTIONAL PRINCIPLE OF THE SEPARATION OF POWERS

The duty to render accounts was so precious and relevant to the 1988 Constituent Assembly that this obli-

gation is present in many provisions of the constitutional text, such as Article 30, item III, which provides for the duty of the municipal administrators to render accounts, and Article 70, sole paragraph, which provides that any individual or corporation, whether public or private, which uses, collects, keeps, manages, or administers public monies, assets, or values shall render accounts.

The importance of this accountability by those who administer public resources is also evidenced by the fact that the noncompliance with this duty is one of the extraordinary circumstances that allow the drastic and exceptional measure of intervention, either federal, in the Federal District or in the states that do not render accounts (Article 34, item VII, subitem “d”), as well as by a state in those municipalities which, in the same way, do not render the due accounts (Article 35, item II).

In addition, the Federal Constitution of 1988 also reserved an entire section (Section IX, within Chapter I – The Legislative Power, of Title IV – The Organization of the Powers) to deal with accounting, financial and budgetary control, in articles 70 to 75. Such articles shape the public bodies of external and internal control, being the latter exercised by bodies of the public administration itself (of all the branches, not only of the Executive), and the former exercised by bodies outside the administration (in the case of federal resources, incumbent on the Brazilian Congress, with the aid of the Federal Court of Accounts).

Although the first article of this constitutional section (Article 70) establishes the rules for the (external and internal) control systems of the Union, such rules are mandatory for all other entities of the Federation (states, municipalities and Federal District) due to the principle of constitutional symmetry and also to the express provision in that respect in the last article of such section (Article 75).

Thus, the Federal Constitution establishes that, in all federated entities (Union, states, Federal District and municipalities) of the Federative Republic of Brazil, the Legislative Branch is responsible for controlling the duty to render accounts, but not limited to such duty, since the control must also be exercised regarding the parameters of lawfulness, legitimacy, and economic efficiency, under the terms of Article 70 (BRASIL, 1988).

In that respect, it should be pointed out that the audit function arose with constitutionalism and the rule of law implanted with the French Revolution. It is also worth mentioning that this function, in the system of separation of powers, has always been a basic task of the Legislative Branch (federal, state and municipal legislative bodies), which is responsible for drafting and updating laws, being also responsible for controlling the compliance with the

legislation by the public administration, even by logical consequence (SILVA, 2008).

Thus, one can ascertain that each of the duty to render accounts and the control and audit systems established in the constitutional text does not represent an end in itself, nor have they entered the Brazilian legal system in isolation, but in support of a set of other relevant constitutional principles, such as the separation of powers.

According to Silva (2008), Aristotle, John Locke, and Rousseau had already variously suggested the principle of the separation of powers but it was Montesquieu who finally defined and disseminated it. The constitutions of the former British colonies in America aimed at this principle, it was however in the Constitution of the United States of America of 1787 that it was definitively materialized. With the French Revolution, the principle of the separation of powers became a constitutional dogma of great relevance so that Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789 declared that any society in which the separation of powers is not determined has no constitution.

The great importance given to the principle of the separation of powers remains to the present, so much that it was included by the original Constituent Assembly of 1988 among the entrenched clauses of the Federal Constitution, in its Article 60, paragraph 4, item III<sup>1</sup>, therefore, being forbidden any amendment to the constitutional text even aimed at abolishing it.

However, today the principle no longer has the rigidity of the past, since the expansion of the activities of the contemporary state imposed a new vision on the theory of the separation of powers, as well as new forms of relationship between the legislative and executive bodies and of these with the judiciary branch (SILVA, 2008, p.109).

In the same vein, Albuquerque (2013) asserts that Montesquieu’s doctrine of separation of powers has been undergoing a reinterpretation, and that for many, this new interpretation departs from the modern theory of democracy by discrediting the legislative branch.

This new view of the principle involves the analysis of the system of checks and balances set forth in the constitution, and the way in which the mechanisms of such a system of mutual control have been used. As Silva (2008) points out, the system of checks and balances seeks the balance necessary for the realization of the common good and is indispensable to avoid arbitrariness and that a branch becomes too powerful, detrimentally to the other branches and especially to the governed.

It is noteworthy that even the avowed defenders of a new vision of this principle, when dealing with the role

of the judiciary branch as the holder of the constitutional review or the control of public policies – thus controlling the activities of both the Legislative and the Executive branches – understand that such judicial control cannot mean the replacement of the administration or the legislature by the Judiciary.

In that respect, for Seferjan (2010) the separation of powers remains intact in the control of public policies by the Judiciary Power, as there should not be a replacement of the Legislative Branch by the Judiciary, in order to transform legislative discretion into judicial discretion.

