Fiscalização a serviço da sociedade

REVISTA do TCU

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Roberto Brant

"We are increasingly characterized as a country that maybe won't work"

Federative Republic of Brazil

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To improve public administration for the benefit of society through government audit

Vision Statement
To be a reference in promoting a more efficient, ethical, responsive and responsible public administration

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Letter to the Reader

Bruno Spada

José Múcio Monteiro
Minister of the Federal Court of Accounts of Brazil and Head of the Editorial Council of the TCU Journal

Dear reader,

Issue number 140 of the TCU Magazine presents a wide range of themes, highlighting current and urgent discussions, such as the social security matter and the concern with the balance of public finances in Brazil.

The interviewee of this quarter is the professor and Law graduate Roberto Brant, who was a constituent deputy and minister of Social Welfare and Assistance, and is currently an advisor of TCU's Center for High Studies of Control and Public Administration - Cecap. Brant talks about the current Brazilian political scenario, the challenges to the sustainability of the social security system and the role of the courts of accounts in this process.

In the opinion column, TCU's Governmental Macro Evaluation Secretary, Leonardo Albernaz, warns of the risks and opportunities involved in the relationship between fiscal rules and the prioritization of public expenditures, in pursuit of the necessary stabilization of public accounts, so that there are macroeconomic conditions that enable a lasting growth in the country.

Highlights in this issue are: the second meeting of Cecap, which had as its theme TCU's performance strategy in 2018 and the planning of Cecap's next actions; the beginning of the Postgraduate course in Social Justice, Crime and Human Rights, promoted by the Serzedello Correa Institute in partnership with the schools of government of the Federal Senate and the Chamber of Deputies, and the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (Ilanud/ONU); TCU's implementation of the e-Pessoal system, a technological solution for communication, analysis and instruction of personnel actions; and the execution, by the Court, of another edition of the Public Dialogue with the objective of discussing Bill 7,448/2017 and its impact on the external control of Public Administration.

The articles covered several issues relevant to the debate on external control, among which: organizational governance applied in public health; fiscal authority evaluation - with a case study of the Independent Fiscal Institution - IFI in the Federal Senate; minimum time of disreputableness to discourage corruption - a case study of Operation Lava Jato; notarial minutes as proof of the physical execution of social and cultural projects financed with public resources; constitutional jurisdiction over the attributions of the courts of accounts in the light of the constitutional hermeneutics; panorama of the participation and contracting of micro and small companies in electronic auctions of foodstuffs - a case study of the Belo Horizonte Reserve Officer Training Corps; and management adjustment terms as perspectives for consensual external control.

Have a good Reading!

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"We are increasingly characterized as a country that maybe won't work":

Roberto Brant talks about a crisis in the Brazilian political system and brings suggestions for the social security issue.

Roberto Brant
Professor and Bachelor of Laws

Professor and Bachelor of Laws, Roberto Brant was a constituent Congressman and Minister of Social Security and Welfare between 2001 and 2002. He is currently the president of the CNA Institute, a non-profit civil association that develops social and agribusiness studies and research. Since 2017, he has also been a counselor of the TCU Center for Advanced Studies in Public Administration and Control (Cecap). In an interview to the TCU Journal, Brant talks about the current Brazilian political scenario, the challenges for the sustainability of the social security system, and the role of the courts of accounts in this process.

At the first meeting of Cecap's Superior Council (6/27/2017), you said that Brazil runs a serious risk of being a society that did not work and that in a few years we would be sure about that. In your opinion, what are the critical factors that put the country on this path today?

Today, I would state this even more emphatically. I think the institutions of the Brazilian State are not working in a coordinated way, with a view to a predetermined objective. In a poor country like ours, this objective is to allow material progress, to allow this progress to be extended and provide adequate basic public services such as education, health, and safety for everybody.

But I feel that the Brazilian State has become an arena in which distributive conflicts, that is, who pays what and who re-

ceives what, need to be ordered more fairly. This has led to a very large fiscal crisis, mainly to a precarious public service delivery, which only the State can provide in a more egalitarian way, such as safety and health care, for example. I don't see this course being reversed.

Therefore, I think we are increasingly characterized as a country that maybe won't work. There are many countries in the world that had everything to succeed and failed. The greatest example is here by our side, which is Argentina. In 1900, Argentina was the second or third richest country in the world in per capita income. It was paradise for anyone in the world. People came from Europe to live here. It had everything, climate, soil, a people much more cultured than the rest of Latin America, etc. However, the country almost went bankrupt and became irrelevant. No one talks about Argentina anymore, except in soccer.

Another example is Italy. We can finally say that this country failed. It is beyond repair. A clown created a political party and had majority in the elections. A clown, literally, who used to work on television: Bepe Grillo. A country that descended from the Romans, from the Etruscans, created the Renaissance and now is over. Maybe in 50 years they will have some regeneration, but the country no longer believes in itself, everyone faces everything with mockery. In the elections, for example, it is not that the voters believe that these people will solve anything. They have just reached a point of mockery and decided to vote for the clown. This also already happened here in Brazil. People didn't think he was going to do anything. They just thought "this is not worth more than a clown", and, in the end, I don't know if they were wrong.

In the case of Brazil, historically, what do you think that were the origins of this crisis in the State's performance?

I notice that the origin of this has two sources. The first one are the flaws of the Constitution of 88. I say this very naturally, because I was a constituent. A constitution is a kind of pact between the various sectors of society. It aligns the rights that must be protected with the duties that must be apportioned. Our constitutional pact came at an unfortunate time in World History. First because it was a year before the fall of the Berlin Wall. After that, the world's view changed completely. This way of thinking, with the State being too strong, with little regard for individual enterprise, with too much emphasis on the distribution of rights to public bureaucracies, everything would have been different if it happened two years later. A second point is that, at the time, the country came from an authoritarian experience, which contaminated people with the fear of excessive power by the Executive Branch. Thus, although the Constitution consecrates the division of powers, all situations reveal a distrust in the Executive Branch, so that the controls were exaggerated and their effective powers diminished. Even though, contradictorily, the actions of the State, which are performed by the Executive Branch, have been expanded, it has been increasingly cornered until it reached the current situation.

"The institutions of the Brazilian State are not working in a coordinated way, with a view to a predetermined objective. In a poor country like ours, this objective is to allow material progress, to allow this progress to be extended and provide adequate basic public services such as education, health, and safety for everybody."

Moreover, when the Constitution was drafted there was no clear civilian leadership that could direct the process. The democratic society is plural, but the truth is that this plurality has to be harmonized, otherwise coexistence is not possible. Harmonization occurs when some people give in some things, others give in other things and so you can live on common terms. At least, this is the ideal.

The second source for the causes of the crisis in in the Brazilian State is that there was a kind of bankruptcy of the political system. In fact, the State and society depend very much on the quality of the political system, on how political institutions work.

"The democratic society is plural, but the truth is that this plurality has to be harmonized, otherwise coexistence is not possible. Harmonization occurs when some people give in some things, others give in other things and so you can live on common terms. At least, this is the ideal."

Basically the parties and the parliament. The military government interrupted the ongoing process of formation of public men. There were two or three parties in operation until 1964, with a certain clarity, coherence, and a great deal of representativeness in relation to society. The military government liquidated the parties, invented two parties by decree, and hunted down everyone who had a little freedom of speech. With that, it discouraged an entire generation from being part of Brazilian politics, including mine. I graduated in 1964. My dream was to be a politician and I waited twenty years for that. However, most people who also had this dream got lost in the private sector. When they resumed their political life, a continuity had been broken. There was a tradition that the most intelligent people came to politics, we had big names. Since 1985, the quality of the political representatives has diminished.

Moreover, the excess of freedom of political initiative has created a great fragmentation. Brazil then became a sick country, which has thirty parties, but none represents absolutely anything. The National Congress' attempt to change this – through a barrier clause – was thwarted by the Supreme Court, which I also consider to be one of the institutions responsible for what we are experiencing.

Today the parties do not work and it is through the parties that the parliamentarians work. Our Legislative Branch represents absolutely nothing. It is a body that lives of itself, for itself, to survive and to eternalize itself. Therefore, we have a defective Constitution and institutions that function in a defective way, in view of the State's goals of distributing rights and duties, taking from those who can afford it through the tax system and distributing services that give equal opportunities to everyone. Nonetheless, the Brazilian State does not provide the poor with professional opportunities or the opportunity to rise in life, nor treatment in disease and misery nor public safety, as we are seeing in Rio de Janeiro. Moreover, the political system has no capacity to regenerate these functional defects.

"The excess of freedom of political initiative has created a great fragmentation. Brazil then became a sick country, which has thirty parties, but none represents absolutely anything"

Thus, if Brazil remains at this point, I think we will end up being a country that did not work at all. We were brought up with the idea that Brazil would be the country of the future. The present was bad, but the future was going to be great. I've learned this since I was a kid. It turns out that the future has not come and there comes a time when you say: does it really exist? I'm not saying it won't come. This country has energy, strength, and people. Nevertheless, in this moment we are living, it is fair to admit, at least, that we have gone astray from our future.

And how could the country build a turning point to approach this future?

Things are solved in two ways: either by means of reforms and regeneration conducted by the intelligent hand of man, or by virtue of an unsolvable crisis, in which chaos is created and things resolve themselves, which is the worst option. I think we need a deep institutional reform to review not only the constitutional pact, but also the formation of the political system.

We can't have thirty parties. We will have an election for President of the Republic

"We were brought up with the idea that Brazil would be the country of the future. The present was bad, but the future was going to be great. It turns out that the future has not come and there comes a time when you say: does it really exist?"

now and it is so without representation that anywhere in the world you have two or three candidates. Here, we already have 14, and this is madness. In any country in the world, the voters are unfamiliar with the major issues of public policies. Voters guide themselves in the elections through a few symbols, embodied in two or three people. It is multiple choice, with few squares. Here in Brazil we are going to a multiple choice of 15 squares. You see, if I ask you something trivial and give you 15 possible answers, you're going to get lost. The Brazilian people are being subjected to this and can't distinguish one option from the other. This is a sign of the disease of the political system, which is unable to agglutinate. Politics means aggregation, processing of diversities to reduce differences. You have a thousand points of view you try to reduce to 200, 100, 50, 20, 5, 3... and then you have options. Nobody is completely satisfied, but this is politics. The rest is a primitive society, which cannot live in large numbers.

Considering then the current scenario in relation to the constitutional and political panorama, what would be the prospects for the next president?

This next president will arrive without significant majorities, natural majorities. And he or she will have to deal with a Congress of 30 parties, most of which do not care who will win the election. They are there waiting for the visitor – who is the President of the Republic – to negotiate how he or she will govern, because they are the ones who are going to dictate it. If the president says he or she will not exchange favors, that he or she will not deal with a particular party, that he or she will not appoint a particular person, the president will not be able to approve any bills either. A country in which everything is constitutionalized, everything depends on large majorities to be approved. We are already in a crisis and in need of legislative reforms. He or she will not approve any, and will lose people's confidence, then push the Congress against the people, the people against the Congress, become isolated and end up leaving. In 15 years, we had two impeachments. This is a symptom that everything is wrong, and if we think that by going on like this, things will be solved by themselves, it is a mistake.

Thus, for a deep regeneration of the Brazilian state, I can't see the horizon. Who is going to lead it? When the Congressmen make a political reform, they make a miserable one, such as this one that is going to regulate the election now. It is an election made in such a way that no one outside the political system can enter because they have banned private funding. Now only public funding is accepted through the party. The party bureaucracies will receive millions and millions in taxes and will define to whom they are going to give them, since there is no rule, no law no decree to force them to do anything. They have their own money, and the medium sized parties are privileged, because they have no candidate for president or governor, so their money is for congressmen, and congressmen are currency. The more Congressmen they have, the more money they will have in the next election, whether from the party fund or the electoral fund. And this is their livelihood, they are financial agencies. Now, if financial agents, whose owner says, "vote for me or I will not give you the money" dominates the Congress, the Brazilian people have no political representation. I see what is happening and get sadder every day. It doesn't mean that the future is over, but that it is running away from us.

"We need a deep institutional reform to review not only the constitutional pact, but also the formation of the political system."

What could be the contribution of the courts of accounts to help the country reverse this situation?

I think the TCU has an important role to play. First because it helped in directing the functioning of the State. If you consider the period before and after 88, this was one of the few things in which the Constitution may have had breakthrough. Before the Constitution, the role of the court of accounts was subordinate. The Public Administration felt no pressure from external control. After 88, the courts of accounts became more important and better equipped in terms of personnel, auditors, so that they started to exercise effective control. Uncontrolled power is absurd.

In addition, the courts of accounts started to have a more preventive role. In the old days, when you did something wrong, the court would come and condemn you, but the mistake was already made. In fact, the function of control is not to punish. The function of control, in my view, is to prevent. There are people who even get annoyed with it. They want to initiate a bidding process and say it can't be done because the court has not yet released the call for bids. I prefer it this way. After all, what would be the opposite? The government would make the call as they wanted, proceed with the bidding, execute the contract, and then, the court of accounts would say that everything was wrong, find overprice, stop the work, and waste a lot of time, and still live with the losses.

"The function of control is not to punish. The function of control, in my view, is to prevent."

I also see a great improvement in the technical capacity of the courts of accounts. This will always be controversial, but anyway, unfortunately, the Executive Branch has been losing technical quality. After the Constitution of 88, some bodies improved technically, such as the Office of the Public Prosecutor, the Judiciary Branch improved, the courts of accounts, some careers, such as the Central Bank and National Treasury are also good. However, except for these islands, the Executive Branch is very poor of technical resources.

Today, much of the conflict with the Executive Branch may result from the fact that the technical staff of the courts of accounts are better. This also involves the salaries. The Executive Branch eventually complied with all the restrictions that were placed. And universal restraints are always dumb. We should restrict where restriction is needed, but, in some areas, we need opening. The public sector spends a lot of money where there is no longer a need and fails to spend where it is indispensable, such as coordination, planning, monitoring. The Executive Branch has lost the ability to hire high-quality people because of salary issues. They say, "you will earn less, but then you will retire". But they will change the rules of retirement, and then you will get nothing. The person who is good and has quality should earn the equivalent in the market. The Executive Branch was orphaned. And this is also one of the dysfunctions of the Brazilian State, which, in a reform of the public service, would have to be addressed at all costs.

Regarding the reforms being discussed in the country, the social security one deserves attention. In your opinion, what are the critical points to be considered in a reform that seeks to make the Brazilian social security model feasible?

Social security has become impracticable in Brazil, but it is happening in many parts of the world. First, let's talk about the private pension, that is a quite typical case. The financing mechanism of the private pension worldwide, not only in Brazil, is a contribution collected by a worker who has a job and a collection from the employer. These are the two pillars. Here in Brazil, the company collects 20% of the payroll and 8 or 9% are discounted from the salary of the worker. This low social security is supposed to protect the people as a whole, against the calculated risk of old age and death. Everyone is subject to this. But only part of the people finances the system, because only 30 million Brazilians have a regular employment in a company. The remainder of the active population, almost 100 million people, is out of the system. Therefore, this system runs a deficit by nature.

In addition, we have the transformations of the labor market. This number of employed, that we consider low, shows no tendency of growing, because, although the unemployment is cyclical when the economy is

falling, it improves when the economy is rising; in the long term, other forms of work are taking place in economic and social life, such as partial work, temporary work, work by task, work at home,... These forms of work that the International Labor Organization (ILO) calls atypical are already representing a very large amount in the total economy. Here in Brazil, it corresponds to approximately 20%, not considering the informal work. These atypical forms, since they don't have a permanent labor relation, have no company paying part of their contribution. The contribution of the worker is a small part of the social security fund, since the company pays 20% on its payroll and the person pays 9% only on the ceiling of his/her contribution, which is R$ 5 thousand. So, I would say that approximately 65%, 70% of the financing of the social security comes from the regular employer. And when we decrease the importance of the regular employer, we affect the financing of the social security. So, this financing is structurally problematic. On the other hand, a large part of the Brazilian population will not have the protection of the social security. For me, this problem is as big as the deficit itself.

And we still have the deficit. Even with all this, contributions are not being enough, for a simple reason: people are living longer. This social security thing has existed in the world for a very short time. In Germany, it exists since the XIX century, but in the rest of the world, only after the war, which began when people lived very little. Now, we live a lot. People retire at 40, 50, 50 and a few years and they will live to 80, 85. Today, the life expectancy at birth in Brazil is 76 years, but, when the person reaches that age, his/her life expectancy goes to 85, 90. The system became unfeasible, because, in the old days, 5, 10 years of retirement were affordable, and the person soon died. Now, it finances 20, 30. The calculations can't match. Reforms must be made, such as the one proposed, which increases the retirement age, ends with retirement for time of contribution, decreases it for some categories, separates it from the minimum wage. All this to try to give some more years to the system. Now, in the long run, 20, 30 years, the system as it stands, even with these mends, is still untenable.

And what is required for us to reach a sustainable model?

A bad thing here in Brazil – and this one is exclusively Brazilian – is that our rules are in the Constitution, a thing that was made to last. But economic and social scenarios are changing a lot. Ideally, this should be regulated by a law, because a law is something that can be changed easily. You can change it every 10 years, without much trouble. In the Constitution, the rule is frozen, but, in one moment, it becomes impossible, and changing it leads to a great impact.

So, if it was a law, it could be changed as reality changes. Thus, it would affect people's lives over time, there wouldn't be a shock. It's not a surgery. Let's say, in an analogy, that this social security illness could be treated with a remedy, just like we treat diabetes, high blood pressure, we don't even feel it, and, in the end, you get there. But no, here we let the thing reach a critical point and then we need a huge surgery.

In the case of the public sector, it is just the same. The State grew a lot and gained other responsibilities. Those rights that the workers had back on 1940, 1950 become unfeasible in 2018. Some rules are even absurd, such as the so called equal pay, equating the retired to those still working. First of all, it demotivates the employees. Whether in the public sector or in the private sector, an increase in the salary must be derived from increased productivity or increased requirements for the exercise of the profession. 40 years ago, an engineer should have a certain qualification to be hired, today it is much higher. In addition, when productivity increases, it's only fair to improve people's actual income, not just inflation. And then you transfer this to everyone that is retired, it doesn't exist anywhere in the world. Everywhere else in the world, once you are retired, you cut your link with the active world. From that moment on, you should have the right to a regular recovery of the purchasing power of that retirement. But the employees still working may receive an increase of the salary, get a promotion, in accordance with their needs. So, this even pay is not right.

"The State grew a lot and gained other responsibilities. Those rights that the workers had back on 1940, 1950 become unfeasible in 2018. Some rules are even absurd, such as the so called equal pay, equating the retired to those still working."

A person retiring with 100% is also something exclusive from Brazil. This so-called "retirement replacement rate" generally ranges from 50 to 60%, at most 70%, in Europe, for example, which is a generous continent in this matter. In the United States it doesn't even exists. But in Europe, which is our model – although they are much richer than us – they are also not being able to afford it. Anyway, here, until 2003, we gave 100% replacement plus a last salary.

People may argue that this is a vested right. But the rights are not exactly the same. Some rights are limitless. So, I can exercise my right without affecting other people' rights. For example, the right of association, credit right, freedom of movement. The fact that someone enjoys these rights does not hinder other people's enjoyment of their respective rights. And then, we have the economic rights, within them, we have those that are public, such as environment, the right to a clean air etc. This costs money. Often, you have to think: is it worth wasting R$ 100 billion to improve the air or is it better to invest in other things? It is a decision, but, in any case, it is a public property. The fact that I am breathing clean air does not stop anyone from breathing it too, it is not a competition. Then, we have the individual economic rights, as salaries and retirements. This is an individual right, exercised as a society, these rights cannot be absolute. I have the right to receive my retirement pension of R$ 30,000 every month, but this right is paid by the society as a whole, and, in Brazil, 90% of the people are poor, earning less than 3 minimum salaries, and these people do not have any of these benefits. And this is the injustice: the Constitution is a pact of rights and duties, but a lot of people were left out and few people are in. This is also something that makes society sick.

How may the Federal Court of Accounts contribute, in relation to specific aspects, with the formation of a more sustainable and egalitarian system for the social security?

The TCU may help a lot. Senator Paulo Paim brought an Investigating Commission of the social security in the Senate and they came to the conclusion that there is no deficit, everything may stay the same. The huge role of the TCU is to legitimate the correct information. It has authority to say "look, things are exactly like this, this costs this much". It is not about what is fair and

what is not, this is not the role of the Federal Court of Accounts. And, if this is in the Constitution, this is fair. The political system needs to change the rule of the Constitution, but it is not up to the TCU. The Federal Court of Accounts will say: "are those data true? Is that right?". In addition, making projections, as already done, for example, in the global tax area, golden rule, projections of the evolution of expenditure, revenue, deficit, public debt, they do this constantly and I think that this should also be done with social security, including in the area of financing ... if there are failures, if there are frauds.

This government says that, in the cases of retirement due to physical disability, they could eliminate tens of thousands of them. In the cases of rural retirement, I believe there was a fraud. For example, when I was a minister, I examined the number of rural retirements in Paraíba and Rio Grande do Norte, because rural retirement is very strong in the Northeast. Then, I took IBGE data and noticed that the population eligible in the census were smaller than the benefits that had been granted. It does not necessarily mean that there was a fraud, people may have moved to the state, etc. But, anyway, it's evidence. The eligible population is of women aged 60 and men 65 in rural areas, with no employment. This is shown by the Agribusiness Census and the Demographic Census as well. So, I thought: "there is something wrong here".

For urban workers, since 1975, the data are all on the general server of the social security. In fact, they don't need to prove anything. But in practice, they need to prove the length of service, show the social security card, then, an investigation is made and the retirement is granted. In the rural sector, there is none of this. The INSS does not approve the rural retirement. They were politically forced, since back then. Contag, which is the National Confederation of Agricultural Workers, did all this processing through its branches, delivered, and then that was just approved. Well, that was a union organization, the local politicians then would come and ask: "get me a retirement for the so-and-so". They forced things.

"The huge role of the TCU is to legitimate the correct information. It has authority to say "look, things are exactly like this, this costs this much". It is not about what is fair and what is not, this is not the role of the Federal Court of Accounts. And, if this is in the Constitution, this is fair."

So, if someone would audit rural retirements, it would be a spectacle, in the fiscal sense. Often, the political power, Executive Branch, is afraid to do so. I remember that, during the PT government, Berzoini decided to make a re-registration of retirees in Brazil. A normal thing, just to see who was dead or alive. It was a mess, Jornal Nacional showed they taking a man from his little home to the town. This is one case in a million. Anyone who audits may have a case like this. But they did that and killed the re-registration. The court of accounts could demand the re-registration because it has the role of ensuring the fairness and legitimacy of the acts of expenditure and revenue of the Government.

I think the court has a huge power, even because it is neutral, as an assistant of the Legislative Branch. It could lead something real. I don't see anyone with this capacity. I think it would be a contribution to the benefits of continued provision, to rural retirement and even to urban retirement, which has too many frauds. Every time we see a fraud scandal, they arrest someone, but it's a topical thing, we need something systematic. And then, we empower the Government to do it, because the Government is afraid to do it.

Do you believe that for the social security model to be improved, it must approximate the private pension model?

I do not think that the models should be the same, but I think that the process that is under way in Brazil is fair. To have a small basic retirement for everyone and, in the case of the public sector, to have access to a complementary fund in which you contribute with part and the State with another. This doesn't exist in the private sector. The private worker has his/her only the INSS retirement. If he/she wants a supplementary plan, he/she will pay alone for it.

In the public sector, the costs are shared, because the horizons are smaller, theoretically.

Then, different models must be treated differently. However, it can't be as different as it is today. In this debate, people are too influenced by politics and the topic should be discussed without emotions or political opinions, since it is a reasonable thing that can be gradually implemented. I am against great ruptures. We are always seeking surgical solutions to problems that could be treated in a first-aid-room, using a medical analogy. If we were aware that these things are going to be like this, from the first day, we would adapt, so people would not feel a trauma, nor a reversal of their expectations, that also have to be respected.

When I was minister of social security, I order some projections for the social security system, only taking into account the real increase of the minimum salary, since Brazil established that no social benefit could be lower than the minimum wage. We made several projections and realized that, if the minimum salary increased any amount above inflation, by 2030, the system would become absolutely broken. Then, Lula came along and ordered huge increases to the minimum salary. This ended up being unfair, since the minimum salary in the private sector is more of a guide because most people already earn more than a minimum salary, but the effect on the public sector was terrible. You have 10 million rural retirees, who never contributed – because they did not have the money for that – but retirement pay had to be readjusted based on the minimum salary. I believe that the real increase in the minimum salary should correspond to the increase in general labor productivity in the economy. However, the rural worker is not working, he/she is there, isolated, and it benefits are paid with tax money.

People who have reached the age of 65 without income and have any physical disability also receive continued benefits based on the minimum salary. There are basically these two in the case of the Federal Government. However, in the case of the municipalities, more than half of the city hall employees in Brazil earn in minimum salaries, so they would also have that increase. This generated a huge tax pressure. It is a matter of deciding whether to spend money with these people – that are already reasonably affected, and we can't compare their lives with ours, but with their own lives because they had nothing – or invest a little more in education, health, etc.

Since the resource is finite, transferring all that money to older people is actually taking it away from the children. What we should be addressing is that the people who are children today do not need a continued benefit tomorrow nor rural retirement, which are non-contributory things. No society is able to give money to everyone. We should provide to them minimum educational opportunities so that they could earn 2, 3, 4, 5, 6 minimum salaries or more. We are neglecting the future generations. We are wasting the money for the future in the present, which is a sign of reckless and unwise people.

I call Brazil a reckless society. This is very typical of us, tropical. We don't think about the future, tomorrow is not a problem. Brazilians do not have personal savings and we don't want the state to save either. I use to say that saving is to invest in the people of tomorrow. A reckless State like this will generate problems tomorrow. And I repeat, maybe we have no future for that, because we are increasing our public debt distributing money in the present. This is neither left nor right. This is nothing, because left or right, money has no color, no ideology.

Is there an explanation for this lack of long-term commitment? Would it be a characteristic of the Brazilian political culture?

I believe this is a characteristic of our social culture, not just political. But in the politics, it has something to do with the current political party system. Here, each Congressman speaks for himself/herself, each senator speaks for himself/herself. The tendency is that each one tries to save himself/herself, and then, the long-term concern actually disappears, because he/she needs to be re-elected, nothing else. When

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a political party truly works, it manages to give a certain order to this diffusion of personal ambitions. The political party is an organization with bureaucratic functions, hierarchies, scopes of deliberation and discussion that greatly diminish individual voluntarism.

However, in Brazil, it's like we have no parties. If I were a Congressman today, there would be three or four parties fighting for me, offering me money for my campaign. If I join such a party, I have no duty to them, I made a deal. As soon I am re-elected, I am alone again. I do not even know who the president of the party is, or I know, but we have no link – organic links, solidarity links, a bond of cohesion.

We've thrown out the organizational and institutional filters. The president of the Republic today talks to 30 parties, but out of the 30, there are a lot of people who say: "when you speak with so-an-so, you are not speaking with me". I heard from a minister of the current government that they need to talk to all Congressmen almost individually. There's no such thing. I mean, there is, but it doesn't work. There is no way it can work.

With this dispersion, this fragmentation, this voluntarist individualism, it is impossible to produce reasonable public decisions and policies. Each department of public performance is separate – energy here, transportation there. It is separated and they do not speak to each other, because each department is controlled by a certain political group. Thus, the logic of decisions has to meet the national need, which is not always ignored, but has to meet the logic of that sectorial interest.

It can't work at all. We don't have true politics, and the government is a hostage, just as the next president of the Republic will be. He/she will also be hostage of the parties, hostage of the congress, and then he/she ends up hostage of the Office of the Public Prosecutor. Anyway, we have to distance ourselves more from the individualism and voluntarism and seek more collective solutions.

Today, I believe things are worse than on that day of the first meeting. Today, I would say that things are more difficult.

"We have to distance ourselves more from the individualism and voluntarism and seek more collective solutions."

Opinion

Tax Rules and Public Choices: Risks and Opportunities in 2019

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The country will arrive on the eve of 2019 at a crossroads on the medium-term future of the public accounts; its main tax rules threatened due to the difficulty in equating its needs and ambitions, on the one hand, and capabilities and sustainability, on the other. Whether by the control of its compulsory expenses or by the increase of collections – which does not necessarily mean increase of the tax burden–, the tax effort required to stabilize the public debt trajectory is of approximately R$ 300 billion, which corresponds to nearly 6% of the GDP.

It is not about a tax effort concentrated on a fiscal year to eliminate an inventory problem, but a continuous effort to rebalance the income and expenditure flows, in a lasting manner, in that order of magnitude; leaving the annual deficit that, after 2014, has repeatedly exceeded the hundred billion reais and generating even greater surplus. It is not a simple task and it may expose a hard distribution conflict among social groups, in the collection of revenues and public expenditure.

Since 2015, the greatest part of the deliberate effort to rebalance the public accounts has been focused on the discretionary primary expenditure, in order to offset the effects of accelerated growth in compulsory expenditure. There are, however, problems and traps in this strategy. The problems are critical, as they combine insufficiency and impossibility of increasing the adjustment for this path of action. Insufficiency because, even if no discretionary expenses were incurred, the compulsory expenditure would follow its unsustainable growth trajectory, thus violating short-term tax limits. And impossibility because, as discretionary expenditure includes items that are essential to the operation of public bodies and their policies, such expenditure cannot be reduced far beyond the current levels – it is impossible to imagine a health unit functioning without hygiene and maintenance, a court without security, a police station without electricity.

The traps of this strategy are no less negligible. A relevant part of this adjustment is affecting the public investment, which is neither replaced nor increased by private investments. The result is reflected on the decreasing rates of fixed capital gross formation and, therefore, on insufficient growth rates of the economy, which is especially critical for a country of low average income. It is worth remembering that, in addition to being unequal, the wealth available in the country is not relatively high: regarding the limitation of the indicator, at the end of 2017, Brazil was the 71st country in the world considering the relationship between GDP and population, according to the estimate of the International Monetary Fund.

Notwithstanding this scenario of degradation of public finances, at the same time of the adoption of some measures for tax contraction expenditure, including revisions of programs based on financial and credit subsidies, measures that imply the maintenance of tax exemptions at high levels have continued to be implemented or renewed. Taking into account only the items corresponding to the so-called tax expenditure, as classified by the Federal Revenue, at the federal level, the granting of benefits is estimated in approximately R$ 270.4 billion in 2017, corresponding to 4.12% of the GDP.

It is a high amount but, even so, it does not reach the total reduction of the tax burden. There are measures that cannot be classified as tax expenditure and that represent billionaire collection losses, additionally, there have been a series of amnesty and remission programs that affect the availability of public resources. In an environment of a relatively stable tax burden, this means that the distribution of tax effort is subject to distortions of several orders and natures, harming the collectivity in favor of specific groups.

This scenario is aggravated by the exemption programs that, despite the intention behind them, are rarely evaluated, or even associated with objectives and goals explicitly stated. Approximately half the total tax expenditure does not even have a responsible management body, thus escaping not only from the allocative dispute of the budget cycle, but also from any expectation of critical review. These aspects have been repeatedly pointed out by the TCU (Federal Court of Accounts) in comprehensive supervisions or supervisions focused on specific resignations, evidencing the need for a more effective reaction by the society and its representatives.

The convergence of the recession, of the decrease in tax collection, of the continuous increase in compulsory expenses and of the maintenance of tax exemptions in high levels have generated a dynamic imbalance between expenses and revenues since 2014, whose reversal has not yet been consolidated and which results in accelerated growth of public debt: the Gross Debt of the General Government reached, at the end of 2017, the level of 74% of the GDP. However, this debt does not correspond to a legacy of infrastructure, or great investments in human capital and innovation that could change the level of competitiveness of the country.

