

Accountability to the Federal Court of Accounts within the Open Government Partnership



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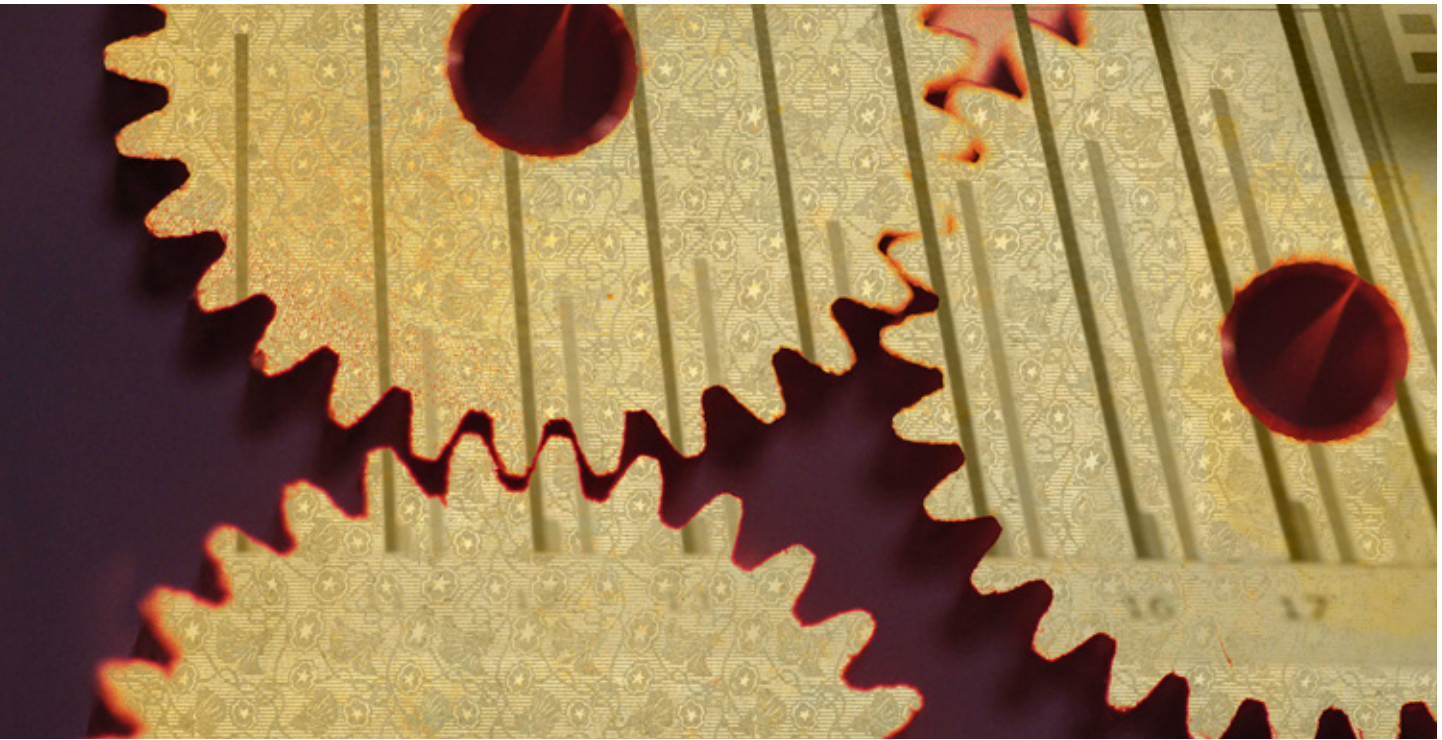


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ABSTRACT

The Federal Constitution of 1988 confers new features to the Brazilian public administration. By establishing ways and forums of participation, as well as access to public information, the Constitution broke off the insulating model of public administration in force until then. These achievements, that seek to engage more and more people in the everyday activities of the Federal Government, have become more apparent since the entry into force of the infra-constitutional norms that governed forms of participation, transparency and of obtaining information about government actions. In 2011, the Brazilian Government, aiming to be recognized as open government, joined the Open Government Partnership - OGP and committed to improve government action through the promotion of transparency, accountability and responsiveness. This task could be facilitated if the Courts of Accounts and, in particular, the Federal Court of Accounts - TCU, could contribute to the achievement of those commitments. Thus, the objective of this article is to discuss the possibility of the TCU, by means of rendering of accounts, to improve the exercise of accountability and contribute to the Executive Branch in achieving the commitments made. The analysis allowed identifying the rendering of accounts as a relevant instrument TCU has to contribute to the Executive Branch in the fulfillment of the principles outlined by the OGP.