Also, in the same vein, Binenbojm (2014) understands that in those fields where, due to their high technical complexity, and specific dynamics, objective parameters for a safe operation of the Judiciary Branch are lacking, the intensity of the control should tend to be lower.

Therefore, one can see that the judicial control of administrative acts cannot turn into an undesirable judicialization of the administrative activity, merely replacing the Administration, and ignoring the important dimension of the technical-functional specialization of the principle of separation of powers (BINENBOJM, 2014).

Thus, it is worth noting the following excerpt from the opinion of the Supreme Federal Court JUSTICE Celso de Mello, in the Direct Action for the Declaration of Unconstitutionality – nº 775-MC, still on the use of the system of checks and balances, but this time regarding the control of the Legislative Power over the Executive Branch. This opinion addresses the relation between the republican principle, and the separation of powers and the control of the Executive Branch exercised by the Legislative Branch:

The Executive Branch in democratic regimes must be a power constitutionally subject to parliamentary audit and permanently exposed to the political-administrative control of the legislative branch. The need for a broad parliamentary audit of the activities of the Executive – from the control exercised over the head of this State Power – construes a requirement fully compatible with the postulate of the Legal Democratic State (Federal Constitution, Article 1, head provision) and with the political-juridical consequences that derive from the constitutional pronouncement of the republican principle, and the separation of powers. (BRASIL, 2006)

Thus, the constitutional system of checks and balances establishes a mutual and permanent control between the three branches of the government (Legislative, Execu-

tive and Judiciary), which is why the principle of separation of powers has been reinterpreted by jurists.

However, the aforementioned principle, erected as an entrenched clause in the Federal Constitution, can still be violated when one Branch enters the sphere of competence of another, beyond the limits established by the constitutional system of checks and balances.

An example of this breach of the principle of separation of powers is found when the Judiciary Branch enters the sphere of competence of the Legislative Branch to control the public accounts of the Executive Branch. In such circumstance the Judiciary replaces the Court of Accounts (body with power to directly exercise the external control, of which the Legislative Branch is the holder), evaluates the accounts of a public administrator, nullifies the judgment of the Court of Accounts, and a representative of the Judiciary renders a judgment on such accounts, what is the exclusive competence of the Court of Accounts, as established in Article 71, item II of the Federal Constitution (BRASIL, 1988).

In this context, it is well-known that any judicial decision (provisional or on the merits) must be reasoned. The reasons for a decision are an essential element not only for the process, but also for the whole society which, before such reasons, is able to know whether the Judiciary acts impartially, and whether the decisions are the result of the law or the arbitrariness of the judge. When a judge gives the reasons for their decision, they list elements that must convince the parties that their reasoning is the most correct, results from the law, and that their discretion does not stem from arbitrariness, but from a good evaluation of the evidence, and the entire legal system (RODRÍGUEZ, 2015).

Thus, the reasoning of the judgment must be exhaustive and well detailed, so as to explain to the parties the understanding of the judge, also making clear to them that such understanding is not arbitrary, in any of its parts, but the result of a logical and fair consideration on the application of the law to the concrete case (RODRÍGUEZ, 2015).

In spite of this, when examining the merits of some cases, some judges have annulled decisions of the Courts of Accounts, even without any illegalities or unlawfulness in such decisions, sometimes without the due reasoning of the judgments. In some cases, judges even usurp the constitutional powers of the Courts of Accounts, by not only vacating the challenged decision (for the competent Court to decide again), but also declaring the accounts regular (CEARÁ, 2012, 2014), acting as a Court of Accounts. This shows us a manifest violation of the principle of separation

of powers, considering that the external control exercised by such Courts is an exclusive constitutional duty of the Courts of Accounts, also recalling that the holder of such control is the Legislative Branch.

It appears that when a judge examines the merits of a decision of a Court of Accounts on the irregularity of accounts, vacates the decision, and replaces the Court of Accounts by declaring such accounts regular, there is a direct infringement of the principle of separation of powers. Such infringement arises from the fact that the judicial body replaced the evaluation of the accounts carried out by the Court of Accounts, being the evaluation of the accounts an activity that represents an exclusive constitutional duty of these independent bodies, in the exercise of the external control, of which the Legislative Branch is the holder, according to the aforementioned Article 71 of the Federal Constitution (BRASIL, 1988).

Albuquerque (2013) teaches an important lesson on the subject, when addressing the analysis of political issues by the Judiciary Branch, by stating the following:

**In the performance of their duties, the judge shall evaluate with prudence the consequences of their decisions.** Their freedom of choice cannot be considered as broad as that of an agent of more political nature. Indeed, **judicial legitimation also has to do with the exercise of a wise self-restraint as opposed to a proclaimed activism**, as can be definitely noticed from a series of jurisprudential principles applicable to the activities of the judge of the constitutional review of laws. (ALBUQUERQUE, 2013, page 15, emphasis added).

