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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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Department of Postgraduate Studies and Research

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revista@tcu.gov.br

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Letter to the Reader

José Mucio Monteiro
Minister of the Federal Court of Accounts – Brazil (TCU)
and supervisor of the Editorial Board of the TCU Journal.

DEAR READER,

Continuing with the process of modernization and technical-scientific qualification of the TCU Journal, as of this edition, the Journal will receive submissions and publish articles in the electronic version continuously. The articles will be available for consultation shortly after the peer blind review. Readers will not have to wait for the printed edition. The change aims to ensure the celerity of the editorial process and timely dissemination of the work, thus improving the periodical's relevance indicators. The new digital support, which presents the previous editions of the Journal since 1997, allows a greater dynamism in the publication of articles and significantly increases the number of readers. The printed edition will continue semiannually.

The interviewee in this edition is Murilo Portugal. Current President of the Brazilian Federation of Banks (Febraban), Portugal was National Treasury Secretary, Executive Director of the World Bank, and Deputy Director of the International Monetary Fund (IMF). He offers his insights on national productivity and the ways to achieve a world-class excellence standard.

In the Opinion column, Horácio Sabóia, Federal Government Auditor of the TCU and specialist in risk management, discusses the characteristics of two models of entities created to control public expenditure: Auditor General and Court of Accounts.

This edition highlights the results achieved by TCU's external control actions during the year of 2018 as well as the 2018 Government Policies and Programs Report - which points out some of the deficiencies that compromise the results of public policies in Brazil. The Journal also brings information on the Public Transparency Systemic Report that identifies the common causes for the lack of transparency in the public sector.

The articles deal with a variety of topics. Among them parity of guarantees and prerogatives between ministers or councilors and ministers and substitute auditors of Brazilian Courts of Accounts and the national judiciary; the accumulation of positions, jobs or public functions in the Federal Constitution and in Law 8.112/1990; the system of integrated contracting and its discretionary or binding adoption by the manager; the adversary system and the right to a fair trial in the scope of administrative sanctions enforced by Law 13303/2016 (State-Owned Enterprises Law); and the principle of effectiveness in performance audit.

We invite readers to participate in the TCU Journal by reading, commenting or contributing with articles.

Good reading!

Interview

Opinion

Highlights

Articles

Index

Productivity and challenges for Brazilian growth

Murilo Portugal

Lawyer and economist, Murilo Portugal has a long career in the public sector and in international organizations. He was the Brazilian National Treasury Secretary from 1992 to 1996, when he joined the World Bank as Executive Director (1996 to 1998). Next, he became the Executive Director (1998 to 2005) and Deputy Managing Director (2006 to 2011) of the International Monetary Fund (IMF). Since 2011, he has been the President of the Brazilian Federation of Banks (Febraban). In an interview with the TCU Magazine, Murilo Portugal talked about productivity and challenges for Brazilian growth.

We need to do more and better with less. It seems contradictory, but the world has evolved in this manner, and that means increasing productivity.

Before this scenario of fiscal restrictions, in your opinion, what are the crucial challenges for Brazil to be able to rebalance its public accounts and finance the needs of economic and social development at the same time?

Look, I think the 1995 Constitutional Amendment, which was approved in 2016, is very important for Brazil. The Netherlands were the first country to have a spending ceiling back in the 1990s. Then, Sweden and Norway. An IMF study compared the performance of 57 countries from 1985 to 2012, of which 26 had a spending ceiling, and the other 31 did not. This study verified that countries with spending ceilings presented a better fiscal performance, lower primary expenses, and a greater economic growth. There is a negative correlation between high levels of public debt and economic growth. Growth is not generated by the public sector; it is generated by the private sector. I don't see this dichotomy between economic growth and the constraint of public spending. On the contrary, the private sector, companies, and families are the ones who will finance Brazil's economic development. It is not the government. For this reason, I think establishing a spending ceiling is positive, for this limit will force us to really set priorities.

I worked in the public sector for 33 years, and I have been working in the private sector for the past 10 years. In the public sector, it seems that the idea of giving priority to a sector is related to how much is spent on it. In the private sector, it is how much is being produced that matters. Thus, the goal is to produce more and spend less. In the public sector we have: how much are we going to spend on health? How much are we going to spend on education? There isn't a concern about results. On the other hand, for the population, what matters is how much is produced in health or in education. Now, for those selling products to the government or for those working in the government, the most important thing is how much is spent, rather than the results. We have to shift the focus from spending to producing, because that is how the private sector works. We need to do more with less. It seems contradictory, but the world has evolved in this manner, and that means increasing productivity.

Regarding efficiency and productivity, there is an apparent consensus that Brazil needs to improve the quality of public spending to reach a reasonable standard of sustainable growth. What needs to be done to increase productivity in Brazil and thereby the competitiveness of national products?

Well, productivity is the primary engine for long-term economic development, and several things are needed to drive it: increasing public and private investment rates and building the capacity of workers to increase productivity by introducing new methods and new production technologies. All this is achieved by increasing investment rates. To do so, we need to increase the savings rate sustainably without creating external balance issues. We must increase the rate of domestic savings, which is extremely low. We used to save 16% of the GDP, and now we are at 14%. However, we have invested up to 21% of the GDP. With investments, we can improve workers' qualifications, invest in innovation and technology and make our economy more competitive.

You see, we live in a competitive world. We have to do things better than other countries are doing if we wish to be successful. If not better, then at least at the same level. For that, the Brazilian economy needs more openness: we need to force ourselves to be more competitive and compete internally with foreign products sold here. It is hard to find a country that has done this transition from a medium-income country, which is the case of Brazil, to a developed country without more economic openness. Briefly, the path to be taken is of more investment, more education, more innovation, and more openness of the domestic economy.

To what do you attribute Brazil's difficulty in speaking about economic openness?

I don't know the reason. Perhaps there is an ideology in Brazil that we have to take more advantage of the domestic market instead of trying to compete with the external market. I understand that it is not the most appropriate stance. Maybe it has to do with our heritage; I do not know where this difficulty comes from, but Brazil is a closed country. Our percentage of foreign trade is low. Our exports are close to 12% of the GDP, while in South Korea it is more than 26% of the GDP.

Considering your experience in other countries, what best practices would you highlight to increase productivity? In some countries, such as Australia and New Zealand, there is what I call the "productivity commission" and it shows promising results. In the World Bank "Doing Business" rank, for example, New Zealand is in the first place, which demonstrates the progress the country has achieved. Which path should Brazil follow?

For 13 years, I worked in the United States. First at the World Bank and later at the International Monetary Fund, as Deputy Managing Director. I had 81 countries under my management, including Australia and New Zealand. All across the world, people give great importance to productivity, both in the private and in the public sector. In New Zealand, for instance, competition is fierce. To survive, one must be as competitive as your competitor is. In the public sector, this does not happen much, but there is a focus on the outcome.

And in Brazil, how to integrate this productivity logic to the public sector?

I think it is an immense challenge. When I was the Treasury Secretary, I implemented a performance-based pay system. It was very difficult. That was in 1994. The creation of a productivity performance bonus is from this period. It was a struggle to achieve it, but it had a very positive result in the Treasury. Once it was implemented there, it spread to other entities, but the experience at the Treasury was very positive. During my first week as a Secretary, there was a strike. The National Treasury servers' salary was equivalent to US$ 300.00. They were on strike for 40 days, and those who did not join the strike had to run the Ministry of War payroll. Despite the effort, in the end everything worked out. At the time, we had the following proposal: those who work more and better will earn more! From there, we created the correct incentives. We summed the number of points. Each point was worth 1 real. This represented half of the Treasury salary and it was about concrete goals, as it was done in the private sector.

Do you think it is the way to go with the public sector?

I do. I think we must also discuss stability in careers that are not State careers. Of course, the Federal Court of Accounts, the Judiciary Power and the Federal Prosecution Service are bodies with typical State careers; but teachers, doctors, engineers, and many other professions do not have this characteristic.

Another issue you have highlighted is about the importance of measuring costs. It seems a little obvious, but it still needs improvement. How do you see the difficulty we have in measuring costs and how could TCU act on it?

It is a difficult and permanent path. Because cutting expenses is like cutting your nails: you cut them and they grow back, you cut them and they grow back... You have to keep cutting all the time. I think TCU could have an important role within the public administration. To know the unit cost of each activity, whether it is health, education or other sectors that are important for the population and that demand significant volumes of public resources. It is necessary to establish unit cost measurements of a certain service, to compare them to the private sector, and to do the same thing regarding quality indicators. Both have to be measured: quality and costs, because taxpayers do not want to know how much is being spent, they care about how much is being produced; it is not a one-to-one relationship, and sometimes expenses increase, but the results do not.

Auditor General or Court of Accounts

Horácio Sabóia Vieira

He is Federal Auditor of External Control at the Federal Court of Accounts since July of 1992. Has undergraduate degrees in Civil Engineering, Mathematics and Graduate in Economics by University of Brasilia. Participated in International Exchange programs with National Audit Office (UK) and the Office of the Auditor General of Canada. Worked at Intosai Development Initiative for a year as a Consultant. Was Chief of Staff, Aide to the Minister and Director of a technical unit. Currently works at Seplan, with risk management

CONTEXT

Every nation has its own governmental organization, which results from its historical process and the struggle of forces that define the division of power. This division also reflects, to some extent, the cultural characteristics and prevailing values in the society, since these aspects are vectors of great influence in the direction and the formation of a country. However, even in the face of the idiosyncratic diversity that characterizes the universe of nations that currently exist and play a role on the global stage, it is possible to identify governmental arrangements, which seek to answer questions relevant to the stability of public institutions and retain similarity in their function, although, sometimes, they take on different forms.