Not coincidentally, the so-called Golden Rule of the Federal Constitution, whose purpose is to avoid public indebtedness to finance the current expenditures, has only been fulfilled due to atypical measures, mainly BNDES' (National Development Bank) funds return to the National Treasury. For 2019, however, there is a consensus that the Federal Government will have to use the exception provided for in the rule itself, requesting the National Congress to approve additional credits by absolute majority. From the legal perspective, the goal will be achieved; in its essence, however, we will continue in the opposite direction, as the country will issue government securities to finance current expenses, such as social security, payroll and debt interest, following an unsustainable trajectory.

At this point, therefore, it is clearly impossible to comply with the restrictive tax rules, in a substantive way, simultaneously with the rules of creation and increase of public expenses. In other words, there is an incompatibility between the provisions of the legal system that, on the one hand, demand expenses, and, on the other hand, seek to limit these expenses. And, before the rules, the actual issue is: the unsustainability of the public debt trajectory in case of maintenance of the current fiscal dynamics.

Therefore, inexorably, the next Presidents of the Republic and the legislature of the National Congress will have to start 2019 willing to direct a huge medium-term settlement of accounts, under penalty of leaving it to inflation, with all its damaging consequences to the growth of the economy and to the guarantee of social rights.

Edmund Burke said: "Those who don't know their own History are doomed to repeat it." Bringing it to our context, perhaps this is the central point of the crisis in public finances: looking back, it is past time for us to know, understand and learn from our past, or to accept to repeat the same mistakes from time to time. Perhaps, we have shown so far little capacity to assimilate all historical lessons, learn from what leads us to crises and what makes us achieve relevant successes – and with that, we may have missed some opportunities to move forward consistently.

The difficulties are clear, but not insurmountable, and proof that the country can deal with these obstacles is in our recent History. Approximately 30 years ago, during the 80s, we experienced a terrible State crisis – a time when, in fact, the ubiquity of the word crisis made it seem that it was a condition immanent to the nation, demanding from every Brazilian the ability to conform to no hope for a better future. The current news remind us of that time, as if we had gone back three decades, to a circumstance in which Brazil was an impossible country, in which people no longer believed in the country of the future that never arrived.

But this is not because the objective data tell us that. There is no evidence that we regressed to that point, on the contrary. However, our human, psychological experience leads us to this collective mistake; the country experienced the summit of hope, the impression that the future had finally arrived, and, suddenly, discovered that it was not exactly true. The collective certainty of the lost decade of 1980 seems, to everyone, truer than the conviction of developed Brazil of the first decade of this century. We went from the euphoria to depression and, from this current perspective, we cannot clearly distinguish between the past and the possible future.

Approximately 30 years ago, we restored democracy in Brazil, consolidating institutions and freedoms in the current Constitution. And approximately 20 years ago, we overcame the macroeconomic degradation and conquered a currency: if we go back to the end of the 1980s, we will remember a time when inflation surpassed 1,700% in a single year, resisting at absurd levels to periodic packages, until the "*Plano Real*" (Real Plan) took us to a new level of civilization in terms of economy. Today, we are back to an inflation below 4% per year, and our people have already shown that no longer tolerate the continued loss of the value of our currency.

Less than 10 years ago, the Federal Supreme Court decided, unanimously, to prohibit the practice of nepotism in the country, based on the principle of morality. In historical terms, it was yesterday. Our time is not the time of History. The daily news afflicts the good citizens who are led to hopelessness to the point where we forget how far we have progressed in our democratic governance: in the establishment of a Rule of Law; in the formation of professional qualified bureaucracies, especially in the scope of the government careers; in the availability of information and transparency to society; in the mechanisms of social participation and accountability.

In terms of economy, by analyzing the behavior of the product, it is undeniable that the country experiences a new lost decade. Regarding *per capita* figures, we are returning to the levels of the beginning of the decade, and it will take us years to re-establish after this wasted time. But we are not the same country of the 1980s. We are a better country and we cannot forget it. Development does not follow a linear trajectory. It is an irregular walk, with accelerations and decelerations, with progress and setbacks, with overruns and stumbles. However, we cannot deny our progress. And by saying it, we are not praising the conformism, we are not ignoring the harshness of the crisis that afflicts millions and millions of unemployed Brazilians, we are not failing to realize the crudity with which our institutions were and are vilified. On the contrary: we are recognizing what we already have and all that we still need to accomplish as a people.

Finally, it is time for reflection. In the year we celebrate 30 years of the Constitution and 18 years of the Fiscal Responsibility Law, we will have general elections and the opportunity for public debate about the country and its future. It is from this debate, technically informed, but essentially political – as noted by Schmitter, politics is peaceful resolution of conflicts – that a better country can emerge. We can avoid this debate and seek once more short-term illusions that lead to crises and lost decades; or we can face it, to make better choices from the collective point of view. We will face challenges ahead, on innovation, productivity and inclusive growth, but there is a precedent issue: rebalance the public accounts and ensure that the debt returns to a sustainable trajectory, to enable macroeconomic conditions required for a sustainable growth and resources to ensure social rights.

Second Cecap meeting: performance evaluation and planning of next actions

The Superior Council of the Center for Advanced Studies in Public Administration and Control (Cecap) of the Federal Court of Accounts – Brazil (TCU), an advisory body that seeks to assist in improving external control, held its second meeting on April 3, 2018.

Among the highlights of the discussion were debureaucratization, fighting corruption, performance of the courts of accounts, risk management, efficiency and quality of public services. Counselors Carlos Velloso, Denis Rosenfield, Everardo Maciel, Jackson Schneider, José Cechin, Murilo Portugal Filho, Roberto Brant and Robson Braga de Andrade, as well as the TCU minister, Augusto Nardes, court officers and public servants attended the meeting.

At the opening of the meeting, the president of the TCU, Minister Raimundo Carreiro, highlighted the results already obtained by Cecap and explained that, based on the suggestions made by the counselors at the first meeting, in June 2017, several actions were developed to improve the external control results.

The Secretary-General of External Control, Claudio Castello Branco, presented to the councilors problem situations of the public administration that TCU is facing. The director-general of the Serzedello Correa Institute (ISC) and Cecap executive secretary, Maurício Wanderley, spoke about the progress of the Cecap thematic groups.

The Working Group on efficiency and quality of public services was the first WG implemented and, in 2017, among other topics, discussed Constitutional Amendment No. 95/2016, which created the New Tax Regime. In 2018, the group will focus their studies on debureaucratization.

In 2017, the thematic group on evaluation of results of public policies and programs dedicated itself to analyze and discuss the Government Policies and Programs Report 2017 (RePP), produced by the TCU. In 2018, it will focus on discussions about multilevel governance and long-term planning.

The other groups, to be implemented during the year 2018, will discuss Fight against Fraud and Corruption, Performance of the Courts of Accounts, and Digital Transformation.

TCU promotes a graduate program in social justice, crime, and human rights

The program is offered by the Serzedello Correa Institute (ISC), TCU's School of Government, in partnership with the government schools of the Federal Senate and the Chamber of Deputies, and the Latin American Institute of the United Nations for Prevention of Crime and Treatment of the Offenders (ILANUD/UNO). The purpose is to enable practical contributions to the improvement and diffusion of strategies of social justice, crime control, and defense of human rights. The duration is 18 months, with a total of 400 hours.

The program consists of three modules: social justice, crime, and human rights. The courses will address issues such as human security, criminal policy, money laundering, cybercrimes, urban violence, penal system, social discrimination, transnational trafficking, and organized crime, among others. These issues are part of the 2030 Agenda for Sustainable Development prepared by the UN. Human security is one of the 17 Sustainable Development Goals (SDGs).

According to Ilanud director, Elías Carranza, Brazil's cooperation is fundamental to reduce the alarming numbers of violence. "The region of Latin America and the Caribbean is, at present, the one with the highest homicide rates in the world. It is necessary to attack crime as a whole, as proposed by the new university, a project that the Brazilian government will present to the United Nations and which has very good prospects for approval. And so be it for the good of mankind."

The magna lecture took place at the Petrônio Portella Auditorium, in the Federal Senate, on April 4, 2018, and had Yukio Takasu, the Special Advisor on Human Security of the UN General Secretariat, as speaker. According to the Special Advisor, human security requires four guiding principles: focus on the individual, comprehensiveness – integrating civil, political, economic, and cultural aspects -, context-specificity, and search for solutions for local realities.

The director-general of ISC, Maurício Wanderley, said that this program in Brazil is of great relevance to discuss the issue of security and crime with the contribution of renowned professors. He also pointed out that the TCU, as an external control body, has dedicated itself to this issue, with audits to evaluate, for example, the National Public Security Policy, the Brazilian prison system, and the national border policy. "These audits demonstrate how much the Brazilian Public Administration needs to approach these issues in a technical and qualified way", he said.

Implementation of the *e-Pessoal* system

The final stage of implementation of the *e-Pessoal* system was concluded. It is a technological solution for communication, analysis, and issuing technical opinions of personnel acts, and it was made available to all bodies of the Executive Branch. The ceremony that marked the beginning of a new stage, with the use of the platform by the entire federal public administration, occurred on March 5, at the Federal Court of Accounts (TCU).

Each year, the TCU examines on average 100 thousand acts of personnel admission and acts related to retirement and civil and military retirement and pensions. There is a huge amount of information circulating daily. The information involves both managers, who are at the base of the process, and auditors, who are at the end of the process. A date of birth entered incorrectly or an invalid CPF number may delay the assessment of these acts, consuming time and resources that are precious for the efficiency of external control and, consequently, for society.

With *e-Pessoal*, the assessment of these processes will become faster, and the information will be less subject to error – or even easier to identify and correct. This reduces the effort of all bodies involved in internal control and personnel management activities; increases the quality of procedural assessments; and decreases the time between the issuance and judgment of the act by the TCU.

"This system has allowed faster processing of the acts subject to registration, providing substantial improvements in the workflow, with the consequent reduction of the number of cases awaiting action. It also enables better control of deadlines to send the acts and the implementation of automatic criticisms based on complete and reliable information. Personnel managers have the possibility of inserting more complete information, which reflects the reality of the concession or admission", highlighted the President Raimundo Carreiro. "The gains are visible not only for the Court, which improves the timely performance of its institutional mission of external control, but also for the other players involved in the process", said Carreiro.

Public Dialogue: "Discussion of Draft Bill (PL) 7.448/2017"

Promoted by the TCU, the public dialogue "Discussion of Draft Bill (PL) 7.448/2017" occurred in the auditorium Ministro Pereira Lira, on April 23. The purpose of the event was to discuss the Draft Bill that sought to include in the Law of Introduction to the Norms of Brazilian Law "provisions on legal security and efficiency in the creation and application of public law". Two days after the event promoted by the TCU, the draft bill was partially vetoed by the President of the Republic, Michel Temer.

The debate was intense, with many disagreements, several points in favor and against the proposition. The disagreements were already present at the opening of the meeting. The panel consisted of the president and vice-president of the TCU, ministers Raimundo Carreiro and José Múcio Monteiro, respectively, the prosecutor general of the Office of the Prosecution General at TCU, Cristina Machado, the prosecutor general (PGR), Raquel Dodge, the Federal Attorney (AGU), Grace Mendonça, the Minister of Transparency and Office of The Federal Comptroller General (CGU), Wagner de Campos Rosário, the Minister of the Superior Court of Justice (STJ), Herman Benjamim, and the President of the Court of Accounts of the Federal District (TCDF), Anilcéia Machado. The second part of the seminar had the participation of jurists, professors, and members of civil society.

The subject was a trending topic on Twitter, in Brasília, and reached the mark of 1,662 views on YouTube (watch here) during the event. With highlight in the national press, the debate was intense, with many disagreements, several points in favor and against the proposition.

THE PUBLIC DIALOGUE ON SOCIAL NETWORKS AND ON THE TCU WEB PORTAL

19,990 people commented about it
1,011 reactions (likes, comments, and shares)
1,662 views (during the event)
32 national media coverages, according to TCU Clipping
79,285 twits (during the event)
#diálogopúblico
#PL7448/2017
1st place during the event in the Brasilia trending topics

Organizational Governance applied to Public Health

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ABSTRACT

Public organizational governance in health, or simply health governance, basically comprises the leadership, strategy, and control mechanisms put into practice to assess, orient, and monitor the performance of those in charge of the Unified Health System (*Sistema Único de Saúde* – SUS), aiming to conduct public policies and deliver health services to society. Organizational governance in health should not be confused with governance in the SUS network, whose essence refers to a logic of coordination among federative entities to carry out the public health policies. Neither should it be confused with management, which is in charge of planning, executing, and controlling actions and services. The concepts presented require that there be segregation of governance functions and health management. Current legislation assigns to the health councils the role of the main actors in organizational governance while management remains the responsibility of the Ministry and health secretariats. Measuring the capacity of the governance and management practices can point to the causes of the bottlenecks in delivery of quality public services.

Keywords: Public health, Governance, Risks, Internal controls; Control self-assessment.

1. INTRODUCTION

Between 2015 and 2016, in partnership with 26 Courts of Accounts in Brazil, the Federal Court of Accounts (TCU) conducted a control self-assessment aiming to contribute to the improvement of public organizational governance in the agencies in charge of health policies in Brazil (FEDERAL COURT OF ACCOUNTS, 2015b).

This work was done by sending out questionnaires to all state and municipal health councils of Brazil and all the Bipartite Inter-managerial Committees (CIB), with the objective of obtaining and systematizing the information related to governance practices in these organizations. The practices were inspired by the models defined by TCU in the Governance Basic Reference Tool (Id., 2014a), from the perspective of public administration agencies and entities (health councils) and, for the CIBs, on the Reference tool for assessment of public policies governance (Id., 2014b), with the appropriate adaptations by the teams of TCU and of the participating courts of accounts and by the managers and health specialists in the country, considering the legal framework and specialized bibliography.

As seen on the work website (Id., 2015c), control self-assessment (CSA) "is a process in which managers themselves assess their controls (in this case, their governance and management practices in the health area)". In addition, there is this description:

> In a CSA process the typical role of audit is that of facilitator. In this work, the audit (Courts of Accounts teams) coordinated the elaboration of the self-assessment tool; gave orientation regarding how it should be carried out; collected in electronic questionnaires data on the self-assessment results of several organizations; analyzed this data, carried out benchmarking; identified issues that deserve attention; and will send feedback reports. These reports will allow organizations to plan the improvements they deem more relevant in face of their needs and reality (FEDERAL COURT OF ACCOUNTS, 2015c).

During the several events, reference panels, and studies carried out in the TCU audit, various factors came up that limited the effective delivery of good quality health services. Among them, we can mention deficiency in interfederative articulation and in financing in the area of health and deficiencies regarding governance and management. Like TCU's audit, this paper will focus on the topic of governance and management in health.

After this introduction, section 2 brings concepts of risks and internal controls, basic content to approach the topic of governance. Different perspectives of governance are presented in section 3; while section 4 deals with the differences between governance and management in health. Concepts and examples are used to present such differences. Section 5 outlines the players in health governance (organizational) in light of the interpretation of the norms in effect. Section 6 presents the conclusions and indicates that measurements in the system of health governance can point to the root causes of the deficiencies in the delivery of public health services.

From the outset, we stress that the governance under study in this paper is not focused on organizational governance of health establishments – as is the case of public hospitals governance. Our focus is on governance exercised by health councils in relation to the health secretariats, considered as a sole organizational bloc.

2. WORK PROCESS, RISKS, INTERNAL CONTROLS AND INTERNAL AUDIT

Work regarding improvement of governance and management in any sector requires knowledge and appropriation of some concepts, such as the definitions of work process, risks, internal controls, and audit.

ISO 9001 ISO 9001 (BRAZILIAN ASSOCIATION OF TECHNICAL NORMS, 2015) gives guidance on the search for total quality and provides for the following:

> In order for an organization to function efficiently, it has to identify and manage several interconnected activities. An activity that uses resources and is managed to enable transforming input into output can be considered a process. Frequently, output of a process is the input for the next process.
>
> Application of a system of processes in an organization, together with identification, interactions of these processes and their management, may be considered as a "process approach."

We will use the concept that a **work** process is a set of interrelated and interdependent activities that transform different inputs into products or services, and that are of value to the internal or external client (FEDERAL COURT OF ACCOUNTS, 2013). Such activities are carried out by people (players) who play roles. A process becomes formal when it is documented and published within the organization. The final output of a process is associated to its **objective**. Purchase of health services from private establishments is an example of a process whose input is information such as health services needs that have to be supplied and generates as an output services delivered to the population by the health department hired. In this case, the objective of the process can be described as having health services delivered by the hired establishment.

Once the process is mapped, it is possible to identify risks in this process. According to the Brazilian Association of Technical Norms (2009a) NBR ISO 31000 (Brazilian norm that deals with the principles and guidelines for risk management) a risk is the "effect of uncertainty on the objectives of an organization." Risk, in a negative sense, refers to events that may occur and that make it difficult, or even prevent, achievement of the objectives. Going back to the example, a possible risk in the process of buying health services from private establishments is the hired party not delivering the service with the appropriate quality.

Internal controls are implemented to reduce risks. **Internal controls** are measures adopted by managers to reduce risks. If we revisit the example given, internal controls to reduce risk of the establishment hired not delivering the service with the appropriate quality can be:

a) inclusion in the formal contract, which must be signed by the parties, of quality indicators for the service to be delivered (for example, user satisfaction evaluation);

b) inclusion in the remuneration clauses of the contract of conditions that reduce the amount paid when service is delivered without the quality that was hired;

c) inclusion in the penalties clause of the contract of sanctions such as a fine and termination in case there is reiterated delivery of service with inappropriate quality (according to the contract indicators);

d) monitoring of the quality indicators (for example, follow-up of the user satisfaction evaluation reports).

We note that implementation of internal controls tends to reduce the chance of materialization of the risk, but we cannot affirm that the internal controls prevent risks from occurring.

Note that these three elements – objectives, risks, and internal controls – must always be taken into consideration together, whatever the work process.

The same norm ABNT NBR ISO 31000 defines risk management as "coordinated activities to guide and control an organization regarding risks" (Ibid.). It is through risk management that organizations seek to increase their chances of achieving the desired objectives.

In the course of the work conducted by TCU, in some interviews with managers, we noticed a certain level of difficulty in understanding the concept of **risk within the scope of public management**, especially since the managers in the health area are more used to dealing with **clinical risks**, which cover factors and circumstances to which patients are submitted in any procedure to care for their health in situations such as surgeries, service priorities, and choice of equipment, among others.

While the risks present in health organizations have an impact on achievement of the objectives set, and, indirectly, on the quality of services to citizens, clinical risks occur in the daily routine of medical practice. Just as medical teams care about reducing clinical risks, health managers should adopt measures (internal controls) to reduce the risks that affect organizational objectives.

There is a typical example of clinical risks in the health area in Brazil in the news report[1] in the show *Fantástico*, on TV Rede Globo, aired on January 8, 2016. In the report, a patient had an eyesight problem in his left eye and, due to a mistake, had his right eye operated. It is possible that the existence of standardized work processes and appropriate check lists before surgeries (which are internal controls) would reduce the exposure of Brazilian citizens to this kind of situation.

Similarly, returning to the example discussed in this section, the adoption of work processes to hire services and appropriate check lists to monitor these contracts would reduce the chances of hired establishments delivering services with inappropriate quality. And this will be the case in all processes in the area of

health, whether they relate to the end activities or to administrative affairs.

A recurring confusion, also identified in other areas that TCU has assessed, occurs regarding what is internal control and what is internal audit. To clarify this difference, we transcribe below some concepts contained in the recently published Joint Normative Instruction MP/CGU nº 1/2016, which deals with the implementation of internal controls, risk management, and governance with the Federal Executive Branch (BRASIL, 2016):

> Art. 2º For the purposes of this Normative Instruction we consider:
>
> […]
>
> III – internal audits: […] Internal audits should offer evaluations and advisory to public organizations, aimed at enhancing internal controls, so that controls that are more efficient and effective mitigate the main risks which might prevent agencies and entities from achieving their objectives. […]
>
> V – management internal controls: a set of rules, procedures, guidelines, protocols, automated systems routines, conferences, and processing of documents and information among others, put into operation in an integrated manner by the board and by the employee staff of the organizations, designed to approach the risks and provide reasonable assurance that, in carrying out the mission of the entity, the following general objectives will be achieved: […]
>
> Art. 7º The management internal controls dealt with in this chapter must not be confused with the activities of the Internal Control System listed in article 79 of the Federal Constitution of 1988, nor with the mandates of internal audit, whose specific purpose is to measure and evaluate efficacy and efficiency of management internal controls of the organization.

Thus, we can conclude that managers and senior management are responsible for the implementation of internal controls aiming to reduce the main risks in their organization, while **internal** audit is an independent activity and seeks to evaluate whether the internal controls implemented by the manager are sufficient and appropriate. We also conclude that the lack of the component SUS audit (internal audit) does no justification for the manager to not implement the internal controls, which are his responsibility.

3. DIFFERENCE BETWEEN ORGANIZATIONAL GOVERNANCE AND NETWORK GOVERNANCE

When we talk about governance in the area of health it is more common to think about the aspects related to network governance. This fact is due to the discussions on how to render effective the governance system for the Health Care Networks (*Redes de Atenção à Saúde* – RAS), established in Internal Rule GM/MS n° 4.279/2010, which defines RAS governance as "the capacity to intervene that involves different players, mechanisms, and procedures for shared regional management of the mentioned network" (BRASIL, 2010).

However, there are other ways of approaching the topic of governance. There are four perspectives of public governance (FEDERAL COURT OF ACCOUNTS, 2014a). They are:

> Society and state perspective:
>
> It is the political aspect of public governance, focused on national development, on the socioeconomic relations, on the structures that ensure governability [capacity of a political system to produce public policies that solve societal problems (MALLOY, 1993 apud SANTOS, 1997)] of a State and meeting the demands of society.
>
> […]
>
> Federative entities, branches of government and public policies perspective:
>
> It is the political-administrative aspect of governance in the public sector, focused on formulation, implementation, and effectiveness of public policies (WORLD BANK, 2012); in transorganizational networks which seek to overcome the functional barriers of an organization (STOKE, 1998); and on the capacity of self-organization of those involved.
>
> […]
>
> Public sector organizations perspective
>
> It is the corporate aspect of public sector governance, with a focus on organizations (ANU, 2012), on maintaining purposes, and optimizing the results offered by them to citizens and services users (CIPFA, 2004).
>
> […]
>
> Intraorganizatonal activities perspective
>
> Governance from the perspective of intraorganizational activities can be understood as a system by which the resources of an organization are directed, controlled, and evaluated.

The content (Ibid.) details aspects related to the perspective of public sector organizations, henceforth called **organizational governance**.

In 2014, TCU published the *Referencial para avaliação de governança em políticas públicas* (Basic public policies governance reference guide), which details aspects related to the perspective of "a "Federative entities, branches of government and public policies" (Id., 2014b). This document brings another concept of governance when it establishes that "Governance in public policies refers to the institutional arrangements that condition the manner in which policies are formulated, implemented, and evaluated, in benefit of society" (Id., p. 32).

Each of the four observation perspectives is not stagnant in relation to the others. Figure 1 shows the relationship between the observation perspectives of governance in the public sector.

Figure 1:

Relationship between the observation perspectives of governance in the public sector

Source: Tribunal de Contas da União (2014a)

Note that the aspects dealt with in Internal Norm GM/MS nº 4.279/2010 and in the Reference Guide to evaluate public policies governance in TCU are similar since they approach governance from the perspective of federative entities, branches of government, and public policies. From this perspective, TCU evaluated governance of the tools for interfederative agreement in the Unified Health System – SUS (FEDERAL COURT OF ACCOUNTS, 2015a). The part of the TCU survey that set the profile of the Bipartite Inter-managerial Committees (CIB) approaches governance from the same perspective of those two documents. However, this was not its main focus, as explained in this paper.

In the mentioned work by TCU, the focus was to obtain the governance (organizational) and management profile, respectively, of the health councils, and state and municipal secretariats.

I would like to register the connection between these two perspectives of governance: deficiencies in governance (organizational) can be causing an impact on the task of carrying out governance of interfederative articulation, which would become more complex and have less probability of success. After all, if a municipality cannot even govern its management, how could it coordinate with other municipalities to form health regions and health care networks?

4. 4. DIFFERENCE BETWEEN GOVERNANCE (ORGANIZATIONAL) AND MANAGEMENT IN HEALTH

In order to contribute to the improvement of Brazilian Public Administration, TCU elaborated a document called *Referencial básico de governança aplicável a órgãos e entidades da administração pública* – RBG (Basic reference guide of governance applied to public sector organizations). The 2013 publication was updated in 2014.

According to this document:

> Governance in the public sector essentially comprises the mechanisms of *leadership, strategy,* and *control*, put into practice to *evaluate, direct,* and *monitor* performance of *management* with the purpose of conducting public policies and delivering services of interest to society (FEDERAL COURT OF ACCOUNTS, 2014a, p. 26, emphasis in original document).

With regard to organizational governance, it is important to stress that it is not a question of management. In this paper, we will adopt for "management" the same concept as that of "administration" contained in NBR ISO/IEC 38500 (BRAZILIAN ASSOCIATION OF TECHNICAL NORMS, 2009b, p. 4) – Brazilian norm that deals with corporate information technology governance -, which defines:

> Administration: The system of controls and processes necessary to achieve the strategic objectives established by the head of the organization. Administration is subject to the guidelines, policies, and monitoring established by corporate governance.

According to the concepts presented, in a more simple language, governance deals with evaluating the situation, determining the direction, and monitoring the events to check if the direction set out is being followed, whilst management deals with elaborating work processes to execute the cycle plane-execute-control, with the objective of following the direction established by governance. Based on the topics they deal with, we observe that governance is incumbent on the higher part of the pyramid of an organization, which henceforth will be called **Leadership** of the organization. Management is incumbent on all managers. Table 1 summarizes the main differences between governance and management.

Table 1:

Differences between governance and management

Governance	Management
What to do	How to do it
Direction	Work process
Evaluate, direct, and monitor	Plan, execute, and control
Leadership (Council and High Management)	Managers

Following is a sample situation that allows us to differentiate the concepts of governance and management. Literature recommends that one way to increase resolution of basic care is by using protocols that are predefined in the regulatory activity because they "force" utilization of some clinical procedures in basic

health care before sending the patient to medium/high complexity, increasing, indirectly, resolution.

Suppose the leadership of a municipality receives a report to evaluate the situation of its basic health care and finds that resolution is not appropriate. This report must have been produced by the basic health care managers, who are the ones that have detailed information regarding delivery of services in the day-to-day. After this evaluation, the leadership can define guidelines for the health units of the municipality to use protocols predefined in the regulatory activity. Once they receive this guideline, the basic health care management should establish the protocols that will be used. They can, for example, select those that would bring greater results to their region among the ones available on the website of the Ministry of Health, disseminating the chosen protocols and training the professionals to use them and obtaining information to produce the reports for governance. The next step would be issuance of monitoring reports by the leadership, regarding both resolution and use of the protocols.

In the example above, we see the various elements of the governance-management relationship. Management produces the information (resolution report) for governance to **evaluate** the situation. Governance **gives a direction** to management by establishing guidelines ("solve the resolution problem by implementing protocols"). In turn, management **executes the work** process needed to implement the use of the clinical protocols and generate new reports for the leadership. The latter, in the end, uses the new reports to **monitor** if the measures were appropriate for achieving the objectives ("Are the protocols being used? Has resolution improved?"). This is done by follow-up to check if the units are using the protocols that could contribute to improving resolution.

Concluding: governance is different from management. While the latter is concerned with the planning activities, execution of what was planned, control so goals and objectives are reached, governance is in charge of evaluating the information provided by management (and by other sources); it is in charge of giving direction to management's performance, for example, by defining strategies that must be followed and for exercising control of management by constant monitoring.

While governance is essentially concerned with achieving effectiveness and economy, management must focus on efficacy and efficiency, with regard to its planning (FEDERAL COURT OF ACCOUNTS, 2014a).

In addition, observing what we have said up to now with regard to organizational governance in public health, we see that its main player is modified as the focus of the analysis decreases or increases in relation to an organizational block or to only one organization.

For example, considering the organizational block comprised of the health council and by the respective health secretariat, the current legal framework and corresponding literature, the council is the main player in governance. However, if the analysis takes into consideration only the health secretariats, the respective heads of those agencies are the main players. On the other hand, if we consider exclusive observation of a public hospital, the main player in governance in relation to this establishment will be the top manager or its board of directors (if there is one.)

5. PLAYERS IN GOVERNANCE (ORGANIZATIONAL) IN HEALTH

Once the concepts of organizational governance and public policies governance are separated, as well as the concepts of governance and management, as we will see later, the norms in effect leave no doubt that the role of management in health is the responsibility of the health secretariats (state and municipal) and that the main player in management is the head of SUS in the respective spheres.

As for the role of governance, current legislation allows us to state that **the** main **player in health organizational governance is the health council**. This is based on the relevant competencies given to the health councils, which are listed below, provided for in law (in a strict sense).

– oversee how financial resources are used in SUS, article 33, Law 8.080/1990 (BRASIL, 1990a);

– approve the health plans, article 14-A, sole paragraph, I, Law 8.080/1990 (Ibid.);

– formulate health strategies, article 1, § 2, Law 8.142/1990 (Id., 1990b);

– control execution of the health policy, including regarding economic and financial aspects, article 1, § 2, Law 8.142/1990 (Ibid.);

– decide the guidelines for the establishment of planning priorities, article 30, § 4, Complementary Law 141/2012 (Id., 2012);

– evaluate every four months the consolidated report on the results of budgetary and financial execution in health and the report of the health manager on

the repercussion of the execution of Complementary Law 141/2012 on health conditions and on the quality of health services, article 41, Complementary Law 141/2012 (Ibid.);

– examine the indicators for quality evaluation of the public health actions and services formulated and made available by management, article 43, § 1, Complementary Law 141/2012 (Ibid.).

– evaluate the detailed report of the previous four months, article 36, heading and items I, II and III, Complementary Law 141/2012 (Ibid.);

– evaluate the annual management report, article 36, § 1, Complementary Law 141/2012 (Ibid.); and

– approve the annual health program, article 36, § 2, LC 141/2012 (Ibid.).

Similarly, we emphasize the competencies of the councils provided for in the fifth guideline of Resolution CNS nº 453/2012, typical of governance (BRAZIL, 2012b):

– participate in the formulation and control of the execution of the health policy (item IV);

– define guidelines for elaboration of health plans and deliberate on its content (item V);

– deliberate on the approval or not of the management report (item VI);

– establish strategies and procedures for monitoring management of SUS (item VII);

– deliberate on the health programs and approve projects to be forwarded to the Legislative Branch (item IX);

– evaluate the organization and functioning of the Unified Health System (item X);

– approve the annual budget proposal for health (item XIII);

– propose criteria for financial and budgetary programing and execution for the Health Funds (item XIV);

– oversee and control expenditures (item XV);

– analyze, discuss, and approve the management report (item XVI).

We note that these are competencies which dictate the direction of health in its area of performance, so that **the council must play a major, not supporting role in evaluating, directing, and monitoring health management** with management being the responsibility of SUS management.

Along the same line, I would like to cite Dias and Matos (2012, p. 168), who talk of the following characteristics regarding the public policies councils (the authors also consider as such the health councils).

> c) In general, they are deliberative, comprehensive, and permanent. The mandates of the councils are not restricted to formulating suggestions or to forwarding demands. They cover deliberating on the guidelines for the policies on specific topics, approval of standardization and regulation of government actions, and approval of the budget proposal, and therefore affect the definition of macro priorities in the formulation of regulatory public policies.

In general, literature shows that in Brazil there is a worrisome gap between the legal role that should be played by the health councils and what has been found in practice.

Correia (2005) points to relevant problems that are big limiting factors to the effective exercise of governance by the health councils, such as: political interference in the choice of councilors; lack of information on the part of councilors; lack of coordination with their bases; weakness in mobilizing represented entities which, in turn, is a reflection of the lack of mobilization of society; co-option of leadership in exchange of favors; low level of transparency of managers regarding the use of resources; manipulation of councils/councilors to legitimate management; low level of social visibility of the action of Councilors; non-compliance with the deliberations made by managers (CORREIA, 2002, apud CORREIA, 2005).