Furthermore, in the analysis of the subject, the author brings the concept of the power of self-restraint, allied to the concepts of democracy, and deliberation, in the analysis of political issues by the Judiciary Branch (ALBUQUERQUE, 2013). Despite specifically dealing with judicial decisions on chiefly political issues, the author understands that the power of self-restraint, allied to the concepts of democracy, and deliberation can also be adapted to situations in which judges have to analyze technical and highly complex decisions, such as those issued by the Courts of Accounts.

In that respect Binenbojm (2014, p. 241) states the following:

In those fields where, due to their high technical complexity, and specific dynamics, objective parameters for a safe operation of the Judiciary Branch are lack-

ing, the intensity of the control should tend to be lower. In these cases, the expertise and experience of the bodies and entities of the Administration in a given matter may be decisive in the definition of the span of the control. (BINENBOJM, 2014, page 241).

The author further states that the fight against arbitrariness, through judicial control of administrative acts, cannot turn into an undesirable judicialization of the administrative activity, merely replacing the Administration, and ignoring the important dimension of the technical-functional specialization of the principle of separation of powers.

It is also worth noting the similar understanding of Cappelletti (1999) who teaches that the good judge is aware of their limitations and weaknesses, and sensitive to the many circumstances that recommend prudence in certain cases.

In addition, the technical control exercised by the external control bodies (Courts of Accounts) is extremely complex and qualitative with respect to the public policies, and thus, constitutes an activity for which, as a rule, the judicial assessment is not applicable.

Therefore, it appears that it is the responsibility of the agents of the Judiciary Branch to avoid replacing the Administration (the technical body to which the Federal Constitution has assigned exclusive authority to evaluate the accounts of public administrators), when facing issues of high technical complexity, such as decisions on the accounts of public administrators issued by the Courts of Accounts. It shall be done through the exercise of the power of self-restraint, allied to the concepts of democracy, and deliberation, thus avoiding the violation of the principle of separation of powers.

### 3. THE ROLE OF THE LEGISLATIVE BRANCH, AND THE COURTS OF ACCOUNTS IN THE EXERCISE OF EXTERNAL CONTROL, AND THE BRAZILIAN ELECTORAL SYSTEM

The unappealable decisions of the Courts of Accounts that declare accounts irregular are considered grounds for ineligibility, under the terms of subitem “g” of item I of Article 1 of Supplementary Law 64/1990. However, this consequence of “ineligibility” is at the discretion of the Electoral Courts, as the Supreme Federal Court has long ruled in the Suit for a Writ of Security no. 22.087: “the Electoral Court System is the competent jurisdiction for rendering value judgments regarding the irregularities pointed out by the Court of Accounts, that

is, whether or not irregularities are ground for ineligibility” (BRASIL, 1996).

Accordingly, it competes to the Courts of Accounts, regarding a possible ineligibility, simply to draw up the list of administrators with unappealable decisions for irregular accounts to be sent to the Electoral Court System in each year that there are elections, as determined by Article 11, paragraph 5 of the Law No. 9.504, of September 30, 1997<sup>ii</sup>.

Thus, it is important to reflect on the constitutional functions assigned to these Courts of Accounts.

Article 71 of the Federal Constitution prescribes various prerogatives to the Courts of Accounts, among which those provided for in items I and II are the most relevant, as they constitute the main duties of those Courts, namely: examine the annual accounts of the heads of the Executive Branch (item I); and evaluate the accounts of the administrators and other persons responsible for public monies, assets, and values of the Public Administration (item II) (BRASIL, 1988).

It is known that the “examined” accounts, provided for in item I, are the so-called *government accounts* or global accounts, on which the Court of Auditors only issues a prior opinion, resting upon the Legislative Branch for its judgment, which is purely political in nature. Such annual accounts, of a “macro” nature, relate for example to: general balance sheet; financial, budgetary, and patrimonial management; application of the minimum percentage of resources in health and education; among other political issues. Thus, as can be seen, these are aspects of administrative policy, and for that reason subject to the political trial of the Legislative Branch.

In item II, the Federal Constitution assigned to the Courts of Accounts the duty to “evaluate”, referring to the administrators and other persons responsible for public resources. These are the so-called *management accounts*, or, more specifically, isolated management acts. These include, for example, the payment of current expenses, such as the purchase of equipment and vehicles, the contracting of services, the execution of bids, among others. Unlike government accounts, they are isolated acts of administrative management, comprising the direct use of public money, appropriation, liquidation, payment, and others, which can and shall be controlled in isolation and, if possible, routinely, for them to be timely corrected or challenged and sanctioned with a fine, as provided in item VIII of the same constitutional provision.