The classic tripartite division of powers (executive, legislative, and judiciary) has been widely adopted by many countries today, in which legislative and executive powers are typically elected directly by the population. In this arrangement, it is up to the legislature to approve the public budget and up to the executive to comply with the approved budget. It is true that both the legislative and the judiciary also execute their budget quotas, but, in general, the most representative amount of public expenditure is the responsibility of the executive branch.

An issue of extreme importance in this context concerns the control and transparency of public spending. The managers of the *res publica* have the power to decide how public resources will be used and the duty to do so always for the benefit of society, in a transparent and responsible manner. To ensure that these ends are achieved, two predominant models of external control have been observed. One based on the Anglo-Saxon tradition (Westminster Model), often identified as Auditor General, adopted in countries such as the United Kingdom, Canada, the United States, and another one rooted in the Latin tradition, such as Italy, France, Portugal, and Brazil, called the Court of Accounts.

I have been an external auditor at the Federal Court of Accounts for over 26 years. I also had the opportunity to know well the Auditor General system, mainly on the exchanges I attended in the UK (National Audit Office - NAO, London) and in Canada (Office of the Auditor General of Canada - OAG, Ottawa), as well as frequent participation in IDI (Intosai Development Initiative) activities and events. A very interesting question arises: which one of the two models is the best? Perhaps even more important is the debate about which model is the best for our country. I would like to offer my contribution to this discussion, from a comparison between the operation of the Auditor General of Canada (OAG) and the TCU.

IN CANADA

The position of Auditor General of Canada is held by a professional chosen by the Parliament for a ten-year non-renewable mandate. The occupant enjoys broad independence of action, translated into the freedom to choose areas or subjects that will be audited, to recruit his/her team, besides the guarantee of access to all documents and information in the scope of the federal government of Canada. The result of his/her work is the audit reports covering two types of audit: financial audit, which also examines aspects of legality; and performance audit, following the traditional concept embodied in the three elements of economy, efficiency, and effectiveness.

How does this model contribute to the external control of expenditure, transparency, and accountability? The reports are sent to the parliament on predetermined dates and are widely publicized in the press. The Auditor General of Canada may disclose his/her reports from the date he/she formally submits them to the parliament, regardless of the congressional action on its content. At the congress, there is a Public Accounts Committee, led by the largest opposition party, which receives the reports from the Auditor General and promotes public sessions in which the Prime Minister and his ministerial team are scrutinized as to the findings of the audits.

The media and social control put great pressure on the holders of the executive branch, given the high credibility attributed to the Auditor General. Although there is no mechanism that makes it mandatory for managers to adopt the recommendations of the Auditor General, the culture of respect for society and transparency, supported by the strong reputation of the Auditor General, lead most of them to be implemented by the managers.

Thus, the pillars of this mechanism are independence and credibility of the Auditor General, effective functioning of the Public Accounts Committee, wide dissemination in the media and social control. If a single one of these pillars collapses, the entire accountability chain will be disrupted. It is clear that the efficiency of the Auditor General's performance heavily depends on external actors, especially the Public Accounts Committee, the media, and social pressure, associated with the dominant culture of seriousness with public spending and respect for society.

Among the factors determining the effectiveness of the model, the only one that depends exclusively on the Auditor General is the maintenance of his/her untouchable reputation and his/her high credibility, derived from a high level of professional competence and party-political exemption in his/her work.

IN BRAZIL

Our constitutional model has conferred upon the National Congress the function of external control, with the assistance of the Federal Court of Accounts. In terms of mandates, the TCU can develop a broad spectrum of different external control actions, including all types of auditing characteristic of an auditor general. The result of TCU's performance materializes in the delivery of judgments, which may be binding, in cases that contain determinations aimed at correcting noncompliance with the law, or a recommendation, when evaluating operational (performance) audit reports. The differences do not stop there. The TCU may declare managers unfit to hold public office, declare the incapacity of companies to participate in bidding processes with the Federal Government. In the event managers refuse to provide the required information, the TCU has the power to impose a fine, for example.

In case it judges the accounts of a public manager as irregular, he/she may become ineligible, with a decision taken by the electoral court based on the TCU Judgment. When the public manager is convicted of debt, this renders the debt to the treasury certain and causes the issuance of a judicial process of executive collection.

The effectiveness of the TCU's performance does not depend directly on the National Congress

nor the media, despite the relevance of these two players. TCU's decisions are meaningful on their own, due to their legal powers. The accountability chain in our model does not require Congressional action, although a more active participation of the legislature in the exercise of external control is highly desirable, nor does it depend essentially on the action of the media or social control, although these stakeholders have a strong influence over public administrators.

COMPARISON

The auditor general model depends on the existence of a strong and active parliament, in particular a public accounts committee or commission that demands improvements and corrections in management from public managers, from the reports received from the auditor general. Such a committee will only be successful if it actually assumes the role of defender of the society's interests, above partisan interests.

I do not see this scenario in Brazil. The work of our parliamentarians is still very marked by the fierce electoral dispute between parties, which often results in the prioritization of the conquest of political positions of power above the search for the common good. In countries with a cultural matrix such as Canada's there is a culture of care with public affairs and respect for the citizen, which are fundamental requirements for the proper functioning of the model of external control adopted by them. However, this is not the case in countries with a Latin cultural background, in which there is an overvaluation of the legal culture in the sense that someone can only be considered incapable for public service after a final court judgment.

If a Canadian minister of state has his action questioned or image tarnished by some public complaint, or by obtaining an opinion with reservations from the auditor general about his/her financial statements, the most frequent measure is that that person voluntarily moves away from the government, thus avoiding embarrassment to society or prevention of any investigation procedures. In this, we can perceive the cultural basis that supports the control model of auditor general, which assumes the seriousness of dealing with public affairs and respect for citizenship. They understand that the citizen has the right to efficient and reputable public managers above any suspicion, regardless of legal processes.

Clearly, this is not the culture that prevails in our government. I could mention many recent cases in which strong evidence of embezzlement of public resources has surfaced without those involved taking any steps to move away from the positions they occupy. They prefer to misuse the good principles of due legal process and presumption of innocence.

Another relevant difference is the nature of the output of each of the two models. The outcome of the Auditor General's work falls into two categories. In the financial audit reports, an opinion is given on the statements, accompanied by notes and recommendations for improvement. In performance audits, no opinion is given, but recommendations are made for efficiency, effectiveness or cost-effectiveness improvements for the government. Neither the opinion nor the recommendations impose mandatory compliance by the managers, nor do they serve to apply any type of sanction.

In the political and cultural environment that dominates the Brazilian public administration, a model

of external control devoid of any binding or sanctioning power would tend to have its performance completely disregarded by the managers. In turn, the Court of Accounts model has a strong legal and sanctioning authority, so that the manager cannot ignore the results of the decisions made.

It is true that the Court of Accounts demands a more complex and costly structure, since it requires professionals from several areas other than those associated with audit work, particularly the disciplines of Law. However, the worst cost to society is the one that brings no benefit at all.

CONCLUSION

I rely on the constitutional principle of efficiency and the axiological structure proposed in ISSAI 12 to formulate my conclusions. ISSAI 12 prescribes that the purpose of a supreme audit institution is to add value and benefit to citizens through the performance of its activities. Associating with the caput of Art. 37 of our Constitution, which establishes that the government must provide services to citizens efficiently, that is, at minimum costs or with optimized results, I believe that the best external control model is the one that has the greatest potential to induce improvement in quality and in the results of public spending, and consequent benefits for society. For the previously mentioned reasons, the auditor general model would be impotent to induce these results in a society with the characteristics of Brazilian society. In turn, the Court of Accounts model, although a little more complex, certainly incorporates a greater potential to induce behavior change in public managers and improve the lives of citizens, considering the political and cultural matrix of our country.

Financial benefits obtained from TCU's work surpassed 25 bi in 2018

The potential financial benefit derived from actions by the Brazilian Federal Court of Accounts (TCU) reached R$ 25,104,319,359.00 in 2018. That means each R$ 1 invested in the Court's work has returned R$ 12.38 to society.

This amount results from corrections of irregularities or improprieties in acts carried out by the public administration due to TCU actions. As an example, we have the Basic Health Care Units Computerization Program (PIUBS) implementation follow-up, which aimed to prevent and correct potential distortions and avoid irregularities or the misuse of public resources. This action saved the public treasury over R$ 6.3 billion (Court Decision 1961/2018).

Another example is the follow-up on the concession, maintenance, and payment of social security benefits by the Brazilian Social Security Institute (INSS) (Judgement 1.057/2018), which resulted in more than R$ 2.5 billion in savings for society. Another audit of the fifth round of bids for the concession of blocks in pre-salt areas (Court Decision 2199/2018) for exploration and production of oil and natural gas reached financial benefits of more than R$ 3.9 billion.

Throughout the year of 2018, the last year under Minister Raimundo Carreiro's administration as TCU President, the Court concluded 555 audits and examined 4,687 external control processes conclusively.

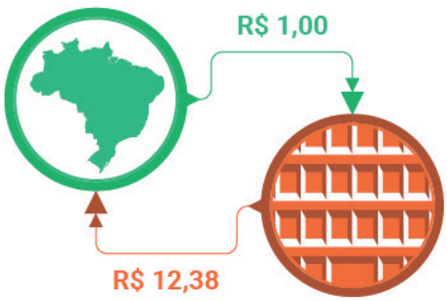
During this time, control efforts concentrated on four main lines of action: fighting fraud and corruption; evaluating the efficiency and quality of public services; evaluating the results of public policies and programs; and promoting transparency in the federal public administration.

In addition to the financial benefit measured, control actions have also generated other impacts in the country, such as the potential to reduce irregularities by expectation of control, waste prevention, improved resource allocation, suggestions regarding improvement of laws, reduction of environmental impacts, and improvement of public policies.