Keywords: Open Government Partnership. Transparency. Accountability. Rendering of Accounts.

1. INTRODUCTION

The Brazilian Federal Public Administration – APF, at least until the 20th century, was marked by a vertical performance and turned inwards. It did not take into account the role of prominence that society could perform. However, the administration of public matters began to take new shapes in the country, mainly as of the Federal Constitution of 1988 – CF/1988.

This Constitution states right in its article one that all power emanates from the people, who exercise it by means of elected representatives or directly. Therefore, in a simple way, the option for a representative democracy model is renewed in Brazil. In this model, the representation comes with accountability, which assumes that the representatives are held responsible for their actions before those they have the right to represent (O'Donnell, 1994, p. 61).

CF/1988 also provided, in several of its articles, the guarantee of participation of the society in different fields of the APF, the right to access to public information and transparency of actions carried out by the State. Despite this apparent progress, only from infra-constitutional norms, such as the Fiscal Responsibility Act – LRF and the Access to Information Act - LAI, Brazil began to become more transparent and permeable to its citizens.

More recently, Brazil became part of the Open Government Partnership - OGP, an international institution created to enhance governmental action through the promotion of transparency, accountability and responsiveness. To this end, the Brazilian Government committed to principles that can lead it to be recognized as an open government.

Having seen the breadth of these principles, the commitment made by Brazil with OGP may become a difficult implementation task if only one branch remains acting alone to fulfill obligations undertaken. Such obligations will reflect not only the context of governmental actions, but also the perfection of the Brazilian democratic model.

The Courts of Accounts are institutions that can play an important role so that Brazil can be considered a country with an open government. As they are autonomous, independent institutions, and external from the Executive Branch, they may contribute to the improvement of accountability, especially when judging the accounts that the public administrators annually submit to their scrutiny.

From that assumption, the following question can be made: Can the annual accountability of agencies and entities allow TCU to contribute with the Executive Branch so that it can fulfill its commitments with the OGP.

Once the research question to be answer is established, the purpose of this article can be fixed as being

the discussion of the possibility of TCU, through the instrument of rendering of accounts, to perfect the exercise of accountability and contribute to the Executive Branch to fulfill the commitments made with the OGP.

To carry out this objective and provide an answer to the question made, this article was organized into six sections, in addition to this introduction. The second section briefly talks about the open Government in Brazil. The third seeks to establish some discussions concerning the accountability and transparency of public managers. The fourth demonstrates the evolution of accountability within the TCU. The fifth, in turn, demonstrates the interrelationship between accountability to TCU and the Open Government Partnership. Finally, the sixth and seventh sections have the final considerations and bibliographical references, respectively.

2. OPEN GOVERNMENT IN BRAZIL

The Open Government Partnership is an international initiative aimed at the improvement of government action through the promotion of transparency, accountability and responsiveness. The general assumption is that Governments are more effective and reliable if they are open to social participation. OGP1 was established in 2011, when eight founding Governments (Brazil, Indonesia, Philippines, Mexico, Norway, South Africa, United Kingdom and United States) formally adopted the Open Government Declaration and announced their first national action plans. OGP currently has 65 member countries (OGP, 2014).

The participating countries of the OGP must meet minimum requirements related to open Government principles, in addition to endorsing a declaration of principles and preparing action plans in order to put into practice a series of effective measures of transparency and access to public information and promotion of citizen participation (CGU, 2011). According to the Declaration of Principles, the commitments of OGP must be framed between five major challenges: improvement of public services; increase of public integrity; more effective management of public resources; creation of safer communities; increase of corporate responsibility. Such commitments must also follow the four principles of Open Government defined by OGP: transparency; citizen participation; accountability; and information technology (OGP-Brazil, 2011).