In short, government accounts (item I) are examined by the Courts of Accounts and evaluated by the Legislative Branch, while the management accounts

(item II) are examined and evaluated by the Courts of Accounts themselves.

The Courts of Accounts, therefore, due to constitutional impositions, must evaluate the acts of management, even if performed by municipal mayors, whenever they, despite their status of political heads of government, begin to exercise administrative functions, acting as secretaries or authorizing expenditures, which is a day-to-day reality of the municipal governments of the Brazilian hinterland.

#### 4. THE UNDERSTANDINGS OF THE SUPREME FEDERAL COURT ON THE CONSTITUTIONAL POWERS OF THE COURTS OF ACCOUNTS, AND THE LEGISLATIVE BRANCH IN THE EXERCISE OF EXTERNAL CONTROL

In the previous section, it was concluded that the illegality of management acts, even when practiced by the heads of the Executive Branch, is subject to the technical evaluation of the Court of Accounts and is not subject to a political examination by municipal councilors.

However, in August 2016, the Federal Supreme Court analyzed the RE 848826<sup>iii</sup> (BRASIL, 2017), with recognized General Repercussion (Theme 835), which dealt since the beginning with the objection to the candidacy of a former mayor with management accounts rejected (declared irregular) by an unappealable decision of the Court of Accounts of the Municipalities of the State of Ceará. In that occasion the Court established that, for the purposes of the ineligibility specified in subitem “g” of item I of Article 1 of Supplementary Law 64/1990 (BRASIL, 1990), the decisions of the Court of Accounts, both on government accounts (item I) and management accounts (item II) must be submitted to the trial of the Legislative Branch, when the person responsible for such accounts is the head of the Executive Branch.

The entire content of the bench decision of the Supreme Federal Court in the record of RE 848826 was published only one year later in August 2017 (BRASIL, 2017). It is possible to note in that ruling that a tight majority of the Justices (six) decided to take into account the personal criterion (person who is the incumbent head of the Executive Branch) to differentiate the authorities of the Courts of Accounts set forth in items I and II of Article 71 of the Federal Constitution (BRASIL, 1988), to the detriment of the technical criterion that takes into account the nature, and the different purposes of the rendering of government accounts, and management accounts, as clarified in the previous section of this paper.

It is worth mentioning that this technical criterion that differentiates the authorities of the Courts of Accounts described in items I and II of Article 71 of the Federal Constitution, according to the nature and purposes of the accounts rendered, separating them into management accounts and government accounts is the criterion used since 1988 by all the Courts of Accounts of Brazil, and continues to be used, including by recommendation of the Association of Members of the Brazilian Courts of Accounts (*Associação dos Membros dos Tribunais de Contas do Brasil – “Atricon”*), as will be clarified below.

However, such a decision (in RE 848826) has not yet become final and unappealable, since a privy, a state representative from Ceará, who considered himself aggrieved by the effects of the aforementioned decision of the Federal Supreme Court, filed a motion for clarification that has not yet been decided.

In addition, it should be noted that the New Code of Civil Procedure of 2015, in dealing with the general repercussion in an Extraordinary Appeal, in its Article 1035, paragraph 11, stipulates that the precedent set by the Court in the decision on the general repercussion (legal interpretation established) shall be recorded in the minutes of the trial session to be published in the Federal Official Journal. It further stipulates that such minutes shall be valid as a bench decision, that is, the legal interpretation established therein shall be effective upon publication (with the power of a bench decision) and shall produce effects beyond that specific tried case.

Therefore, the legal interpretation established in general repercussion decisions must be applied to legal proceedings that have a relationship with the subject matter of general repercussion, under the terms of Article 1040 of the abovementioned law (New Code of Civil Procedure).

Thus, analyzing only the legal interpretation established in General Repercussion (Theme 835, published in August 2016), it appears that its wording conflicts with the provisions of the final part of subitem “g” of item I of Article 1 of the Supplementary Law No. 64/1990 (BRAZIL, 1990). The reason is that in such a subitem (with the wording given by Supplementary Law No. 135/2010 – Clean Slate Law) it is undoubtedly stated that the provisions of item II of Article 71 of the Federal Constitution (evaluation of management accounts by the Courts of Accounts) shall apply to all those who authorize expenditures, without excluding the holders of a political mandate acting in this condition, that is, shall apply even to mayors who act authorizing expenditures.

It should also be pointed out that in RE 848826, in which such general repercussion legal interpretation

was established, no unconstitutionality of the Ineligibilities Law (Supplementary Law No. 64/1990) or the Clean Slate Law (Supplementary Law No. 135/2010) was raised. On the contrary, the constitutionality of said subitem “g” was expressly declared by the Supreme Federal Court, in another circumstance (in 2012), when the court jointly decided the Direct Actions for the Declaration of Constitutionality No. 29 and No. 30 and the Direct Action for the Declaration of Unconstitutionality No. 4578 (BRAZIL, 2012a; 2012b; 2012c).