Regarding improvements in the public efficiency, for instance, the Court initiated specific actions to assess bureaucratic dysfunctions and improvements in the quality of public services. Part of the audits conducted on the subject was consolidated in the Systemic Report on Dysfunctions of State Bureaucracy.

While presenting the results of his term, Minister President Raimundo Carreiro also highlighted advancements in the selection of objects of control actions, which now give priority to chronic national problems. Such themes are grouped in the High-Risk List (LAR) and are classified according to the operational or financial risks they present due to their vulnerability to fraud, waste, abuse or mismanagement. “This is an unprecedented initiative, which will enable us to present to the future administration the most relevant challenges to be faced by the Court, also allowing a better planning of control actions”, said Carreiro.

Investment return in 2018



External control at the service of improving public policies

In the exercise of its mission to improve the Federal Public Administration through external control, since 2017 the Federal Court of Accounts (TCU) has been forwarding a specific report to the

Federal Government, which identifies recurrent institutional deficiencies that compromise the results of policies and the quality of public spending.

The Government Policies and Programs Report (RePP) presents an overview of risks, irregularities and relevant deficiencies that affect the achievement of goals repeatedly in the public policies assessed.

The document presented in 2018 (Judgement 2608/2018 Plenary) is based on audits carried out of 18 government policies and programs covering priority areas of great social interest for Brazil, such as health, education, housing, the prison system, and water infrastructure.

This report included programs such as the *Minha Casa Minha Vida* housing program, the National School Meals Program (PNAE), the Broadband in Remote Regions Policy, projects funded by the Rouanet Law, and measures to eradicate *Aedes Aegypti* mosquitoes.

The deficiencies presented by the Court of Accounts are associated with governance and management practices. They encompass issues such as failure in public policy transparency, failure in the quality of services rendered or their discontinuity, absence of efficiency, cost-benefit and effectiveness analyses, and inaction of policymakers.

For instance, the report highlights that out of 15 policies analyzed, 87% presented shortcomings in the selection process of beneficiaries and in policy targets; out of 13 policies evaluated, and 62% were not preceded by an appropriate demand survey or problem diagnosis. Furthermore, out of 13 policies examined, 46% were evidently unaware of the problem they intended to address.

The RePP was prepared to meet Article 124 of the Budgetary Guidelines Law (LDO) for 2019 and it was forwarded to the Mixed Committee for Plans, Public Budgets, and Oversight to support the National Congress's discussion on the Annual Budget Law Project (PLOA).

Systemic report points out main hindrances to Transparency

Despite constant efforts towards increasing transparency in the Brazilian Administration, citizens still face many obstacles when searching for information from public authorities and institutions. But which are these obstacles?

According to the Systemic Report on Public Transparency (FiscTransparência), produced by the Brazilian Federal Court of Accounts (TCU), the most common causes of lack of transparency are related to failure in public organizations' internal governance arrangements and in the interpretation of the law. Likewise, the document highlights public authorities and entities' low capacity of correctly managing standards and instruments regarding document confidentiality classification, and the fragile culture of open data

FiscTransparência has consolidated 45 audit judgments by TCU, which were carried out based on three guiding axes: management of public finances, transparency in the activities of government organizations, and transparency in performance and outcome indicators.

By associating themes and their corresponding audits, FiscTransparência allows a systemic identification of institutional aspects that provide greater accountability. This report is available at TCU's website (tcu.gov.br) and it lists best practices that should be shared and disseminated throughout public administration as a whole.

Incipience of Constitutional Parity Norms on the Guarantees and Prerogatives of the Members and Auditors of Courts of Accounts with Those Typical of Judiciary Magistrates

Alex Pereira Menezes

Undergrad in Law by the Faculty of Administration and Business of Sergipe (2014), Accounting Sciences by Tiradentes University (2006) and Data Processing by Tiradentes University (1998). Graduate in Public Law by the Faculty Estácio de Sá (2015), in Governmental Audit and Public Accounting by the Faculty of Administration and Business of Sergipe (2009) and in Statistics by the Federal University of Sergipe (2001). Analist in Finances and Control at General Controller of the Union (CGU).

ABSTRACT

This article examines the concept of constitutional parity of members (ministers or councilors) and auditors who substitute for members of the Brazilian courts of accounts with magistrates of the Judiciary Branch. Parity stems from art. 73, *caput* and §§ 3 and 4, and art. 75, *caput*, of the Constitution, which perceives as inadmissible that, in the forefront of neo-constitutionalism, norms of constitutional root lack concrete application. Driven by this intention and with a slight doctrinal tone, this study summarizes the guarantees, benefits and prohibitions of Judiciary magistrates to be conferred to members and auditors of the eminent *Tupiniquin*[1] audit courts.

Keywords: Members. Auditors. Courts of accounts. Parity. Magistrates. Judiciary Branch.

1 HISTORICAL ARCHETYPES

The constitutional provision for a Federal Court of Accounts in Brazil came about during the Imperial period through the 1891 Charter, under the direct influence of Ruy Barbosa who was Minister of Finance during the Deodoro da Fonseca government. He upheld the creation of the Federal Court of Accounts (TCU), which was then materialized through Decree 966-A, on November 7, 1890.

However, the subsequent Constitution of 1934 went beyond its predecessor and equated Justices of the Federal Court of Accounts (TCU) with superior court Justices, a provision that was

1 Tupiniquim is the name of an indigenous tribe of Brazil. The term has come to mean “Brazilian” or “national”

maintained in subsequent Constitutions and broadened considerably in the 1988 Constitution, which established parity between auditors of the Brazilian court of accounts and Judiciary Branch magistrates. Indeed, the 1988 Constitution, at the caption of its art. 73, states that *"The Ministers of the Federal Audit Court shall have the same guarantees, prerogatives, impediments, remuneration, and advantages as the Justices of the Superior Court of Justice"* (art. 73, § 3), and that *"the auditor, when substituting for a Minister, shall have the same guarantees and impediments as the incumbent Minister, and, when in exercise of the other duties of the judicature, those of a Judge of a Federal Regional Court."*; (art. 73, § 4). Moreover, it imposed the symmetry of the federal model to the state courts of accounts, according to *article*. 75.

Notably, the process of re-democratization, which is deeply rooted in the 1988 Constitution, strengthened the category of auditors (substitute Federal Court of Accounts (TCU) Ministers and counselors from other courts of accounts) by creating parity between them and magistrates of the highest career level, as are considered judges of the federal regional courts. Moreover, it determined parity of Ministers from the Federal Court of Accounts and Justices of the Superior Court of Justice (STJ) and, *ipso facto*, counselors of state courts of accounts equivalent to judges of local justice courts.

Thus, ever since the enactment of the first Constitution - and subsequently all others that were proclaimed and ratified - finally culminating in the 1988 Constitution, we observe this unwavering determination to ensure parity between members and auditors of any court of accounts in Brazil and the magistrates of the Judiciary Branch (as can be observed given the force of constitutional norms, supported mainly by neo-constitutionalism). This extends to state constitutions and organic laws and especially to the respective internal norms of the courts of accounts, even though it has not always come to fruition.

An issue, which, regardless of being constitutional, has not been commonly supported by the doctrine, established the area of public administration. Thus, impelled by this doctrinal deficiency - as well as by the incompatibility of the infra-constitutional rules of the country's courts of accounts and the provisions of the Federal Constitution (notwithstanding the advent of neo-constitutionalism) - the work details the essential aspects in order to effectively achieve constitutional parity of members of courts of accounts and magistrates. Lastly, it demonstrate results and opportunities that support the improvement of the legislation of courts of accounts.

2 COURTS OF ACCOUNTS

The courts of accounts, in Meirelles's view (2014: 73), *are "functionally independent bodies and their members are in the same category as political agents"*, given that they originate directly in the constitutional text from which they also draw their institutional mandate and are not subordinates of any hierarchy or functionality.

These courts, by virtue of the *caput* in art. 71 of *Lex Fundamentalis,* assist the Legislative in its exercise of external control of Public Administration, however, according to the terms previously affirmed and now ratified (MENEZES, 2014, p.88):

> One should not confuse, therefore, the aid it provides to this Power concerning external control with any apparatus of submission or subordination. In fact, the Supreme Court has even recognized the existence of implicit precautionary power for the courts of accounts.

For this reason, Alexandrino and Paulo (2014: 902) argue *"there is no hierarchy between courts of accounts and the Legislative Branch."*

Within the scope of fiscal control introduced by Supplementary Law 101, from May 4, 2000, nationally recognized as the Law of Fiscal Responsibility (LRF), as with the verification of the limit of expenditure with personnel and indebtedness, according to Piscitelli (2012, 229), the Court acts *"as a technical body at the disposal of the other Powers, aiming for greater control and accountability in the management of public spending."*

Its importance is also evident when its functions are broken down – all of which derived from the Constitution - and described didactically by Lima (2013, p. 116). They are oversight, opinionative, judgement-issuing, sanctioning, corrective, consultative, informative, adjudicator and normative. Currently, the Federal Republic of Brazil comprises 34 courts of accounts, including the Federal Court of Accounts (TCU), 26 state courts of accounts, the Federal District Court of Accounts (TCDF), and four municipal courts of accounts from the states of Bahia, Ceará, Goiás and Pará, and two municipal courts of accounts, one in Rio de Janeiro and one in São Paulo.

The Federal Court of Accounts (TCU), under the terms of art. 73, *caput* and § 2, of the Federal Constitution, is composed of nine Ministers, one third of which are appointed by the President of the Republic (PR), two of whom are alternately chosen from among auditors and members of the Court's Public Prosecution (MPTCU), indicated through a three-fold list by the Court, in accordance to criteria of seniority and merit; and two thirds by the National Congress (CN).