When discussing the public policies councils (as they consider the health councils), Abranches and Azevedo (2004), cited by Dias e Matos (2012, p. 169), state:

> Municipal councils still face many other difficulties that can explain having a performance below what is expected: lack of physical infrastructure and of operational support; irregular participation of councilors; political divergences with regard to the use of the public fund and to the format of programs; among others. The lack of capacity of the councilors has also been considered as a factor that creates difficulties and hinders the decisions by councils due to lack of knowledge of the laws, of the budgetary guidelines, of differences between plan and policies and of the function of councilors and councils.

In this sense, the authors add:

> Although they have multiplied, the municipal councils in Brazil do not have a recurring pattern regarding their operation, their functions or composition, and, in some cases, are no more than formal bodies that do not have an effective practice. "In other cases, they are controlled by the municipal Executive branch, with no autonomy nor exercise based on articulation with other sectors of civil society" (IBGE, 2010 apud Dias e Matos, 2012, p. 166).

Furthermore, in the report that served as basis for Court Decision 2.788/2009-TCU-Full Court, TCU (2009) had already pointed out the following risks related to health councils: lack of infrastructure and its own budget; loss of independence in relation to the health manager; reduced preparedness on the part of councilors; and isolation of social control in relation to the other levels of control.

Thus, we arrive at two important principles that must be emphasized: **there needs to be segregation of functions between governance and management in health, and the major players in organizational governance are the health councilors**.

Figure 2 represents the actions and roles of organizational governance in health from the viewpoint presented (roles are not presented in an exhaustive manner because there are other important components that are not being approached in this paper).

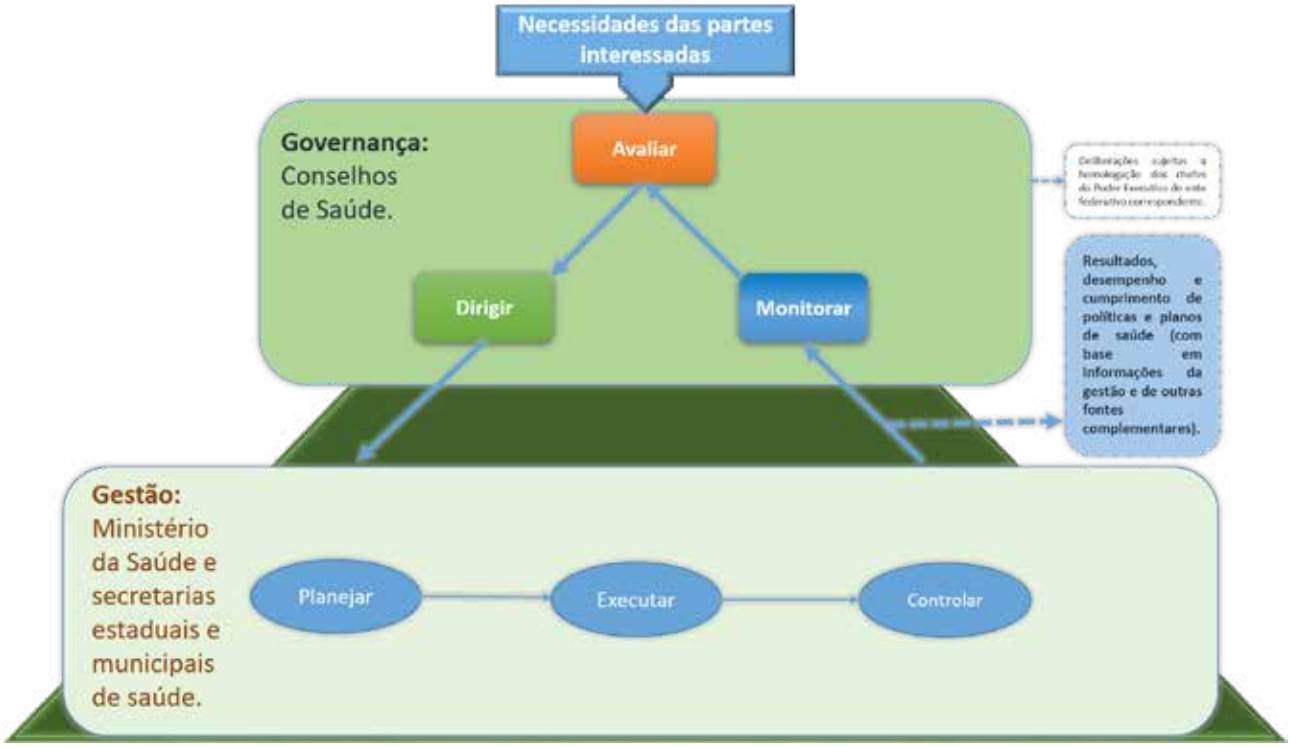
In this wake, the Brazilian health councils need to govern public health by means of three main tasks (BRAZILIAN ASSOCIATION OF TECHNICAL NORMS, 2009a; FEDERAL COURT OF ACCOUNTS, 2014a):

– **evaluate** the environment, scenarios, performance, and results, current and future, related to public health in their sphere of performance;

– **direct** and guide perception, articulation, and coordination of health policies and plans, aligning the organizational **functions** with the needs of the

Figure 2:

Relationship between Public Governance and Public Management in Health



Source: adapted from the Information Systems Audit and Control Association (2012), Brazilian Association of Technical Norms (2009a) and Federal Court of Accounts – Brazil (2014a)

stakeholders (users of public health services, citizens and society in general) and ensuring achievement of the objectives established; and

– **monitor** the **results**, performance, and enforcement of health policies and plans, confronting them with the goals established and expectations of stakeholders.

In conclusion, based on the adaptation of the RBG it is possible to define public organizational governance or, henceforth, governance in health, as follows:

Public organizational governance in health, or simply **governance in health, comprises essentially the mechanisms of leadership, strategy, and control put into practice to evaluate, direct, and monitor the performance of SUS management, aiming to conduct public policies and delivery of services in the area of health to society.**

6. CONCLUSION

Public organizational governance in health, or simply governance in health, comprises essentially the mechanisms of leadership, strategy, and control put into practice to evaluate, direct, and monitor the performance of management of the Unified Health System, aiming to conduct public policies and delivery of services in the area of health to society.

Organizational governance in health must not be confused with network governance. The former focuses on organizations (in this case, the Ministry of Health and the health secretariats) and the latter on the relationship between the organizations.

Neither can governance be confused with management. While governance evaluates, directs, and monitors the organization, management executes the work processes to conduct the organization towards the direction determined by governance.

In the health organizational governance system, the legislation in effect grants the functions of major players in organizational governance to the health councils, who should evaluate, direct, and monitor health management (Ministry of Health and health secretariats) in their jurisdiction. In face of the definitions presented, it is clear that there is a need for segregation of the functions of governance, which are the responsibility of the councils, and those of health management, for which the respective health secretariats are in charge.

Between 2015 and 2016, the Federal Court of Accounts conducted a self-assessment by sending questionnaires to all Brazilian state and municipal health councils and to all the Bipartite Inter-managerial Committees (CIB), with the objective of obtaining and systematizing the information related to the governance practices in these organizations.

The measurements carried out by TCU in this work will enable estimating the capacity of the governance and management practices in health. Similarly to what occurred in other works of the same nature conducted by TCU, these measurements might signal the causes of bottlenecks in the delivery of quality public services.

NOTES

1 Available on: <https://glo.bo/2t5bERR>. Access on Feb 28 2018.

REFERENCES

BRAZILIAN ASSOCIATION OF TECHNICAL NORMS. ABNT NBR ISO 31000:2009 – Gestão de riscos – Princípios e diretrizes. São Paulo, 2009a. Available at: <http://bit.ly/2CJEB5r>. Access on: 4 Mar 2017.

_____. ABNT NBR ISO/IEC 38500:2009 – Governança corporativa de tecnologia da informação. São Paulo, 2009b. Available at: < http://bit.ly/2FcT2Ve>. Access on: 4 Mar 2017.

_____. ABNT NBR ISO 9001:2015 – Sistemas de gestão da qualidade: requisitos. São Paulo, 2015. Available at: <http://bit.ly/2F20xuR>. Access on: 4 Mar 2017.

Brasil. Law 8.080/1990, of 19 September 1990. Provides for the conditions for promotion, protection, and recovery of health, organization and functioning of related services and other matters. Diário Oficial da União, 20 Sep 1990a. Available at: <http://bit.ly/1luhiiN>. Access on: 26 Feb 2018.

_____. Law 8.142/1990 of 28 December 1990. Provides for participation of the community in management of the Unified Health System (SUS) and for intergovernmental transferences of financial resources in the area of health and other matters. Diário Oficial da União, 31 Dec 1990b. Available at: <http://bit.ly/1ETadnu>. Access on: 26 fev 2018.

_____. Ministry of Health. Internal Norm MS/GM 4.279, of 30 December 2010. Establishes guidelines for organization of the Health Care Network within the Unified Health System (SUS). Brasília, DF, 2010. Available at: <http://bit.ly/1OW8XGy>. Access on: 26 Feb 2018.

_____. Decree 7.508, of 28 June 2011. Regulates Law 8.080, of 19 September 1990, to provide for organization of the Unified Health System – SUS, for health planning, health assistance, and interfederative articulation and other matters. Diário Oficial da União, Brasília, DF, 29 Jun 2011. Available at: <http://bit.ly/2jsLz87>. Access on: 26 Feb 2018.

_____. Complementary Law 141/2012, of 13 January 2012. Regulates paragraph 3 of article 198 of the Federal Constitution to provide for the minimum amounts to be applied annually by the Federal Government, States, Federal District, and Municipalities in public actions and services in health; establishes criteria for apportionment of transference resources to the health area and norms for oversight, evaluation, and control of health expenditures in the three spheres of government; revokes provisions of Laws 8.080, of 19 September 1990, and 8.689, of 27 July 1993; and other matters. Diário Oficial da União, 16 Jan 2012. Available at: <http://bit.ly/2t5sQqE>. Access on: 26 Feb 2018.

_____. Ministry of Health. National Health Council. Resolution CNS 453/2012, of 10 May 2012. Approves the guidelines for institution, reformulation, restructuring, and functioning of the Health Councils. Brasília, DF, 2012b. Available at: <http://bit.ly/1L6yfAe >. Access on: 26 Feb 2018.

_____. Ministry of Planning, Budget, and Management. Comptroller-General of the Union. Joint Normative Instruction MP/CGU 01, of 10 May 2016. Provides for internal controls, risk management, and governance within the scope of the federal Executive Branch. Brasília, DF, 2016. Available at: <http://bit.ly/2t26Ht7>. Access on: 26 Feb 2018.

CORREIA, M. V. C. Desafios para o controle social: subsídios para a capacitação de conselheiros de saúde. Rio de Janeiro: Fiocruz, 2005.

DIAS, R.; MATOS, F. Políticas públicas: princípios, propósitos e processos. São Paulo: Atlas, 2012.

INFORMATION SYSTEMS AUDIT AND CONTROL ASSOCIATION. COBIT 5: Framework for the governance and management of enterprise IT: ISACA, 2012.

FEDERAL COURT OF ACCOUNTS – BRAZIL. Court Decision 2.788/2009-TCU-Full Court. Brasília, DF, 2009.

_____. Serzedelo Corrêa Institute.Mapeamento de processos de trabalho com BPMN e BIZAGI. Brasília, DF, 2013. Available at: <http://bit.ly/2FENhNH>. Access on: 4 Mar 2017.

_____. Basic reference guide for governance applied to public administration organizations. Brasília, DF, 2014a. Available at: <http://bit.ly/2p4vRRN>. Access on: 20 Jan 2017.

_____. Basic reference guide for governance evaluation in public policies: 2ª version. Brasília, DF, 2014b. Available at: <http://bit.ly/2p4vRRN>. Access on: 7 Oct 2016.

_____. Court Decision 2.888/2015-TCU-Full Court. Brasília, DF, 2015a.

_____. Survey on governance and management in health – 2016 cycle. Brasília, DF, 2015b. Available at: <http://bit.ly/2t57J7B>. Access on: 20 Jan 2017.

_____. Survey on governance and management in health – 2016 cycle (Introduction). Brasília, DF, 2015c. Available at: <http://bit.ly/2HT3Fe1>. Access on: 20 Jan 2017.

_____.TC 011.770/2015-5. Survey Report. Brasília, DF, 2015d. Available at: <http://bit.ly/2FG2lp0>. Access on: 28 Feb 2018.

Evaluation of fiscal authority: the IFI case in the Federal Senate

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ABSTRACT

This paper evaluates the creation and form of operation of the Independent Fiscal Institution (IFI), which is linked to the Federal Senate and was created in 2016. The evaluation is done based on the existing definitions and standards for entities that carry out this kind of function, recommended by academics and by the international organizations International Monetary Fund (IMF), Organization for Economic Cooperation and Development (OECD), and European Union European Commission (EU). This Brazilian case study uses bibliographic research of scientific articles and official international publications with theoretical discussions, comparative studies, and analyses of case studies about independent fiscal entities in several countries of the world. The results obtained show that, considering the form in which the IFI was instituted in Brazil, there is room for strengthening it with regard to appropriateness to the legal framework in effect, enhancement of actual independence, better relations with the Parliament in terms of accountability and rendering of information, participation and opinion on the elaboration of budgetary laws, among others. There is still a need to ponder and define the field of action of the IFI to avoid overlap of mandates regarding other agencies, such as the Legislative Consultancies of the two Houses of the National Congress and the Fiscal Management Council, provided for in the Fiscal Responsibility Law. Examination of the matter also shows that the relationship of the

IFI to the press and society is one of the greatest virtues of the fiscal institution, playing effectively a role that is typical of these types of institutions.

Keywords: *Accountability*; Fiscal policy; Independent Fiscal Institution

1. INTRODUCTION

The importance of countries maintain a budget that is balanced and sustainable in the long term is well known. However, in practice, this is not always confirmed and can generates successive deficits, growth of debt, and economic crises in countries that are not managed with fiscal responsibility (BEETSMA; DEBRUN, 2016; KOVACS; CSUKA, 2012). Both academia and supranational organizations research and develop continuously new methods and tools that can help in the appropriate fiscal management of countries (CALMFORS, 2011; DEBRUN et al., 2013; EUROPE COMISSION, 2016a; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, 2014).

One of these tools is an entity that has autonomy in relation to all Branches and would have the mandate to carry out studies and estimates on the fiscal situation of the country and to influence budgetary discussions. In the past decades, implementation of this type of entity has grown in all continents, particularly in Europe because of the European Union requirements. (DEBRUN et. al., 2013).

Brazil seems to have followed this global trend. In 2016, it created the so-called Independent Fiscal Institution (IFI), linked to the Federal Senate, whose purpose is to elaborate estimates for fiscal variables and analyze compliance with the budgetary goals, among others (FEDERAL SENATE, 2017a).

This paper aims to evaluate the creation and form of operation of this entity based on the definitions and standards recommended by academia and by international organizations. These institutions can bring several benefits to fiscal management in a country, as long as minimum principles and standards are followed, since the performance of an institution and the political-economic scenario in which it is inserted are more determinant for the effectiveness of its activities than the mere decision to create the institution (BEETSMA; DEBRUN, 2016; POSEN, 1995).

The method used was bibliographic research, followed by normative evaluation of the creation and performance of the IFI, inspired on the methodology of theory-based evaluation (EUROPE COMISSION, 2013). The first development section deals with the context in which the IFI was created. The second describes the definitions and standards established by international organizations and the academia. The third section is a comparison between the normative criteria identified and what is being implemented in the Country through the IFI. Finally, we have the conclusion that summarizes the results obtained and points out suggestions for possible studies and future developments regarding this topic.

2. THE BRAZILIAN IFI AND ITS RELATIONSHIP WITH THE OTHER FISCAL AND BUDGETARY INSTITUTIONS

2.1 CRATION BACKGROUND AND MANDATES CONFERRED TO THE IFI

Article 67 of the Fiscal Responsibility Law (LRF), Complementary Law 101/2000 (FEDERATIVE REPUBLIC OF BRAZIL, 2000), provides for the creation of the Fiscal Management Council (CGF), which could be a fiscal council like entity for the country. However, the necessary regulation was not approved even after 16 years of publication of the LRF. Some people say that the main difficulty to materialize the institution CGF is its excessively comprehensive composition (BIJOS, 2015).

The possibility of creation and effective installation of another type of independent fiscal authority in Brazil was the topic of some theoretical studies. Bijos (Id.) defended that instituting an entity following the model of independent Parliamentary Budget Office, but linked to the Federal Legislative Branch, like the Congressional Budget Office (2016) – CBO –, in the United States of America (USA) since 1975, would be positive for the strengthening of national budgetary governance.

However, Bittencourt (2015) was of a contrary opinion when analyzing Constitutional Amendment Proposal (PEC) 83/2015, aimed at creating the Independent Fiscal Authority (IFA), considered as independent despite being linked to the National Congress (FEDERAL SENATE, 2015b). According to the author, the mandates foreseen for the IFA are already carried out by other bodies such as the Federal Legislative Aides Offices and the Federal Court of Accounts (TCU), and with a greater degree of technical capacity, independence, and nonpartisanship than what was established for the IFA in the PEC.

This PEC was rejected in a first vote and, on December 15, 2015, a proposal for creation of the Independent Fiscal Institution (IFI), which would be linked only to the Senate, was presented by means of Senate Resolution Project (PRS) 61/2015. The rationale for the mentioned project (FEDERAL SENATE, 2015a) was essentially identical to that of PEC (Id., 2015b) and affirmed that the purpose of this institution would be to "improve the mechanisms for evaluation and social control of the fiscal policy, favoring consistent macroeconomic stability to promote economic growth, with social justice" (Id., 2015a).

The text itself stresses that the issue is the creation of an institution different from the CGF and approaches the difference between the mandates of the future IFI and other public agents, since the "IFI will not be allowed to regulate fiscal police nor judge government accounts. Its mandates, on the contrary, are aimed at diagnosing the quality of fiscal policy and of government programs" (Ibid., p. 4).

Creation of the IFI only occurred on November 1st, 2016, when Federal Senate Resolution 42/2016 was published, a result of the approval of PRS 61/2015, by the Senate Plenary, on March 23, 2016 (Id., 2017a).

According to article 1 of the Resolution, the IFI is an institution that exists within the scope of the Senate, presided over by an executive director nominated by the president of the Legislative House and directed by a Board of Directors comprised of a president director and two other directors nominated by two Senate committees. All the reports produced are published after approval by the majority of the Board of Directors (§§ 11 and 12). IFI also has a Technical Advisory Council, made up of up to five Brazilians nominated by the executive director, indefinitely, who will have periodical meetings (§ 9º). Because it does not have its own staff, Senate civil servants will give support to the IFI (art. 2º).

Finally, article 3 of the Resolution establishes the obligation of the "competent official institutions" to "provide all information necessary for the full and appropriate performance of the mandates of the Independent Fiscal Institution" (Id., 2017a, p. 3). Paragraph 10 of article 1 of the Resolution also establishes that the IFI can forward, through the Senate Board of Directors, requests for information to the "Cabinet Ministers and any other heads of bodies directly subordinated to the Presidency of the Republic. Refusal to do so, noncompliance with the request within thirty (30) days or providing false information will be considered an impeachable offense" (Ibid., p. 3).

We note that, according to item 4 of article 13, Law 1.079/1950, the Cabinet Ministers commit an impeachable offense if they do not provide "within thirty days and without good reason, to, to any of the Chambers of the National Congress, information requested in writing or provide false information" (FEDERATIVE REPUBLIC OF BRAZIL, 1950, art. 13, item 4). Thus, we presume that the resolution that created the IFI bases itself on this legal provision to discipline the occurrence of an impeachable offense in the case mentioned in its paragraph 10 of article 1.

2.2 RELATIONSHIP BETWEEN THE IFI AND THE OTHER GOVERNMENTAL BODIES AND AGANCIES AND WITH PLAYERS IN SOCIETY

Monthly, the IFI has published on its page on the Senate portal its fiscal monitoring reports (RAF) that show their analysis of the trajectory of the main fiscal and economic indicators[1] and on fiscal topics such as the social security reform. The IFI has also given collective interviews to the press (SENADO AGENCY, 2017c), in addition to promoting events designed specifically for the financial market (Id., 2017b).

According to the IFI executive director, the intention is for the institution to also produce technical notes, data banks, and economic projections on its own initiative or by specific demands from senators, in addition to giving opinions on the draft bills and government measures, in order to support decisions by Senators (Ibid.).

The Resolution is silent regarding the relationship of the IFI to those in charge of fiscal policy, since it only mentions these bodies and entities when it establishes the obligation they have to answer IFI's questions. It is probable that the bodies that receive requests, such as the National Treasury Secretariat (STN) and the Federal Budget Secretariat (SOF), have knowledge of the reports and analyses published by the IFI. However, there is no legal obligation regarding this knowledge, much less regarding complying with this institution's recommendation. The expected effect of IFI's performance is to give greater transparency to the budgetary information and to be a source of independent estimates for fiscal parameters, as emphasized by the IFI executive director (Id., 2016a).

As for IFI's relationship with the other bodies and entities, which have similar mandates, Senate Resolution 42/2016 is succinct, limiting itself to stating in its article 1, paragraph 1, that the mandates of IFI "do not exclude nor limit themselves to those conferred to the jurisdictional, normative or control bodies" (FEDERAL SENATE, 2016, art. 1, paragraph 1). The TCU Full Court approved sending to IFI Court Decision 938/2017 – Full Court (FEDERAL COURT OF ACCOUNTS, 2017), which assessed revenue estimates, establishment of expenditures, and fiscal targets of the 2017 Annual Budgetary Draft Bill (PLOA 2017), as per Chapters III to VII of the LRF and article 3, item III, of TCU Resolution 142/2001 (Id., 2001).

Note that the IFI executive director was invited to participate in public hearings, such as the one in the Parliamentary Inquiry Committee (CPI) of Social Security, as per Request 134/2017 (FEDERAL SENATE, 2017d). At the international level, the IFI intends to establish partnerships with the OECD (SENATE AGENCY, 2017a). Furthermore, its representatives have participated in events as lecturers (INDEPENDENT FISCAL INSTITUTION, 2017).

3. INTERNATIONAL STANDARDS ESTABLISHED FOR THE IFAS

From the second half of the 20th century, we observed an increase in the number of countries, especially those that are part of the OECD, who presented successive fiscal deficits (BEETSMA; DEBRUN, 2016; KOVACS; CSUKA, 2012). Specialists point to several possible causes, with emphasis on the existence of inappropriate fiscal discipline and weak fiscal management motivated by problems such as insufficient comprehension of the impact and consequences of budgetary decisions of current fiscal policy on future solvency of the state, both on the part of citizens and politicians. (CALMFORS, 2011; DEBRUN et. al., 2013).

Several mechanisms were proposed to guide and control fiscal policy in order to reduce such deficits. Particularly from the 1990 decade on, the strategy most recommended and adopted was the creation of fiscal rules, which established parameters to be achieved or avoided. That is, targets or limits, respectively (CALMFORS, 2011). Opting for one or another model of fiscal rule is at the discretion of government leaders, because there

is no consensus on which model of fiscal rule is more effective, nor if there is a need for fiscal rules for fiscal policy to be adequate. (EUROPE COMISSION, 2014).

According to Beetsma and Debrun (2016), the very decision by a government to institute a fiscal rule would already denote that this government has greater predisposition to follow a more responsible fiscal policy. Furthermore, depending on how the established fiscal rule is calculated there is the possibility of using methods to distort and hide the actual result of the rule, which is called creative accounting. This is observed in practice, for example, in France, Greece, and Italy in the decade of 1990, during the transition to join the European Union (MILESI-FERRETTI, 2000; VON HAGEN; WOLFF, 2004).

Considering that this whole scenario weakens the effectiveness of the fiscal rule tool and the very credibility of fiscal results, since the end of the 90s, those who study the topic have proposed other institutional mechanisms to promote a fiscal policy that is more responsible, sustainable and aligned with the well-being of the country in the long term: technical entities dedicated exclusively to overseeing governmental fiscal policy (CALMFORS; WREN-LEWIS, 2011; DEBRUN; HAUNER; KUMAR, 2009; DEBRUN et. al., 2013).

We note that bodies with mandates that are identical or similar to this have been around for decades in countries all over the world. Some examples are Belgium, created in 1936; Netherlands, in 1945; Denmark, in 1962; Austria, in 1970; and United States, in 1974 (ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, 2014).

However, there is a significant increase in the number of these institutions, which are being created by countries in all continents, especially during the first two decades of the 21st century, such as Austria, in 2002, South Korea, in 2003, Canada, in 2008, Kenya, 2009, United Kingdom, in 2010, Portugal, in 2010, Australia, in 2012, Chile, in 2013, and South Africa, in 2014 (DEBRUN et. al., 2013).

Nonetheless, there is no generic nomenclature adopted consensually by all authors and international organizations for these entities. The following expressions are used as synonyms: independent fiscal institutions, fiscal councils, congressional budget offices, and independent fiscal authorities (Ibid.). In this article, they will all be called collectively by the expression **independent fiscal authorities** (IFA).

3.1 CONCEPT AND CHARACTERISTICS OF IFAS IN INTERNATIONAL LITERATURE

In the international literature, some make an analogy between monetary and fiscal policies, that is, between the role of central banks and IFAs. In this context, delegation to a technical and independent institution of part of or all decisions regarding the respective policy would make it possible to avoid or at least reduce the risk of this policy being hindered due to economic or political incentives that benefit only a small group at the expense of stability of the State as a whole (Id., 2011).

Some scholars defend delegation of the fiscal policy decisions themselves, as occurs with the monetary policy; others propose that only the activities of forecasts, analyses, and evaluation be delegated (CALMFORS; WREN-LEWIS, 2011).

However, Debrun, Hauner and Kumar (2009) highlight that there is a fundamental difference between these institutions, due to the fact that the monetary policy can be delegated to a technical body and commanded by representatives that are not elected by citizens, whilst fiscal policy cannot be totally subject to this same delegation. This applies especially regarding the aspects preferentially aimed at the distributive objectives.

The opposite occurs with the aspects of fiscal policy in which the criteria for good performance can be easily described *ex ante* and are stable over time, in which there is a need for specialized technical knowledge to carry out evaluations, and in which political incentives end up distorted due to temporal inconsistency, according to Alesina and Tabellini (2005). These authors defend that it is more effective to delegate such decisions to bureaucrats, instead of assigning these competencies to elected agents.

According to an official document of the International Monetary Fund (IMF), it is possible to conceptualize an independent fiscal authority as "independent agencies aimed at promoting sound fiscal policies" and that "do not have the discretionary power to define public policy tools" (DEBRUN et. al., 2013, p. 5).

On the other hand, the OECD established the following concept for IFIs: "publicly funded, independent bodies under the statutory authority of the executive or the legislature, which provide non-partisan oversight and analysis of, and in some cases advice on, fiscal policy and performance" (ORGANISATION

FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, 2014, p. 5).

Since 2006, The European Commission has carried out annual studies on the competencies and activities of agencies that perform as IFIs in European countries, based on a more comprehensive definition of these institutions "non-partisan agencies that [...] prepare macroeconomic scenarios for budget, monitor fiscal performance and/or giver recommendations to the Government regarding fiscal policy" (EUROPE COMISSION, 2016a). As a result, these studies have identified an overlap of entities performing some of the tasks that are assigned to the IFIs, including audit institutions, economic research institutes, and several types of committees and councils linked to the Executive Power and Legislature. For example, in addition to the agency identified as an IFI, in Austria there are four more such institutions with similar mandates and, in Germany, there are five other entities (Id., 2016b).

One of the initiatives by the European Union (EU) to improve economic governance after the 2008 crises was Directive 2011/85/EU. This directive mentions explicitly the need for effective and timely monitoring of compliance with fiscal rules, based on "reliable and independent analysis carried out by independent bodies or bodies endowed with functional autonomy vis-à-vis the fiscal authorities of the Member States." (Id., 2014).

In 2012, the Commission established rules and principles on the tasks and the institutional form that such independent bodies should have, in its Communication COM(2012)342. In 2013, the European Union inserted these requirements in Regulation (Europe Union – EU) 473/2013, which was part of a series of legislation aimed at improving fiscal governance in euro zone countries (Ibid.). Thus, we note that each author and each organization defines IFIs differently.

The IMF study concluded, based on a research about IFIs worldwide, that the functions of IFIs differ, according to the characteristics of each country. In places like Portugal, Austria and Belgium, the IFIs also have a legal mandate to examine matters related to state-owned companies and state and local governments. In the USA, some states have their own IFIs (DEBRUN et. al., 2013).

However, at the same time, we note the requirement of some basic characteristics for the performance of the IFIs to be truly effective and capable of improving the fiscal situation of the country where it operates, according to the summary of in Chart 1. It is also necessary to ensure that the entities maintain their operational independence, to make it difficult for IFIs to be subject to retaliation or external pressure in its work due to its opinions. This was the case with the IFI of Belgium, that had a two-year delay in its financing, and with the Hungarian institution, which was practically extinguished in its second year of operation (Ibid.; DEBRUN; TAKAHASHI, 2011).

According to the IMF study, the size of the staff of IFIs varies significantly. At one extreme, there are cases such as Sweden, where the IFI has five employees and a budget of one million dollars to perform the fiscal policies evaluations. On the other extreme, there are countries like the United States, where the IFI has 240 employees and a 45 million dollar budget to perform tasks such as costing of legislative proposals and outline scenarios of long term fiscal sustainability (DEBRUN et. al., 2013).

Chart 1:

Synthesis of minimum characteristics recommended by the IMF for IFIs

Typical activities	• Independent analysis, review, and monitoring of fiscal policies, plans, and performance of the government; • Development or revision of budgetary or macroeconomic projections; • Costing of political proposals, including electoral platforms; • Give advice to managers and legislators on the options available for public policies.
Target audience	• Press; • Society; • Parliament.
Independence criteria	• Independence of party and political influences; • Legal requirement regarding professional experience and qualification • Operational autonomy in relation to financial, human, and material resources; • External evaluation
Legal form	• According to the political-economic and legal characteristics of each country and the context in which the entity was created.

Source: elaborated by author based on information contained in a publication by Debrun et. al. (2013).

In turn, the OECD established 22 principles for IFIs, which were gruped into nine categories. Local ownership; Independence and non-partisanship; \ mandate; Resources; Relationship with the legislature; Access to information; Transparency; Communications; and External Evaluation (ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, 2014). Chart 2 summarizes the minimum criteria contained of these principles.

Chart 2:

Synthesis of minimum characteristics recommended by the OECD for IFIs

Typical activities	• Functions that are relevant within the fiscal framework of the country; • Fiscal and economic projections; • Analysis of the executive's budget proposal; • Monitoring compliance with fiscal rules or official targets; • Costing of major legislative proposals; • Analytical studies on selected issues.
Target audience	• Press; • Society; • Parliament; • Financial market; • Local and international specialists.
Independence criteria	• Objectivity and professional excellence, without conducting studies with a political-partisan bias; • Employees who have qualification in economy, public finances, and public budget, in addition to being selected according to criteria similar to civil servants of the executive and legislative Powers; • Access to necessary information; • External evaluation; • Transparency.
Legal form	• *Accountability* of the entity before the legislature; • Must be created based on the reality of each country without importing a ready model from other countries; • Foreseen in law.

Source: elaborated by author based on information contained in a publication by the Organisation for Economic Co-Operation and Development (2014).

The EU legislation established minimum criteria and a set of progressive tasks similar to those of IFAs, as described in Chart 3 (EUROPE COMISSION, 2014).