Therefore, to be considered as Open Government, the countries' management, actions, projects and

programs must reflect the principles of the OGP. The countries must also seek to achieve the objectives of increasing the availability of information on Government activities, supporting social participation, implementing the highest standards of professional integrity in public administration and increasing access to new technologies for purposes of openness and accountability (OGP-Brazil, 2011).

The search for accountability, transparency and social participation in Brazil started long before the entry of the country as a member of the OGP. In 1988, CF/1988 anticipated, since its promulgation, access to public information and the guarantee of social participation in various areas of public administration, as well as accountability, which, in this case, has been accepted mostly in the sense of rendering of accounts and accountability (MEDEIROS, CRANTSCHANINOV e SILVA, 2013).

The Fiscal Responsibility Act – LRF (Complementary Law No. 101/2000) enacted in order to establish rules for public finances aimed at accountability in tax management, is another important institute in the Brazilian search for the promotion of accountability and transparency. According to this law, the instruments of transparency of tax management, which shall have wide dissemination, are: the plans, budgets and budget guidelines law, accountability and its prior opinion, the summary report of the budget execution and the tax management report.

Following the same line of the LRF, the Law 12.527/2011, Access to Information Act- LAI, established a new and important milestone in the Brazilian scenario to regulate the right of access to public information provided for in CF/1988. Since its publication in 2012, there were 232,040 requests for information, nationwide, on the most varied topics were processed, and 230,024 of these requests were answered, i.e. an average of 99.13%. We can say that the LAI is the result of the National Action Plan on Open Government established by the Brazilian Government through Decree without number of September 15, 2011 for the purposes of fulfilling the requirements of OGP.

We can conclude that the CF/1988 traced wide paths for an increased permeability of the Brazilian State to citizen participation. To this end, access to information and, consequently, the transparency of the acts performed by the Government and the accountability of its agents are fundamental elements necessary for the strengthening of contemporary democracies. Such strengthening, however, cannot constitute an unique

and isolated effort of the Executive Branch as it can, as we will below, have great contribution from other branches, in particular, external control exercised by Courts of Accounts - TC.

3. ACCOUNTABILITY, TRANSPARENCY AND RENDERING OF ACCOUNTS OF PUBLIC MANAGERS

In an influential article about accountability, Campos (1990) inquires the possibility of translating such word into Portuguese. In her study, she emphasizes that the exercise of accountability is determined by the quality of the relationships between Government and citizens and between bureaucracy and clientele; and that there will only be conditions for accountability if citizens that are vigilant and aware of their rights organize themselves. (CAMPOS, 1990, p. 6). In this model, the citizen has a much broader role than the mere participation as a voter in the choice of their rulers, i.e., becoming an influential protagonist of public decisions.

In this regard, Dahl (1997, p. 25-26) highlights the quality of being responsive to all citizens as a remarkable feature of the democratic political system. Even in this scenario of democracy, Manin, Przeworski and Stokes (1999) argue that elected politicians may not act on citizens' best interest, since they have their own goals, interests and values. In these circumstances, the only "instrument" available to citizens to punish elected politicians for embezzlement, or to reward them for good service, would be the vote.