Given the aforementioned constitutional symmetry inserted in art. 75, *caput,* the other courts of accounts follow the same identical proportionality for the selection of their components, one third appointed by the head of the local Executive Branch and two thirds by the local Legislative Branch.

As the Constitution itself determines that these courts of accounts be composed of seven councilors, the proportionality above does not result in exact figures. When this question was submitted to the guardian of the Constitution, it was interpreted as follows:

> In the state court of accounts, that are composed of seven councilors, four must be appointed by the legislative assembly and three by the head of the state executive branch. The latter must appoint one from among the auditors and one from the members of the Public Prosecutor's Office (Ministério Público), and the third is his/her prerogative. (Summary STF 653)

Nevertheless, those chosen as TCU ministers or counselors in the case of the other courts, including those who are auditors and members of the Public Prosecutor's Office, must meet the requirements set forth in art. 73, caput and § 1, which are: to be a of Brazilian nationality; between 35 and 65 years of age; have moral integrity and spotless reputation; have notable

knowledge of the law, accounting, economics and finance or public administration; and more than ten years of exercise in office or actual professional activity which requires the knowledge mentioned in the preceding item.

3 ADMINISTRATIVE DUTIES OF THE AUDIT COURTS

The provisions of art. 73, caput, combined with art. 75, caput, from the Federal Constitution, state that the courts of accounts must exercise, when appropriate, the duties of the Judiciary courts, pursuant to art. 96. The provision covers the administrative powers of the judiciary courts, which are invariably exercised by courts of accounts. These are generally recorded in the organic laws and/or internal regulations of the 34 Brazilian courts of accounts.

If we restrict ourselves to item I of art. 96, we may extract the following list of mandates that are exclusively the competence of judiciary courts:

> Art. 96. It is the exclusive mandate of:
>
> I – the courts:
>
> a) to elect their directive bodies and draw up their internal regulations, in compliance with the rules of proceedings and the procedural guarantees of the parties, and to regulate the competence and the operation of the respective jurisdictional and administrative bodies;
>
> b) to organize their secretariats and auxiliary services, as well as those of the tribunals connected with them, guaranteeing the exercise of the respective inspection activities;
>
> c) to fill, under the terms of this Constitution, offices of career judges within their respective jurisdiction;
>
> d) to propose the creation of new courts of first instance;
>
> e) to fill, by means of a civil service entrance examination of tests, or of tests and presentation of academic and professional credentials, according to the provisions of art. 169, sole paragraph, the offices required for the administration of justice, except for the positions of trust as defined in law;
>
> f) to grant leave, vacations and other absences to their members and to the judges and employees who are immediately subordinated to them.

Therefore, the courts of accounts are the ones that elect their own governing bodies, draft and approve their internal regulations, and promote administrative decentralization within their scope. They discipline the procedures of their cases, which must be mandatorily observed by all under their jurisdiction, organize their secretariat, establish their internal affairs office. They also promote public entry examinations, both for vacant positions for auditors and auxiliary

services, while equally observing the limits imposed by the LRF for expenses with personnel in the Legislative Branch (art. 169 of the Constitution, combined with art. 20, items I, “a”, II, “a” and III, “a”, from Complementary Law 101 from May 4, 2000). Furthermore, they must adopt all necessary measures to fill the vacancies for ministers and counselors, communicating these to the constitutionally competent appointment authorities, and grant leave, vacations and other absences to its members and other civil servants who are members of their staff.

In the same vein, there are no discernible differences between the duties of the courts of the judiciary, as per art. 96, item I of the Constitution, and those of the Brazilian courts of accounts.

Having established this, our focus now shifts to the examination of item II from the same constitutional article:

> II- the Supreme Federal Court, the Superior Courts and the Courts of Justice, to propose to the respective Legislative Power, with due regard for the provisions of article 169:
>
> a) alteration in the number of members of the lower courts;
>
> b) creation and extinction of positions and remuneration of auxiliary services and of the courts connected with them, as well as the establishment of the compensation for their members and for the judges, including those of the lower courts, if existent;
>
> c) creation or abolishment of lower courts;
>
> d) alteration of the judicial organization and division.

In this case, as we are dealing with the mandates of specific courts that make up the Judiciary, which do not have the same constitutional structure of the courts in this present study, the supposed correlation is not as perceivable.

And this could not be different since, according to art. 92 of the Federal Constitution, the Judiciary is composed of the following bodies: Federal Supreme Court (STF), National Council of Justice (CNJ), Superior Court of Justice (STJ), federal regional courts and federal judges, labor courts and judges, electoral courts and judges, military courts and judges, courts and judges of the states and the Federal District and Territories. The courts of accounts, however, are not invested with the national scope of Political Power, as they are independent and their jurisdiction is restricted to the corresponding federal entity, without any judicial subordination within their strict jurisdiction or any other, except regarding the protection of constitutional rights and guarantees. Thus, there are no lower courts of accounts.

With regard to item III of the constitutional article in question *(“the Courts of Justice, are to try judges of the state, of the Federal District and of the territories, as well as members of the Public Prosecution, for ordinary crimes and crimes of malversation, except in those cases under the jurisdiction of the Electoral Courts”),* it is clear that the competence to judge common crimes

and crimes of malversation committed by members of the courts of accounts is outlined at the constitutional level. Therefore, within this scope, there are no incompatibilities with the aforementioned item, since the same law defines both jurisdictions.

Therefore, as supported in art. 102, item I, "c", the Supreme Federal Court will judge members of the Federal Audit Court, regarding crimes of malversation and ordinary crimes, while the judgment of crimes of the same nature committed by members of other courts of accounts shall be judged, in accordance with art. 105, item I, "a", shall be judged by the Superior Court of Justice.

Given this constitutional determination of mandates, there are no further contradictions regarding the consistency of the application of art. 96, item III, within the scope of courts of accounts.

4 THE MAGISTRACY IN COURTS OF ACCOUNTS

The introduction of this paper brought to light the evolution of the constitutional text regarding parity between auditors and members of courts of accounts and the judges of the Judiciary, regarding their guarantees, prerogatives, impediments, salaries and advantages.

In fact, the Federal Court of Accounts is composed of nine Ministers, who as a result of art. 73, paragraph 3, of the Federal Constitution, are endowed with the same guarantees, prerogatives, impediments, salaries and advantages as the Justices of the Superior Court of Justice, while the other courts of accounts are composed of seven councilors, who, given the parity determined in art. 75, *caput*, are equal in the same way to the judges of the respective courts of Justice.

Despite the auditor (substituting a Federal Court of Accounts Minister or counselor in any of the other courts of accounts) not being considered, in Constitutional terms, a member of the Court, as is reflected in art. 73 and 75, sole paragraph of the Federal Constitution, he/she does have parity, in terms of guarantees and impediments, with a judge of the Federal Regional Court, according to art. 73, § 4 (in the case of the auditors from the Federal Audit Court), or to the state court judge of last entrance or special entrance, in accordance with the symmetry imposed by art. 75, *caput*, combined with art. 73, § 4 (in relation to the auditors in other courts of accounts). And, as Lima (2013, p. 68*)* asserts once again*, "when, substituting a counselor, the auditor has parity with a judge of the Court of Justice."*

Regarding this topic, Fernandes (2012, p.819) concludes:

> It is important to note that the Constitution was very careful in defining the ordinary duties of the auditor, qualifying them, not without reason, as 'judiciature', given the judicial aspect of the decisions rendered by courts of accounts. This argument reinforces the fact that ministers and counselors, and the Court of Accounts itself, exercise jurisdictional and other functions. Thus, the auditors, by virtue of a constitutional provision, have ordinary judicature duties, that is, of a judge and of the exercise of their judiciary careers.

This conclusion is in harmony- free of any anachronism- with Ruy Barbosa's definition in the explanatory memorandum of Decree 966-A, dated November 7, 1890, which institutionalized the Federal Court of Accounts (TCU):

> Body of magistrates, intermediary between Administration and Legislation, not belonging, therefore, to either, but in an autonomous position, with the jurisdiction of revision and judgment, surrounded by guarantees against any threats.

This perception is literally stated in the study of jurisprudence from the country's judicial courts, as reiterated by Mourão and Ferreira (2014, p.165):

> In these spheres it is understood that courts of accounts are composed of magistrates specialized in accounting, finance, budget, operational and proprietary issues of direct and indirect Administration from the states and entities, being the Ministers, counselors and auditors (substitute ministers and substitutes counselors) of the courts of accounts, hereinafter referred to as accounts magistrates.

In addition, given the normative force of the constitutional text, the infra-constitutional legislator is subordinate to this parity in his work, which reflects in the practical life of the Brazilian courts of accounts, in line with Barroso's neo-constitutionalist lessons (2005: 851):

> Because of this process, the constitutionalizing of the Law affects the irradiation of values that are enshrined in the principles and rules of the Constitution throughout the legal system, notably through constitutional jurisdiction at its different levels. This results in the direct applicability of the Constitution to various situations, the unconstitutionality of norms incompatible with the Constitutional Charter and, above all, the interpretation of the infra-constitutional norms according to the Constitution, which confers them their meaning and scope.

4.1 EXAMINATION OF PARITY REGARDING CONSTITUTIONAL GUARANTEES OF THE MAGISTRACY

The Federal Constitution clearly lists the guarantees and prohibitions of the judges from the Judiciary branch, among which are included the ministers of the higher courts, such as those of the Superior Court of Justice, since such courts are bodies of the aforementioned Political Power.

The constitutional aim when establishing these guarantees was to uphold their independence, as elucidated by Branco and Mendes (2009, p.975):

> The guarantees of the Judiciary, in general, and of the Magistracy, in particular, have the intention of granting and confirming the independence that the constitution intends to concede to judicial activity.