Chart 3:

Synthesis of minimum characteristics recommended by the European Commission for IFIs

Typical activities	• At least, monitoring compliance with fiscal rules should go beyond mere assessment and involve monitoring the very functioning of the rule, in a continuing relationship between agencies, as opposed to the traditional view of *ex post* specific assessments; • Produce or endorse macroeconomic forecasts used in the annual budgets and in the medium term fiscal plans.
Target audience	• Press; • Society; • Executive Power; • European Commission.
Independence criteria	• Not receive instructions from other agencies; • Communication capacity of reports; • Leaders with experience and competence; • Appropriate resources; • Appropriate access to information.
Legal form	• Can be different autonomous bodies, respecting the characteristics of the legal framework in each country; • Foreseen in law

Source: elaborated by author based on information contained in a publication by the European Commission (2014).

3.2 CRITICISM AND QUESTIONS APPLICABLE TO THE IFIS

Beetsma and Debrun (2016) show that the world trend in this century is to encourage both the creation of new institutions and reform of old ones, in pursuit of fiscal credibility, based on the questions raised decades ago by several researchers regarding the actual impact that these institutional arrangements have on the outcomes of policies. The mere existence of an institution does not ensure its credibility nor its effectiveness. Such parameters are influenced by the incentives leaders have to maintain these institutions operating soundly and by the political and legal costs that will be imputed on these

leaders in case they disrespect or interfere with these institutions (BEETSMA; DEBRUN, 2016).

In one of his papers dedicated to analyzing effectiveness of the acclaimed independence of central banks in monetary policy, Posen (1995) concluded that, although institutional factors may determine some of the results, especially in the short and medium terms, consistent results over time depend, to the same extent, on both the existence of consistent political contexts for these institutions and on the institutions themselves. Therefore, it is not enough to have a central bank with formal independence, there needs to be awareness and commitment by all of society regarding the need to actually maintain this independence to reach the objectives of the monetary policy (Ibid.).

This understanding is also valid for other types of independent institutions, such as IFIs, because the effectiveness of the performance of these entities does not depend solely on the existence of norms that explicit their duties. It is essential that there be external conditions that ensure and strengthen the effectiveness of the actions carried out by these agencies.

Likewise, Caruso, Scartascini and Tommasi (2013) show that there are situations in which formulation and decisions on public policies are influenced mainly by non-institutionalized factors, such as street demonstrations, performance of the press, and threats of violent disturbances or economic unbalance. The lower the level of institutionalization of a country, the greater the impact these factors will have on public policies, reducing significantly the effectiveness of the performance of formal bodies provided for in law, in the three Powers (Ibid.).

Schacter (2005) highlights that the performance of independent state institutions will be more effective and sustainable the better the control exercised by voters individually and by organized society. That is, a greater vertical control of government leads to a better horizontal control, because the desire of society for improvement of the oversight tools becomes a positive incentive for leaders to act in this direction and thus gather more political support from voters. On the other hand, weak horizontal controls increase the transnational costs of the vertical controls (BITTENCOURT, 2009; SHACTER, 2005).

In this regard, the IMF publication shows that, in countries such as Canada, Sweden, and the Netherlands, there is a consensus by the population on the importance of having a robust fiscal policy with a balanced budget. Thus, the recommendations and alerts by the local IFIs are widely disseminated by the press and are respected by government leader. Now in Belgium, over time, the local institution lost this credibility and influence before voters. This resulted in a lower level of effectiveness of their work (DEBRUN et. al., 2013).

3.3 SYNTHESIS OF CRITERIA CHOSEN TO EVALUATE THE BRAZILIAN IFI

With regard to the typical activities, it is considered more appropriate that the Brazilian entity restrict its performance to the specialized topic that justifies its

creation. That is, elaboration of macroeconomic and fiscal studies and scenarios, especially medium and long term ones. Therefore, it can give quality opinions while, at the same time, manifest itself with an independence of an entity that is not, at any time, part of the decision making process. This alone reduces significantly the pressures and possible negative incentives to produce reports that would justify a posteriori preestablished decisions.

With relation to the target audience of the communications and work of IFIs, it is an international consensus that the press and society should be a part of this group. Due to the control and oversight role constitutionally assigned to the Legislative Power in Brazil, with or without the assistance of TCU (BITTENCOURT, 2009), it is reasonable for the IFIs to interact with and cater to the needs of this player. The financial market and local and international specialists were also included since greater transparency and interlocution can contribute significantly to improve credibility of the Brazilian fiscal policy, having a positive impact on the macroeconomic context.

The independence criteria were chosen based on the basic characteristics of the agencies and entities that have some degree of autonomy or independence such as TCU, the Office of the Comptroller General of the Union (CGU), the regulating agencies, and even Central Bank, which is copared so much to IFIs in specialized international literature.

Finally, the recommended legal form repeats what is widely accepted by international specialists: every IFI should be created respecting the legal framework of the country, without importing models that make no sense in the Brazilian context. In other words, this means that the IFI must be instituted only after close analysis of the agencies and entities that already exist in the country, paying special attention to the legal mandates of such entities. This has the purpose of avoiding duplication of efforts, invasion of competencies or even incompatibility of functions. This also implies that the institutional structure chosen for the IFI should be compatible with the Brazilian legal framework itself, avoiding legal questions regarding the legality of its existence or constitutionality of its mandates.

The last criteria included was the duty of *accountability* to the Parliament, once more in view of the role the Federal Legislative Houses carry out in the control and oversight of the public agencies, with the representatives elected by the people, added to the perspective that the IFI remain linked to the Legislative. It should be noted that this does not have the power of removing the IFI duty to be accountable to the TCU in the quality of an entity that receives public resources.

The parameters selected in this section, summarized in Chart 4, were used as a tool to evaluate the IFI, as discussed in the next section.

4. EVALUATION OF BRAZILIAN IFI COMPARED TO INTERNATIONAL STANDARDS

4.1 LEVEL OF ADHERENCE OF IFI TO INTERNATIONAL STANDARDS

The rationale for creation of the IFI, in 2016, was the need to establish in the country an IFI that could work effectively towards fiscal improvement. However, the legal instrument chosen to constitute the IFI was a Federal Senate Resolution. This implied in the insertion of the institution in the organizational structure of this Legislative House, at the same hierarchical level as sectors such as the Office of the Ombudsman and the Parliamentary Office of Internal Affairs (SENADO FEDERAL, 2017c), in disagreement with recommendations by the OECD and the EU.

We should note that this is not the exception mentioned by the IMF regarding IFIs created within the scope of agencies as a way to accelerate their development and increase their reputation and credibility from the beginning. Examples of this are the IFIs of Austria, linked to its Central Bank; of France, linked to its Court that carries out the mandates of a Supreme Audit Institution (SAI)[2] and shares magistrates and the independence provided for in the law (DEBRUN et al., 2013); and Finland, which was the SAI itself, the National Audit Office (NATIONAL AUDIT OFFICE OF FINLAND, [201-]).

If this model were adopted in Brazil, the IFI would be linked to agencies such as the Institute for Applied Economics Research (Ipea), Ministry of Labor, and CGU, or Legislative Advisories and the TCU, to mention some of the possibilities.

Likewise, the IFI competencies were defined in this resolution, which, according to legislative technique, regulates internal topics or topics that are under the exclusive jurisdiction of the house. In turn, the material, financial, and human resources of the IFI were conferred by the Senate, while its board of directors was selected among specialists in the area, by the Committees of Economic Affairs (CAE) and of Transparency,

Governance, Oversight, and Control and Consumer Defense (CTFC)[3].

The fact that it is subject to commands from a non-statutory act may weaken the IFI, insofar as there are few juridical obstacles to an eventual undue intervention in its performance. Neither does a resolution have the same level of transparency for society, of enforcement for the demanded agencies, and of legal competence to define the rights and duties of the IFI nor of the agencies with whom it interacts.

It is worth remembering criticisms by Bittencourt (2015, p. 16): "giving prerogatives and status of an independent agency to bodies that are no more than delegates of the circumstantial majority like all others represents, clearly, a severe institution involution".

Furthermore, it is understood that participation of the minorities from the Legislative Houses in nominating one or more participants to the entity could be a way of ensuring a counter-majoritarianism that benefits execution of the duties of a fiscal authority, as expected in moder democracies.

Additionally, the resolution only sets forth general lines and guiding principles as the purposes of performance of IFIs. It does not specify exactly which are the products the entity should elaborate nor with what frequency. Likewise, there is no provision regarding the relationship between such analyses and the budgetary process or even who would be the recipients of the studies, which is in disagreement with recommendations by the OECD, by the IMF, and by the EU.

We also need to remember that the LRF provides for the establishment of the CGF. a LRF. In spite of the difficulties and contrary opinions regarding implementation of this council (BIJOS, 2015), the provision remains legally valid and there are several proposals underway for its implementation. We highlight PL 3.744/2000, by the Executive Power, which presented a favorable opinion at the Committee on Finance and Taxation (CFT) on July 11, 2017 (CHAMBER OF DEPUTIES, 2017).

Thus, it would be prudent to analyze to what extent there can occur overlap of competencies, especially because the CGF results from a provision of a complementary federal law, while a Federal Senate Resolution created the IFI.

As mentioned earlier, it should be noted that the Resolution that created the IFI establishes that, when Executive Power agencies do not answer the requests for information made by the IFI, this implies in the hypothesis of an impeachable offense. This is provided for in Law 1.079/1950, which addresses noncompliance with requests by the Federal Senate and Chamber of Deputies.

The mentioned provision reveals how a norm such as a resolution is not enough to ensure its own enforcement tools for the IFI, leading it to resort to existing mechanisms that belong to the Senate. This limitation is even greater in the case of private entities, agencies that are not linked to the Federal Executive Power, and those belonging to other federated spheres. The Senate competency that is used by the IFI to request information does not reach such players.

This means that, although planning and execution of the fiscal policy require participation of all Powers and federal independent agencies, the IFI can only require information and data directly from the Federal Executive Power. They have no competence to request aggregated data from state or municipal agencies, from private institutions or from those not linked to a Ministry, even if such institutions have the information needed by IFI to perform its work.

Nevertheless, even in the case of the obligation imposed to Cabinet Ministers based on the law that defines impeachable offenses, it should be noted that there is reasonable doubt regarding the legality and constitutionality of assigning such prerogatives to an institution like the IFI, especially through a resolution. Among other questions, there is the fact that legal prerogatives resulting from the political power of Congressmen were allegedly being extended to an entity that, in addition to have different purposes and performance, should be technical and independent.

Another issue that is not compatible with mentioned international standards is that IFI is linked only to one of the Legislative Houses and the absence of any mention to a relationship between the IFI and the CMO. This goes against the principle of the relationship with the Legislature, recommended by the OECD as being relevant because the Legislative Power, in any democratic country, performs functions that are essential to accountability in the fiscal area.

It is understood that the mandate assigned to the IFI by the resolution is substantially vague and generic, especially when compared to the international standards pointed out by the IMF, by the OECD and by the EU. For this reason, to evaluate the IFI in relation to its level of compliance with the criteria of the typical activities, the actions considered were those actually adopted by the entity during its first eight months of operation and not only its normative competences.

Here it is worth mentioning the need to define explicitly and appropriately the duties of the IFI so as not to collide with the competences foreseen for the Legislative Advisory offices of the two Houses, which have a consolidated role in the budgetary process, especially in the stages the PLOA goes through the legislative process. This becomes even more important in face of the possibility of the IFI being linked only to the Federal Senate, since, in some moments, its form of participation and advisory to the proceedings of this House can be redundant with the work already developed by the Senate Advisory office (BITTENCOURT, 2015).

Lack of a more precise definition of the limits for the performance of the IFI in thesis could also create conflicts with the mandates of the TCU, especially in its role of analysis and examination of fiscal management in compliance with the LRF, which is regulated by TCU Resolution 142/2001 (Ibid.).

For example, the Court has the legal duty of monitoring fiscal management and issuing alerts whenever it sees the possibility of one of the fiscal targets not being met. This task is similar to the one carried out currently by the IFI in its monthly reports. However, there are different characteristics in the elaboration of this product: TCU's evaluation has greater enforcement power because it has a legal basis that allows it to apply sanctions and issue determinations, while the work of IFI is timelier since it is a much smaller institution and with less organizational and decision-making levels than the Court. Finally, the form and scope of dissemination of the results obtained are different because the press is part of the main target audience of IFI.

Therefore, considering the current constitution of IFI and what is recommended according to international best practices, we envisage less possibility of conflict between its performance and that of TCU since they can perform complementary activities. In spite of this, the resolution that created the IFI does not establish any parameters or conditions for relationship or interlocution between the entity and TCU, which should occur according to recommendation by the OECD.

Although an advisory committee that is external to the IFI was established, we observe that the tasks assigned to the committee are not clear. It is also not clear how these external agents will influence the work of IFI. That is why it is understood that there is no provision for external independent evaluation, national or international, of the work carried out by the IFI. According to the OECD and to the IMF, this kind of evaluation contributes to enhance the credibility and reliability of the reports issued by the entity.

We must also highlight the positives. The IFI did not receive any delegation for decision-making in fiscal policy, acting only as a state audit institution that also promotes social control, in line with what is recommended ty the IMF and the OECD. The initial cooperation actions and relationship with similar institutions from other countries and with the press, economists, and financial market agents are also virtues of this new entity (SENATE AGENCY, 2017b; INDEPENDENT FISCAL INSTITUTION, 2017).

Evaluation of the Brazilian IFI is summarized in Chart 4. We attributed "high" level to the aspects in which there is greater compliance than what is recommended, even if all requirements were not totally fulfilled. The "low" level was assigned to the aspects that failed to achieve satisfactorily even the minimum criteria required by the IMF, OECD, and EU. The other items were assigned "medium."

Chart 4:

Evaluation of the Brazilian Independent Fiscal Institution

Types of criteria	Selected criteria	Proponent	IFI level of achievement
Typical activities	Monitoring of compliance with the fiscal rules and goals, and monitoring of the very functioning of these rules	IMF; OECD; EU	Medium
	Produce or endorse estimates of macroeconomic scenarios used in the budgetary guidelines laws (LDO), pluriannual plans (PPA), and annual budgets (LOA)	IMF; OECD; EU	Low
	Analytical studies on macroeconomic and/or fiscal aspects of topics selected by the Parliament or by the IFI themselves	OECD	Medium
Target audience	Press	IMF; OECD; EU	Alto
	Society	IMF; OECD; EU	Medium
	Parliament	FMI; OCDE	Low
	Financial market	OCDE	High
	Local and international specialists	OCDE	Medium
Independence criteria	Independence from partisan and political influences	FMI; OCDE	Low
	Legal requirement for professional experience and qualification in Economy, Public Finances, and Public Budget	IMF; OECD; EU	Medium
	Operational independence, both in relation to financial resources and human and material resources	IMF; OECD; EU	Low
	Access to necessary information	OCDE; UE	Medium
	External evaluation	FMI; OCDE	Low
	Transparency regarding making reports available	OCDE; UE	Alto
Legal form	Accountability of entity before the Legislature	OECD	Low
	Respect to characteristics of legal framework of the country, without purely and merely importing external models	IMF; OECD; EU	Low
	Legal provision	OECD; EU	Low

Source: elaborated by the author based on information contained in publications by Debrun et. al. (2013), Organisation for Economic Co-Operation and Development (2014), and Europe Commission (2014).

The IFI evaluation was consolidated in only one quantitative concept for each type of criteria and for the institution as a whole. This kind of analysis was also carried out in other works found in literature, such as Beetsma and Debrun (2016). Considering this work convers standards and recommendations from other organizations besides the IMF, it was not possible to use the same indicator. However, the methodology shown here is similar. The main difference is the proposal of an indicator capable of measuring with more sensibility the degree of achievement of each criteria by the entities.

To preserve the conceptual numerical scale, the equivalencies were adopted: score 2 for the "low" level; 5 for "medium", and 8 for "high". To calculate averages, we used simple arithmetic mean and weight mean of each criterion according to the quantity of international organizations that recommend it. The results obtained are not significantly different, as seen in Table 1.

Table 1:

Brazilian IFI evaluation in numerical scale

Type of criteria	IFI level of achievement	
	Simple mean	Weighted mean
Typical activities	4,00	3,71
Target audience	5,6	5,6
Independence criteria	4,00	3,93
Legal form	2,00	2,00
All	3,90	4,03

Source: elaborated by author

We find that the values encountered are compatible with what is pointed out in the qualitative analysis. We verify that the level of achievement of the Brazilian IFI in relation to what is recommended by the IMF, OECD, and EU is close to 4, in a scale from 0 to 10, and to medium-low, in a conceptual scale. We note that calculation of the mean in any case is only an approximation. With this in mind, we conclude that the Brazilian IFI needs improvements in order to be considered satisfactorily aligned with the standards and best practices supported by the IMF, the OECD, and the EU.

4.2 SUGGESTIONS FOR ALTERATIONS IN THE IFI TO IMPROVE ITS ROLE IN THE BRAZLIAN FISCAL SCENARIO

The most pressing change seems to be a more precise definition of the role of the IFI within the Brazilian institutional framework, considering a provision in the LRF that establishes the creation of the CGF and the current competences of the Legislative Advisory Offices of the Legislative Houses, of the CMO and of TCU. Therefore, it is recommended that legislative proposals be made to evaluate the existence of an IFI with the provision of creation of the CGF contained in the LRF, because, depending on the chosen configuration and on the changes implemented, it is possible to extinguish one of them and strengthen the performance of the other.

This definition should include both what are the duties of the IFI, to avoid overlap of its activities with the several other institutions, and how the relationship between the IFI and the other agencies will take place. This should occur in a way that each of them will assist the others in carrying out their mandates and, at the same time, receiving the information produced by others as input to develop their own work.

It is necessary that all institutions involved have total awareness of the fact that independence does not mean being hermetic nor isolation. On the contrary. All the agencies can and should coexist in harmony, collaborating mutually to achieve their objectives, which ultimately converge to a single greater purpose: fiscal management that is sustainable and responsible enough to ensure the well-being of society.

We can include in this topic the discussion concerning the convenience and appropriateness of foreseeing among the IFI competences analysis and evaluation of fiscal policies of the subnational agencies, especially the states. This type of relationship was already provided for with regard to the CGF of the LRF, despite being much more comprehensive and necessary than the usual role of the IFI. In addition, in some countries, control of fiscal policy of the other units of the federation is one of the responsibilities of the federal institution.

It is imperative that a stricto sensu law, which defines explicitly its duties and responsibilities, eliminating the need for the entity to appropriate the enforcement tools that are typical of the Senate, establish such entity.

If the model that links the IFI to the Legislative Power is maintained, which is appropriate to the Brazilian reality and in line with the best international practices, it is essential for the entity to have the same level of relationship with both Houses. This includes choice of leaders, the prerogative to request information, the power to oversee activities, and the obligation to contribute financially to the maintenance of the IFI. Another weakness to be corrected is the low level of relationship between the IFI and the CMO.

We reiterate that the creation of an IFI should not weaken other institutions or duplicate unnecessary efforts. Because, if there are specific problems with the functioning of an agency, this should be corrected through the appropriate measures and not by creating new institutions to replace the duties that this agency no longer carries out satisfactorily.

Thus, the greater purpose in creating the IFI should be to strengthen all the agencies and institutions that exist in all the branches of Power so that each one can develop its work more and more effectively, aiming to improve fiscal management in the country.

As highlighted by the authors mentioned in the previous section, particularly Posen (1995), it is not enough to formally create one more institution and hope that it will be effective in itself. It is necessary to give the institution the

appropriate tools to carry out its mandates and promote the adequate conditions in the external environment so it can develop its work with effectiveness, efficacy, and efficiency.

When we remember that only some of these conditions result directly from the actions of the state, we find it is fundamental that there be greater involvement of society in these issues of fiscal policy since strengthening this vertical control implies in better horizontal control.

5. CONCLUSION

In the past decades, we observed that scholars proposed several tools to improve fiscal management of countries and ensure sustainability of their fiscal policy, especially in the medium and long terms. In this context, the IFIs arise: national institutions belonging to the state apparatus, who measure fiscal performance of the government and elaborate macroeconomic scenario estimates to assist and/or guide the performance of the respective Executive and Legislative Powers.

This paper focused on reporting the main standards and criteria defined by the IMF, the OECD, and the EU for independent fiscal entities, with the purpose of delimitating which aspects recommended were complied with in the creation and functioning of the Brazilian Independent Fiscal Institution.

We found that each organization prioritizes a certain set of characteristics, although there are some common issues, such as the fiscal entity should be established by means of a law and in a way that is coherent with the national legal framework; trio; it should have operational independence and independence from political influences; it should disseminate its reports widely to society and to the press; and be active during the budgetary process in its country, particularly with regard to estimating macroeconomic parameters.

Considering how the IFI was established in Brazil, the evaluation showed that there is room for strengthening it in the aspects of compliance with the current legal order, enhancement of effective independence, better relationship with the Parliament in terms of accountability and providing information, giving opinion in the elaboration of budget laws, among others. There is also the need to consider and define the field of action of the IFI to avoid overlap of duties in relation to other agencies, such as the Legislative Advisory Offices of the two Houses and the CGF, whose creation is provided for in the LRF.

The study also showed that the relationship between the IFI and the press and society is one of the greatest virtues of the Fiscal Institution, which occupies a role that is appropriate and does not conflict with the mandates of the other agencies linked to fiscal policy.

Based on the analysis, we conclude that, despite the fact that the IFI can promote better fiscal management in the country at the federal level, we identified several normative gaps and inconsistencies that can produce antinomies in the application of the existing norms. This can hinder the good functioning of the institutions that work with fiscal issues, at best, or render ineffective the work of these institutions, at worst.

It should be noted that the scope of this research did not include discussing the convenience, appropriateness and/or cost-benefit of the State creating and/or maintaining a state agency like the IFI in a scenario of fiscal crises caused by successive deficits or of restricted resources due to the expenditure limit in force since the approval of Constitutional Amendment 95/2016. Neither was it our objective to discuss the positive impact on fiscal policy that effective performance by this institution could generate.

As suggestions for possible future studies, we envisage other research that will analyze the IFI based solely on IMF criteria that will compare its performance with that of other IFIs and that evaluate empirically its results on Brazilian fiscal policy.

NOTES

1 Available at: <http://bit.ly/2oy5Ziz>. Access on 6 Jun 2017.

2 Entidades Fiscalizadoras Superiores (EFS) são instituições presentes na maioria dos países, usualmente criadas pelas Cartas Constitucionais e que possuem atribuições de fiscalização sobre os demais órgãos e entidades estatais. Os dois modelos de estruturação mais comuns são como Tribunal de Contas, vinculado ao Poder Legislativo ou ao Judiciário, e como Controladoria ou Auditoria-Geral, ligada a um Poder que possa gerar força coercitiva para suas decisões. No Brasil, a EFS é o Tribunal de Contas da União (RIBEIRO, 2002).

3 The Resolution that created the IFI mentions the former Committee on Environment, Consumer Defense, and Oversight and Control (CMA), which was divided into two committees, as per Federal Senate Resolution n 3/2017: the CTFC and the Environment Committee.

REFERENCES

AGÊNCIA SENADO. Diretor-executivo da Instituição Fiscal Independente toma posse. Senado Notícias, Brasília, DF, 30 nov. 2016a. Disponível em: <http://bit.ly/2oDepVe>. Acesso em: 3 fev. 2017.

_____. Diretor-executivo diz que objetivo central da IFI é "colocar luz sobre contas públicas". Senado Notícias, Brasília, DF, 9 dez. 2016b. Disponível em: <http://bit.ly/2oDQyol>. Acesso em: 3 fev. 2017.

_____. Instituição Fiscal Independente inicia parceria com OCDE. Senado Notícias, Brasília, DF, 16 fev. 2017a. Disponível em: <http://bit.ly/2oDyB9j>. Acesso em: 16 fev. 2017.

_____. Instituição Fiscal Independente apresenta relatório a economistas. Senado Notícias, Brasília, DF, 10 mar. 2017b. Disponível em: <http://bit.ly/2GSaJ9D>. Acesso em: 8 maio 2017.

_____. IFI apresenta relatório de acompanhamento fiscal. Senado Notícias, Brasília, DF, 8 maio 2017c. Disponível em: <http://bit.ly/2FdDdNM>. Acesso em: 5 jun. 2017.

ALESINA, A., TABELLINI, G. Bureaucrats or Politicians? EconPapers: Levine's working paper archive, Örebro, 2005. Disponível em: <http://bit.ly/2oEUoNU>. Acesso em: 2 jun. 2017.

BIJOS, P. R. S. Instituições Fiscais Independentes: subsídios para a implantação de um imperativo fiscal no país. Orçamento em discussão, Brasília, DF, n. 15, 2015. Disponível em: <http://bit.ly/2HS0OSQ>. Acesso em: 20 jan. 2016.

BITTENCOURT, F. M. R. O controle e a construção de capacidade técnica institucional no parlamento: elementos para um marco conceitual. Textos para Discussão, Brasília, DF, n. 57, 2009. Disponível em: <http://bit.ly/2F2qOci>. Acesso em: 4 jul. 2017.

_____. Uma nova organização não significa mudança institucional: o caso da PEC nº 83, de 2015. Orçamento em Discussão, Brasília, DF, n. 19, 2015. Disponível em: <http://bit.ly/2F9kUtk>. Acesso em: 20 jan. 2016.

CALMFORS, L. The Role of independent fiscal policy institutions. CESifo Working Paper, Munich, n. 3367, feb. 2011. Disponível em: <http://bit.ly/2FF60sn>. Acesso em: 13 dez. 2016.

CALMFORS, L., WREN-LEWIS, S. What should fiscal councils do? Economic Policy, v. 26, n. 68, p. 649-695, 2011. Disponível em: <http://bit.ly/2F2Cr71>. Acesso em: 13 dez. 2016.

CÂMARA DOS DEPUTADOS. PL 3.744/2000: Projeto de Lei. Brasília, DF, 2017a. Disponível em: <http://bit.ly/2FIyMbT>. Acesso em: 7 ago. 2017.

CARUSO, G., SCARTASCINI, C., TOMMASI, M. Are we all playing the same game? The economic effects of constitutions depend on the degree of institutionalization. IDB Working Paper Series, Washington, DC, n. IDB-WP-237, 2013. Disponível em: <http://bit.ly/2GNnkuH>. Acesso em: 12 jun. 2017.

CONGRESSIONAL BUDGET OFFICE. An introduction to the Congressional Budget Office. Washington, DC, 2016. Disponível em: <http://bit.ly/2FdwQKw>. Acesso em: 9 dez. 2016.

DEBRUN, X. Democratic accountability, deficit bias, and independent fiscal agencies. In: INTERNATIONAL MONETARY FUND. IMF Working Paper. Washington, DC, 2011. Disponível em: <http://bit.ly/2CO2oBu>. Acesso em: 13 dez. 2016.

DEBRUN, X., HAUNER, D., KUMAR, M. S. Independent fiscal agencies. Journal of Economic Surveys, Hoboken, v. 23, n. 1, p. 44-81, 2009. Disponível em: <http://bit.ly/2HTPkOG>. Acesso em: 13 dez. 2016.

DEBRUN, X., TAKAHASHI. K. Independent fiscal councils in Continental Europe: old wine in new bottles? CESifo DICE Report, Munich, v. 9, n. 3, p. 44-50, 2011. Disponível em: <http://bit.ly/2CNcu5y>. Acesso em: 13 dez. 2016.

DEBRUN, X. et al. The functions and impact of fiscal councils. Washington, DC: International Monetary Fund, 2013. Disponível em: <http://bit.ly/2qQszGC>. Acesso em: 13 dez. 2016.

BEETSMA, R. M. W. J.; DEBRUN, X. Fiscal councils: rationale and effectiveness. In: INTERNATIONAL MONETARY FUND. IMF Working Paper. Washington, DC, 2016. Disponível em: <http://bit.ly/2t2Coml>. Acesso em: 13 dez. 2016.

EUROPE COMISSION. Evalsed Sourcebook: method and techniques. Brussels, 2013. Disponível em: <http://bit.ly/2F0QA4y>. Acesso em: 14 fev. 2017.

_____. Public finances in EMU – 2014. Brussels, 2014. Disponível em: <http://bit.ly/2F1GFfq>. Acesso em: 13 dez. 2016.

_____. Independent Fiscal Institutions. Brussels, 2016a. Disponível em: <http://bit.ly/2FFqDVg>. Acesso em: 13 dez. 2016.

_____. Independent fiscal institutions in EU member States database. Brussels, 2016b. Disponível em: <http://bit.ly/2HP2ts9>. Acesso em: 13 dez. 2016.

INSTITUIÇÃO FISCAL INDEPENDENTE. El papel de la "Instituição Fiscal Independente (IFI)" y la posibilidad de mejorar la financiación de las políticas publicas. Brasília, DF, Senado Federal, 2017. Disponível em: <http://bit.ly/2F1IyEA>. Acesso em: 8 maio 2017.

KOVACS, B.; CSUKA, G. The role of independent fiscal institutions in managing the European sovereign debt crisis: the case of the United Kingdom, Germany and Poland. In: CRISIS AFTERMATH: ECONOMIC POLICY CHANGES IN THE EU AND ITS MEMBER STATES, 2012, Szeged. Conference Proceedings… Szeged: University of Szeged, 2012. p. 242-256. Disponível em: <http://bit.ly/2F7e3xi>. Acesso em: 13 dez. 2016.

MILESI-FERRETTI, G. M. Good, bad or ugly? On the effects of fiscal rules with creative accounting. In: INTERNATIONAL MONETARY FUND. IMF Working Paper. Washington, DC, 2000. Disponível em: <http://bit.ly/2F47aN5>. Acesso em: 6 jun. 2017.

NATIONAL AUDIT OFFICE OF FINLAND. Fiscal policy monitoring and evaluation. Helsink, [201-]. Disponível em: <http://bit.ly/2FGiC2z>. Acesso em: 13 dez. 2016.

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. Recommendation of the Council on principles for independent fiscal institutions. Paris, 2014. Disponível em: <http://bit.ly/2Fhsxh4>. Acesso em: 9 dez. 2016.

POSEN, A. S. Declarations are not enough: financial sector sources of Central Bank Independence. In: BERNANKE, B. NBER Macroeconomics Annual. Cambridge: The MIT Press, 1995. v. 5, p. 253-74. Disponível em: <http://bit.ly/2oytGaE>. Acesso em: 29 maio 2017.

REPÚBLICA FEDERATIVA DO BRASIL. Lei nº 1.079, de 10 de abril de 1950. 10 abr. 1950. Diário Oficial da União, Rio de Janeiro, RJ, 12 abr. 1950. Disponível em: <http://bit.ly/2IgJIhM>. Acesso em: 5 jun. 2017.

_____. Lei Complementar nº 101, de 4 de maio de 2000, denominada Lei de Responsabilidade Fiscal – LRF. 4 mai. 2000. Diário Oficial da União, Brasília, DF, 5 mai. 2000. Disponível em: < http://bit.ly/2IgJIhM>. Acesso em: 5 jun. 2017.

RIBEIRO, R. J. B. O controle externo federal no Brasil: uma análise do modelo de gestão frente às demandas do sistema sócio político. 2002. 232 f. Dissertação (Mestrado em Administração Pública) – Fundação Getúlio Vargas, São Paulo, 2002. Disponível em: <http://bit.ly/2HU6gVd>. Acesso em: 4 jul. 2017.

SENADO FEDERAL. Projeto de Resolução do Senado Federal nº 61/2015. Cria a Instituição Fiscal Independente no âmbito do Senado Federal. Brasília, DF, 2015a. Disponível em: <http://bit.ly/2CRzbFM>. Acesso em: 12 dez. 2016.

_____. Proposta de Emenda à Constituição nº 83, de 2015. Acrescenta o art. 166-A à Constituição Federal, para dispor sobre a Autoridade Fiscal Independente. Brasília, DF, 2015b. Disponível em: <http://bit.ly/2FbT6Eu>. Acesso em: 12 dez. 2016.

_____. Resolução do Senado Federal nº 42, de 1º de novembro de 2016. Diário Oficial da União, Brasília, DF, 3 nov. 2016. Disponível em: <http://bit.ly/2Dpo3QQ>. Acesso em: 12 dez. 2016.