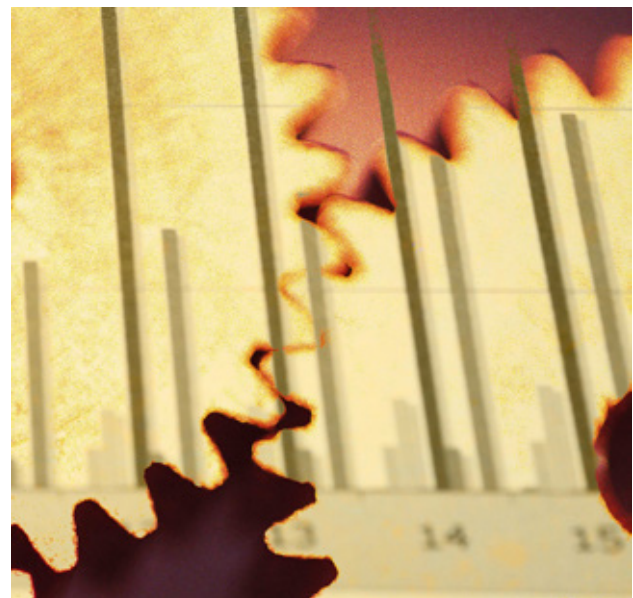
However, the vote is not enough to reward good rulers or to punish bad ones if the citizen cannot rely on independent institutions that act to encourage transparency of actions taken by the State. In the classification proposed by O'Donnell (1998), such institutions would be part of the horizontal² accountability that, to be effective, it must possess legal and actual authority, in addition to autonomy. Such institutions go beyond the classical institutions of the Executive, Legislative and Judiciary and reach arrangements as the ombudsmen, and the instances responsible for auditing the accountability (O'DONNELL, 1998, p. 43).

It is in this context that the importance of the Courts of Accounts (TCs) grows as institutions capable of promoting the reduction of informational gaps between State and society. The transparency of the acts performed by the different public actors and accountability of public managers become indispensable and

relevant mechanisms for the sponsorship of uninterrupted political accountability of the Public Government towards society.

Transparency, in this scenario, would be a preliminary search for the satisfaction of the promise unfulfilled by the democracies: the elimination of the unseen power. That is, the elimination of decisions and actions taken in secret, in the darkness, to give life to a Government whose actions should be carried out publicly, in daylight (Bobbio, 2000, p. 40). The OGP, therefore, by establishing its principles, promotes the improvement of democracy. The information analyzed by the TCs for judgment of accountability of public managers can improve, or at least, a portion of information approved by control institutions that operate independently can be placed at the disposal of citizens.

Rendering of accounts in Brazil is regulated, at the federal level, by the Federal Constitution (CF)-1988 and by the organic law of the TCU, Law No. 8443/1992 - LOTCU. At sub-national levels, by the respective State constitutions and municipal organic laws, as well as by the laws of creation of the TCs in the different States. According to the CF/1988, the Federal Court of Accounts, among other mandates, shall examine the accounts provided annually by the President of the Republic, issuing a prior legal opinion. The Court must judge the accounts of managers and other people responsible for monies, goods and public values of the direct and indirect administration, including foundations and societies instituted and maintained by the Federal Government, and the accounts of those that cause the



loss, misplacement or other irregularity resulting in loss to the Public Treasury (BRAZIL, 1988).

LOTUCU, in turn, establishes the annual rendering of accounts, as well as the form (taking or rendering of accounts), composition, decisions under such processes, in addition to the sanctions that the managers responsible for conducting public matters are subject to. Therefore, this law left the organization of processes related to accounts, conferred upon TCU, for standardization through normative instruction - IN, which obliges public institutions of the three branches to comply with. The evolution of the rendering of accounts to TCU be initiated by IN TCU 57/2008 and currently represented in IN 63/2010 is what we will discuss below.

4. EVOLUTION OF THE RENDERING OF ACCOUNTS TO TCU

We can say that the process of rendering of accounts is the gene that shapes and characterizes the Federal Court of Accounts since its creation (Decree 966-A/1890) to date, although its powers were extended over the past 120 years of existence to give other assignments that became important within the new political and social context experienced in Brazil, especially since the second half of the 80's.

Therefore, from the rendering of accounts, derives the competence of TCU to judge the accounts of



managers of public resources. In the post CF/1988 scenario, the judgment of the federal accounts reaches all those responsible for managing public resources of the three branches that, annually, are accountable to TCU. This broad range of action encompasses both direct and indirect public administration. In addition to that, the improvement process that public management has been experiencing since the model centered in paternalism to the management and, more recently, in the model and concepts of the new public management.