Along the same lines of reasoning, Lenza states (2015, p. 844):

> The guarantees assigned to the Judiciary take on a very important role in the scenario of the three-fold division of Powers, ensuring this body's independence, which can make decisions freely, without being overwhelmed by any kind of pressure that comes from the other Powers.

The *numerus apertus* list of the guarantees is found in art. 95, caput, namely:

> Art. 95. Judges are granted the following guarantees:
>
> I- life tenure, which, at the first instance shall only be acquired after two years in office, loss of office being dependent, during this period, on deliberation of the court to which the judge is subject, and, in other cases, on a final and unappealable judicial decision;
>
> II – irremovability, save for reason of public interest, under the terms of article 93, VIII;
>
> III – irreducibility of compensation, except for the provisions from articles 37, X and XI, 39, §4, 150, II, 153, III, and 153, §2, I.

The life tenure that is acquired after two years in office is limited to first level jurisdiction, that is, to the initial years in a judges' career when in the condition of substitute, as based on art. 93, item I, of the Federal Constitution. Consequently and in view of the fact that the members of the courts of accounts are invested in public offices equivalent to those of Justices at the Superior Court of Justice or judges of the Courts of Justice, bodies which as a rule, are not covered under the first instance, they are expropriated if the period for obtaining the guarantee is expired. Life tenure should therefore be immediately attributed to the positions of the members of the courts of accounts.

Likewise, it is not legitimate to require that auditors have two years in office in order to obtain life tenure, as in the District Courts (art. 75 of Complementary District Law 1/1994) and in the state of São Paulo (art. 2, § 1, of the State Complementary Law 979/2005), or three years in office, as according to the state courts of Amapá (art. 285 of Normative Resolution 115/2013-TCE / AP), of Santa Catarina (art. 99 of Complementary State Law 202/2000) and the municipalities of Pará (art. 20 of the Complementary State Law 84/2012). As mentioned above, they are in a position equivalent to that of final entrance magistrates, who, by logical consequence have already passed the phase of substitute judge. Therefore, norms contrary to this are out of line with Constitutional text.

The irremovability of judges does not adequately conform to courts of accounts, not because of the lack of potential of a real need to access the aforementioned guarantee (since institutional performance fully covers the respective federal entity), but, due to the fact that all 34 Brazilian courts of accounts, the collegiate, both those in Plenary as well as Chambers or Sections, work at the headquarters of the court, being the same place where the offices of members and auditors are located.

The irreducibility of wages, in turn, has a visible application, given that the establishment and scheduling of the limit to benefits of STF justices are precisely provided for in art. 93, item V, of

the 1988 Constitution. Indeed, what in fact takes place is the practically automatic, increase of the wages of members and auditors of courts of accounts according to occasional adjustments conferred in sequence to the raises in Supreme Federal Court benefits.

Thus, the Federal Court of Accounts Ministers receive a wage corresponding to 95% of that of the Supreme Federal Court, due to the provisions in the aforementioned constitutional article. While the counselors of other courts of accounts earn wages limited to 90.25% of the subsidies of the ministers of the Supreme Court, as provisioned in art. 37, item XI, of the Constitution.

The auditors, on the other hand, receive wages equal to those of the highest level magistrates in the same state sphere, normally stipulated in the local Code of Judicial Organization, except when they are replacing the ministers (in the Federal Court of Accounts) or the counselors (in the other courts of accounts) according to art. 73, § 4, combined with art. 75, caput, they take over the guarantees of the holders of the positions

Constitutional art. 93, item XV, declares another guarantee for judges, the immediate distribution of cases at all levels of jurisdiction. This said and considering the judicious nature of the ministers, counselors and auditors of courts of accounts, it is urgent to include the guarantee in the work methodology of the courts.

In practice, members of the courts of accounts regularly instruct and preside over the proceedings before them, as is the case in the courts of the Judiciary. The same applies to auditors substituting members of courts.

However, the controversy arises when taking into account the proceedings sent to auditors who are not substituting Federal Court of Accounts Ministers nor counselors of other courts of accounts. Incidentally, it is common knowledge that auditors perform duties of the judiciary, whether when exceptionally substituting Federal Court of Accounts Ministers or counselors in other courts of accounts, or during their routine work, when not substituting, since, as stipulated in art. 73, § 4, *in casu*, they shall carry out "the other duties of the judiciary".

Well, during substitution they take on the main role in cases under the responsibility of the holder of the position, including right to vote, in judgements of the plenary session or their respective special body, depending on the structural organization of the audit court. Judgment in which the auditor will participate effectively, and in which his vote must be computed when, in the same way, he is effectively replacing the member, for reasons of leave, vacations, absences or other legal departures.

However, there is a lack of standard regarding the rules regarding auditors conducting proceedings when they are not replacing members of the courts of accounts or as described in the 1988 Constitution.

While maintaining the Judiciary paradigm unscathed, the cases of the courts of accounts are regularly distributed to the auditors, so they may preside over their investigation - and even determine pertinent proceedings - to then, forward proposals to the collegiate for voting and deliberation.

Unfortunately, contrary voices foster the perpetuation of anachronistic laws, which ultimately

reduce the auditor's duties to a mere issuer of legal opinions in the cases referred to them, as transcribed in art. 17 of the Organic Law of the Court of Accounts of the State of Acre - TCE-AC and in art. 14 of the Organic Law of the Court of Accounts of the State of Mato Grosso do Sul.

Combating a flagrant offense against the constitutional text, some judicial sentences stand out in support of the present thesis. One example of this is the driving vote in the Writ of Mandamus 5918-31.2009.8.06.0000 / 1st sentence, filed in the Court of Justice of Ceará, in detriment of the Court of Accounts of the municipalities of Ceará, which resulted in the recognition of the "total functional independence" of the auditors, including regarding the regular distribution of cases.

Accordingly, the preliminary injunction granted in the scope of Writ of Mandamus 2012.00107425, managed in the aspiration, then reached, of determining the immediate distribution of audit proceedings to the auditors of the Sergipe Court of Accounts, allotted in fairness and according to impersonal criteria to all magistrates of the Court of Accounts, so they may preside over the proceedings, reporting them to the members of the Plenary or of the Chamber for which they are appointed.

4.2 EXAMINATION OF PARITY REGARDING CONSTITUTIONAL PROHIBITIONS OF THE MAGISTRACY

The prohibition to the judges are contained in the sole paragraph of art. 95:

> Sole paragraph. Judges are forbidden from:
>
> I – hold, even when on paid availability, another office or position, except for a teaching position;
>
> II – receive, on any account or for any reason, court costs or participation in a lawsuit;
>
> III – engage in political or party activities;
>
> IV – receive, on any account or for any reason, financial aid or contribution from individuals, and from public or private institutions, save for the exceptions set forth in law;
>
> V – practice law in the court or tribunal on which they served as judges, for a period of three years following their retirement or discharge.

The prohibitions of the foregoing items I and III are reproduced in the internal norms of the courts of accounts, as opposed to the infrequency of those found in items II, IV and V.

Although having a Law degree is not a requirement to take office as a member of the courts of accounts - and not forgetting it is essential to have notorious legal knowledge, as claimed by art. 73, paragraph 1, item III, of the Federal Constitution, the prohibitive aspect of item V must be preserved, due to the proposed constitutional parity. Provision that is respected by the courts of

the states of Goiás (art. 22, item X, from State Law 16,168 / 2007), of Minas Gerais (art. 9, item VII, from the State Complementary Law 102/2008) of Paraná (art. 138, subsection VI, from the Complementary State Law 113/2005) and Sergipe (art. 22, item X, from State Complementary Law 205/2011).

4.3 EXAMINATION ON PARITY REGARDING INFRA-CONSTITUTIONAL BENEFITS OF THE MAGISTRATACY

The national nature of the Judiciary is inherent and the Supreme Federal Court is the "highest body of the Judiciary Power", as already stated by this same court ADI 3.367, judged on April 13, 2005. That is why there is a tendency to standardize the benefits granted to magistrates, regardless of the federal sphere to which they belong institutionally.

For these reasons, the constitution states in the heading of art. 93, the exclusive right of the Supreme Federal Court to initiate the legislative process that created the complementary law establishing the Statute of the Magistracy. In addition, it authorized the states of the Federation to organize their own Judiciary, without, however, failing to observe the principles established in the Federal Constitution and, as a logical consequence, in the Statute of the Magistracy. This authorization converged to the promulgation of existing Judicial Organization Codes in the Brazilian states.

Based on the proposed correspondence between the Judiciary and the courts of accounts, a broadened correlation can be traced between the benefits, including the financial ones that are stipulated by the laws or codes of judicial organization for its magistrates and those conferred on the members and auditors of courts of accounts from the same state. *Verbi gratia*, representation funds or bonuses granted by virtue of the exercise of the functions of president, vice president and magistrate.

A similar subject of parity is the annual leave of the judges, which, as per art. 66 of the Organic Law of National Magistracy (*Lei Orgânica da Magistratura Nacional* -LOMAN) - materialized in Complementary Law 35, from March 14, 1979 -, are a total of 60 days. As a consequence, the members and auditors of the courts of accounts have the same right, which has however, not been reflected in legislation, save in the Organic Law of the Court of Accounts of the State of Acre (State Complementary Law 38/1993), which provides, in its art. 16, § 2, 30 days of annual leave for the auditors, as opposed to the 60 days stipulated, in art. 13, for the respective counselors.