_____. Projeto de Resolução do Senado nº 61, de 2015 – Agenda Brasil 2015. Brasília, DF, 2017a. Disponível em: <http://bit.ly/2oHHyP8>. Acesso em: 5 jun. 2017.

_____. Proposta de Emenda à Constituição nº 83, de 2015. Brasília, DF, 2017b. Disponível em: <http://bit.ly/2oH74Eg>. Acesso em: 5 jun. 2017.

_____. Institucional: estrutura. Brasília, DF, 2017c Disponível em: <http://bit.ly/2GQBmvF>. Acesso em: 27 jun. 2017.

_____. Atividade Legislativa: CPI da Previdência. Brasília, DF, 2017d. Disponível em: <http://bit.ly/2t2lx2O>. Acesso em: 16 ago. 2017.

SCHACTER, M. A framework for evaluating institutions of accountability. In: SHAH, A. (Ed.). Fiscal management. Washington DC: The World Bank, 2005. p. 229-249. Disponível em: <http://bit.ly/2oySsat>. Acesso em: 3 jul. 2017.

TRIBUNAL DE CONTAS DA UNIÃO. Resolução nº 142/2001, de 30 de maio de 2001. Dispõe sobre as competências atribuídas ao Tribunal de Contas da União pela Lei Complementar nº 101, de 4 de maio de 2000, denominada Lei de Responsabilidade Fiscal – LRF.30/05/2001. Diário Oficial da União, Brasília, DF, 4 jun. 2001. Disponível em: <http://bit.ly/2FLwlQp>. Acesso em: 5 jun. 2017.

_____. Acórdão 938/2017 – Plenário. Sessão de 10 de maio de 2017. Brasília, DF, 2017. Disponível em: <http://bit.ly/2oGRdFz>. Acesso em: 12 maio. 2017.

VON HAGEN, J., WOLFF, G. What do deficits tell us about debts? Empirical evidence on creative accounting with fiscal rules. Journal of Banking and Finance, Amsterdam, v. 30, n. 12, p. 3259-3279. 2004.

Minimum time of debarment to discourage corruption: the Operation Car Wash case

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ABSTRACT

The current scenario of Brazilian corruption, characterized, among other points, by the cartel action in Petrobras public tenders for more than a decade, involving the largest construction companies in the country in schemes of fraudulent contracts, generating significant overbilling in the largest national construction sites, forges a context in which the time of debarment repute needs to be adequately adjusted to provide an incentive design that allows the continuity of the institution of leniency agreements and, at the same time, to bring the necessary deterrent effect in corrupt companies. Faced with this reality, this article, based on the theory involved in the Law and Economics and the Economics of Crime, used an investment analysis technique called net present value to quantify the necessary period of debarment that would lead the criminal option to not be a rational investment anymore. As a result, in the concrete case of one of the construction companies involved in the cartel that operated in Petrobras, it is concluded that the attribution of debarment repute penalties of less than one year would bring a scenario where the crime of corruption would compensate.

Keywords: Operation Car Wash; Debarment; Corruption; TCU; Law and Economics.

1. INTRODUCTION

In the midst of the rise of the perception of corruption in light of facts unveiled with Operation Car Wash, the discussion about the optimized role of each one of the organs integrating the Control Network gains momentum. Such a debate is as relevant as it is complex because of an intricate network of entities – the Federal Court of Accounts (TCU), the Comptroller General's Office (CGU), the Attorney General of the Union (AGU), the Federal Public Prosecutor's Office (MPF), Federal Police Department (DPF), Administrative Council for Economic Defense (CADE), Federal Courts, Supreme Federal Court (STF) – and variables – fines, damages, kickbacks, plea bargains , leniency agreements, unavailability of assets and debarment repute – which make up the national scene, as explained by Dallagnol (2017).

Thus, it is relevant to analyze not only legally, but also analytically, from an economic point of view, the tool available to the TCU for it to accomplish its constitutional purpose. In other words, it is relevant to use the Law and Economics to ensure, according to Cooter and Ulen (2010), a greater efficiency of the Punitive Administrative Law itself.

Consequently, this article presents a quantitative subsidy for the calculation of the sentence for debarment repute due to the application of article 46 of Law 8.443/1992. At this pace, and within the particularities of the national scenario, it is further sought to overcome the understanding in which the debarment repute penalty antagonizes with the continuity of leniency agreements. Instead, it is based on analytical criteria that allow the two instruments to be combined in a proportional way. This way, adjustment is sought between the penalties mitigated by leniency agreements and the duration of the debarment repute penalty in the greater purpose of discouraging the perpetuation of corruption.

It is worth mentioning that the content of this article[1] is extracted from a case file of the Court of Accounts that addresses a concrete case of one of the construction companies involved in Operation Car Wash. Regardless, the necessary anonimity was granted in order to preserve the company, focusing instead on the showcase of the proposed modeling, as well as its consequences.

The main result of this work is the exposition of the discounted cash flow analysis technique as a means of considering the debarment repute penalty applied by the TCU in a more reasonable way, considering the context of leniency agreements, which can be of up to five years.

In light of the above introduction, it is important to clarify that this work will be developed with the following divisions: the second section presents the branch of Crime Economy, since this branch of knowledge, inaugurated by Becker (1969), represents the core of the theoretical basis, as well as the strong connection with the pedagogical and sanctioning role of TCU in the fight against corruption. The third section presents

the practical application of the fundamentals of Crime Economics, using typical resources of the investment analysis – discounted cash flow and net present value – to indicate which debarment repute terms would be more proportional to the case on the screen. Lastly, in the conclusion, the implications of the dissemination of this new type of analysis are presented and possible extensions to the present study are signaled.

2. ECONOMICS CRIMES AND THE TCU

The external control body is responsible for a series of actions aimed at the protection of the Treasury and the punishment of those who have harmed the public assets. In this set, fines are included up to the cost of the damage (article 57 of Law 8.443/1992), reimbursement of debt in Special Rendering of Accounts (section II, article 12 of Law 8.443/1992 and sole paragraph of article 198 of TCU Internal Regulations) and also the declaration of the debarment repute penalty (article 46 of Law 8.443/1992). In view of this arsenal and the importance of the Court of Auditors decisions, it is convenient and opportune to improve the studies involved in the calculation of the sanctions at TCU's disposal, especially considering the new context with the advent of leniency agreements.

Subsequently, it is useful to share some of the lessons of the Nobel in Economics of 1992, Gary Stanley Becker, which of special interest are the conclusions reached by the scholar in the article "Crime and punishment: an economic approach" that, according to Cerqueira and Lobão (2004, pg. 233-269, grifos nossos) can be synthesized as:

> The decision whether or not to commit the crime would result from a process of **maximizing expected utility**, in which the individual would confront, on the one hand, the potential gains resulting from the criminal action, the cost of the punishment and the associated probabilities of detention and imprisonment, on the other hand, the opportunity cost of committing crimes, translated by the alternative wage in the labor market.

The "utility function" – which quantifies the level of satisfaction of an economic agent -, exposed above, culminated in the construction of what came to be called the **beckerian** optimum fine. According to this concept, the disinterest of the corrupt agent tends to materialize when the total pecuniary punishment is at least the result of the quotient between the damages arising from the criminal action (illicit product – which varies a lot from case to case) by the probability of detection (generally considered to be at most 30%, according to the economic doctrine[2].

Thus, for example, deviations which characterize a total damage of U$ 1 billion, a minimum of U$ 3.33 billion (result of the division between U$ 1 billion and 30%) in order to eliminate interest in relapse. This conduct was known in the US as treble damage.

At the national level, the relevance of this type of approach is also corroborated by the Cade (Administrative Council for Economic Defense) advisor's article[3], in which economist Cristiane Alkmin criticizes the fact that cartelists in Brazil are not sanctioned for the damage they caused. While noting the negative consequences of disregarding the damage[4], the researcher pointed out that in the United States it is common to apply three times the amount of the damage as a fine, while in the European Union there is an imputation corresponding to the product of the damage for the number of years the cartel lasted for.

In addition, the concept of the Becker's fine is already used in addition to the academic contours, for example AC 08012.003931/2005-55 analyzed by Cade – case of irregularities in the purchase of ambulances in which the amount of compensation for the company was approximately 4.5 times the value of the contract covered by the cartel. Thus, there are undeniable paradigms for quantifying a dissuasive punishment.

Furthermore, it is worth recording the level of diffusion of Gary Becker's initial ideas – the approach of crime/corruption under an economic bias – quoting other researchers.

Ehrlich (1974) comments in his model that the criminal agent seeks the satisfaction of his preferences, reacting to incentives and disincentives in the selection of the conduct to be adopted. Similarly, Ghignone (2013) explains that, as in any economic activity, the rational agent can consider the possible expected gains and losses and their respective probabilities, so that if the expected benefit as a result of the criminal action is higher to any damages, the agent will opt for the perpetration of the corrupt action. Klitgaard (1988) argues that, according to an economic approach to corruption, the agent will opt for a criminal stance when the probable benefits exceed the expected costs, which causes the client to offer a bribe (or other illicit methods) to the public agent if the expected rewards exceed the costs.

Also in line with the lessons learned, it is imperative to keep in mind one of the core concepts of behavioral economics – widely disseminated in the study of decision making -, risk aversion. According to researcher Kahneman (2011), Nobel in Economics of 2002, agents generally respond more strongly to losses than to gains, so that the possibility of loss of a certain amount generates much less utility than the possibility of increasing the equity in the same amount. Consequently, the effect of discouragement is greater on punishments than on awards.

This conclusion draws attention to the weighting between the burden and bonuses given to potentially lenient companies, which the State must evaluate in order to base its decisions also in a pedagogical way, which is significantly impacted by the time of debarment – the time in which companies involved in the commission of illicit activities will be prevented from contracting with the Federal Public Administration – as it will be covered further ahead.

Moreover, it is relevant to understand, under a quantitative bias, the design of incentives and their implications in view of the complexity of the theme and the decentralized performance of the State.

To this end, it is essential to recognize the existence of: i) group 1: known corrupt companies interested in leniency agreements; (ii) group 2: companies known to be corrupt but not interested in leniency agreements; iii) group 3: corrupt companies not discovered by the Control Network; iv) group 4: non-corrupt companies. The proportion of business enterprises in each of these four groups is dynamically and directly influenced by the sum of benefits and sanctions charged by the State to groups 1 and 2.

As a result, excessively severe leniency agreements (along with other sanctions at the disposal of the State, such as the debarment penalty) tend to increase the number of companies in group 2, which would delay knowledge of crime engineering vis-a-vis the more limited pace of investigative leverage due to the lack of collaboration. On the other hand, excessively lenient punishments will lead to the increase of group 1, but also to the reduction of group 4, whose members will begin to consider the commission of harmful acts to ensure their survival in response to the growth of the other groups and also because of the dissuasive character of punishments. In the latter case, we would be faced with the undesirable scenario in which leniency agreements are encouraged, but corruption is not discouraged. Such a scenario would hide short-term positive results with dire consequences in the medium and long term.

So, it proves valuable to use the Law and Economics in the opportunity to analytically examine the benefits and punishments, including the debarment repute penalty – to achieve the delicate balance in which the agreements of leniency are stimulated and, at the same time, corruption is discouraged.

This article explored the idea that the "utility function", from the perspective of the offending agent, must necessarily have a negative result for groups 1 and 2, and the first group should still present better results than the second, since it decided to collaborate with the State.

3. DEBARMENT AND DETERRENCE

The initial part of the methodology adopted here is based on the work of the Organization for Economic Cooperation and Development (2016). This article sought to present quantitative arguments the presence or not of monetary sanctions to deter new corrupt acts (payment of fees) for works construction contracts, when considering the legislation of more than 30 countries.

That said, also in this article, through the methodology of discounted cash flow, it was assessed if the amounts involved with bribe, overbilling and pecuniary penalties would portray a positive or negative net present value (NPV) to the company involved (belonging to group 1) . Thus, if the NPV presented a value greater than zero, there would be an investment option (in bribe) that would rationally tend to be reproduced in the future. In a reflexive way, a negative NPV would have a result that would discourage the repetition of the corruption offense.

Likewise, it is also important to comment that such methodology is fully adherent to the national and international literature regarding rational choice theory, according to Rose-Ackerman's (2016) explanations for large-scale white collar crimes, involving large sums of resources[5].

According to this approach, for the specific case – delimited here by the participation of one of the 16 companies that acted most incisively in the scheme that injured Petrobras -, the decision as to its performance in the cartel, or not, went through a risk analysis which compared the following variables:

i) amount of illicit investment (kickback and associated concealment costs);

ii) amount of unlawful incremental gain resulting from this bribe (overbilling/damage/debt/illicit products[6];

iii) probability of being discovered;

iv) probability of, being detected, if punished;

v) probability of, being punished, in fact paying some importance, and finally[7];

vi) the expected value of this hypothetical penalty payment.

All variables exposed to some extent are related to the five anti-corruption mechanisms, consisting of: prevention, detection, investigation, correction and monitoring, in accordance with the Federal Court of Accounts's Framework for Combating Fraud and Corruption (2017). Thus, the perception of the market agent is that it will define its way of acting, an understanding widely disseminated in the research area of the Crime Economy, as already explained.

In the present case, the company's performance in the cartel for more than a decade attests to the combination of the abovementioned variables to a large extent in disfavor of the Public Administration. In other words, the construction company saw a derisory "entrance fee" when compared to maximizing profits from high overbilling, together with the ineffectiveness of detection and punishment for deviating values.

Another relevant observation is that, in relation to the OECD article cited above, an adaptation was made that added clarity and, at the same time, conservatism to the analysis carried out. This is because in this article we considered all the probabilities previously predicted by the potential criminal to be 100% (he migrated from the probabilistic approach – which is generally based on maximum percentages of 30% – for deterministic – 100%). So, it would be the same as treating the problem of deterrence by the following question: "If the cartel company knew in advance that it will necessarily be detected, tried and punished again, still, the repetition of the scenario under consideration will be a financial transaction profitable and therefore rational? "

Therefore, for the case in question, it was possible to use real values of a sanctioning nature alluding to leniency agreements previously signed by such company with MPF and Cade[8].

Additionally, Martins et al. (2017) bring econometric calculations related to the overbilling of contracts of the same company. This study, which indicated as minimum damage estimated a discount of less than 17 percentage points for contracts in the Petrobras Supply Directorate affected by the cartel, was even accepted by the TCU Plenary in Ruling 3.089/2015[9].

Other revelations from Operation Car Wash made it possible to use a threshold associated with the illicit investment, representing fees for 3% of the contracted amounts[10]. On the other hand, the performance with respect to the reimbursement actually obtained after final decision on the debt at the end of the TCE was extracted from public events in which AGU's employees reported an average percentage of around 3% at the end of a period that often exceeds a decade[11].

Thereby, the decision variables linked to the go, no go of the unlawful act of fraudulent bidding by means of collusive actions carried out by a cartel are met. In other words, the understanding of the Bribery in Public Procurement: Methods, Actors and Count-Measures of the Organization for Economic Co-operation and Development (2007, pg. 47) is confirmed:

> The bribe offeror usually expects something in return for its payment. Ultimately, the one who invests in the payment of bribes expects a better result than the scenario without the payment of the bribe. Bribe acts are therefore organized and planned to have a calculated profit.

The innovation of this study is due to the estimated monetization of the time of debarment repute as another factor to be added next to the sanctioning portion. In summary, the impact from the time (up to five years) in which the construction company would be unable to contract with the Federal Public Administration was included in the discounted cash flow. For this purpose, public figures were used in the company's balance sheet[12].

The main objective of such a measure is to impose a negative net present value after the processing of bribes, overbilling, amounts to be paid as part of the leniency agreements signed, amounts to be effectively recovered due to the TCE instaurations and loss caused by the time of debarment repute. This last factor was stipulated annually as the average net profit between the period from 2007 to 2015, applied over the double of the year with greater net revenue of the construction company for the interval of 2007 to 2015. This last assumption was made to behave conservatively, intangible and negative externalities associated with the declaration of debarment repute[13].

With this arrangement, it is clear that the companies belonging to groups 1 and 2 (corrupt lenient and

non-lenient) deserve and need to be punished with a dissuasive tone only compatible with a negative NPV, and this damage is more accentuated to the second group than to first, which chose to collaborate with the investigations in exchange for some easing in his sentence. To sum up, under no circumstances, corrupt companies (lenient or not) can see in the fraudulent past a case of success from a financial point of view.

In view of the foregoing, the net present value inherent to the corruption case treated herein can be generically represented by the following equation.

$$VPL = -Pro + \frac{Dano}{(1+i)^m} - \frac{TCE}{(1+i)^n} - \frac{Len\ A}{(1+i)^o} - \frac{Len\ B}{(1+i)^p} - \Sigma\frac{Ini}{(1+i)^q}$$

In the presented flow, (VPL) represents the net present value and the correction of the value in time (taxa i) was made by the average Selic rate in the considered timeframe. The variable (Pro) represents the initial illicit disbursement (bribe). (Len A) and (Len B) express the amounts of fines related to the leniency agreements entered into with CADE and MPF, respectively. The variable (TCE) represents the effectively expected[14] reimbursement and (Ini) is equivalent to the profits prospectively not perceived by the time of debarment, which could be up to 5 years. The coefficients (m, n, o, p and q) were extracted from Ruling 3.089/2015 – TCU – Plenary. Graphically, we arrive at the following result:

Graphic 1:

VPL versus debarment time

Source: prepared by the author

The main results extracted from Graphic 1 are: i) without the declaration of debarment repute, the company will have an advantageous and rational investment option in crime, since NPV was positive in almost R$ 500 million; (ii) at about two years and nine months time, the same US deterrence level is reached, in which a negative NPV is charged to the amount of treble damage; (iii) it is only by using the whole period of five years of debarment repute that the same level of disincentive of the European Union would be reached, which imputes to the corrupt agent the proceeds of damage for the duration of the cartel in years; iv) penalties of debarment repute of less than one year provide a positive NPV to the corrupt company, showing that the crime, in such circumstances, would compensate; and (v) the one-day to five-year margin of debarment repute implies a tool of dissuasion by the TCU equivalent to R$ 2.5 billion (from +R$ 500 million to -R$ 2 billion).

These results provide more detailed subsidies to delimit what would be a more proportionate scope of action on the part of the Federal Court of Accounts. In other words, considering the formulation presented with all the conservative premises, it is shown that the penalty of debarment repute in this case should be at least one year[15].

4. CONCLUSION

This article brought an unprecedent proposal of quantitative weighting via Economic Analysis of the Law of the time of debarment repute to be imposed to the corrupt companies, although lenient, discovered in the scope of Operation Car Wash. In other words, a Sanctioning Impact Assessment was presented in the sphere of Administrative Sanction Law.

As a result of this, a discounted cash flow model was constructed, containing inputs and outputs related to variables: bribes, overbilling, expected reimbursements, fines to be paid on account of already signed leniency agreements, and profits not prospectively perceived due to time of debarment repute to be decreed by the Federal Court of Accounts, in compliance with Article 46 of the Organic Law of the Court of Accounts. Barring these variables in mind, the delicate balance in which new leniency agreements are stimulated and, at the same time, discouraged reinvestment in the illicit paths, was assessed by measuring the net present value obtained.

In dealing with a concrete case for which the values necessary for the composition of the cash flow were available, it was concluded that penalties of debarment repute of less than one year will characterize a

scenario in which the crime of corruption compensates (positive net present value). Failure to enact debarment would represent an investment option with a positive NPV in the order of R$ 500 million. It is worth noting that these results have already served to subsidize the opinion of the MPTCU in the specific case, at which time it manifested[16] itself as states below:

> The very high degree of conservatism in the analysis carried out by SeinfraOperations is noticed, especially as regards the immediacy of the impact of the declaration of debarment repute26 on company billings, the State's ability to detect and punish all cases of fraud and high-level consideration of dependence of the construction company on resources of federal origin, without including, any action of the company itself to diversify its portfolio of contracts.
>
> [...]
>
> The study carried out by SeinfraOperações shows itself to be valuable in understanding the impact of the sanction of unfairness on the particular [construction company] and, in general, on the construction companies involved in fraudulent bidding for Petrobras. (Bugarin, 2017, pg. 12 and 13).

Succinctly, the declaration of d is of fundamental importance in the fight against corruption.

As extensions to this study – replicable for other companies involved in corruption scandals, fraud, damages and search for leniency agreements – we can mention the inclusion of probabilistic factors related to the efficiency of the State in the detection and punishment of corrupt companies. Moreover, the model presented can be refined through the inclusion of intertemporal discount related to the recovery of values by the State.

NOTES

1 The publication of this article was authorized by the Honorable Minister Benjamin Zymler, rapporteur for the case TC 036.335/2016-9.

2 For more details, see: Fine and punishment, available at <http://econ.st/2F6JCXI>; and The Chicago School of Antitrust analysis, available at: <http://bit.ly/2F4cTqc>. Accessed on: 1 Mar. 2018.

3 The full content of the article presented in newspaper of great circulation can be seen in: <http://bit.ly/2tamdDi>. Accessed on: 1 Mar. 2018.

4 Full article found at: <http://bit.ly/2GUhMhX>. Accessed on: 1 Mar. 2018.

5 It is interesting to note that studies of behavioral economics that question the validity of the theory about the rational choice of the potentially corrupt agent – as found in Dan Ariely's The Truth About Dishonesty – bring experiments centered on cases of small corrupt attitudes – petty corruption – which does not apply to Brazil's biggest corruption scandal.

6 There is also the recent possibility of glossing over the profit declared by the company in case of obtaining the contract through fraud. This approach, dealt with in Judgment 1.306/2017 – TCU – Plenary, was not applied in this case to add more conservatism to the analysis.

7 The joint application of the three probabilities cited is that it consists of the 30% allusive to treble damage. There is evidence that even this percentage of 30% is excessively optimistic for the Brazilian case, which is extracted from a comment by Attorney Deltan Dallagnol, in which the percentage of 3% is cited. Available at: <http://abr.ai/2GZFCcq>. Accessed on: 1 Mar. 2018.

8 The amounts and the form of payment for posting purposes in the cash flow were extracted from: <https://goo.gl/4X37uc> and <https://goo.gl/mNf2uM>. Access on 1 March. 2018.

9 This work includes a series of conservative assumptions, among which we cite: the use of Petrobras' estimates as a paradigm value, disregarding the damages related to the additives and the inefficiencies inherent in a hard-core cartel. Therefore, the percentage of 17% reflects a minimum value of damage, which is also evidenced when comparing this level of damage with that computed by means of Cost Engineering techniques, which led to losses in the 20% house, as expressed in Judgment 2.1092016 – TCU – Plenary. Public works in the market bring overbilling at 35%. Available at: <https://glo.bo/2rtzDYg>. Accessed on: 1 Mar. 2018.

10 Amount quoted in several statements in the context of Operation Car Wash and used by Petrobras itself in its Balance Sheet, when indicating the minimum losses with corruption. The same percentage was also used by Eletrobras in the case of fraud related to Angra 3 (Judgment 483/2017 – TCU – Plenary)

11 As an example, we can cite the Public Dialogue: Combating Corruption in Infrastructure event, available at: <https://goo.gl/qCckBZ>; in addition to meetings with TCU auditors in which the same percentage was informed to justify the relevance of the actions of unavailability of assets as a measure to recover the products of the illicit.

12 Full reports can be accessed at: <https://goo.gl/N8Of9s>. Accessed on: 1 Mar. 2018.

13 An extremely conservative assumption based on the period of profits artificially and illegally increased by the cartel's performance. In addition, the company's entire revenue was considered as coming from contracts with the Federal Public Administration, when the most accurate, if the balance so discriminated, would be the gloss of revenues from private contracts and signed with state and municipal bodies. Not only that, but there would still be some deflator due to the current period of economic recession that the country is going through.

14 The application of any fine (Article 57 of the Organic Law of the TCU) was not considered because there is no news of a penalty standard by means of such a device in large cases of corruption. This assumption is even more likely to be confirmed in the specific case since the external control process would have to take into consideration the previous confirmed in the specific case since the external control process would have to consider the previous signing of two leniency agreements, from which the collaborative position of the company is assumed.

15 There are also other sources of conservatism such as the use of the duration of the cartel for a period of five years (when there is evidence that such an arrangement lasted more than a decade) to adapt to the contracts used in that study and from Ruling 3.089/2015 – TCU – Plenary. In addition, the construction company object of this study still caused damage to the Treasury in contracts with Valec and Eletrobras, overbilling not included in the present study.

16 It is worth mentioning that the complete study of the technical unit brought other simulations (other than represented in Graphic 1). The MPTCU notes reproduced are valid for all cases.

REFERENCES

BECKER, G. Crime and punishment: an economic approach. Journal of Political Economy, Illinois, v. 76, n. 2, p. 169-217, 1969.

BUGARIN, PAULO SOARES – Parecer do Subprocurador-Geral do MPTCU sobre o TC nº 036.335/2016-9, p. 12-13, 2017.

CERQUEIRA, D.; LOBÃO, W. Determinantes da criminalidade: arcabouços teóricos e resultados empíricos. Dados: Revista de Ciências Sociais, Rio de Janeiro, v. 47, n.2, p. 233-269, 2004.

COOTER, R.; ULEN, T. Law and economics. Berkeley: Berkeley Law Books, 2010.

DALLAGNOL, D. A luta contra a corrupção. Rio de Janeiro: Primeira Pessoa, 2017.

EHRLICH, I. Participation in illegitimate activities: an economic analysis. In: BECKER, G. S.; LANDES, W. M. (Eds.). Essays in the economics of crime and punishment. New York: Columbia University Press, 1974.

GHIGNONE, L. Corrupção e eficiência administrativa: um exame à luz da análise econômica do Direito (II). Revista do Instituto de Direito Brasileiro, Lisboa, ano 2, n. 2, p. 367-473, 2013.

KAHNEMAN, D. Rápido e devagar: duas formas de pensar. Rio de Janeiro: Objetiva, 2011.

KLITGAARD, R. E. Controlling corruption. Oakland: University of California Press, 1988.

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. Bribery in public procurement: methods, actors and count-measures. Paris: OCDE, 2007. Disponível em: <http://bit.ly/2sXB8ko> Acesso em: 12 set. 2017.

_____. Is foreign bribery an attractive investment in some countries? Paris: OCDE, 2016. Disponível em: <http://bit.ly/2HQOimt>. Acesso em: 12 set. 2017.

ROSE-ACKERMAN, S. Corruption and government: causes, consequences and reform. Cambridge: Cambridge University Press, 2016.

TRIBUNAL DE CONTAS DA UNIÃO. Referencial de combate à fraude e à corrupção. Brasília, DF, 2017.

MARTINS. et al. Técnicas Econométricas e seu papel inovador no cálculo do sobrepreço: o caso da Lava Jato. Revista do Tribunal de Contas da União, Brasília, DF, ano 49, n. 138, p. 18-29, 2017.

Notarial Minutes as Evidence of the Physical Execution of Social and Cultural Projects funded with Public Resources

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ABSTRACT

This paper discusses the use of notarial minutes as evidence of the physical execution of social and cultural projects funded with public resources. A covenant signed by public or private nonprofit entities is the instrument most used by the Public Administration for this purpose. The monitoring of the physical execution of the projects contracted has not been satisfactory. The notarial minutes present themselves as a viable alternative solution and, in certain aspects, as an advantage to remedy this deficiency.

Keywords: Voluntary Transfers; Covenants; Accountability; Physical Execution; Evidence; Social and Cultural Projects.

1. INTRODUCTION

A large amount of projects of public interest, mainly those of social or cultural character, has been carried out by the Public Administration in a decentralized way, through agreements that deliver public resources to nonprofit public or private entities, which directly performs projects.

The executing entities, called contracted parties, have to account for the resources received at the end of term of covenants, that is, they have to demonstrate

that the physical and financial execution was carried out as agreed upon.

This study analyzes, from the perspective of the Federal Public Administration, the viability of using notarial minutes as evidence of the physical execution of the projects agreed upon in covenants. First, we described the characteristics of covenants and the problems concerning the verification of physical execution of the objects contracted. Next, we presented the concept of notarial minutes and their value of evidence. This paper discusses the use of notarial minutes as evidence of physical execution of social and cultural projects funded with public resources.

2. EXECUTION OF SOCIAL AND CULTURAL PROJECTS IN A DECENTRALIZED WAY

The Decree-law no. 200, of February 25, 1967 (BRASIL, 1967) had the purpose of decongesting the Federal Public Administration and promoting a more appropriate and rational performance for its multiple duties. In article 10, paragraph 1, the decree provides for a broad decentralization in the execution of activities according to the following plans:

a) within the frames of the Federal Administration, with levels of execution and direction clearly distinguished;

b) from the Federal Administration to the federal units, when duly equipped and through agreements;

c) from the Federal Administration to the private sphere, through contracts and concessions.

Maria Sylvia Zanella Di Pietro (2006) notes that item "a" refers to administrative deconcentration instead of decentralization, since competences are distributed within the same legal person, that is, there is an internal distribution of competences. On the other hand, decentralization means a distribution of competences to another person, either private individuals or legal entities, that is, an external distribution of competences. Concerning item "b", the jurist poses another criticism. She affirms that there is only cooperation between the different government spheres, and not an administrative decentralization.

Although one cannot confuse the plan described in item "b" of the Decree-law 200/1967 with the doctrinal figure of administrative decentralization, this is a mechanism to perform activities in a decentralized way and decongest the Public Administration. With the passing of time, the use of agreements largely increased, mainly with the aim to carry out social and cultural programs, either in cooperation with public state and municipal bodies, or with nonprofit private entities.

Besides agreements, the Public Administration has other ways to establish partnerships: (a) transfer contracts, regulated by Laws on budget guidelines and infralegal standards (Decree no. 6170, of July 25, 2007 (BRASIL, 2007a)), which partnership terms are

restricted to entities classified as civil society organizations of public interest (OSCIP) according to Law 9790, as of March 23, 1999 and Decree no. 3100/99; and (b) management contracts, restricted to entities classified as social organizations (OS), according to the Law 9637/98. The present study will focus on the agreements, but everything that is mentioned here about notarial minutes applies to the other instruments as well.

Between September 2008 and December 2012, agreements represented 82.47% of the total number of transfers. For example, in 2012, the total sum of public resources transferred to the private sector through agreements was of R$ 1,286,240,705.60, while the sum transferred through transfer contracts was of R$ 128,163,758.43, and through partnership terms was of R$ 504,991,979.11 (LOPES et al., 2016).

Law no. 13019, of July 31, 2014, instituted the funding term as another instrument to formalize partnerships established between the Public Administration and civil society organizations and to achieve purposes of mutual interest that involve the transfer of financial resources, as proposed by these entities. There is almost an identity of characteristics between agreements and the funding terms, with possible establishment of future partnerships with private entities through funding terms (Law 13019/2014 (BRASIL, 2014)), rather than covenants.

However, if, on one hand, agreements and other similar instruments have promoted the establishment of partnerships to execute social and cultural projects in a decentralized way, on the other hand, practice has shown a high incidence of problems in the accountability in the financial and physical execution of the object contracted. The causes of this recurring problem are diverse, including, in first place, the technical unpreparedness of the contracted parties to manage public resources, especially when this party is a private entity. Secondly, the bad faith of certain contracted parties. This framework is even worse because of the monitoring deficiency of the contracting bodies due to their own structural limitation to handle the large amount of projects executed through these instruments and their geographical dispersion.

3. AGREEMENTS

Decree 6170/2007 regulates the transfers of resources of the Union through agreements signed with public bodies or entities or private nonprofit organizations. Art. 1, paragraph 1, presents the following definitions:

> I – agreement – deal, adjustment or any other instrument that rules the transfer of financial resources of appropriations recorded in the budgets of Tax and Social Security of the Union and that has, on one hand, a body or entity of the Federal Public Administration directly or indirectly, and, on the other hand, a body or entity of the state Public Administration directly or indirectly or private nonprofit organizations to execute the government program, including the performance of projects, activities, services, purchase of goods or events of mutual interest in a regime of mutual cooperation;
>
> [...]
>
> IV – contracting party – body of the Federal Public Administration directly or indirectly responsible for the transfer of financial resources or for the decentralization of budgetary credits to execute the object of the agreement;
>
> [...]
>
> VI – contracted party – body or entity of the Public Administration directly or indirectly at any government sphere and private nonprofit entity, with which the Federal Administration agrees the execution of the program, project/activity or event upon the conclusion of the agreement. (BRASIL, 2007a)

The agreement is different from the administrative contract due to an essential element: the communion of interests among participants. It means, in a contract, the parties are opposed and divergent, while, in an agreement, there is the mutual interest to achieve a certain purpose (MARRAMARCO, 2008).