The diversity of institutions, their different natures and responsibilities, and the complexity that marks the public administration are factors with which the Courts of Accounts have to deal with so that accountability is made possible. Within the TCU, IN 57/2008 is the standard that shall dictate the new dynamic of accountability and breaks with the model previously adopted. In this new model, the management report – RG - became the most important part of the process of accounts. Selectivity has become heavily used, and the agencies and entities whose directors have accounts effectively judged each financial year were chosen based on a selection matrix that evaluates more than eighty criteria related to materiality, to relevance and to the risk related to management. Likewise, the rules for dealing with content, deadlines and forms of presentation of the accounts began to be regulated by two annual regulatory decisions - DN: one to deal specifically with the preparation of the RG; another to regulate the development of other parts that should compose the accounts process. The possibility of requiring information in a less than a year periodicity the position assumed by the top senior manager and his/her strategic core, as the responsible parties for the rendering of accounts, are two other relevant novelties in the current model of rendering of accounts that collaborate directly with the accountability and responsiveness of public administrators.

These changes gave more dignity to the process of accounts within TCU, since the previous model was seen by the Court's auditors as an untimely and innocuous instrument because it referred to past events, and low visibility since the auditors preferred to work in processes that brought more attention to them and, consequently, would facilitate the rise in their careers.

The challenges for implementing the new model of rendering accounts to the TCU, thus, derived not only from the diversity and complexity of the external environment, but also from the internal disbelief of the technical staff. To meet these challenges, in 2008, the TCU approved the creation of the Audit Project with the

objective of implementing the new system of rendering of the accounts by the units under the jurisdiction of TCU provided for in IN TCU 57/2008.

Among the most important results of the Audit Project include the structuring of the topics that should be included in the RG; the prediction of continuous improvement, including through the use of technological resources capable of conferring greater efficiency and effectiveness to the actions necessary for the judgment of processes of accounts, and the standardization of concepts and understandings with the approval of IN TCU 63/2010, which replaced the IN TCU 57/2008.

In this new model of rendering of accounts, the RG, prepared by the unit under TCU's jurisdiction, gained the status of most important piece to compose a process of accounts. Therefore, its contents started to be dealt with in a unique DN. This regulatory decision might be considered the one with greatest complexity among the rules governing the process of rendering of accounts. The standard, approved annually, provides guidelines for the management of those responsible for conducting public matters to be judged. To this end, it considers various aspects of management that ranges from aspects related to governance to the accuracy of financial statements. This set of features allows the TCU to decide whether the accounts presented by the managers will be considered regular, regular with exception or irregular.

In its current version, this DN has encompassed the following topics: (i) governance; (ii) relationship with society; (iii) operation environment; (iv) planning and results achieved; (v) budget and financial execution; (vi) personnel management and labor outsourcing; (vii) management of assets, (viii) management of information technology; (ix) managing the use of renewable resources and environmental sustainability; (x) information regarding the compliance with demands of control agencies; and (xi) accounting information.

We can conclude from what we've seen so far that the process of accounts is the only instrument available to TCU able to pervade the various public institutions across the board and that generates information periodically. Furthermore, the process of accounts is the only means of oversight that systematically mobilizes people from the jurisdictional units exclusively for the preparation of its content. Therefore, it is through the process of accounts that the TCU can exercise its most important prerogative: judging the managers' decisions and others responsible for money, goods and public values within the Federal government, since the ruling of

the accounts of the President is political and exclusive competence of the National Congress.

5. RENDERING OF THE ACCOUNTS TO TCU AND THE OPEN GOVERNMENT PARTNERSHIP

As discussed in section 2, the practice of accountability is one of the basic principles for a country to be defined as open government. If we use accountability as rendering of accounts and liability, it is almost natural to integrate the Courts of Accounts as important actors for the fulfillment of this principle.

To examine the accounts of public officials and hold them accountable, when applicable, the Courts of Accounts contribute to politicians and bureaucrats seek to act in the best interest of the citizen. Accountability, therefore, shall only have credibility if the ruling institution has independence and legal and actual authority (O'Donnell, 1998). These characteristics elect the Courts of Accounts as indispensable actors for the achievement of the principles provided by the OGP.