5. FINAL CONSIDERATIONS

Ex positis, the coexistence of the Judiciary Branch magistracy and of the courts of accounts was made evident, and is intrinsic to the members and substitute auditors of TCU ministers and councilors from the other courts. Nevertheless, certain constitutional mandates, even more than 25 years after the enactment of the Federal Constitution, are still not being peacefully embraced by these courts, such as the guarantees of life tenure and immediate distribution of processes.

In reality, this disrespect only occurs in relation to the auditors and not to the members. Both, as herein established, are equivalent to judges and therefore should be treated equally in all the circumstances involved and related to the guarantees of the judiciary. The lack of immediate distribution of proceedings reflects an undue obstacle to ensuring that auditors preside over

cases, reducing their role to the role of issuers of legal opinions, a fact that can be observed in legislation pertaining to some state courts of accounts. Furthermore, we also identified that not all the restrictions included in the Constitution for judges are reproduced in the internal norms of Brazilian courts of accounts.

Once the flagrant inconsistencies that thwart the true equivalence of the Judiciary's magistracy and the courts of accounts are remedied, undoubtedly the normative force and effectiveness of the Federal Constitution, derived from constitutional supremacy, will in fact be fulfilled and therefore reinvigorated in the Federative Republic of Brazil.

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The dishonest "option" offered by paragraph 5 of article 133 of Law 8112/1990 to those who illicitly hold more than one public position or job concurrently

Josir Alves de Oliveira
Federal Auditor of External Control at the Federal Court of Accounts, bachelor in Geography and Social Sciences by University of Brasília (UnB), and especialized in Estate Law by Atame Post-Graduate in partnertship with Cândido Mendes University (Ucam). Worked previously as an Analist at the Central Bank of Brazil (Bacen) and Auditor at General Controller of the Union (CGU).

ABSTRACT

The Brazilian Constitution, in general, forbids holding more than one public position, job or function concurrently. The purpose is to preserve principles and behaviors that govern a democratic and republican State: i impersonality, isonomy, deconcentration of power, separation of functions, morality and efficiency. The same Constitution makes an exception for the accumulation of two jobs in the fields of health, teaching, , magistracy, prosecution or in the technical-scientific area, under the terms of article 37, subsections XVI and XVII, article 95, sole paragraph, subsection I, and article 128, paragraph 5, subsection II, item d. This exception is made due to the shortage of human resources in the areas susceptible to accumulation and the correlation and synergy between them. The accumulation of jobs was also conditioned by the Constitution to the compatibility of the working hours. Accumulation of public jobs outside these parameters defies the wording and purposes of such constitutional provisions and must be treated accordingly. A legal provision that characterizes good faith of the employee who chooses one of the positions to hold only after being summoned by the Administration, and which does not consider the previous acts of the employee, goes against the constitutional principles of reasonableness and proportionality. In practice, it can also conflict with the principles of morality, efficiency and other related principles. In addition, such legal provision ends up encouraging the recurrence of the constitutional prohibition infringement, insofar as it makes its administrative and even judicial punishment more difficult. It is imperative to correct such provision and make it sustainable and useful to control instead of an encouragement to the illegal accumulation of public positions, jobs or functions.

Keywords: Unconstitutionality. Dishonesty. Option. Accumulation of positions. Public employee.

1. INTRODUCTION

CORRUPTION, DISHONESTY, IMPUNITY AND CONNIVING LEGISLATION

Corruption and administrative dishonesty are historical problems in societies. Both terms are similar and it is often difficult to tell them apart. The most distinctive element or characteristic is the fact that administrative dishonesty mainly refers to an unlawful act of a public employee or agent, which may eventually affect private individuals, whereas corruption does not necessarily need to be associated to the public sector.

In the Brazilian positive law, administrative dishonesty can be described briefly, according to Law 8429/1992, as the act committed by a public agent that implies private unlawful enrichment or damage to public coffers or violation of the Public Administration principles.

Thus, in this work, the reference to corruption will always encompass administrative dishonesty as a sub-genre of corruption, with the "right of option" established in paragraph 5 of article 133 of Law 8112/1990 being the object now studied.

It was said that corruption historically reaches the entire world and is universal. However, for obvious reasons, it is more common and prevalent in countries suffering from deficiencies of social and political development, as is the case of Brazil. Therefore, concentration of power, depoliticization and marginalization of large portions of society, and, in such condition, reliance of these portions of society on favors from public authorities, the gaps and vices in the state structure of control and monitoring (gaps in terms of competence, lack of cooperation and integration of the actions, etc.,) and the impunity resulting from these factors will tend to be, at the same time, causes and consequences of corruption.

In addition, in the Brazilian case, there are historical and cultural influences that lead to the famous "Brazilian way of doing things", to the so-called "Gerson's Law"[1], to the usual practice of breaking the law or complying with it only occasionally or apparently, and to the saying "and the devil take the hindmost". Such behaviors and expressions of clear selfish morality (practiced in a secret and veiled but also exalted manner) pervade all environments and social strata, and, admittedly, characterize, in part, the behavior of the Brazilian. If such characteristics do not determine impunity, it seems certain that it expands it, making it more acceptable, as it proportionally weakens moral values and spreads this weakness within society.

Well, nothing more conducive to impunity than the relaxation of moral principles, turning into something common and natural values and practices that lead to corruption and dishonesty, through the prevalence of personal and group privileges and the predominance of private interest over the public one. In the words attributed to the famous Brazilian comedian José Eugênio Soares, "corruption is not a Brazilian phenomenon, but impunity does belong to us".

Thus, once the political, social, economic and cultural conditioning factors of Brazil are combined, the country would be almost doomed to corruption, being fed by impunity, making the fight against

1 https://en.wikipedia.org/wiki/G%C3%A9rson%27s_law

it useless. Against such falsehood, there is Stukart's warning (2003, p. 113): "For those who think that corruption is natural, acculturated and indispensable, I must note that more than a hundred years ago that same thought was repeated towards slavery. "

If on one hand, the country is not doomed to corruption, on the other it is not an unquestionable example of the fight against it. The Brazilian State and society have been tolerant of the unlawful practices in question and slow or reticent in combating them. This is especially true when we take into account the recurrent expiration of the statute of limitations of crimes committed by important politicians, the persistent privileges in public careers, the number of moralizing legislative measures being shelved, the constant re-election of prosecuted politicians, the exclusive and corporate treatment of the theme. In this study, such reality is exemplified with a sample of the Brazilian legal system, flawed and incomplete. The focus is on the impertinence of the administrative criminal provision concerning the illegal accumulation of public positions or jobs.

In the legislation of a State that hesitates in fighting corruption, one can observe, from a didactic perspective, three levels of treatment of each subject regarding the fight against corruption. We list them from least bad to worst: (1) the law analyzes the subject, but it does not approach it adequately in order to well equip public administrators and even the legal practitioners; (2) there is total legislative omission on the subject or critical area; (3) there is a legislative provision that is contrary to morality and ethics, which benefits corruption and disrupts the fight against it.

In general, the international anti-corruption agreements can fit, as a whole, predominantly at the level 1 referred to above, as generic provisions, ratified and incorporated by Brazil (Legislative Decree 348/2005 and Decree 5687/2006), but, to a large extent, not specified nationally, not embodied in internal regulations that have practical and actual application. With respect to the political-electoral publicity nature of adhering to these treaties, Ballouk Filho and Kuntz say (2008, p. 31):

> And those conventions do not impose strict punishments, such as commercial blockades, international judgment forums or international isolation of nations that violate the agreements. Although theoretically and technically they represent a breakthrough in the long term (decades) [...], their only practical effect, in the short term, is to become raw material for promoting the image of governments [...] as irrefutable evidence of their concern with ethics, initiatives and endeavor to combat corruption. The impressive amount of nations that become part of these treaties and forums, and their poor practical and/or concrete results in reducing global corruption, could result from, and to a great extent, the risk of political deterioration from not joining in. This fact would mean for any governing group to assume the image of corrupt or conniving and to provide their internal oppositions with a blatant evidence of omission and refusal to support such noble and commendable global anti-corruption initiatives.

In particular, by further analyzing the United Nations Convention against Corruption, which Decree 5687/2006 incorporated as a national regulation (or, at least, federal), one can infer that many of the recommended principles and guidelines are not sufficiently materialized, being examples of levels 1 and 2 mentioned above. That is, many of its provisions have only a guide and do not have a self-enforcing nature, and have not yet led to a national regulation.

As an example, Brazil lacks legislation to comply with the provisions of article 7 regarding editing rules: (a) based on the principles of transparency and efficiency and on the objective criteria of merits, fairness and fitness for positions of trust (the recent Decree 9727/2019 took the first steps in this direction); (b) appropriate for the selection and training of public positions holders that are most vulnerable to corruption; and c) focused on funding transparency of electoral campaigns and political parties.

This study deals with a serious example of flawed legislation, located at the worst level of legislative treatment according to the scale above (level 3), contrary to the fight against impunity and the administrative dishonesty. This is the case of the legal provision contained in the Statute of Federal Civil Public Employees regarding the "option" that is given to the employee to choose one (or two, in certain cases of multiple accumulations) of the unlawfully accumulated positions.

2 CONSTITUTIONAL PROHIBITION OF ACCUMULATION OF PUBLIC POSITIONS

As a general rule, the Fundamental and Supreme Law of the country (BRAZIL, 1988), henceforth called Federal Constitution (CF), prohibits the accumulation of public positions, jobs and functions. The Constitution only allows this in the restricted cases of: (a) a position of teacher with another of teacher or of a technical-scientific nature or of magistracy; (b) a position that is exclusive for health professionals with another equivalent position. These exceptions reflect the wording of article 37, subsections XVI and XVII, article 95, sole paragraph, subsection I, and article 128, paragraph 5, subsection II, item d. In addition, the Constitution also allows the concurrent hold of the position of city council member with another public position, job or function (article 38, subsection III).