For example, if the Administration wants to build a property to meet its operational needs, it must sign an administrative contract with a builder (upon prior bidding) because their interests are opposed; as the Administration seeks the material resources to fulfill its tasks, the builder seeks profit from the provision of its services. Now, imagine the following situation: the Union and a municipality agree with the construction of a vocational school through a

partnership, in which the federal body delivers part of the financial resources and the municipality is responsible for the management. In this second legal relationship, there are not conflicting interests, since both the Union and the municipality have the same interest, that is, the construction of the school. This project is typically an object of agreements that must be concluded between a federal and a municipal body, as presented in the example. However, the purchase of goods and services that will be carried out by the municipality with the resources of the agreement for the construction of the school shall be object of an administrative contract.

The difference between the agreeement and the administrative contract is in the way to prove the compliance with obligations. In the case of administrative contracts, the contracted party must provide the good or service purchased, while the contracting party must receive it and verify the adequacy of the contractual object to the terms of the contract, as provided for in Art. 73 of Law no. 8666, of June 21, 1993 (BRASIL, 1993). In the agreements, the contracted party must account for the application of public resources that were transferred by the contracting party.

In the accountability process, the contracted party must demonstrate the execution of the object contracted (physical execution) and the correct application of public resources received through the covenant (financial execution). The absence or deficiency of proving the financial or physical execution of projects funded with public resources requires the establishment of an administrative process called Special Rendering of Accounts (TCE), which aims to investigate the facts, identify those responsible and quantify the damage. The TCE must be initiated by the granting body. After its completion, his body must forward the case to the Court of Accounts, who will analyze the facts and submit them to the adversarial proceeding and, finally, judge them definitely.

4. NOTARIAL MINUTES

The notarial minutes are a kind of notarial act, like a public deed. The notarial acts are the typical acts exclusively practiced by the notary public himself/herself or his/her agent in the exercise of the notarial function. That is, those acts provided in the legal system that the notary practices in the exercise of the notarial function (BRANDELLI, 2011).

Leonardo Brandelli (2011) states that the notarial minutes are the public instrument through which the notary public understands, through his/her senses, a certain situation or fact and transfers them to his/her register books or other documents. This is the apprehension of an act or fact by the notary public and the transcription of this perception to a proper document. According to Brandelli (2011), the notarial minutes follow the general power of authentication of the notary public, which gives him/her the power to narrate facts with authenticity – attribution established in Art. 6, III, of Law no. 8935, of November 18, 1994 (BRASIL, 1994).

Carlos Fernando Brasil Chaves and Afonso Celso F. Rezende (2010) consider the notarial minutes as a unilateral declaratory act of the notary public, which content corresponds to a written report of facts with the circumstances and the details needed to characterize it. In their opinion, there should be a requirement for its elaboration, since the notary public does not act sua sponte (principle of requirement); however, the requesting party does not have the right to interfere with the content of the minutes.

Law no. 8935/1994, art 7, item III, explicitly included in the legal system the provision of the notarial minutes as an act of exclusive competence of notaries public (BRASIL, 1994). However, prior to this law, the notaries already had a general authorization to authenticate facts according to Article 364 of Law no. 5869, of January 11, 1973 (former Code of Civil Procedure (CPC)) and Art. 45, of Law no. 13105, of March 16, 2015 (new CPC), which provides that the public document is not only a proof of its constitution, but also a proof of the facts that the clerk, the clerk of court, the notary public or the officer declared that occurred in their presence (BRAZIL, 1973; 2015 apud BRANDELLI, 2011).

Leonardo Brandelli (2011) explains that the notarial minutes can contain the narrative of a human will since the declaration of this will is not addressed to the notary public, it means, since the notary public is a mere observer of those wills, without receiving them. Then it is possible to execute the notarial minutes of a meeting of partners or shareholders of a legal person before a notary public, or to settle a verbal contract, because the will is not addressed to the notary public, who only reports what happened. Also according to the author, there are several types of notarial minutes in the comparative law, but, in Brazil, Art. 7, III, of Law 8935/1994, only authorizes the notary public to draw up the minutes of attendance (BRASIL, 1994).

Carlos Fernando Brasil Chaves and Afonso Celso F. Rezende (2010) consider the following regarding the minutes of attendance, which they call *minutes of mere perception, in verbis:*

> In these minutes, the notary expresses the thought formed by his/her own senses, such as, for example, the confirmation of delivery of a document or the unilateral rectification of a material error committed in the notarial act. It is the purest expression of notarial minutes, because these are the minutes in which the notary is limited to transcribe his/her sensory perception concerning the fact occurred. However, in this type of minutes, the notary public must refrain from formulations with personal judgment regarding certain events if he/she does not have enough technical expertise, in order to preserve the genuine notarial function. As the notary public's mission is to attest facts, acts and expressions of will occurring in his presence, he/she must not pass judgment on. The notary public must concentrate on the narration of what he/she perceives, without performing a passive activity whatsoever, because he/she has to strive to identify the thing perfectly and seize the reality accurately. (CHAVES; REZENDE, 2010, p. 162)

5. EVIDENTIARY VALUE OF NOTARIAL MINUTES

The repealed CPC (Law 5869/1973) already tacitly allowed the notary public to draw up notarial minutes, because Art. 364 provided that public documents are not only a proof of their constitution, but also a proof of the facts that the clerk, notary public or the officer declared that occurred in their presence (BRASIL, 1973 apud BRANDELLI, 2011). However, in order to dispel any doubt about that, Law 8935/1994, in Art. 7, item III, expressly inserted the exclusive competence of notaries public to draw up notarial minutes (BRASIL, 1994). Based on this legal framework, Jaime Luiz Vicari and Carolina Gabriela Fogaça Vicari (2014) listed many practical examples of use of notarial minutes suggested by specialized jurists and some real cases tried in Brazilian courts, which already demonstrated the validity of notarial minutes as proceeding evidence at the time.

Érica Barbosa e Silva and Fernanda Tartuce (2016) observed that the civil procedure suffered various changes in the attempt to be faster and more secure. Within this context, the authors emphasized that extrajudicial services started to contribute to the resolution of a series of problems faster and at a lower cost, helping to reduce the overload of judicial proceedings – such as Law 11441, of January 4, 2007, which authorized the conduction of separations, divorces and inventories in the administrative sphere, depending on some requirements (BRASIL, 2007b).

Therefore, the explicit provision of notarial minutes as proceeding evidence included in the new CPC, Law 13105/2015, was not by chance.

> Art. 384. The existence and the mode of existence of any fact can be attested or recorded through minutes drawn up by a notary public, as requested by the interested party.
>
> Sole paragraph. Data represented by image or sound recordings in electronic files may appear in the notarial minutes. (BRASIL, 2015a)

Although the notarial minutes were already a valid means of evidence before the Law 13105/2015, this resource was barely known. The new CPC gave it more visibility – which will certainly result in a significant increase in the use of this instrument. Let us see how three jurists specialized in procedural law, Fredie Didier Jr., Paula Sarno Braga and Rafael Alexandria de Oliveira (2015) interpret Art. 384 of the new CPC.

> Any person interested in the documentation of a certain fact can request a notary public to do so by narrating in writing what he/she took knowledge or what happened in his presence. For example: you can ask the notary public to document the conservation status of a property, the dissemination of works protected by copyright without the precise indication of authorship, the content of a given website, the presence of a certain person in a certain place, a slanderous, insulting or defamatory opinion given by someone on a relationship website or application, the disturbance of the peace in a residential condominium due to improper use of sound devices, the contamination of environment by odoriferous substance from activity performed in your neighbor's property, the testimony of a certain person about a situation, among other things.
>
> There are countless possibilities. (DIDIER JUNIOR; BRAGA; OLIVEIRA, 2015, p. 211-212)

Like in the civil proceeding, the validity of the notarial minutes in the administrative sphere is full, including in the special renderings of accounts. First because the Law no. 9784, of January 29, 1999, which rules administrative proceedings in the context of the Federal Public Administration, establishes broad freedom in evidence production, which can only be refused by a substantiated decision if the evidence is illicit, impertinent, unnecessary or frivolous (BRASIL, 1999c). Besides, within the Federal Court of Accounts, an institution responsible for the external control of the Federal Public Administration and by the judgment of special renderings of accounts, the Precedent 103 is in force, of November 25, 1976, with the following content: "In the absence of specific legal rules, the following provisions of the Code of Civil Procedure apply analogically and subsidiarily to what is within the competence of the Federal Court of Accounts" (BRASIL, 1976). In addition, neither Law 9784/1999 nor the Rules of Procedure of the Federal Court of Accounts prevent somehow the use of notarial minutes as evidence in administrative proceedings, including special rendering of accounts.

6. ADVANTAGES OF NOTARIAL MINUTES AS EVIDENCE OF PHYSICAL EXECUTION OF SOCIAL AND CULTURAL PROJECTS FUNDED WITH PUBLIC RESOURCES

In the accountability, the contracted party must not only prove the execution of the object contracted (physical execution) between the parties, but also demonstrate the correct application of public resources received through the covenant (financial execution).

The demonstration of the financial execution is fundamentally based on the presentation of documents and reports proving the expenses incurred, such as invoices, receipts, contracts, statements of a particular bank account, reports of payments made, report of physical and financial execution etc. Currently, all the documents required in the financial accountability must be presented by the contracted party through the System of agreements (Sincov), which promotes the proper distance examination of the financial execution, since Sincov is a computerized system accessible via the Internet. On the other hand, the assessment of the physical execution of the object contracted is more complex, because most of times it cannot be satisfactorily demonstrated only through documents; therefore, one or more visits to the place of project execution is relevant.

That is the reason why the Ordinance CGU/MF/MP no. 507, of November 24, 2011 (BRASIL, 2011), by regulating the Decree 6170/2007, establishes that the contracting party has the duty to oversee the execution of the covenant to ensure that the object contracted be executed as foreseen in the work plan established, including visits to the place of execution. And, regarding the accountability of the physical execution, the said

ordinance requires that the contracted party submit the following reports:

a) a statement of achievement of the objectives proposed in the instrument;

b) a list of goods purchased, produced or constructed, if applicable;

c) a list of people trained or qualified, if applicable; and

d) a list of services provided, if applicable.

However, the measures provided for in the Ordinance CGU/MF/MP 507/2011 to assess the physical execution of the object contracted are often ineffective, because visits on-site are often performed poorly or they are not performed whatsoever. Besides, the reports presented in the accountability are elaborated by the contracted party itself, it means, there is not impartiality (BRASIL, 2011).

With the aim to better demonstrate the difficulties of proving the physical execution of projects funded with public funds, we will describe a real case. As an example, we will present the case investigated in the proceeding TC 017.777/2014-3, judged by the Decision 9794/2015 – TCU – 2ª Camera (BRASIL, 2015b). The Ministry of Tourism had signed an agreement with a private nonprofit entity at the sum of R$ 168,900.00 to perform the cultural project entitled *1º Arraiá Cultural* (First Cultural Festival). As a form of verifying the physical execution of the object of the covenant, the Ministry of Tourism requested the contracted party the presentation of photographs or footage to prove the leasing of professional lighting and stage, among other things. In response, the contracted entity forwarded some pictures; however, the contracting body considered that the images photographed did not prove satisfactorily the execution of the object of the covenant. Then, the Ministry of Tourism filed a special rendering of accounts to determine the responsibilities and the value of debt, later forwarding it to the Federal Court of Accounts for analysis and trial. The contracted party reimbursed the contracting party, returning the value of debt to the Union, which did not prevent the Federal Court of Accounts to try the irregularities of its accounts, condemning it to the payment of a fine.

Concerning this real case, the advantages of the notarial minutes are unmistakable. First because this is robust evidence: minutes are certified and produced by an impartial and delegating source of the Public Power, that is, it is in the category of public instrument (Article 405 of the CPC), while the pictures forwarded by the contracted party certainly did not have the same level of credibility, although they were admitted as evidence. The notarial minutes are classified as minutes of attendance (or minutes of mere perception) so that they can only be issued when the notary public or the clerk authorized by him/her visits the event location. Besides, the notary public can photograph or shoot what he considers necessary.

The notarial minutes are robust evidence capable of consistently proving not only the execution of the object of agreement, but also the non-execution, if applicable. Its use reduces the number of cases in which the contracted party is trustworthy, but due to practical reasons, it fails to prove satisfactorily the physical execution of the project contracted. In case the notarial minutes report the total or partial non-execution of the object contracted – although one cannot avoid the institution of the special rendering of accounts -, this case shall be processed faster, since this robust evidence tends to reduce the necessity of repairing measures in the records of the TCE.

In the assessment of accountability, conducted either by the contracting body or by the Federal Court of Accounts, there is a clear understanding that the manager is responsible for proving the good and regular application of public resources he/she received. This burden of proof is secured by the general duty of accountability of the *res publica* presented in Art. 70 of the Federal Constitution (BRASIL, 1988). It is a undisputed positioning in the jurisprudence of the Federal Court of Accounts. That is, in some cases, even without evidence that the contracted party has effectively failed to execute the agreement, the Court of Accounts can condemn it to a debt simply because it has not succeeded in proving the good and regular application of public resources, that is, based on the burden of proof.

However, the criteria of the burden of proof must be the last resource, because the administrative sphere considers the principle of the material truth, which imposes on the public authorities the duty to seek decisions based on evidence that effectively demonstrates the execution or non-execution of the objects of covenants, thus producing fairer, faster and more stable decisions. Therefore, considering consistent evidence, the need to implement repairing measures and produce evidence diminishes. For this same reason, the possibility of non-resignation by the losing party reduces regarding the decision, giving it more stability. And, although one can file an appeal, it will certainly be tried faster. The existence of robust evidence of the

non-execution of the object of the covenant can also result in a fairer decision, since it allows more precise and proportional measurements for the sanction in comparison to cases in which there is the mere application of the criteria of the burden of proof.

Another point to be considered is that agreements have been concluded with public or private entities based in many different places in Brazil. This fact hinders the conductions of inspections, which is a duty of the contracting parties according to the Decree 6170/2007 (BRASIL, 2007a). First, there is the financial difficulty to accommodate and transport inspectors to visit a great number of places. In addition, there is a chronic insufficiency of qualified staff to supervise so many agreements, since the Union also concludes transfer contracts, partnership terms, and funding terms. At last, besides the financial and human resources needed to carry out visits to places where agreements are executed, there are the issues of frequency and timeliness of such visits. There are projects executed on a certain day (for example, an artistic cultural event), which would demand an on-site oversight on that specific date, while others can last for months or even for longer than a year (for example, a project of professional training to people in need), which would require a greater amount of visits to the place of execution and at specific times. For all these reasons, the assessment of physical execution of the objects contracted has not been satisfactory, both in qualitative and quantitative terms.

On the other hand, the offices of notaries public are geographically well distributed throughout the country. There is not a single municipality that does not count on an office of notary public, although some of them can serve more than one municipality, and some municipalities are served by more than one office. Although notarial minutes always present the notary public's signal, they can be made up by the notary or the authorized clerk, which constitutes a multiplier factor of the service capacity of offices of notaries public concerning this type of demand. However, Leonardo Brandelli (2011) observes that there is the following restriction: the notary public cannot act outside the territorial jurisdiction for which he received delegation,

emphasizing that the delegation can be conferred on the notary for a limited area, which can coincide or not with the political division of the municipality, according to Art. 8 combined with Art. 9 of Law 8935/1994 (BRASIL, 1994).

Regarding the costs to draw up notarial minutes, the following considerations can be made: each state establishes its own table of fees for the offices of notaries; thus, we will consider the values in force in the state of Sao Paulo, as determined in Law no. 11331, as of December 26, 2002. Art. 8 of this law establishes the exemption from payment of fees concerning the state of Sao Paulo and its local agencies. Regarding the Union, the other states, the Federal District, and municipalities and their agencies, the only fee charged will be the notary public's payment. The other sums that are usually included in the value of fees will not be charged (SAO PAULO, 2002). In Table I, attached to the law, the cost of notarial minutes without economic consequences is R$ 180.00 for the first sheet and R$ 95.00 for each additional page – a very low cost, therefore. However, in the case of agreements and similar instruments, there is always a value associated with projects totally or partially funded with public

funds, that is why the table of fees for the values declared shall be applied. That is, the costs of fees shall be proportional to the values declared for the projects executed in covenants. According to this table, the fee to draw up notarial minutes for the real case previously mentioned, which value was R$ 168,900.00, would be R$ 828.88, if the request had come from the Ministry of Tourism. If the contracted party had requested the document, as a private entity, the cost would be R$ 1,323.00. As a cost threshold, the table provides, for projects exceeding R$ 9,000,000.00, the fixed fee of R$ 10,000.00 (if requested by the Union), which is equivalent to a maximum fee of 0.11% of the total value of the object of the covenant.

Law 11331/2002, of the state of Sao Paulo, charges a double fee for acts without declared value and drawn up out of the office hours or out of the registry office, except when the public bodies have any interest in them. Thus, in case the notarial minutes are requested or authorized by the Public Administration within an agreement, there is not this additional charge for two reasons: first because the interested party is a public body, and secondly because the minutes requested within a covenant has its value declared. However, this situation can vary from state to state; then, one can verify in each of them whether there is an additional charge for the service provision depending on the type of inspection.

The costs of fees for the preparation of notarial minutes are competitive in relation to the costs of inspections conducted by the contracting bodies or auditing bodies, such as the Office of the Comptroller General (CGU) and the Federal Court of Accounts. Besides, the costs of notarial minutes are directly proportional to the values of the projects executed in the covenants, while the costs of inspections by the Public Administration are almost independent of the value of the object inspected. Therefore, the lower the value of the projects contracted, the higher the economic advantage of notarial minutes.

The Decree-law no. 1537, as of April 13, 1977, exempts the Union from paying the costs and fees for the provision of deeds by the notary public, although it does not mention any exemption regarding the elaboration of notarial minutes (BRASIL, 1977). According to Agnaldo Nogueira Gomes (2013), the Decree-law 1537/1977 was received by the Brazilian Federal Constitution of 1988, which Art. 22, item XXV, provides for the private competence of the Union to legislate on public records (BRASIL, 1988). Based on this the-

sis, one cannot discard the hypothesis that, in the future, the Union can come to legislate in order to make the use of notarial minutes even more economically advantageous for the Federal Public Administration.

Érica Barbosa e Silva and Fernanda Tartuce (2016) mention a few legal mechanisms that seek to ensure the quality of services provided by extrajudicial services of the offices of notaries public. Firstly, the Constitution of 1988 and Law 8935/1994 started to require, for the exercise of the notarial duty, that professionals have degree in Law, since they act as impartial legal advisors and assist all those involved in legal relationships by writing the instruments required for the purpose intended by the parties. Besides, the admission of professionals in this career is by approval in competitive civil-service examination, including exams and qualification analysis. After this examination, the notarial activity is delegated to the candidate approved and monitored by the Judicial Branch and in a private office. The notary is considered a public officer for criminal purposes (Art. 327 of the Brazilian Criminal Code); thus, he/she can commit crimes against the Public Administration (articles 312 to 326), including the crime of passive corruption (SOUZA, 2011). Besides, the elaboration of omitted, false or incorrect notarial minutes can be considered an offense of misrepresentation on a public or private document (Art. 299 of the Criminal Code). Besides, regarding the administrative disciplinary regime, Law 8935/1994 provides for the possibility to apply to the wrongful notary the following sanctions: letter of reproval, fine, suspension for 90 days, extendable for another thirty days; and loss of delegation (BRASIL, 1994)

Although this study has focused on the use of notarial minutes from the perspective of the Federal Public Administration, trustworthy contracted parties have every interest in the presentation of robust physical execution of the agreement in order to insure itself against any questions in the examination of its accountability by the contracting party or by the auditing bodies of the Public Administration.

Unfortunately, however, the notarial minutes remain almost unknown within the Public Administration. However, considering its advantages, the public authority should adopt the necessary measures to encourage its use. In the case of agreements, the Decree 6170/2007 and other regulatory norms should include the explicit provision that the contracting party can conduct its assessment of physical execution of objects through the request of notarial minutes to the local offices of notary public, and the contracted party can use the minutes in the accountability.

Although the validity of the notarial minutes as evidence does not depend on the normative inclusion suggested here, the explicit mention of this possibility would provide greater visibility, similar to what was done in the new CPC.

7. FINAL CONSIDERATIONS

The notarial minutes are valid evidence in administrative proceedings, including special rendering of accounts cases filed due to damage caused to the national treasury by irregular execution of agreements, which trial is under the jurisdiction of the Federal Court of Accounts in the federal sphere.

There are major advantages in the use of notarial minutes as evidence of physical execution of projects contracted through covenants. As this document is certified and impartial, the notarial minutes are robust evidence. Besides, the lower the value of the project, the more advantageous is this resource. This characteristic, if well used, can help the Public Administration to concentrate its limited structure for inspection on the on-site oversight of projects of higher values, without giving up proper assessment of the physical execution of other projects, which is possible upon request of notarial minutes.

The field of application of the notarial minutes is not restricted to agreements; it covers projects executed by other instruments that concretize the so-called *voluntary transfers*, that is, transfer contracts, partnership terms, and funding terms. Thus, the notarial minutes can be used within the scope of any administrative proceeding, as, for example, those initiated to assess the cultural projects implemented under the Rouanet Law – Law no. 8313, of December 23, 1991 (BRASIL, 1991).

REFERENCES

BRANDELLI, L. Teoria geral do direito notarial. 4. ed. São Paulo: Saraiva, 2011. 474 p.

BRASIL. Decreto-Lei nº 200, de 25 de fevereiro de 1967. Dispõe sôbre a organização da Administração Federal, estabelece diretrizes para a Reforma Administrativa e dá outras providências. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 27 fev. 1967. Available at: <https://goo.gl/y4loNm>. Access on: 1 mar. 2018.

_____. Tribunal de Contas da União. Súmula nº 103. Relator: Min. Octávio Gallotti, Julgamento em: 25 nov. 1976. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 16 dez. 1976. Available at: <https://goo.gl/fjgLQU>. Access on: 1 mar. 2018.

_____. Decreto-Lei nº 1.537, de 13 de abril de 1977. Isenta do pagamento de custas e emolumentos a pratica de quaisquer atos, pelos Ofícios e Cartórios de Registro de Imóveis, de Registro de Títulos e Documentos e de Notas, relativos às solicitações feitas pela União. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 14 abr. 1977. Available at: <https://goo.gl/zrUYY9>. Access on: 1 mar. 2018.

_____. Constituição (1988). Constituição da República Federativa do Brasil, de 5 de outubro de 1988. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 5 out. 1988. Available at: <https://goo.gl/EfgJMD>. Access on: 1 mar. 2018.

_____. Lei nº 8.313, de 23 de dezembro de 1991. Restabelece princípios da Lei n° 7.505, de 2 de julho de 1986, institui o Programa Nacional de Apoio à Cultura (Pronac) e dá outras providências. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 24 dez. 1991. Available at: <https://goo.gl/Uop6dY>. Access on: 1 mar. 2018.

_____. Lei nº 8.666, de 21 de junho de 1993. Regulamenta o art. 37, inciso XXI, da Constituição Federal, institui normas para licitações e contratos da Administração Pública e dá outras providências. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 22 jun. 1993. Available at: <https://goo.gl/0e3Yg>. Access on: 1 mar. 2018.

_____. Lei nº 8.935, de 18 de novembro de 1994. Regulamenta o art. 236 da Constituição Federal, dispondo sobre serviços notariais e de registro. (Lei dos cartórios). Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 21 nov. 1994. Available at: <https://goo.gl/A84AkI>. Access on: 1 mar. 2018.

_____. Lei nº 9.637, de 15 de maio de 1998. Dispõe sobre a qualificação de entidades como organizações sociais, a criação do Programa Nacional de Publicização, a extinção dos órgãos e entidades que menciona e a absorção de suas atividades por organizações sociais, e dá outras providências. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 18 maio. 1998. Available at: <https://goo.gl/3SYuD0>. Access on: 1 mar. 2018.

_____. Lei nº 9.790, de 23 de março de 1999. Dispõe sobre a qualificação de pessoas jurídicas de direito privado, sem fins lucrativos, como Organizações da Sociedade Civil de Interesse Público, institui e disciplina o Termo de Parceria, e dá outras providências. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 24 mar. 1999a. Available at: <https://goo.gl/gVgzXg>. Access on: 1 mar. 2018.

_____. Decreto nº 3.100, de 30 de junho de 1999. Regulamenta a Lei no 9.790, de 23 de março de 1999, que dispõe sobre a qualificação de pessoas jurídicas de direito privado, sem fins lucrativos, como Organizações da Sociedade Civil de Interesse Público, institui e disciplina o Termo de Parceria, e dá outras providências. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 13 jul. 1999b. Available at: <https://goo.gl/idY6YV>. Access on: 1 mar. 2018.

_____. Lei nº 9.784, de 29 de janeiro de 1999. Regula o processo administrativo no âmbito da Administração Pública Federal. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 1 fev. 1999c. Available at: <https://goo.gl/PeKnjP>. Access on: 1 mar. 2018.

_____. Decreto nº 6.170, de 25 de julho de 2007. Dispõe sobre as normas relativas às transferências de recursos da União mediante convênios e contratos de repasse, e dá outras providências. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 26 jul. 2007a. Available at: <https://goo.gl/41v9F>. Access on: 1 mar. 2018.

_____. Lei nº 11.441, de 4 de janeiro de 2007. Altera dispositivos da Lei no 5.869, de 11 de janeiro de 1973 – Código de Processo Civil, possibilitando a realização de inventário, partilha, separação consensual e divórcio consensual por via administrativa. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 5 jan. 2007b. Available at: <https://goo.gl/E6uHd>. Access on: 1 mar. 2018.

_____. Portaria Interministerial CGU/MF/MP nº 507, de 24 de novembro de 2011. Estabelece normas para execução do disposto no Decreto no 6.170, de 25 de julho de 2007, que dispõe sobre as normas relativas às transferências de recursos da União mediante convênios e contratos de repasse, revoga a Portaria Interministerial nº 127/MP/MF/CGU, de 29 de maio de 2008 e dá outras providências. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 28 nov. 2011. Available at: <https://goo.gl/moaekg>. Access on: 1 mar. 2018;

_____. Lei nº 13.019, de 31 de julho de 2014. Estabelece o regime jurídico das parcerias voluntárias, envolvendo ou não transferências de recursos financeiros, entre a administração pública e as organizações da sociedade civil, em regime de mútua cooperação, para a consecução de finalidades de interesse público; define diretrizes para a política de fomento e de colaboração com organizações da sociedade civil; institui o termo de colaboração e o termo de fomento; e altera as Leis nos 8.429, de 2 de junho de 1992, e 9.790, de 23 de março de 1999. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 1 ago. 2014. Available at: <https://goo.gl/0vFfww>. Access on: 1 mar. 2018.

_____. Decreto nº 13.105, de 16 de março de 2015. Código de Processo Civil. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 17 mar. 2015a. Available at: <https://goo.gl/6b0EbE>. Access on: 1 mar. 2018.

_____. Tribunal de Contas da União. Acórdão nº 9.794, de 3 de novembro de 2015. Processo nº 017.777/2014-3. Relator: Min. Augusto Nardes. 2015b. Available at: <https://goo.gl/5hE82y>. Available at: 1 mar. 2018.

CHAVES, C. F. B.; REZENDE, A. C. F. Tabelionato de notas e o notário perfeito. 6. ed. Campinas: Millennium, 2010.

DI PIETRO, M. S. Z. Direito administrativo. 19. ed. São Paulo: Atlas, 2006. 823 p.

DIDIER JUNIOR, F.; BRAGA, P. S.; OLIVEIRA, R. A. de. Curso de direito processual civil: teoria da prova, direito probatório, ações probatórias, decisão, precedente, coisa julgada e antecipação dos efeitos da tutela. 10. ed. rev., ampl. e atual. Salvador: Juspodivm, 2015. v. 2. ISBN 9788544203514

GOMES, A. N. Pagamento de custas e emolumentos cartorários pela União: da recepção dos artigos 1º e 2º do Decreto-Lei nº 1.537/77 como norma geral da união. Fórum administrativo, Belo Horizonte, v. 13, n. 147, p. 9-16, maio. 2013.

LOPES, L. V. C. F. et al. Fomento e colaboração: uma nova proposta de parceria entre Estado e Organizações da Sociedade Civil. In: CONGRESSO CONSAD DE GESTÃO PÚBLICA, 6., 2013, Brasília, DF. Anais... Brasília, DF: [s.n.], 2013. Available at: <https://goo.gl/1ojTBe>. Access on: 1 mar. 2018.

MARRAMARCO, C. Convênio como instrumento de descentralização da Administração Pública. 2008. 66 f. Monografia (Especialização em Administração) – Universidade Federal do Rio Grande do Sul, Porto Alegre, 2008. Available at: <https://goo.gl/KZdbnX>. Access on: 20 nov. 2016.

SÃO PAULO. Lei nº 11.331, de 26 de dezembro de 2002. Dispõe sobre os emolumentos relativos aos atos praticados pelos serviços notariais e de registro, em face das disposições da Lei federal nº 10.169, de 29 de dezembro de 2000. Diário Oficial [do] Estado de São Paulo, São Paulo, 27 dez. 2002. Available at: <https://goo.gl/Tf6F9K>. Access on: 1 mar. 2018.

SILVA, É. B.; TARTUCE, F. O novo CPC e os atos extrajudiciais cartoriais: críticas, elogios e sugestões. Revista Magister: direito civil e processual civil, Porto Alegre, v. 12, n. 71, p. 19-40, mar./abr. 2016.

SOUZA, E. P. R. de. Noções fundamentais de direito registral e notarial. São Paulo: Saraiva, 2011. 382 p.

VICARI, J. L.; VICARI, C. G. F. Ata notarial: prova pré-constituída, segura e célere. Florianópolis: Conceito Editorial, 2014. 128 p.

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

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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[i], 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, Executive 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 lacking, 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[ii].

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[iii] (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 (BRAZIL, 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 nº 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[iv]), 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 redemocratization, 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 Federal 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. (BRAZIL, 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 administrators. 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-weighing", "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.

REFERENCES

ALBUQUERQUE, F. B. Direito e política: pressupostos para a análise de questões políticas pelo judiciário à luz do princípio democrático. Florianópolis: Conceito Editorial, 2013.

BARROSO, L. R. O começo da história: a nova interpretação constitucional e o papel dos princípios no Direito Brasileiro. Revista da EMERJ, Rio de Janeiro, v. 6, n. 23, p. 25-65, 2003.

BINENBOJM, G. Uma teoria do direito administrativo: direitos fundamentais, democracia e constitucionalização. 3rd ed. rev. and updated. Rio de Janeiro: Renovar, 2014.

BRASIL. Constituição (1988). Constituição da República Federativa do Brasil, de 5 de outubro de 1988. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 5 Oct 1988. Available from: <https://goo.gl/EfgJMD>. Accessed: 13 Jul 2017.

_____. Lei Complementar nº 64, de 18 de maio de 1990. Estabelece, de acordo com o Art. 14, § 9º da Constituição Federal, casos de inelegibilidade, prazos de cessação, e determina outras providências. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 21 May 1990. Available from: <https://goo.gl/H1Efwb>. Accessed: 13 Jul 2017.

_____. Lei nº 9.504, de 30 de setembro de 1997. Estabelece normas para as eleições. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 1 Oct 1997. Available from: <https://goo.gl/ytEMc8>. Accessed: 13 Jul 2017.