Thus, it is noted that the Supreme Federal Court, in an Extraordinary Appeal (RE 848826), modified an understanding previously adopted by the very Supreme Federal Court sitting en banc in the context of a concentrated constitutional review, since the winning interpretation in the subject-matter under discussion ended up being the one sought by Justice Dias Toffoli in the joint trial of the Direct Actions for the Declaration of Constitutionality No. 29 and No. 30 and the Direct Action for the Declaration of Unconstitutionality No. 4578 (BRAZIL, 2012a; 2012b; 2012c). In that occasion the Justice, then defeated, advocated that should be “adopted a conformable interpretation to the final part of subitem g, under discussion, to clarify that the heads of the Executive Branch, even when they act authorizing expenditures, are subject to the terms of item I of Article 71 of the Federal Constitution.”

It must be emphasized that this construction – as set out in the legal interpretation established in Theme 835 of General Repercussion, as well as in the excerpt from the dissenting opinion of Justice Dias Toffoli in the trial of ADCs No. 29 and 30, and of ADI n° 4578 (BRAZIL, 2012a; 2012b; 2012c) transcribed above – in fact, has a wording which is literally opposite to the legal text interpreted.

We shall now analyze the effects of the legal interpretation established by the Supreme Federal Court in Theme 835 of General Repercussion – RE 848826 on the decisions of the Courts of Accounts.

As for the financial effects of such a legal interpretation, in principle, since it was limited to electoral purposes, there may be no interference in the financial effects of the decisions of the Court of Accounts, if these, in accordance with the recommendation of Atricon (Article 1 of Resolution No. 4, dated August 25, 2016<sup>iv</sup>), continue to evaluate all management acts, even of heads of the Executive Branch (who act authorizing expenditures), to apply to these administrators fines and/or debts when applicable and only after the issuing of the bench decision, in compliance with the interpretation of the Federal Supreme Court, send such decisions to the Legislative

Branch, only for the electoral purposes provided for in the well-known subitem “g”.

It is clarified that the understanding that the Courts of Accounts can continue to evaluate the management accounts rendered by heads of the Executive Branch, also imposing debts and applying fines, when applicable, is based especially on the express restriction made in the beginning of the Supreme Federal Court interpretation discussed herein, since it was expressly limited to electoral purposes, that is, for the purpose of analyzing whether or not the ineligibility described in subitem “g” of item I of Article 1 of Supplementary Law 64/1990 is present (BRAZIL, 1990).

However, with regard to the political-electoral aspect, such interpretation will have serious deleterious effects on democracy, since it requires, for the purpose of ineligibility, that the decisions of the Courts of Accounts – on the management accounts of mayors who act authorizing expenditures – be ratified by the Legislative Branch.

The Municipal Legislative Council will, of course, only make a political evaluation of – management – accounts, which involve not only political aspects, as would be the case for government accounts, but also management acts. In such acts, large deviations of public resources may even be observed, and even if they are declared and evaluated irregular by the Court of Accounts, they will not be analyzed with due attention in purely political evaluations such as those that occur in the Legislative Houses of the whole country, there being also the risk that they may be disregarded for ineligibility purposes.

In that respect, it is worth emphasizing the understanding of Justice Teori Zavascki, presented in the excerpt from his opinion in RE 848826 transcribed below:

(...) **in case the conclusion endorsed by the divergent opinion prevails – according to which the Courts of Accounts would not have authority over any accounts of mayors – we would be affirming an interpretation that would transform the provision of Article 71, I, of the Federal Constitution into a true rule of jurisdiction prerogative**, which use would be limited to remove from the authority of the Courts of Accounts the acts practiced by the Heads of the Executive Branch. That understanding, however, ignores the substantial differences between the two duties of the Courts of Accounts. And it is even worse than that. Such understanding admits the existence of a rule of jurisdiction prerogative highly subject to accidental factors. After all, its incidence will depend on the exercise (or not) by the mayor of atypical administrative functions, as

happens when they directly determine the ordering of expenses. (BRAZIL, 2017, p.3, emphasis added).

In addition, it is also highlighted that Atricon issued a statement affirming that this decision is one of the biggest defeats of the Brazilian Republic after the re-democratization, and that “in practice, a protective writ of habeas corpus has been issued to mayors who practice illegalities, misapplications, and corruption” (PASCOAL, 2016, paragraph 3).