With respect to retirement pensions, as a general permanent rule, the Constitution allows its accumulation with the remuneration of a public office only when it comes to offices that may be accumulated, elective offices and commission offices. This is what is established in article 37, paragraph 10. The retirement pensions can be received only with positions subject to accumulation, which is a logical consequence of the constitutional provisions related to accumulation while on duty.

Surely, the constitutional prohibition has the noble purpose of preserving principles and attitudes that govern a democratic and republican Nation: impersonality, isonomy, deconcentration of power, efficiency, separation of functions, etc. Such prohibition intends, thus, to avoid the so-called *cabides de emprego*[2], the concentration of offices and powers, and the poor fulfilment of duties and the principles previously mentioned, within the scope of the public sector.

Meireles (2000, p. 404), quoting Aguiar (1970, p. 57), warned, "in general, the accumulation of positions is harmful, especially because accumulated jobs are jobs that are poorly performed". Indeed, as a rule, the performance and the availability of the person are different when they hold multiple positions.

On the other hand, the strict exceptions are based on the need to use skilled and experienced labor in the deficient and strategic areas of Health and Education, in comparison with the expertise and experience in the technical-scientific area, teaching and magistracy. The correlation between the areas of the accumulative positions and the consequent synergy present in their performance, in

2 A public office that hires more people than necessary for the administration, based on political or personal reasons. [Translator's note]

favor of the full and efficient staffing in the corresponding areas, would help national development and would justify such exception. In the case of aldermanship, the justification appears to be limited to the transience of the mandate and flexibility of the working hours.

The illegal accumulation of public positions was not specified by Law 8429/1990 as a misconduct, nevertheless its practice is pervaded, as a rule, by a violation of principles contained therein, which are subsumed under the relevant provisions of said law, according to the specificities of the unlawfulness. Perhaps the legislator did not specify it due to the possibility of the unlawful accumulation being non-intentional or in good faith.

Cammarosano (2006, p. 114) defines misconduct as the intentional violation of the legal system and juridical moral principles (loyalty, good faith, truthfulness, etc.).

The unlawful accumulation is, as a rule, an act of intentional violation. Since no one can justify non-compliance with a law on the grounds that they were not aware of it, this applies even more to a public employee, considering it is their primary duty to know and comply with the law, especially when it comes to a specific rule about their status as employee, notably because it is a constitutional rule.

In addition to the noncompliance with a constitutional principle with moral content, the unlawful accumulation is followed often by other pretenses and intentional unlawful acts: false statement, which omits positions or changes information on working hours, delay of the duty to inform the accumulation, noncompliance with the working hours, etc. Ultimately, the unlawful accumulation often contains multiple acts of dishonesty.

The fact is that those who accumulate positions other than the ones that are constitutional exceptions (a teaching position with another teaching or technical-scientific position or member of the Judiciary or of the Public Prosecution; two positions of health professional) are committing an act that is at the same time unconstitutional (for violating article 37, subsection XVI; article 95, sole paragraph, subsection I; and article 128, paragraph 5, subsection II, item d, of the Federal Constitution), unlawful (for violating the corresponding legislation, being, in the federal sphere, articles 118 to 120 of Law 8112/1990) and immoral (for disrespecting the law and the moral foundations of the constitutional prohibition, that is, to avoid *cabides de emprego*[2] and ensure fairness, impersonality, deconcentration, efficiency, full compliance with the working hours and with the duties).

As an example, there is the case of an employee who omits, in his/her declaration of accumulation of positions, the accumulation of another public position. Wouldn't such employee be dishonest and be acting with self-interest and contrary to the Public Administration, disrupting statistics, diagnoses, human resources planning and other administrative actions, and be committing a crime of false representation?

Another example. Wouldn't the employee who accumulates positions with incompatible working hours be dishonest and be acting with self-interest and against the public coffers? Wouldn't they be obtaining an unlawful advantage, an unlawful remuneration, for a work poorly fulfilled or not fulfilled at all?

One final example. Wouldn't the bosses of the employee that illegally accumulates public jobs, while covering up such unlawful situation, or even directly participating in it (with false statements,

permission for infringing the working hours, etc.), also be dishonest with society and with the State?

The affirmative answer to all these questions is obvious. In the first and last examples, the unlawfulness can be categorized as an act of administrative dishonesty that "violates the principles of Public Administration"; in the second, as a misconduct that "results in unlawful enrichment". All of them are perfectly grounded in the conceptual terms contained in the enunciation of articles 9 and 11 of Law 8429/1992.

Well, there is a legal provision that contradicts all this imperative logic of Law, which provides several opportunities for the employee that illegally accumulates to declare the accumulation in good faith, with this legal provision not making any reservation with respect to its application, being applicable to all and every situation. This is the case of article 133, paragraph 5, of Law 8112/1990. It establishes the good faith of the employee who chooses one of the positions until the deadline established by the Administration for their defense, under the terms referred therein.

It is important to attack this legal provision, characterizing its impropriety and inconsistency, aiming at its revocation or alteration, so that it can be suited to the constitutional principles of morality, proportionality and reasonableness, to the principles of the Administrative Dishonesty Law and to the fight against impunity in the country.

In effect, the option provided in paragraph 5 of article 133 of Law 8112/1990, while in force, brings a range of evidence and perverse theoretical and practical effects to society and the State. Among them, it is worth mentioning: the increase of the sense of impunity; the incentive to the unlawful accumulation and its economic advantages to the offender while the accumulation persists; the discouragement to the investigation of the facts and the search for the material truth.

At the same time, this study seeks to contribute to the fight against administrative dishonesty in several traditional fronts of struggle: by improving legislation, giving it public purpose and making it compulsory, by discouraging the practice of the unlawful accumulation of positions and by fighting impunity. The criticism of the current law and the suggestions for it to change all go in this contributory direction.

3 UNCONSTITUTIONAL ASPECTS OF THE "OPTION"

The text below is an almost full transcript of Freitas' article (2001) Acumulação ilícita de cargos públicos e o direito de opção (Unlawful Accumulation of Public positions and the Right of Option), available at http://jus.com.br/revista/texto/2182. The text deals with doctrinal argumentation about unconstitutionality (permissiveness to unlawfulness, noncompliance with the principle of reasonableness, etc.) in the law in question, in the same line of the present work. The underlined text is the part of the study that deserves an observation: the absolute and universal state of impunity that is presented is, in fact and in practice, a very prevailing situation, which results from the indulgent tendency in the administrative sphere, which, once closer to the tainted facts and the people being investigated, look for the easiest and tolerant path of the legal literal interpretation of the "option".

> The disciplinary administrative procedure to investigate the unlawful accumulation of positions began, after the publication of Law 9527 in 1997,

to be conducted under a new rite, called summary procedure. It takes place in stages identical to those of the common rite, but has shortened deadlines for the development, conclusion and judgment, which may not exceed 30 days, with the exceptional possibility of a 15-day extension, if overriding circumstances so require.

The main novelty brought by Law 9527/1997, however, does not concern the rite of the procedure, but rather the unusual and reprehensible opportunity given to the employee, before the start of the procedure, of choosing one of the positions being accumulated and of characterizing, with this act, their good faith, thereby preventing the continuation of the disciplinary action. [...] the disciplinary procedure can only be started after the employee has been offered the opportunity of choosing one of the positions, a situation which characterizes, with this act alone, their good faith, and, as a result, the procedure will not even be initiated.

[...] The new legal rule goes even further to the point of allowing that, even after the procedure has been initiated, the employee has a new opportunity of choosing one of the positions [...].

With this new legal rule, no commission will ever be able to prove the bad faith of the employee who is illegally accumulating positions, taking into account that the choice for one of the positions within the deadline established by law will characterize the employee's good faith and will lead to the discontinuation of the procedure or, if this has already occurred, its immediate archiving. […] In other words, no employee will ever be punished for having accumulated public positions, jobs or functions, thus turning into dormant law the constitutional prohibition of accumulating public positions. There will be cases, therefore, in which the employee will accumulate public positions for one, two, five or ten years with the clearest bad faith, until the irregular situation is detected by the control authorities and the employee is then invited to choose one of the positions, thus solving the unlawful situation, without them being fired or forced to return the sums of money unlawfully received for years (underlined by us).

It is easy to realize that the provisions of Law 8112/1990 that establish this option are unconstitutional, therefore deserving immediate revocation or the decreeing of their invalidity through the appropriate judicial means. The option in question, in addition to infringing the Federal Constitution, is a true encouragement to the unlawful accumulation of positions, because only after the irregular situation has been verified that the employee will be invited to choose among the positions. Besides, they will also receive, as a reward, the forgetting of the past, being exempt of the obligation to return the sums of the money that was unlawfully received. […] A simple right to choose, obviously, does not have the power to solve the irregular past. Unconstitutional acts cannot be legitimized by means of an ordinary law, except if one intends to destabilize the constitutional legal system.