This is not to say that the rendering of the accounts structure and internal accountability in the government branches, representing control on itself, are not important. On the contrary, the performance of the internal control agencies of powers is essential. However, the independence of performance is more evident when the institution with authority to exercise control is external to the controlled environment.

It is exactly in this role that TCU stands out. As an institution with constitutional jurisdiction to judge the accounts of administrators and those responsible for money, goods and public values of the federal government's units and indirect administration agencies, and of all those who cause loss, misplacement or other irregularity resulting in loss to the Treasury, as well as to analyze accounts rendered by the President of the Republic. As an institution that is independent and not part of the Executive Branch, the TCU can add greater value to accountability.

Given its broad jurisdiction, the TCU reaches any institution that receives federal funds. Its scope even includes sub-national public agencies when these institutions are celebrating an agreement that involves federal public resources.

Considering this broad area of influence, TCU is qualified, via analysis of accounts, to be an important partner in achieving the goals outlined by the OGP and accepted as commitments to be pursued by Brazil. Such

commitments are large, ambitious and much desired for the growth of the country and the Brazilian democracy and, therefore, should not be of concern of only one of the branches of the government.

In this context, the process of rendering of accounts can become (or at least contribute to) the solution of two major and important issues: the reduction of the information gap between the government and the society, which is the instrument that have been judged by an independent institution, and allow citizens to exercise their citizenship outside of election periods. In other words, the citizen will be important not only every four years, when politicians seek them in order to conquer their votes to remain in power.

Therefore, having reliable information, which goes through a process of analysis and assessment by an autonomous and independent institution, can have the power of transforming the citizen from a mere spectator or recipient of public policies into an important player in conducting and controlling public matters. Thus, we conclude that the rendering of accounts instrument could be an important asset for the TCU to improve accountability and Brazilian democracy.

6. FINAL CONSIDERATIONS

The purpose of this article was to discuss TCU's possibilities of improving accountability performance by using the rendering of accounts instrument, and to contribute with the Executive Branch in implementing the commitments undertaken with the OGP.

From the analysis performed, we demonstrated the important role that the Courts of Accounts can play in improving accountability. Particularly in the case of TCU, it was confirmed that the process of rendering of accounts can constitute a powerful tool for this Court of Accounts to collaborate with the Executive Branch in complying with the principles that will be recognized as an open government and, consequently, the improvement of the Brazilian democracy.

Unlike other oversight activities conducted by TCU, it is the accounts analysis that runs like a thread through public administration, in a comprehensive and regular basis; and, therefore, it is able to generate a large flow of information, on a variety of topics. By analyzing this information and by giving an opinion, the TCU, by issuing its ruling, provides an explanation to society about the performance and property of management of public resources used by politicians and bureaucrats.

When TCU judges the accounts, it sends a signal that the information is vital and authoritative, autonomous and independent to empower the citizen to express better his/her choices in election rounds and to encourage his/her participation in the control of public management during these periods. Thus, the TCU, through the rendering of accounts, can become an important and relevant player in achieving the goals defined by the OGP. Therefore, the Executive Branch will not need to fight the mills in solitary winds.

In accordance with the analysis performed, the question posed can be answered affirmatively, in the sense that the rendering of accounts instrument is a valuable tool available to TCU that can be used by citizens and by the Executive Branch as a means to achieving the commitments made to the OGP.

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NOTES

- 1 For greater detail, see: REIS, Sérgio Roberto Guedes. A política de Governo Digital do governo federal brasileiro como práxis do paradigma de Governo Aberto: uma análise de suaviabilização a partir de um Modelo de Integração de Agendas. XIX Congreso Internacional del CLAD sobre la Reforma del Estado y de la Administración Pública, Quito, Ecuador, 11 – 14 nov. 2014.
- 2 For O'DONNELL, horizontal accountability means the existence of State agencies that have the right and the legal power and are indeed willing and able to perform actions, ranging from the supervision of routines to legal sanctions or even the impeachment against actions or omissions by other State agencies or agents that may be classified as tortious (O'DONNELL, p. 4, 1998).