Accordingly, there is an evident loss of the binding force of the Ineligibilities Law, with the wording amended by the Clean Slate Law, since, at least as regards the ineligibility specifically set forth in said subitem “g”, there will be a drastic reduction of its normative concretization. It is worth noting that the most frequent cause of ineligibility of politicians in Brazil in recent times has been precisely that arising from decisions by the Courts of Accounts to reject accounts rendered, on the grounds of such legal provision (subitem g).

In this sense, it is worth examining the concept of *symbolic legislation* presented by Marcelo Neves in his work *A constitucionalização simbólica* (“The symbolic constitutionalization”) in the following terms: “symbolic legislation, marked by a hypertrophy of its symbolic function to the detriment of the normative concretization of its legal text” (2011, page 32).

Therefore, the risk of the political effects of the aforementioned legal interpretation established by the Federal Supreme Court is noteworthy, since, under the terms mentioned therein, there is a considerable menace of serious damage to the normative force (as to the heads of the Executive Branch) of the Law of Ineligibilities, with the new wording given by the Clean Slate Law for subitem “g”, even resembling the concept of *symbolic legislation* presented by Marcelo Neves (2011).

## 5. THE PROBLEMATICS ARISEN OUT OF THE INTERPRETATION, AND ABANDONMENT OF THE DOCTRINE OF DETERMINANT *RATIO DECIDENDI* BY THE SUPREME FEDERAL COURT IN RE 848826

As stated above, RE 848826, which had a recognized general repercussion, is in literal terms contrary to Article 1, item I, subitem g, of Supplementary Law No. 64/1990 (BRASIL, 1990). This, of course, was also influenced albeit reflexively by the Supreme Federal Court abandoning the doctrine of Transcendent Determinant *Ratio Decidendi*.



The reason for the above statement is that from the time the Supreme Federal Court abandons this Doctrine of Determinant *Ratio Decidendi*, due to the excesses of constitutional complaints alleging violation of the grounds of some decision in a Direct Action for the Declaration of Unconstitutionality, an inconsistency in the court precedents begins, such as pointed out in this paper, generating legal uncertainty and instability in the judicial system.

Initially, it is well-known that in Brazil there is no tradition of conforming to precedents, what is more usual in *common law* countries.

Due to the overall relevance of such doctrine for the judicial system, the binding precedents and, even more recently, the regulations introduced by the New Code of Civil Procedure on the subject matter are to be considered in this context. The relevance of these precedents lies in the fact that the decisions rendered by the Federal Supreme Court in the context of a concentrated constitutional review have a subjective efficacy upon (that is, have force against) individuals, all bodies and entities of the Judiciary Branch, and of the direct and indirect public administration, with the exception of the full bench of the Supreme Federal Court, being, therefore, binding upon everyone (*erga omnes*).

This binding effect may or may not be limited to the order imposed by the judgement. There lies the discussion. If it is, one has the restrictive doctrine; if it is not, the binding effect will also be applicable to the *ratio decidendi*, to the grounds for that interpretation established by the Court. In this hypothesis, one will be mentioning the so-called Doctrine of Transcendent Determinant *Ratio Decidendi*.

In that context, for a few years this doctrine has been applied countless times by the Supreme Federal Court in many of its decisions, such as: Rcl. No. 2986, Judge-rapporteur Justice Celso de Mello; RTJ 193/513, Judge-rapporteur Justice Gilmar Mendes; and Rcl. 1.987 / DF Judge-rapporteur Justice Maurício Corrêa (BRAZIL, 2014).

In turn, the Federal Constitution itself, in Article 102, paragraph 2, expressly refers to the effects of the final decisions on merits of the Supreme Federal Court in the context of concentrated constitutional review but does not establish clearly which part of the decision would be binding (BRAZIL, 1988).

Moreover, as previously pointed out, the Supreme Federal Court has already favored the application of the Doctrine of Transcendent Determinant *Ratio Decidendi*. An excerpt from the enlightening decision of the single Justice Celso de Mello, the most senior Justice of Supreme Fed-

eral Court, on the subject in the Constitutional Complaint (“*Reclamação Constitucional*”) No. 2986 is transcribed below:

**It is known that there are those who maintain the possibility of invoking, for purposes of complaint, the so-called transcendent effect of the reasoning that gave grounds to the judgment rendered in an abstract control** (e.g. RTJ 193/513, Judge-rapporteur Justice GILMAR MENDES – Rcl. 1.987/DF, Judge-rapporteur Justice MAURÍCIO CORRÊA), **in order to recognize that the reach of the binding effect may extend beyond the order imposed by the judgment, also covering the *ratio decidendi* underlying the decision of the Supreme Federal Court. I also share this same understanding, that is to say, that it is possible to recognize in our legal system the existence of the phenomenon of the “transcendence of the motives that underpinned the decision” issued by this Federal Supreme Court in an abstract control process**, so that it becomes feasible to proclaim, as a result of this understanding, that the binding effect also relates to the “*ratio decidendi*” itself, going beyond the order imposed by the judgment rendered in an abstract normative control. **However, the Supreme Federal Court sitting en banc has repeatedly rejected this interpretation** (e.g. Rcl 2.475-AgR/MG, Judge-rapporteur for the precedent Justice MARCO AURÉLIO – Rcl 3.014/SP, Judge-rapporteur Justice AYRES BRITTO), **what imposes on me, as an effect of the principle of collegiality, the compliance with what prevailed in such judgments, although contrarily to my own opinion**: “II. Interlocutory appeal. Denial. **In a recent trial, the Federal Supreme Court sitting en banc rejected the interpretation of the binding effectiveness of the determinant *ratio decidendi* of the decisions in abstract constitutional review actions** (RCL 2475-AgR, 2.8.07).” (Rcl 2.990-AgR / RN, Judge-rapporteur Justice SEPÚLVEDA PERTENCE – emphasis added) 1. Lack of material identity between the challenged decision and the paradigm decision. 2. **Non-applicability of the doctrine of determinant *ratio decidendi*. Precedents.** 3. Interlocutory appeal denied.” (Rcl 5.216-AgR/PA, Judge-rapporteur Justice CÁRMEN LÚCIA – emphasis added) **It is worth noting that this same interpretation has been adopted in many other judgments**, including on the same subject matter of this case (Rcl 14.266/RJ, Judge-rapporteur Justice LUIZ FUX), **all of**

**them in the direction of rejecting the doctrine of the binding effect of the determinant *ratio decidendi* of the decisions rendered in the context of concentrated constitutional review** (BRASIL, 2014, paragraph 12).

However, as clarified by Justice Celso de Mello in his transcribed decision, the Court changed its position and has been maintained the new one until now, although it is relevant to mention that the non-applicability of the doctrine is subject to a significant divergence between the Justices. This understanding of the Supreme Federal Court was evidenced from the judgment Rcl 11.477 AgR/CE, Judge-rapporteur Justice Marco Aurélio, on May 29, 2012:

The 1st Panel denied the interlocutory appeal filed against a decision by Justice Marco Aurélio, declining to hear the complaint of which he was the judge-rapporteur, for considering inappropriate to apply particular shape to the uniformization incident, which would occur if the doctrine of transcendent determinant *ratio decidendi* was admitted. The Panel pointed out that the complaint would be an exceptional measure and would imply the usurpation of the jurisdiction of the Supreme Federal Court or a non-compliance with a decision rendered by the court. It was mentioned that the doctrine of transcendent *ratio decidendi* was in discussion. The judge-rapporteur pointed out that the Court would not have accepted the adequacy of the complaint by such doctrine. Justice Luiz Fux noted that the claimant would make an analogy to a decision rendered in relation to a member state other than that under consideration. Justice Carmen Lúcia recalled that, many times, the Justices of the Supreme Federal Court in the full bench would reach the same determination on different grounds and only the opinions of the conclusion of judgement would be counted. (BRASIL, 2012).

In fact, undoubtedly, the non-observance of this Doctrine causes inconsistencies in the judgments arising from the construction activity, which ultimately diminishes the Supreme Federal Court credibility in the preservation of the constitutional order.

Indeed, the situation discussed in this paper evidences exactly such lack of congruence in the interpretation of the cases by the Supreme Federal Court, since the interpretation that prevailed in the judgment of RE 848826 indicates that only the Municipal Legislative Council has the legitimacy to render ineligible the municipal adminis-

trators. This understanding flagrantly and literally undermines Article 1, item I, subitem g of the Supplementary Law No. 64/1990 (BRASIL, 1990) which has been ratified as constitutional by ADI No. 4578 (BRAZIL, 2012a, 2012b, 2012c).

Certainly, if the Supreme Federal Court had adopted the Doctrine of Transcendent Determinant *Ratio Decidendi*, there would also be a binding effect on the Panels of the Court in relation to the grounds of the decision, avoiding not only inconsistencies in later judgments, but also hindering an unrestricted interpretative freedom of changing what is set in the Federal Constitution (BRAZIL, 1988).

And, in fact, despite the emergence of a new constitutional interpretation, in which the Judiciary Branch is given more freedom in the activity of applying the rules in order to make the Federal Constitution effective, it is still necessary to adopt the plain interpretation, without great theoretical speculations, that simple one of subsuming the fact to the norm. This is the lesson of Luís Roberto Barroso:

Before proceeding further on the subject, a warning note is relevant. There are still many situations for which the constitutional interpretation will involve a simple intellectual operation, of mere subsumption of a certain fact to the norm. This is particularly true in relation to the Brazilian Constitution, populated by rules that have few to do with values and that address day-to-day issues. (...)