_____. Lei Complementar nº 135, de 4 de junho de 2010. Altera a Lei Complementar nº 64, de 18 de maio de 1990, que estabelece, de acordo com o § 9º do Art. 14 da Constituição Federal, casos de inelegibilidade, prazos de cessação e determina outras providências, para incluir hipóteses de inelegibilidade que visam a proteger a probidade administrativa e a moralidade no exercício do mandato. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 7 Jun 2010. Available from: <https://goo.gl/ukBXPa>. Accessed: 13 Jul 2017.

_____. Supremo Tribunal Federal. Medida Cautelar em Ação Direta de Inconstitucionalidade nº 775. Relator: Min. Celso de Mello, Julgamento em: 23 out. 1992. Diário de Justiça, Brasília, DF, 1 Dec 2006. Available from: <https://goo.gl/BGLZLM>. Accessed: 13 Jul 2017.

_____. Supremo Tribunal Federal. Ação Direta de Constitucionalidade nº 29. Relator: Min. Luiz Fux, Julgamento em: 16 fev. 2012. Publicado no DJE de 29 jun. 2012a. Available from: <https://goo.gl/Aq1aPA>. Accessed: 28 Feb 2018.

_____. Supremo Tribunal Federal. Ação Direta de Constitucionalidade nº 30. Relator: Min. Luiz Fux, Julgamento em: 16 fev. 2012. Publicado no DJE de 29 jun. 2012b. Available from: <https://goo.gl/2XhywW>. Accessed: 28 Feb 2018.

_____. Supremo Tribunal Federal. Ação Direta de Inconstitucionalidade nº 4578. Relator: Min. Luiz Fux, Julgamento em: 16 fev. 2012. Diário de Justiça Eletrônico, Brasília, DF, 29 Jun 2012c. Available from: <https://goo.gl/hbmDkP>. Accessed: 25 Oct 2017.

_____. Supremo Tribunal Federal. Mandado de Segurança nº 22.087. Rel. Min. Carlos Velloso, Julgamento em: 28 mar. 1996. Diário de Justiça, Brasília, DF, 10 May 1996. Available from: <https://goo.gl/FJ7f7e>. Accessed: 25 out. 2017.

_____. Supremo Tribunal Federal. Recurso Extraordinário nº 848826. Relator: Min. Roberto Barroso. Redator do Acórdão: Min. Ricardo Lewandowski, Julgamento em: 17 ago. 2016. Diário de Justiça Eletrônico, Brasília, DF, 24 Aug 2017. Available from: <https://goo.gl/ws9S89>. Accessed: 25 Oct 2017.

_____. Supremo Tribunal Federal. Reclamação nº 2986. Relator: Min. Celso de Mello, Julgamento em: 12 mar. 2014. Diário de Justiça Eletrônico, Brasília, DF, 14 Mar 2014. Available from: <https://goo.gl/YKoQVX>. Accessed: 21 Nov 2017.

_____. Supremo Tribunal Federal. Agravo Regimental na Reclamação nº 11477, Relator: Min. Marco Aurélio, Julgamento em: 29 mai. 2012. Diário de Justiça Eletrônico, Brasília, DF, 29 Aug 2012. Available from: <https://goo.gl/SJ29Zu>. Accessed: 22 Nov 2017.

CEARÁ. Tribunal de Justiça do Estado do Ceará. Processo nº 0137448-92.2008.8.06.0001. Julgamento em: 20 mar. 2012. Available from: <https://goo.gl/tRi5Mg>. Accessed: 13 Jul 2017.

_____. Tribunal de Justiça do Estado do Ceará. Processo nº 0138241-89.2012.8.06.0001. Julgamento em: 20 jan. 2014. Available from: <https://goo.gl/NrmD4n>. Accessed: 13 Jul 2017.

CAPPELLETTI, M. Juízes legisladores? Trad. Carlos Alberto Alvaro de Oliveira. Porto Alegre: Sérgio Antonio Fabris Editor, 1999.

NEVES, M. A Constitucionalização simbólica. 3. ed. São Paulo: WMF Martins Fontes, 2011.

PASCOAL, V. Nota pública sobre decisão do STF que retira dos Tribunais de Contas a competência para julgar contas de prefeito ordenador de despesa. Atricon, 11 Aug 2016. Available from: <https://goo.gl/hmYa7L>. Accessed: 25 Oct 2017.

RODRÍGUEZ, V. G. Argumentação jurídica: técnicas de persuasão e lógica informal. 6. ed. São Paulo: WMF Martins Fontes, 2015.

SEFERJAN, T. R. O controle das políticas públicas pelo Poder Judiciário. In: DI PIETRO, M. S. Z.; RIBEIRO, C. V. A. (Coords). Supremacia do interesse público e outros temas relevantes do direito administrativo. São Paulo: Atlas, 2010. p. 303-328.

SILVA, J. A. Curso de Direito Constitucional Positivo. 30 ed. São Paulo: Malheiros, 2008.

Overview on the participation and contracting of micro and small enterprises in online procurement of foodstuffs: case study of *Centro de Preparação de Oficiais da Reserva de Belo Horizonte* (Reserve Officer Training Center of Belo Horizonte) in the period from 2007 to 2015.

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ABSTRACT

The purpose of the article is to analyze the participation and contracting of micro and small enterprises ("MSE") in online procurements of foodstuffs conducted by Centro de Preparação de Oficiais da Reserva de Belo Horizonte, the Reserve Officer Training Center of Belo Horizonte ("CPOR") in the period from 2007 to 2015. It was also examined if the benefits of the Complementary Law No. 123, of December 14, 2006 ("CL 123/2006") have contributed or not to increase the participation and contracting of MSE in the tender processes of the body. A survey was carried out with qualitative, descriptive and documental approaches. The analyzed data seemingly indicate that the advantages of the legislation have not contributed significantly to enhance the participation and contracting of MSE in the procurements of foodstuffs conducted by the CPOR. It was concluded that, for that purpose, micro and small enterprises have, historically, been winning the tenders, and it cannot be made any assertion that the legislation has a beneficial and significant effect in favor of such enterprises.

Keywords: Procurement; Micro-enterprises; Complementary Law 123/2006.

1. INTRODUCTION

Notwithstanding the endless debate about the functions of the Government in relation to the market,

as well as on the limits of its competence, it is widely known that governmental intervention in the economy generates considerable impact, for better or worse.

Machado (2005), while positing the classic functions of the State as described by Musgrave (1974 apud MACHADO, 2005), emphasizes the stabilizing role when the budgetary policy is used as an instrument to maintain full employment, with possibility of such resources being applied through consumption (MACHADO, 2005).

For that reason, the governmental procurement market is a formidable instrument of economic intervention. In the case of Brazil, according to data provided by the Brazilian Micro and Small Business Support Service (SEBRAE, 2011), this market moves about 400 billion Brazilian Reais annually, considering the procurements conducted by all public entities (federal, state, municipal and Federal District) and their respective bodies.

On the other hand, the same data also signal that the governmental procurement market displayed an unequal participation of businesses of different sizes: in 2011, large and medium size companies, which represented 1% of all commercial establishments in Brazil, participated in 80% of such procurements, while the slice of micro-enterprises and small size companies (MSE), which, in the said year, corresponded to 99% of the national commercial establishments, was only 20% of the public procurements conducted by the Federal Government (SEBRAE, 2011).

The unequal participation of businesses in that market gives room to the possibility of oligopolies and cartels being formed, what might raise costs and/or affect the quality of goods and services procured by the Government. It could also result in an unsatisfactory performance by the Brazilian State of its stabilizing role, considering that in 2013 the MSE offered more than half of the formal employment posts provided by private non-rural establishments in Brazil (SEBRAE, 2017).

MSE are so important to the national economy that the very Federal Constitution of 1988 determined a special treatment for those enterprises, as it may be observed in the Art. 146-III (d), in the Art. 170-IX, and in the Art. 179 (BRASIL, 1988). However, such provisions were only effectively regulated with the enactment of the Complementary Law No. 123, of December 14, 2006 (BRASIL, 2006).

Besides implementing a differentiated and more beneficial tax regime for the MSE, the CL 123/2006 innovated the legal system as it extended to public procurements the treatment that favored small businesses, with the aim to foster economic and social development in the municipal and regional scopes, improve the efficiency of public policies and encourage innovation.

With the same intent, when the Law No. 12.349, of December 15, 2010 amended the Art. 3 of the Law No. 8.666, of June 21, 1993, which is the major Brazilian law on government procurement, it expressly included the promotion of national sustainable development among the purposes of bidding processes (BRASIL, 1993).

Considering the general scene of inequality observed between MSE and companies of medium and large size in the procurement market, we wonder if the changes in the regulation that have favored micro and small enterprises did effectively enhance their participation in public procurements. To verify the results of such change of legislation, the online procurements for purchase of foodstuffs conducted by *Centro de Preparação de Oficiais da Reserva de Belo Horizonte* (CPOR) were analyzed in the period from 2007 through 2015.

Thus, the general objective of this study consists in analyzing the participation and contracting of micro and small enterprises in online procurements of foodstuffs conducted by CPOR from 2007 to 2015. It is also intended to evaluate if the benefits of the CL 123/2006 have contributed or not for increasing the participation and contracting of MSE in bidding processes of the entity in the analyzed period.

For that purpose, this article is structured in five topics, the first of which is this introduction, which is followed by a review of the literature and of the research methodology. The fourth topic contains the presentation and the results of the empirical research, while the fifth one ends the article with the conclusion and final considerations.

It is worth stressing that in the academic field, there are few empirical studies available on this subject, and, for that reason, the result of this research will be a valuable contribution, not only to the academia, but also to enterprises and public administrators.

2. THEORY REFERENCE

2.1 THE USE OF GOVERNMENTAL PROCUREMENT POWER AS AN INSTRUMENT TO FOSTER NATIONAL SUSTAINABLE DEVELOPMENT OF MSE

According to Moreira (2014), sustainable development may be analyzed through many perspectives, such as social, economic, cultural and environmental, and all approaches converge into the need to establish a balance between satisfaction of present needs, and the planning and maintenance of future resources by the society.

The said author informs that among the known diverse notions of sustainability, this is more better understood by the triple bottom line concept, created in the 1990's by John Elkington (apud MOREIRA, 2014).

Such concept, also known as the three P's (people, planet and profit), means, in a didactic way, that the sustainable development must consider the following dimensions: 1) People: regarding the treatment given by the company to the human capital, understood as the social contribution of the enterprise by guaranteeing decent working conditions, rights and benefits to its direct and indirect collaborators, with ensuing effects on their families and their communities; 2) Planet: refers to natural capital, which consists in the adoption of measures, by the company, in favor of ecologic and environmental efficiency of its productive processes, applying cleaner and safer solutions for the environment, thus reducing the environmental impact and negative external effects of the performance of its economic activity; 3) Profit: regarding the gain, or positive economic result obtained from the performance of its economic activity (MOREIRA, 2014).

According to the author, financial sustainability may be understood as the entrepreneur's ability to cover its operating costs, to seize opportunities and to negotiate, and also to remain operating in the long-term market, as defined by Dum, Arbuckle and Parada (1998).

Therefore, the financial development does not contemplate solely the income in capital terms of the enterprise itself, but the enterprise's ability to survive in an increasingly competitive and dynamic market.

One may hint that, for the last decade, public procurements in Brazil have become an empirical example of application of the triple bottom line concept.

The General Law on Government Procurement – Law 8.666/1993 – demonstrates that the State does not only aim to enhance economic development through its demand for goods and services, but, rather, the national sustainable development, in conformity with express legal provision in its Art. 3[i]. In the words of Santana (2014): "The Art. 3 gathered innumerous constitutional values and principles which, in short, induce and permit the execution of various public policies as a consequence of the governmental procurement power" (SANTANA, 2014, p. 21).

One of the purposes pursued by the Government with that measure, is to use its procurement power to foster and develop the regional economy by hiring companies, thus contributing for maintaining reasonable levels of employment.

With the increased demand for goods and services by the Government, public procurements became to be perceived not only as an instrument capable to supply the goods needed for its operation, but also as an efficient way to employ public resources to enhance

the growth of groups or segments of the society considered as vulnerable or strategic for regional development, such being one of the facets of the State's stabilizing role (ARANTES, 2006).

Meanwhile, Silva (2008) reports that the expression "use of the procurement power" represents a real power, as the availability of resources by a certain institution – in the case, the State -, confers upon it the possibility to induce others to adopt specific behaviors aimed at achieving results that exceed the purpose of simply fulfilling the needs of the Government (SILVA, 2008).

An example of that governmental induction was the promulgation of the Statute of Micro-enterprise and Small Size Company – Complementary Law 123/2006. By said law, the Government has created a series of legal mechanisms that confer upon MSE considerable competitive advantages in relation to medium and large size companies in bidding procedures.

Although the CL 123/2006 has been in effect since December 14, 2006, in the Federal Government it was only after the publication of the Decree No. 6.204, on September 5, 2007, that the tender benefits in favor of small businesses have become more effective (BRASIL, 2007). Another significant change has occurred since August 7, 2014, with the signing of the Complementary Law No. 147 /2014, which amended the CL 123/2006. As one of the main modifications, Santana (2014) highlights the obligation imposed on the Government to carry out MSE-only bidding processes for items priced at up to R$ 80,000, identified on Comprasnet[ii] as Tender Type 1[iii]. In this case, micro and small enterprises compete in the bidding process only with other businesses of the same size, tendering for items that do not exceed the mentioned amount. Prior to the legislation of 2014, that benefit was optional[iv] and the R$80,000 were considered in relation to the total amount of the tender, and not of the item.

About this subject, it is important to say that, even before the CL 123/2006 having suffered the changes in 2014, the case law of TCU[v] had already been established in the sense of interpreting that the Type 1 benefit was applicable per item, and not on the global amount of the procurement. That information is essential for understanding one of the results of this research, which found out that CPOR had already been adopting that interpretation since 2011, in the Bidding 6/2011, and so it did in the subsequent ones.

The CL 147/2014 equally mandated reserve quotas of up to 25% of the object, in case of separable goods, for competitive bidding only among MSE, identified on Comprasnet as Tender Type 3. Under that benefit, the Government is obligated to

reserve a portion of the procured object, up to 25%, for competition only among small businesses. Those enterprises may still contend for the remaining 75% of the object, competing, though, with medium and large companies.

Santana (2014) informs that the CL 147/2014 maintained as optional the subcontracting of small businesses for services and works, identified on Comprasnet as Tender Type 2. That benefit enables the Government to impose on a large company that has won a tender that it subcontracts a MSE to perform a portion of the work or service.

Other innovations of the CL 147/2014 highlighted by Santana (2014) are: 1) extension of the term from two to five business days, in case the award is granted, to make any tax regularization afterwards. Accordingly, micro and small enterprises may participate in bidding processes even if they have pendency in tax documents, which must be corrected within the legal term; 2) creation of the preference for contracting a MSE, in the event of waiver of competitive bidding owing to the value of the object; 3) creation of the possibility to contract local and regional small businesses whose bids have exceeded only up to 10% above the best offer made in the competition.

The author also informs that there has been no changes in the benefit known as fictitious tie, whereby the MSE may cover the best proposal, provided that its offer does not exceed it by more than 10%, in the modalities listed in the Law 8.666/1993, and by 5% in auctions (SANTANA, 2014).

At the federal level, such benefits were regulated by the Decree No. 8.538, of October 6, 2015 (BRASIL, 2015), which has been in effect since January 5, 2016 and revoked the preceding Decree 6.204/2007.

Accordingly, the amendments in the legislation seem to be promising not only to foster small businesses but also to make public procurements converge into sustainable development. The formal insertion of that principle in the Law 8.666/1993 "[…] reminds the appliers thereof to adopt practices, including in government procurements, which promote growth of the country, which is achieved with actions that encourage the manufacturing sector, commerce, formal employment,

technological and scientific development" (SANTANA; ANDRADE, 2011, p. 42).

3. METHODOLOGY

In this article, we decided to work with the methodological classifications suggested by Gil (2002). The approach of the research was qualitative, descriptive and documental. It was made an analysis of content of quantitative data, taking as parameter the systematics of government procurements in Brazil and the aspects related to the MSE- preferred program, implemented in December 2006, when the Complementary Law 123/2006 became effective.

The data was collected from the Procurement Portal of the Federal Government – Comprasnet. A database was organized, with information obtained from 11 online auctions of foodstuffs or similar objects[vi] conducted by CPOR, of Belo Horizonte, from 2007 through 2015, covering the invitations to bid and the minutes that were available on the Portal until December 31, 2015.

The reason of the surveyed period is the promulgation of the CL 123/2006 in December 2006, what affected the first bidding processes with application of its benefits from the following year onwards.

The federal entity was chosen because it allowed easy access to analyze the necessary documents and to check, *in loco*, any diverging information that might possibly have appeared, but did not.

It was decided to work only with foodstuffs because such goods are highly probable to be contracted by MSE, as seen from the huge quantity of procured items and, among which, most of them are of small unit price, being, thus, more appropriate for competitive bidding among micro and small enterprises.

After analyzing the calls of tender and minutes of tender meetings, four invitations were removed from the sample as the auctions had been abandoned[vii]. Of the seven remaining auctions, it was analyzed 861 items, which were successfully[viii] contracted and totaled a procurement amount of R$ 9,430, 631.80. We worked with the final amounts of the bidding, that is, those determined for each item after the ending of the auction bid phase, rather than with the estimated contract amounts.

The decision to analyze the procured items separately, even though pertaining to a same procurement, is grounded on the criterion established by the case law of the Federal Court of Accounts (TCU), in the Synopsis 247[ix]. TCU is the main external control entity of the Federal Government, responsible for monitoring the accounts of the bodies under its jurisdiction.

It was carried out an individualized analysis of each one of the benefits of the CL 123/2006, verifying if they had been prescribed in the selected invitations and if such benefits were decisive for the enterprises' success in the biddings. It was measured the number of items, the unit and global prices, the average prices and average global [sic] of the items and the percentage of use of each benefit. Lastly, it was determined the values tendered exclusively and the bidding processes won by MSE.

4. RESULTS

The results of the research indicate that the benefits of the CL 123/2006 were not determinant to increase the participation and contracting of MSE in procurements of foodstuffs conducted by CPOR. Table 1 exhibits quantities, values and percentages of the items procured and completed with success, irrespectively of being exclusive or not.

Table 1:

Exclusivity of items procured and completed with success.

Procured items	861	100,00%	R$ 9.430.631,80	100,00%
MSE – only items	549	63,76%	R$ 6.239.071,16	66,16%
MSE non-exclusive items	312	36,24%	R$ 3.191.560,64	33,84%

Source: Comprasnet (2016)

It is verified that the MSE-only procured items are significant in relation to quantity and prices. That amount exceeds R$ 6 million and corresponds to approximately 2/3 of the procurement amount.

In Table 2, it is noted that all the average global prices of the items are smaller than R$80,000. That data was obtained by multiplying the unit price of the item by the procured quantity. Considering the average price of the items, it is found out that all of them

could and would be embraced by the Type 1 benefit of the CL 123/2006, that is, the holding of MSE-only procurements whenever the estimated global price of the item does not exceed R$ 80,000. However, that was not confirmed because, as previously explained, it was only since 2011 that such understanding has been oriented by TCU and was eventually incorporated by the CL 147/2014 in 2014.

Table 2:

Average unit prices of the item and global price of the item, won by MSE and by medium and large size companies.

		Average unit price of the item	Average unit global price
Procured items	861	R$ 12,19	R$ 10,953.11
MSE – only items	549	R$ 13,31	R$ 11,364.43
MSE non-exclusive items	312	R$ 10,23	R$ 10.229,36

Source: Comprasnet (2016)

Table 3 exhibits the quantity of items, percentages and prices won by MSE and by medium and large companies. It was observed that the small businesses have won almost all the competed items, including those for which they had competed with companies of larger size. These figures imply that micro and small enterprises have managed to compete with and win over other companies, at least in relation to foodstuffs.

Table 3:

Size of the winners of the items.

Items won by MSE	858	99,65%	R$ 9.416.390,30	99,85%
Items won by medium and large companies	3	0,35%	R$ 14.241,50	0,15%

Source: Comprasnet (2016)

The figures in Table 4 confirm that the average global price of all items is lower than R$80,000. Therefore, it is noted that all the items could be restricted to competition between micro and small enterprises, considering the legislation that has been in effect since 2014.

Moreover, the relatively low unit and global prices of the procured items for that object may be determinant factors for the predominance of small businesses as winners of those items, in addition to a possible loss of interest by the medium and large size companies for such object.

Table 4:

Average unit price of the item and global price of the item, won by MSE and by medium and large companies.

		Average unit price of the item	Average global price of the item
Items won by MSE	858	R$ 12,22	R$ 10.974,81
Items won by medium and large companies	3	R$ 4,47	R$ 4.747,17

Source: Comprasnet (2016)

It was verified that the Bidding No. 2/2007 did not prescribe any of the benefits in favor of small businesses, probably because that bidding process had taken place on August 7, 2007, before September 5, 2007, when it became effective the Decree No. 6.204, which regulated the benefits for MSE. It may be speculated that, for the same reason, at that time the Comprasnet Portal had not been adapted to the benefits of the legislation. Nevertheless, it was verified that, in spite of the benefits having not been prescribed in the convening instrument and the system being out-of-date, the winners of all the items were micro and small companies. That is, the pointed-out factors, which might have interfered negatively in the MSE's rights, did not impede them to win the tender.

It was observed that the three items not won by MSE occurred at the Bidding 5/2009. Its call already contemplated the rights of untimely tax good standing and the fictitious tie. This latter benefit, as a matter of

fact, was used as a determinant criterion for boosting MSE to win 16 items of the whole sample, corresponding to R$54,422.62, all of which of that same auction, involving five different companies.

The fictitious tie was used in only 1.85% of the procured items of the sample. However, when the benefit was applied in favor of MSE, it was a deciding factor to the victory of those enterprises.

The benefit of late tax good standing and the fictitious tie have been found in all invitations to bid since 2009. The tax good standing grant, albeit present in the invitations, was not used in any of the analyzed items. Such finding may suggest that the MSE owners participating in procurements are concerned to make their tax payments timely, as such conduct is required from suppliers for governmental bodies.

A relevant result was to find that since the Auction 6/2011, that is, prior to CL 147/2014 becoming effective, CPOR has adopted the interpretation of applying the Type 1 benefit on items whose amounts do not exceed R$ 80,000, rather than on the global price of the bidding process. One may think that such a change in the procedures of the entity was intentional and that it was aimed at its adaptation to the case law of TCU, which opined in that sense.

Nonetheless, although provided in the calls of tender of the Biddings 6/2011,11/2011, 1/2013 and 11/2013, it was only since the Bidding 5/2014 that we may affirm that the MSE have started entering in exclusive competitive biddings for items not exceeding R$ 80,000 in value. That because said biddings were all abandoned. This study did not manage to identify the reason for that, which may be done in a complementary study.

On the other hand, it was observed that none of the analyzed invitations had prescribed the Type 2 and Type 3 benefits. That result is plausible because of the nature of the object chosen for analysis. Foodstuffs are goods; thus, they could not enjoy the benefit of subcontracting, which only applies to works and services. As for the Type 3 benefit, which deals with quota reservation for MSE of up to 25% of the object, the fact of not being used by the entity may be owed to two factors: firstly, for not being mandatory under the terms of the Decree 6.204/2007; secondly, in alignment with the prevailing case law of TCU in favor of Type 1 benefit, as already explained.

The analyzed data seemingly indicate that the benefits of the CL 123/2006 have not contributed significantly for increasing the participation and contracting of MSE in CPOR's procurements of foodstuffs. It was noticed that, for that purpose, micro and small enterprises have, historically, been the winners of the bidding process, and it cannot be made any assertion about a beneficial and significant effect of the legislation in favor of the small businesses.

5. FINAL CONSIDERATIONS

This article analyzed the participation and contracting of MSE in online auctions of foodstuffs held by CPOR in the period from 2007 through 2015. In addition, it described how the application of said law has become an up-to-date and empirical example of governmental intervention in the economy. It has also exemplified the concept of the triple bottom line and demonstrated that such notion was incorporated to the major Brazilian law on procurements, the Law 8.666/1993, which prescribes as one of its purposes, the promotion of a national sustainable development.

Furthermore, it indicated that since the effectiveness of the CL 123/2006, there has been significant changes in the dynamics of procurements in Brazil with the specific purpose of benefiting MSE, which represent a meaningful portion of the national economy.

The research also verified that changes have been introduced into invitations to bid and into work processes of those who are engaged with public procurement, such as public servants, control agencies and entrepreneurs.

Therefore, the conclusion is that the analyzed data seemingly demonstrate that the benefits of the CL 123/2006 have not contributed significantly for increasing the participation and contracting of MSE in CPOR's procurement of foodstuffs. In the study, micro and small enterprises have been, for a long time, the winners of the bidding process, and no assertion can be made about a beneficial and meaningful effect of the legislation in favor of small businesses.

This work has some limitations, among others, the fact of having analyzed only one object and federal government body. Future researches may extend, to other objects and bodies, the herein developed methodology, as well as evaluating the participation of MSE in public procurements held by municipal and state government entities.

NOTES

i Art. 3. Procurement is designed to assure observance of the constitutional principle of isonomy, the selection of the most advantageous bid for the government and the promotion of a national sustainable development and will be processed and judged in strict conformity with the basic principles of legality, of impersonality, of morality, of equality, of publicity, of governmental honesty, of the binding power of the convening instrument, of objective judgment and co-related ones. (BRASIL, 1993)

ii Comprasnet is the name of the main procurement portal of the Federal Government. Data collected in 2016. Available at: http://www.comprasgovernamentais.gov.br.

iii To make the reading of the article easier and to avoid repetition in full of the legal benefits of the CL 123/2006, it was adopted the usual nomenclature employed by Comprasnet, i.e., ***Tender Type*** (Tender Type) 1, 2 or 3, as explained previously.

iv The benefit was optional in accordance with the CL 123/2006. However, the Decree No. 6.204/2007 stipulates that it is mandatory to the Federal Government, but the states and municipalities were out of the reach of that regulation.

v See the Appellate Decision No. 3.771/2011 rendered by the 1st Chamber of TCU: "[…] despite the global amount having exceeded the R$ 80,000 ceiling, prescribed in the Art. 48-I of the CL 123/2006 and in the Art. 6 of Decree No. 6.204/2007 for conducting a bidding process designed for participation of micro- enterprises and small-sized companies only, the tender was divided into 52 items to be competed, apart from one another, thus, each item should be battled for independently from the others".

vi To explain 'similar objects', we refer to the Online Auction No. 07/2015, which was intended for procurement of frozen bread, considered, for the purposes of this research, as foodstuff.

vii Abandoned online auctions: No. 06/2011, No. 11/2011, No. 01/2013, and No. 11/2013.

viii Bids for 16 items were either canceled or rejected.

ix Synopsis No. 247 of TCU. It is mandatory admitting an award per item and not for the global price, in invitations to bid for contracting works, services, purchases and sales, the object of which is separable, provided that without prejudice of the group or complex or loss of economy of scale, considering the purpose of promoting full participation of bidders who, though lacking capability to perform, supply or purchase the whole object, may do it in relation to items or separate units, and, for that end, the requirements for qualification must adapt to such separability (BRASIL, 2004).

REFERENCES

ARANTES, R. S. O uso do poder de compra do Estado para a geração de emprego e renda e o desenvolvimento local. [The use of the governmental procurement power to generate employment posts and income as well as local development.] In: CONGRESO INTERNACIONAL DEL CLAD SOBRE LA REFORMA DEL ESTADO Y DE LA ADMINISTRACIÓN PÚBLICA, 11., 2006, Ciudad de Guatemala. Annals. Caracas: CLAD, 2006.

BRASIL. Constitution (1988). Constitution of the Federative Republic of Brazil, of October 5, 1988. Official Gazette of the Federative Republic of Brazil, Executive Branch, Brasília, DF, 5 Oct 1988. Available at: <https://goo.gl/sGhYhb>. Accessed on: 27 Feb 2018.

_____. Law No. 8.666, of June 21, 1993. Regulates the Art. 37-XXI of the Federal Constitution. Official Gazette of the Federative Republic of Brazil, Executive Branch, Brasília, DF, 22 jun. 1993. Available at: <https://goo.gl/smXfGy>. Accessed on: 27 Feb 2018.

_____. Federal Court of Accounts. Synopsis No. 247. Official Gazette of the Federative Republic of Brazil, Executive Branch, Brasília, DF, 23 Nov 2004. Available at: <https://goo.gl/6qi1mm>. Accessed on: 27 Feb 2018.

_____. Complementary Law No. 123, of December 14, 2006. Creates the National Statute of Micro-enterprise and Small Size Company. Official Gazette of the Federative Republic of Brazil, Executive Branch, Brasília, DF, 15 Dec 2006. Available at: <https://goo.gl/cJPt8r>. Accessed on: 27 Feb 2018.

_____. Decree No. 6.204, of September 5, 2007. Regulates the favored, differentiated and simplified treatment for micro-enterprises and small size companies in public procurements of goods, services and works, within the scope of the Federal Government. Official Gazette of the Federative Republic of Brazil, Executive Branch, Brasília, DF, 5 Sep 2007. Available at: <https://goo.gl/rKMoZh>. Accessed on: 27 Feb 2018.

_____. Decree No. 8.538, of October 6, 2015. Regulates the favored, differentiated and simplified treatment for micro-enterprises and small size companies, family farmers, individual small farmers, individual micro-entrepreneurs, consumer cooperative societies in public procurements of goods, services and works, within the scope of the Federal Government. Official Gazette of the Federative Republic of Brazil, Executive Branch, Brasília, DF, 5 Oct 2015. Available at: <https://goo.gl/r4sqep>. Accessed on: 27 Feb 2018.

DUM, E. G.; ARBUCKLE, J. G. Jr.; PARADA, M. R. de C. Extending microfinance approaches into the agricultural sector: a review of key concepts. Columbia: University of Missouri, 1998. 53 p.

GIL, A. C. Como elaborar projetos de pesquisa [How to prepare research projects]. 4. ed. São Paulo: Atlas, 2002.

MACHADO, N. Sistema de Informação de Custo: diretrizes para integração ao orçamento público e à contabilidade governamental. [Costing Information System: directives for integration to public budget and to governmental accounting]. Brasília: Enap, 2005.

MOREIRA, H. S. A. Gestão empreendedora e fatores de sustentabilidade financeira do pequeno e médio varejista do segmento supermercadista na região metropolitana de Belo Horizonte [Entrepreneurial management and factors of financial sustainability of the small and medium size retailer of supermarket sector in the metropolitan region of Belo Horizonte]. 144 f. 2014. Dissertation (Master in Administration) – Faculdade Novos Horizontes, Belo Horizonte, 2014.

SANTANA, J. E. Novo Estatuto da ME e EPP: Lei Complementar nº 147 de 7 de agosto de 2014: essencialidades e orientações. [New Statute of Micro-enterprise and Small Size Company: Complementary Law No. 147, of August 7, 2014: essentialities and orientations]. Belo Horizonte: Fórum, 2014.

SANTANA, J. E.; ANDRADE, F. As alterações da Lei Geral de Licitações pela Lei No. 12.349, de 2010: novos paradigmas, princípios e desafios. [The amendments in the General Law on Procurement made by the Law No. 12.349, of 2010: new paradigms, principles and challenges. Revista Síntese: licitações, contratos e convênios, São Paulo, v. 1, n. 1, p. 34-49, Feb/Mar 2011.

SEBRAE – Brazilian Micro and Small Business Support Service. Negócios com governos movimentam cerca de R$ 400 bi por ano. [Businesses with governments move about R$ 400 bn a year.] Revista SEBRAE, Brasília, DF, n. 20, p. 16-19, Jan/Feb 2011.