Therefore, when one speaks of “new constitutional interpretation”, “normativity of principles”, “value-weighting”, “argumentation theory”, one does not deny conventional wisdom, the importance of rules, or the value of subsumption solutions. Although the history of science is sometimes made of revolutionary disruptive events, that is not what it is all about here. The new constitutional interpretation is the result of selective evolution, which retains many of the traditional concepts, to which, however, it aggregates ideas that announce new times, and answer to new demands. (BARROSO, 2003, pages 28-29).

Thus, as explained in previous lines, it remains evident that the non-adoption by Supreme Federal Court of the Doctrine of Transcendent Determinant *Ratio Decidendi*, as well as the disregard of simple interpretations consisting solely of the subsumption of a fact to a norm, results in incoherent understandings and contradictory judgements, becoming the very Court that has the role of guarding the Constitution the fosterer of legal uncertainty.

## 6. CONCLUSION

In view of the foregoing, it appears that the judicial control over the decisions of the Courts of Accounts, by involving issues of high technical complexity, such as decisions on the accounts of public administrators, must be exercised by the agents of the Judiciary Branch avoiding to replace the Administration – the technical body to which the Federal Constitution has assigned exclusive authority to evaluate the accounts of public administrators – and exerting the power of self-restraint, allied to the concepts of democracy, and deliberation, thus avoiding the violation of the principle of separation of powers.

In addition, it is also concluded that the Supreme Federal Court issued a decision on an Extraordinary Appeal that was contrary to another previous decision of the same court in a concentrated constitutional review, as well as contrary to the literal text of the law under discussion. With such decision the Supreme Federal Court interfered with the constitutional authority of the Courts of Accounts and created a kind of “jurisdictional prerogative” for mayors who act authorizing expenditures.

That happened undoubtedly from the time the Supreme Federal Court abandons the Doctrine of Determinant *Ratio Decidendi*, due to the excesses of Constitutional Complaints alleging violation of the grounds of some decision in a Direct Action for the Declaration of Unconstitutionality, originating an inconsistency in the court precedents and consequently in the trial of the cases, such as pointed out in this paper, generating legal uncertainty and instability in the judicial system.

## NOTES

- i “Article 60. [...] Paragraph 4. No proposal of amendment shall be considered which is aimed at abolishing: [...] III – the separation of the Government Powers” (BRASIL, 1988).
- ii “Article 11. The political parties and coalitions shall request the registration of their respective candidates to the Electoral Court System by 7:00 p.m., August 15 in the year elections are scheduled to be held” (Wording given by Law No. 13.165, dated September 29, 2015). [...] Paragraph 5 The Courts, and Councils of Accounts shall submit to the Electoral Court System, by the date mentioned in this article, a list with the candidates who had accounts related to their former exercise of public offices or functions denied because of fatal defect in unappealable decision issued by competent authority. Such provision does not apply to cases which are being reviewed at the Judiciary Branch, or in which

the interested party has been granted a favorable judgement. (BRASIL, 1997)

- iii Decision: The Court, by a majority vote and in accordance with the opinion of Justice Ricardo Lewandowski (president), who drafted the bench decision, established the following understanding: “For the purposes of Article 1, item I, subitem “g”, of Supplementary Law No. 64, dated May 18, 1990, as amended by Supplementary Law No. 135, dated June 4, 2010, the examination of the accounts of mayors, both the government and management accounts, shall be exercised by the Municipal Legislative Councils, with the assistance of the Courts of Accounts with authority to do so, and the prior opinion of such Court will only cease to prevail by a decision of 2/3 of the municipal councilors”, dissenter the Justices Luiz Fux and Rosa Weber. Justices Cármen Lúcia and Teori Zavascki were absent with cause. Full Court, August 17, 2016.
- iv Resolution No. 4/2016 of Atricon: Article 1 – The Courts of Accounts shall send to the Municipal Legislative Councils the bench decisions rendered on the Management Accounts of municipal resources of the mayor who acted authorizing expenditures, in order that such Legislative Houses examine them exclusively by virtue of the provision of Article 1, item I, subitem “g”, of Supplementary Law No. 64/1990, that is, only for the purpose of legitimizing the possible ineligibility of the head of the Executive Branch, remaining unamended the authorities of the Courts of Accounts to a) impose damages and apply sanctions to such administrators with the force of an executable instrument, b) grant provisional remedies and also c) control the federal or state funds which were or are being used by means of an agreement, arrangement, adjustment, or any other similar instrument entered into with the federate municipal entities, and the rejection of the accounts by the Courts of Accounts in the latter case, which was not subject to the aforementioned judgement, give cause to the ineligibility provided for in Article 1, item I, subitem “g”, of Supplementary Law No. 64/1990.

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