_____. Anuário do trabalho na micro e pequena empresa: 2015. [Yearbook on labor at micro and small enterprises: 2015.] Brasília, DF: DIEESE, 2017. p. 27

SILVA, E. P. O uso do poder de compra do Estado como instrumento de política pública: a Lei No. 123/2006, sua implementação. [The use of the governmental procurement power as an instrument of public policy: the implementation of the Complementary Law 123/2006.] S180 f. 2008. Dissertation (Master in Government Administration) – Escola Brasileira de Administração Pública e de Empresas, Faculdade Getúlio Vargas, Rio de Janeiro, 2008.

Management adjustment terms: perspectives for consensual external control

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ABSTRACT

The study demonstrates the new trend of adopting controversy-solving tools based on consensus in Brazilian public administration in order to increase the State's efficiency. We examine implementation of the management adjustment terms (TAG) in courts of accounts as a new mechanism of proximity between controller and controlled when setting goals to correct irregularities or increase a given public policy's effectiveness. We also present the evolution of the Federal Court of Accounts in adopting consensual solutions for conflicts, especially the precedent contained in a recent judgment that determined that agencies under the Court jurisdiction sign a TAG. Finally, we suggest applying these instruments to control implementation of intersectoral public policies.

Keywords: Consensual solution. Public administration. Court of Accounts. Management adjustment term. Intersectoral public policies. Fundamental rights.

1. INTRODUCTION

There is an increasing demand for the State to improve its performance, whether it is to provide public services or regulate economic activities. Inefficient public administration is no longer acceptable nor is ineffective external control of public bodies and entities acceptable before the essential nature of the policies to fulfill the fundamental goals and duties set forth in our Federal Constitution.

Therefore, public administration must employ other means to achieve public purposes beyond the traditional unilateral actions predominantly characterized by an imperative nature. The new tools for solving conflicts consensually provide administrators with a new option for overcoming eventual bureaucratic obstacles that result in, among other problems, the lack of celerity in resolving cases and the ineffectiveness of applied measures. The controlling bodies shall proceed with the same approach, preferably in a non-adversarial manner.

Consensual public administration models with consensual external control gain more ground. A one-sided, authoritative approach gives way to administrative consultation where the participation of other agents influences the implementation of public policies to be adopted. Citizens (as well as the parties under the court's jurisdiction) can no longer be seen as adversaries but as allies in achieving public purposes[i].

Among the premises in the consensual administrative approach, we consider administrative efficiency as the most important for adopting consensual solutions, especially considering the lack of resources. After efficiency was incorporated as a constitutional premise to be followed by the public administration, according to article 37 of the Federal Constitution, by constitutional amendment no. 19, of June 4, 1998 (BRAZIL, 1988), the activity shall no longer be conducted only by written law and must be preoccupied with the efficacy

of the State's performance in fulfilling its duties so as to guarantee the fundamental right/duty to good public administration (CANOTILHO, 2006[ii]; FALZONE, 1953; FREITAS, 2014).

The possibility to adopt administrative consultation practices is compatible with this premise since it allows overcoming certain bureaucratic obstacles, such as delays in administrative procedures or minimal execution of measures applied by administrative authority. Furthermore, consensus has other potential beneficial effects related directly or indirectly to efficiency that oftentimes the imperative manner cannot achieve, such as the efficacy of administrative decisions, the possibility of decisions that are more proportional to the potential encumbrance, a decrease in the judicialization of administrative decisions, greater participation of the parties involved in the process – administrator and citizens and/or controlling body and party under jurisdiction, decisions more suitable to sectoral particularities and to the concrete case, and the time it saves (FACCHINI NETO, 2017).

We highlight that the alternative of signing agreements instead of one-sided measures is also directly related to one of the sustainable development goals established in the 2030 Agenda signed by 193 Member States of the United Nations (UN, 2015)[iii]. On a national scale, faced with this new reality, Brazilian public administration has been broadening its participation in adopting consensual mechanisms[iv], no longer restricted to mere control/sanction procedures. Even though this movement has gained momentum only in the last two decades, consensus is not a recent phenomenon in Brazilian administrative law. Considering the legislative evolution towards consensual conflict resolutions, Juarez Freitas affirms that "the Brazilian normative system, interpreted systematically, prioritizes consensual conflict resolutions, including within the scope of administrative contracts" (FREITAS, 2017, p. 42).

In this study, aside from presenting brief considerations on the evolving application of conciliation mechanisms in Brazilian public administration, we will also detail the establishment of the management adjustment terms (TAGs) within the courts of accounts as a new control tool based on consensus. We will also reveal the evolution in the Federal Court of Accounts's (TCU) pointing the possibility of using consensual solutions to resolve conflicts within the context of its cases, drawing special attention to the pioneer decision which determined that entities under its jurisdiction employ TAGs. Finally, we will briefly analyze how these instruments were adapted to control the elaboration of intersectoral public policies.

2. MANAGEMENT ADJUSTMENT TERMS IN COURTS OF ACCOUNTS AND EVOLUTION OF THE TCU UNDERSTANDING OF CONSENSUAL CONFLICT RESOLUTION

As the implementation of hypotheses on consensual conflict resolution has gained force, it's necessary the adaptation of the performance standards of public administration control to this new reality since they can no longer be limited to an approach based on control/sanction, as previously mentioned. In agreement with this point of view, the most current legal doctrine (BARROSO FILHO, 2014; CUNDA, 2010; 2013; 2016) proposes that the Courts of Accounts adopt "management adjustment terms" as a method of consensual control of the administration. With these tools, it´s possible to establish an agreement of intention between the controller and controlled parties whereby the latter commits to take measures in order to comply with the law or to make a given public policy more effective. In exchange, the proceedings of a given case that could result in punishment for the controlled party are suspended.

Adopting consensual control mechanisms such as the TAGs allows us to stop viewing the performance of the Courts of Accounts as strictly mandatory so that the practice of negotiations relieved of controversies can be consolidated. Therefore, there is a convergence of control and consensus tied to a management model whose main purpose is collaboration among State, society, and individuals. At the same time, it allows for a departure from the control/sanction approach, which is based on a bureaucratic model tied to legal positivism (ARAÚJO; ALVES, 2012). As for these tools' characteristics, Araújo and Alves (2012) demonstrate that there are three aspects that conduct the establishment of these terms. The first is willingness, since the parties must participate freely, according to their own autonomy and without affecting the administrators' discretion. The second aspect is recognition of the administrators' good faith, since, if there is evidence of bad faith or of consummated losses to the treasury, signing the TAG will not be possible. Finally, consensus is highlighted as the the guiding aspect behind establishing TAGs. This last characteristic resonates with the new paradigm of Ad-

ministrative Law, which diverges from authoritative inflexibility and moves toward democratic flexibility (ARAÚJO; ALVES, 2012).

In face of this new control tool's characteristics, a prior study affirmed that these agreements are capable of enabling both the reparation of losses caused to public funds and the correction of irregularities practiced within the public administration in a quick and efficient manner (CUNDA, 2016). This characteristic aligns with the constitutional principle of administrative efficiency and the fundamental rights to the reasonable duration of a case and to the good public administration. Freitas is another author who mentions the importance of establishing TAG as a tool capable of promoting the improvement of external control. In this jurist's opinion, such instrument has the capacity to make compliance with oversight goals more effective (FREITAS, 2013).

Aligned with this new trend of facilitating consensual tools for resolving controversies, several Brazilian Courts of Accounts have been incorporating TAGs. According to a recent study (SANTOS, 2017), Courts of Accounts of the states of Amazonas, Goiás, Mato Grosso, Minas Gerais, Paraná, Pernambuco, Rio Grande do Norte, and Sergipe had already projected the use of management adjustment terms. Moreover, we also emphasize that there is already a legal or regulatory provision for the Courts of Accounts of Amapá[v], Ceará[vi], Piauí[vii], Rio Grande do Sul[xiii], and Rondônia[ix] to sign the TAGs. Even before the the organic laws of the Courts of Accounts took effect, it is worth mentioning that the first city to adopt TAGs was Belo Horizonte (FERRAZ, 2014).

In relation to the necessity of the organic laws and internal regulation foresee the possibility of adopting TAGs, we reiterate that prior studies mentioned that such provision would not be strictly necessary. On this occasion, the understanding of Luciano Ferraz was ratified for providing enough legal basis for utilization of the aforementioned consensual tools, namely in the Preamble; Article 4, item VII; and Article 71, item IX of the Federal Constitution (BRAZIL, 1988); Article 59, paragraph 1 of the Fiscal Responsibility Law (BRAZIL, 2000); and Article 5, paragraph 6 of the Public-interest Civil Suit Law (BRAZIL, 1985)[x]. To these legal provisions, the new Civil Procedure Code – Law no. 13.105, of March 16, 2015, can be included, which, in Article 3, paragraph 2, provides that "the State shall promote, whenever possible, the consensual resolution of conflicts" (BRAZIL, 2015a, par. 5). We stress that the provisions of Article 15 of the same Code apply alternatively to administrative procedures in the absence of regulatory norms. Furthermore, even in cases where the referred legal provisions are disregarded, the Theory of Implicit Powers corroborates the use of such tools (CUNDA, 2016). However, legal doctrine is not undisputed in this sense[xi]. Faced with controversy among legal scholars regarding the need or not for a specific provision to adopt TAGs in our Courts of Accounts due to a legal security issue, it is understood that the concrete effects of such mechanisms in the organic

laws of these controlling bodies and their respective internal bylaws are appropriate. As mentioned previously, "the explicit provision in the internal regulations and organic laws of the Courts of Accounts seems to be, if not paramount, at least convenient" (CUNDA, 2016, p. 220).

In the search for the real possibility of signing the TAGs, it is also important to note that the provision to adopt this term was already in the draft of the National Law of the Oversight Procedure of the Courts of Accounts (BRAZIL, 2012). Currently, the provision is in the draft of the Organic Law of the Federal Public Administration and Collaborating Entities (BRAZIL 2007). In the context of the states, the provision is in effect in the states of São Paulo and Santa Catarina[xii].

As demonstrated, several Courts of Accounts have implemented the TAGs as conflict resolution alternatives in their jurisdictions. Additionally, there are drafts at the national level and in some states which aim to put these tools into effect. However, the referred terms have not yet been incorporated into either the TCU's organic law or internal bylaws.

Following, we will examine the evolution of the understanding of the Federal Court of Accounts in the use of consensual conflict resolution mechanisms in the cases under its jurisdiction, highlighting the discussion around the TAGs. Generally, the TCU has been reticent to adopt consensual instruments for conflict resolution. However, one can observe that a relative downturn in the rhetoric resistant to negotiated activities in the context of the Federal Court of Accounts has occurred. As an example of this paradigm, an evolution in the TCU understanding can be observed in the possibility of the public administration submission to the arbitration clause (PALMA, 2015). Another example of the TCU progress in incorporating consensual solutions was the introduction of the possibility of the audited body or entity to determine which action plan to elaborate in order to execute the issued recommendations and determinations. This solution is especially possible within the scope of operational audits that seek an efficiency evaluation of a given governmental program or activity, pursuant to the heading of Articles 37 and 70 of the Federal Constitution (BRAZIL, 1988)[xiii].

The incorporation of TAGs to the TCU internal regulations was a topic of discussion in the full court when reviewing this normative rule. The rapporteur, Minister Augusto Nardes, proposed to incorporate the possibility of signing TAGs because he understood this instrument could contribute to improving the Court participation since it would allow for an increase in efficiency (BRAZIL, 2011a). Throughout the process, there were objections to the inclusion of this device due to perceptions that there was no support in the legal framework for the TCU to sign the TAG and that the introduction of this mechanism would create an unnecessary procedural step. Furthermore, attention was drawn to the principles of legality and non-availability of public interest would not allow the TCU to compromise with those responsible when assessing losses in the public treasury nor to reduce punishments provided by law. Before this controversy, the proposal to include the following provision in the internal bylaws was set forth: "Article 298-C. Aiming to improve Public Administration, the court can sign a management adjustment terms with the bodies and entities, public or private, under the terms of the normative act" (BRAZIL, 2011b, par. 298). After the discussion, the suggestion to suppress the provision was accepted, considering that the Court already had the competence to adopt corrective measures without the need to negotiate solutions with the parties under its jurisdiction. However, the same decision that defined this exclusion provided that the matter would be reexamined in specific cases and resolutions, which has not occurred yet (BRAZIL, 2011b).

Notwithstanding the absence of regulation for the TAGs in the TCU, attention is drawn to a recent

legal precedent that determined the organization of a public hearing for the subsequent signing of an instrument of this kind. Decision no. 494, of March 22, 2017 (BRAZIL, 2017), having Minister Augusto Nardes as rapporteur and pronounced within TC 010.915/2015-0, which monitored the determinations and recommendations issued to the Ministry of Sports and the Civil House of the Presidency of the Republic due to the risk analysis related to the legacy of the Olympic Games and its respective implementation plan, especially regarding sports arenas constructed with federal public resources. The following briefly presents the circumstances of the concrete case.

In 2014, the TCU proceeded to track the activities related to the Olympic's legacy. Uncertain of what measures to take, it was determined that the Ministry of Sports would elaborate a document with a plan detailing the legacy of the sports equipment built with federal resources, pursuant to item 9.1 of Decision no. 2.758, of October 15, 2014 (BRAZIL, 2014). Subsequently, the TCU monitored compliance with these deliberations[xiv]. Finally, before evidence of omission to execute the referred proposed measures , a fine was applied to those responsible for not complying with the determination in Decision 494/2017, pursuant to Article 58, item IV of Law no. 8.443, of July 16, 1992 (BRAZIL, 1992); c/c Article 268, item VII; and section 3, of the TCU's internal bylaws. On the occasion, this noncompliance was considered to be the result of omission in the elaboration of the legacy plan and the abandonment of sports arenas in less than six months after the Games ended. We also add that, due to the urgency of the situation and the multiplicity of entities involved in the search for an effective solution for sports centers' maintenance, it was determined that the General Secretariat of External Control would hold a public hearing with all bodies to discuss problems related to the issue. As a result of this hearing, a TAG clearly establishing the responsibilities of each of the entities involved, aiming to solve the problems, would be signed in order to solve the problems (BRASIL, 2017).

It is understood that this precedent means progress for the TCU in employing new mechanisms for resolving controversies under its jurisdiction and meets the latest trends in administrative law to adopt conciliation mechanisms. The argument that there is a lack of public interest can no longer be tolerated in order not to adopt this kind of instrument since Law 13.140, of June 26, 2015, which regulates the resolution of judicial and extrajudicial conflicts in public administration, admits the transaction over inalienable rights, as provided in Article 3 (BRAZIL, 2015b).

Regarding the precedent of Decision 494/2017, a more detailed analysis regarding the *ratio decidendi* is required. Before the situation of the necessary joint participation of several bodies and entities in implementing measures aimed towards the public policy in question, , it was understood that the solution must be achieved upon a negotiation process conducted by the Federal Court of Accounts itself. In order to increase transparency and stimulate democratic participation, a decision was made to hold a public hearing where the issues will be discussed and, finally, the measures taken by each entity involved will be reduced to an adjustment. This decision is worthy of applause because if the TCU had opted for each of the bodies or entities involved to elaborate an action plan, it is possible that each would adopt a strategy that would not be compatible with the measures taken by the others and, consequently, reduce its chances of effectiveness. It is understood that the same solution may be the most appropriate in several other oversight efforts where achieving public policies depends on intersectoral performance. Notably, we can mention the number of operational audits that the TCU has conducted in evaluating certain public policies where the decisions made determinations and recommendations to the bodies and entities involved without the measures being necessarily linked with each other. Promotion by controlled bodies of an agreement to implement measures in intersectoral policies resonates with the new consensual public administration model. In the case of the TAGs to be agreed upon to define the actions that each accountable entity will adopt, the TCU, in face of its constitutional prerogatives and renowned expertise, must act as the true conciliator by recommending cooperative alternatives to those involved[xv].

In any case, even if the precedent of Decision 494/2017 can be considered an evolution in bringing administrators closer in order to arrive at a peaceful solution, it is understood that the effective possibility of tools such as the TAGs, both in the Law and in the internal bylaws, would be an essential measure to implementing the control/consensus approach, just as several other Courts of Accounts have already done. This measure would bring more legal security and, consequently, avoid eventual legal questioning regarding the signed instruments.

3. CONCLUSION

Considering the above, various effective mechanisms of administrative conciliation for conflict resolution in Brazilian legislation exist. Administrative action based on authority and coercion continually loses ground to the new consensual conflict resolutions. Within the context of the Courts of Accounts, the TAG is an example of an instrument that brings the possibility of a participation based on control/consensus in that it allows for a joint effort between the auditing body and the audited entity to agree on goals for correcting irregularities or establishing governmental actions in order to make a certain public policy more effective.

Resonating with this new administrative law trend of introducing consensual solutions for conflict resolution, the TCU's jurisprudence has been changing its jurisprudential understanding with respect to some issues, such as: i) accepting the public administration's submission to the arbitration clause; ii) the possibility of regulating agencies substituting goals agreed upon in the TAG for sanctions; iii) adopting actions in its auditing practices, as determined through open dialogue with administrators through "action plans," to be executed so as to correct the problematic aspects detected.

Nevertheless, with the objective of consolidating non-adversarial administrative activity in the TCU's auditing practices, standardization of the TAG – or a similar instrument – is recommendable and already regulated in several state courts of accounts. This instrument has shown to be more advantageous than the current determination to bodies and entities requesting that they elaborate action plans since the TAG's goals are outlined collectively. Therefore, in addition to reducing the argumentative burden for the application of penalties in case of noncompliance, the interference of control bodies in the discretion of public administrators is also reduced[xvi]. That way, standardization of the referred instrument is urgent in auditing cases that detect the need for the joint cooperation of several bodies and entities to conciliate a given public policy. In this case, the TAG would be a way to stipulate the collective actions of several accountable entities and the TCU would act as auditor of this negotiation, in addition to proposing alternatives to be established in the agreement, in a way that it also assumes a broader leadership role in the efficacy of the fundamental principles, rights, and duties contained in the constitutional charter.

NOTES

i According to Palma (2015), there are three theoretical premises that support consensual administrative performance: efficiency, administrative participation, and public governance.

ii Canotilho (2006) discusses the constitutionalism and geology of good governance (p. 325 and ss.).

iii That is exactly what is discussed in "Peace, justice and strong institutions," which presents as some of its goals, the development of effective, accountable, and transparent institutions, as well as ensuring responsive, inclusive, and participatory decision making. As for sustainable development goals and the 2030 Agenda, access the site <https://nacoesunidas.org/pos2015/>.

iv Some legal documents on this subject are available at: <http://www4.planalto.gov.br/legislacao> (Ac-cess on Nov. 2017): Decree-Law 3.365/1941, head provisions of Article 10; Decree 94.764/1987, which altered the text of Article 45 of Decree 88.351/1983; Law 9.099/1995; Law 9.469/1997; Consumer De-fense Code (Law 8.079/1990), which modified Law 7.347/1985 by incorporating a generic permission to sign conduct adjustment commitments; Law 10.149/2000, which brought CADE the possibility to pro-mote leniency agreements; in the same way, the Securities and Exchange Commission (CVM), pursuant to Law 9.457/1997, included adoption of the commitment term as a regulatory instrument. The move-ment towards implementing consensual instruments gained even more intensity since 2010, v.g. The Law of Solid Residues (Law 12.305/2010), Article 8, item XVIII; Decree 7.562/2011, Article 18, section 4, item III; and Normative Instruction nº 2/2017 of the Ministry of Transparency and Accountability and the Office of the General Federal Controller (CGU), which regulated the signing of conduct adjustment terms in cases of less offensive disciplinary infractions. Available at: <https://goo.gl/L5EiEs> Access on: Nov. 27, 2017.

v Normative Resolution 171/2017-TCE/AP regulated the TAG in the Court of Accounts of the State of Amapá, according to provisions in Article 26, item XX of Complementary State Law 10/1995. Available at: <https://goo.gl/sa6sk5>. Access on: Nov. 24, 2017.

vi The possibility of the Court of Accounts of the State of Ceará signing the TAG was inserted in Article 76, section 4 of the

State Constitution by means of Constitutional Amendment 87/2016. Available at: <https://goo.gl/ddGzvd>. Access on: Nov. 15, 2017.

vii Resolution TCE/PI 10/1996 regulated the TAG in the Court of Accounts of the State of Piauí, accord-ing to provisions in Article 2, items XI and XVIII of State Law 5.888/2009 (Organic Law of TCE-PI). Available at: <https://goo.gl/YT2t6U>. Access on: Nov. 24, 2017.

viii The internal bylaws of the Court of Accounts of the State of Rio Grande do Sul provides the possibility of signing the TAG in Article 142. According to this normative order, specific resolution still needs to be edited in order to establish the terms and conditions for signing this instrument.

ix According to the Article 1, item XVII of Complementary State Law 154/1996, included by Comple-mentary State Law 679/2012. Available at: <https://goo.gl/h6tXXC>. Access on: Nov. 25, 2017.

x Indicating that there is already enough legal basis to apply management adjustment terms, see Cunda, Daniela Zago Gonçalves da. A brief diagnosis of the use of management adjustment terms by state courts of accounts. **Interesse Público**, Belo Horizonte, n. 58, p. 243-251, 2010 and Reis, Fernando Si-mões dos. News Perspectives to the Control of the Administrative Discretion by the Brazilian Court of Audit in Performance Audits. **Interesse Público**, Belo Horizonte, year 17, n. 89, v. 1, Jan./Feb. 2015. p. 270.

xi Regarding the absence of the provision for the possibility of peaceful conflict resolution in Law 9.784/1999, Juarez Freitas affirms that "[...] the Federal Law of Administrative Procedure must be adapted to contemplate the cooperative, non-adversarial procedure as soon as possible. For this purpose, legislation improvement is recommended" (FREITAS, 2017, p. 38).

xii At the Parliament of the State of São Paulo, Complementary Law Project 60/2015 is currently in pro-cess, and it alters the organic law of the state's Court of Accounts in order to establish the management adjustment terms. Available at: <https://goo.gl/RcZ95x>. In Santa Catarina, Resolution 137/2017 was voted unanimously by the full State Court of Accounts, which approved the submission of the law's draft to incorporate the possibility of signing the TAG into the organic law of the aforementioned Court of Accounts. Available at: <https://goo.gl/xaeiy4>.

xiii Regarding the determination of an action plan to implement the TCU's recommendations and deter-minations in operational audits, see Reis, Fernando Simões dos. News Perspectives to the Control of the Administrative Discretion by the Brazilian Court of Audit in Performance Audits. **Interesse Público**, Belo Horizonte, year 17, n. 89, v. 1, Jan./Feb. 2015.

xiv Cf. Decisions 706, of April 8, 2015 (BRAZIL, 2015b), no. 1.856, of July 29, 2015 (BRAZIL, 2015c), no. 3.315, of December 9, 2015 (BRAZIL, 2015c), and no. 1.527, of July 15, 2016 (BRAZIL, 2016), whose rapporteur was Minister Augusto Nardes, considered that the measures adopted by administrators were not enough to solve the matter.

xv As for negotiation techniques, see *"Manual de negociação baseado na Teoria de Harvard"* (MARA-SCHIN et al., 2017), in order to provide orientation to employees regarding negotiation strategies. Avail-able at: <https://goo.gl/1ieu3d>. Access on Dec. 20, 2017.

xvi It is necessary to clarify that discretion will always be tied to the fundamental principles, rights/duties contained in the Federal Constitution. In this regard, see Maurer (1985) and Freitas (2013).

REFERENCES

ARAÚJO, Cláudia Costa; ALVES, Marília Souza Diniz. Termo de Ajustamento de Gestão: resgate do pensamento tópico pelo Direito Administrativo pós-moderno. Revista do Tribunal de Contas do Estado de Minas Gerais, Belo Horizonte, v. 84, n. 3, p. 81-92, 2012. Available at: <https://goo.gl/wBofqW>. Access on: 1 mar. 2018.

BARROSO FILHO, Angerico Alves. Avaliação do termo de ajuste de gestão como instrumento do controle consensual da Administração pública. Constituição, Economia e Desenvolvimento: Revista da Academia Brasileira de Direito Constitucional, Curitiba, v. 6, n. 11, p. 391-415, jul./dez. 2014.

BRASIL. Lei nº 7.347, de 24 de julho de 1985. Disciplina a ação civil pública de responsabilidade por danos causados ao meio-ambiente, ao consumidor, a bens e direitos de valor artístico, estético, histórico, turístico e paisagístico e dá outras providências. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 27 jul. 1985. Available at: <https://goo.gl/YFDcjE>. Access on: 1 mar. 2018.

_____. Constituição (1988). Constituição da República Federativa do Brasil, de 5 de outubro de 1988. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 5 out. 1988. Available at: <https://goo.gl/EfgJMD>. Access on: 1 mar. 2018.

_____. Lei nº 8.443, de 16 de julho de 1992. Dispõe sobre a Lei Orgânica do Tribunal de Contas da União e dá outras providências. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 17 jul. 1992. Available at: <https://goo.gl/AMfu38>. Access on: 1 mar. 2018.

_____. Lei Complementar nº 101, de 4 de maio de 2000. Estabelece normas de finanças públicas voltadas para a responsabilidade na gestão fiscal e dá outras providências. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 5 maio 2000. Available at: <https://goo.gl/Arq14w>. Access on: 1 mar. 2018.

_____. Ministério do Planejamento, Orçamento e Gestão. Portaria nº 426, de 6 de dezembro de 2007. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 10 dez. 2007. Available at: <https://goo.gl/8ApF6k>. Access on: 26 set. 2017.

_____. Tribunal de Contas da União. Ata nº 41, de 4 de outubro de 2011. Sessão Extraordinária do Plenário. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 6 out. 2011a. Available at: <https://goo.gl/K9c35C>. Access on: 1 mar. 2018.

_____. Acórdão nº 3.194, de 30 de novembro de 2011. Processo nº 021.032/2003-0. Relator: Min. Augusto Nardes. Brasília, DF, 2011b. Available at: <https://goo.gl/rKcf9w>. Access on: 1 mar. 2018.

_____. Acórdão nº 2.160, de 15 de agosto de 2012. Processo nº 009.708/2008-3. Relator: Min. José Múcio Monteiro. Brasília, DF, 2012. Available at: <https://goo.gl/ykEJza>. Access on: 1 mar. 2018.

_____. Acórdão nº 2.758, de 15 de outubro de 2014. Processo nº 015.898/2014-8. Relator: Min. Aroldo Cedraz. Brasília, DF, 2014. Available at: <https://goo.gl/QEJTDL>. Access on: 1 mar. 2018.

_____. Lei nº 13.105, de 16 de março de 2015. Código de Processo Civil. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 17 mar. 2015a. Available at: <https://goo.gl/6b0EbE>. Access on: 1 mar. 2018.

_____. Lei nº 13.140, de 26 de junho de 2015. Dispõe sobre a mediação entre particulares como meio de solução de controvérsias e sobre a autocomposição de conflitos no âmbito da administração pública; altera a Lei nº 9.469, de 10 de julho de 1997, e o Decreto nº 70.235, de 6 de março de 1972; e revoga o § 2º do Art. 6º da Lei no 9.469, de 10 de julho de 1997. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 17 mar. 2015b. Available at: <https://goo.gl/kvBrn>. Access on: 1 mar. 2018.

_____. Acórdão nº 706, de 8 de abril de 2015. Processo nº 015.898/2014-8. Relator: Min. Augusto Nardes. Brasília, DF, 2015c. Available at: <https://goo.gl/QLVcAH>. Access on: 1 mar. 2018.

_____. Acórdão nº 1.856, de 29 de julho de 2015. Processo nº 007.973/2015-2. Relator: Min. Augusto Nardes. Brasília, DF, 2015d. Available at: <https://goo.gl/hW3REX>. Access on: 1 mar. 2018.

_____. Acórdão nº 3.315, 9 de dezembro de 2015. Processo nº 010.915/2015-0. Relator: Min. Augusto Nardes. Brasília, DF, 2015e. Available at: <https://goo.gl/SvfSLC>. Access on: 1 mar. 2018.

_____. Acórdão nº 1.527, de 15 de junho de 2016. Processo nº 010.915/2015-0. Relator: Min. Augusto Nardes. Brasília, DF, 2016. Available at: <https://goo.gl/LRok1S>. Access on: 1 mar. 2018.

_____. Acórdão nº 494, de 22 de março de 2017. Processo nº 010.915/2015-0. Relator: Min. Augusto Nardes. Brasília, DF, 2017. Available at: <https://goo.gl/Uzkibm>. Access on: 1 mar. 2018.

CANOTILHO, J. J. G. Brancosos e interconstitucionalidade: itinerários dos discursos sobre a historicidade constitucional. Coimbra: Almedina, 2006.

Anteprojeto de Lei Orgânica da Administração Pública Federal e Entes de Colaboração. Resultado final. 16 jul. 2009. Available at: <http://www.direitodoestado.com.br/leiorganica/anteprojeto.pdf>. Acesso em 26 set 2017.

CUNDA, Daniela Zago Gonçalves da. Um breve diagnóstico sobre a utilização dos termos de ajustamento de gestão pelos Tribunais de Contas estaduais. Interesse Público, Belo Horizonte, v. 11, n. 58, p. 243-251, 2010.

_____. O dever fundamental à saúde e o dever fundamental à educação na lupa dos Tribunais (para além) de Contas. Porto Alegre: Simplíssimo Livros, 2013. E-Book.

_____. Controle de sustentabilidade pelos Tribunais de Contas. 2016. Tese (Doutorado em Direito) – Faculdade de Direito, Pontifícia Universidade Católica do Rio Grande do Sul, Rio Grande do Sul, 2016.

FACCHINI NETO, Eugênio. Jurisdição ou resolução consensual de conflitos: a quem pertence o futuro? Interesse Público, Belo Horizonte, ano 10, n. 103, p. 15-47, maio/jun. 2017.

FALZONE, G. Il Dovere di Buona Amministrazione. Milano: Dott. A. Giuffrè Editore, 1953.

FERRAZ, L. Termos de ajustamento de gestão: do sonho à realidade. Revista do Tribunal de Contas do Município do Rio de Janeiro, Rio de Janeiro, v. 30, n. 56, p. 17-21, 2014.

FREITAS, Juarez. O controle dos atos administrativos e os princípios fundamentais. 5. ed. São Paulo: Malheiros, 2013. 533 p.

_____. Direito fundamental à boa administração pública. 3. ed. São Paulo: Malheiros, 2014. 198 p.

_____. Direito administrativo não adversarial: a prioritária solução consensual de conflitos. Revista de Direito Administrativo, Rio de Janeiro, v. 275, p. 25-46, maio/ago. 2017.

MARASCHIN, M. U. (Coord.). Manual de negociação baseado na teoria de Harvard. Brasília, DF: EAGU, 2017.

MAURER, Hartmut. Allgemeines Verwaltungsrecht. Munique: Beck, 1985.

ORGANIZAÇÃO DAS NAÇÕES UNIDAS. Assembleia Geral das Nações Unidas. Transformando nosso mundo: a agenda 2030 para o desenvolvimento sustentável, 2015. Available at: <https://goo.gl/i7vnYH/>. Access on: 28 nov. 2017.

PALMA, Juliana Bonacorsi de. Sanção e acordo na administração pública. São Paulo: Malheiros, 2015.

REIS, Fernando Simões dos. New perspectives for the control of the administrative discretion by the Court of Auditors of the Union in operative audits. Interesse Público, Belo Horizonte, ano 17, v. 1, n. 89, p. 239-275, jan./fev. 2015.

SANTOS, Daniela Ramos de Oliveira dos. Termo de ajustamento de gestão no modelo de controle consensual da Administração Pública: estudo de caso do estado de Minas Gerais. 110 f. 2017. Dissertação (Mestrado em Direito) – Faculdade de Ciências Humanas, Sociais e da Saúde, Fundação Mineira de Educação e Cultura, Belo Horizonte, 2017. Available at: <https://goo.gl/aZWYK7>. Access on: 15 out. 2017.

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According to Barbosa (2007a, p. 127), .
(BARBOSA, 2007b, p. 94).

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