> The argument used is that this right of option aims to avoid unjust enrichment of the Public Administration that has benefited from the employee's labor for a certain time, and therefore it cannot demand the return of the amounts paid because such sum represents only the payment for the work that was actually performed. [...] Relinquishing the amounts wrongly received should only occur in cases where the true good faith of the employee was verified, as in the cases where there was reasonable doubt as to the legal nature of both positions and their possible lawful accumulation. To admit, however, by a legal presumption, that good faith may be obtained by means of a simple act of choosing is to attack reasonableness, besides serving as a true legal incentive to committing acts that are prohibited by the Federal Constitution. Well, if the employee is forced to declare at the moment they take office that they do not accumulate public positions, how is it possible to later ignore this statement? If they made a false statement, they committed a crime. It is not, therefore, reasonable from a legal perspective that, once the accumulation has been verified, the declarations made when taking office do not serve for absolutely anything. We might as well remove such requirement.
>
> Therefore, it seems to me that the rules previously in force were more in line with the Federal Constitution, because, once the legitimate and true good faith had been verified - not this one admitted by presumption -, the employee was given the opportunity to choose one of the positions, in which case they were exempted from having to return the sums of money, which, although unlawful, had been received without malice or bad faith. However, if their bad faith had been verified, the employee was subject to dismissal from both positions, in addition to having to return the amounts they had unlawfully received during the period of accumulation. The right of option that is now in force by law compromises the good intentions that led the constituent to prohibit the accumulation of public positions, that is, to prevent that few citizens monopolize the occupation of such positions in order to obtain double gain, without the necessary dedication to each job, bringing a negative impact to public service provision. The law that instituted such option is, therefore, blatantly unconstitutional, deserving, for that reason, to be immediately invalidated or corrected by the appropriate judicial means. Good faith cannot be acquired by making an option.

In addition to the legal and logical reasons presented by Dantas, it should be highlighted the potentially harmful effects to the public coffers and to society derived from any unlawful accumulation, as well as the exponential impact of the disputed legal provision on those adverse effects. The unlawful accumulation results in the following potential adversities of legal, ethical, social, and economic natures: affront to the Constitution and legislation of the country, dissemination of such recurrence as something normal/acceptable in society and in public entities, withdrawal of a job position from the market, reducing the efficiency of the service provided (as a result of unfulfilled working hours or work overload), and damage to the public coffers (by remunerating a poorly provided or simply not-provided service by an employee with multiple jobs and by allocating funds to verification/control).

From the “right of option” provided in article 133, paragraph 5, of Law 8112/1990, derives the maximization of the mentioned adverse effects, in a vicious spiral, in the legal, ethical, social and economic sphere: such provision disrespects the Constitution by allowing that such affront is not subjected to accountability and punishment (suspension, dismissal, reimbursement, fine, etc.); it encourages the unlawful accumulation, by leaving the misconduct without its corresponding penalty, being a bad example of the State for society; it favors the prolongation, dissemination and recurrence of the unlawful accumulations, further affecting the public sector and its job market; and it maximizes the losses to the public coffers, by resulting in expenses with poorly provided service and with investigations without criminal and financial results (reimbursements).

With respect to the violation of the Constitution, the tolerance towards the practice of the unlawful accumulation, established by paragraph 5 of article 133 of Law 8112/1990, directly violates several constitutional principles. The principle of morality is compromised by the tolerant nature of the “right of option” towards immoral practices, such as false declaration of non-accumulation, concealment of holding accumulated positions, postponement of the unlawful accumulation until the last moment, etc. The principle of efficiency is undermined, because the permissive “right of option” causes the Public Administration to lose power and means of controlling and stopping the multiplicity and recurrence of accumulations that are unlawful and with poorly performed work and duties. The principle of reasonableness is despised in view of the irrationality of the “right of option”, which magically withdraws from the world of law the real world, forgiving or providing the offender with immunity. The principle of proportionality is ignored once the “right of option” levels all unlawful accumulations, disregarding specifics and aggravating factors, such as multiple jobs, provision of false statements, recurrence of accumulation, etc. Finally, the principle of accountability for unlawful acts is rejected by the “right of option”, when it withdraws from the legal system penalties that would be applicable to those who benefit from unconstitutional acts.

Regarding this last aspect (disrespect to the principle of accountability for unlawful acts, provided in paragraph 5 of article 37 of the Constitution), the legal provision in question proves to be incomplete from a legal perspective, because it establishes the rule (prohibition of accumulating positions save for those cases allowed by the constitution) and the manner of stopping it, without establishing the corresponding sanction (penalty for anyone who violates the rule). One cannot confuse dismissal from a position not subject to accumulation, which is the ultimate necessary way of enforcing the Constitution, with the penalty to be imposed on the offender, which is the part of the rule that intends to coerce people into compliance, bringing security and justice to the community and effectiveness for the rule. Thus, the law lacks the coercive element that must be present in any rule that deals with unlawful acts. Therefore, the legal provision have vices regarding its form and substance.

4 EXAMPLES OF ADVERSE PRACTICAL EFFECTS: IMPUNITY AND LEGAL CONFUSION

The “option” given to the employee who illegally accumulates public positions of choosing one position and resigning from the other, which characterizes their good faith, prevents or hinders the accountability of the employee for the unlawful acts committed during the unlawful accumulation, particularly in the administrative sphere, more than in the judicial sphere.

It is no surprise that the obstacle is more recurrent in the administrative area (Executive Power and in the administration sector of the other Powers) due to its proximity to the employee and

considering that it delimits the provisions in their statute. In addition, it is the first level to deal with the problem of accumulation, which results in a greater number of cases to be analyzed, etc. In this context, the tendency is for the Public Prosecution and the Judiciary to examine more thoroughly and with more acuity (and even impartiality, for being furthest from the facts) the small portion of cases they come across, examining the matter, including from the perspective of other codes.

Legislative indulgence has led to administrative inaction. While the Statute of the Federal Public Employees provides easy forgiveness to those who unconstitutionally accumulate, the central authority and the decentralized bodies of human resources, in synchrony with that indulgence, fail to adequately investigate and fight the wrongdoing. This is the conclusion one reaches from the lack of studies and more systematic and national surveys on the issue, from the lack of a more decisive action to broadly prevent and punish the unlawful accumulations throughout the country. An exception is made, however, regarding the more consistent control action that occurs in the federal level, carried out specifically by the Brazilian Federal Court of Accounts (TCU) and by the internal control system of the Executive Power.

One of the few pertinent national surveys to date pointed out 164,000 indications of irregularities, accounting for 5.3% of the analyzed records, and it estimated that solving the irregularities would generate savings of BRL 1.7 billion. Such survey encompassed only 13 federal states and left out states that are more representative of the amount of public employees, such as São Paulo and Minas Gerais (see http://oglobo.globo.com/pais/mat/2010/03/17/servidores-sao-suspeitos-de-acumular-cargospublicos-916096872.asp). The limited, sporadic, specific and isolated nature of these surveys is one of the indicators of the lack of effective action on the part of the public authorities in this area.

Although partial, the survey released by the press shows alarming data of irregularities that would be categorically and easily characterized as very serious: 53,793 employees accumulating more than two public positions and 47,360 university professors hired under an exclusive dedication working regime accumulating more than one function. Two extreme situations of unconstitutionality and unlawfulness often aggravated by accumulation with positions in the private sector, resulting in partial or total damage to the presence and production in public offices.

At the federal level, the unlawful accumulation of positions has resulted in some punishments over the years in the Executive Branch, according to the "Follow-up report on the dismissals imposed on public employees within the Public Administration", produced by the Brazilian Ministry of Transparency and Comptroller- General of the Union in 2016. However, they are calculated together with the occurrences of abandonment of office and insufficient assiduity, with these three causes for expulsion accounting for only 23% of the total number of such dismissals. One should question the lack of proper categorization (specific calculation of expulsions caused by unlawful accumulations), the percentage of 4 to 16% of reinstatements[3] in the period, the effect of the judicial action on the dismissals and reinstatements, as well as the lack of relevant public reports within other Powers and spheres.

3 Reinstatement is a form of re-hiring that occurs when the employee returns to their public position after the acknowledgment of the unlawfulness of the act that had previously caused their dismissal. [Translator's Note]

In these examples, as in many others, considering only the duties and prohibitions listed in articles 116 and 117 of Law 8112/1990, one could find the following legal violations, probably committed by the employees that illegally accumulate positions, to be investigated and punished, according to the degree of incidence: infringement of the legal and regulatory rules (related to the presence, working hours, duties, etc.); insufficient assiduity and lack of punctuality to the duty; absence during working hours; negligent work; performance of activities incompatible with the office duties and working hours; refusal to update one's registration data, when requested.

Thus, paragraph 5 of article 133 of Law 8112/1990, by establishing the good faith and the reparation of the irregularity when there is the mere option for one of the positions, ends up annihilating many of its own provisions related to the employee's good conduct, in particular those regarding the duties, prohibitions and penalties (Articles 116 to 132).

The "option" in question works as an obstacle to the correct and proportional accountability of those who illegally accumulate positions. Moreover, by making it possible that the State does not properly punish those who commit the wrongdoing, it acts as a serious obstacle to the prevention of unlawful accumulations. By providing a barrier to the due accountability of the violating employee, it ends up not preventing the violation. What is worse, it ends up encouraging it.

In addition, it generates, in practice, a sort of anticipated limitation of actions against the wrongdoings associated with the unlawful accumulation, a kind of immunity to the conduct of the accumulators. Lack of investigation of wrongdoings and impunity of their agents are the harmful effects of such "right of option".

Another ill effect is that of confusing the legal professionals, taking into account that the provision not only differs from the Constitution, but also from related infra-constitutional rules. That's what occurs, for example, with Law 8429/1992, which defines, in the main section of article 11, "acts of administrative dishonesty that attack the principles of Public Administration" such as the "action or omission that violates the duties of honesty, impartiality, lawfulness and loyalty to the institutions".

It is certain that the Public Prosecution seeks to categorize certain unlawful accumulations as administrative dishonesty. This can be verified by searching official websites of the courts of justice or of federal regional courts. Contrary to this position, there are articles and sentences that highlight the literality of the provision in question.

One of these articles is the study by Mattos (2006), where we may find its entire content compiled in the titles of the summary:

> Irregular accumulation of positions. The timely choosing of one of the public positions removes the characterization of the administrative dishonesty lawsuit. I - The open nature of Law 8429/1992 enables the Public Prosecution to improperly handle the administrative dishonesty lawsuit. II - The general constitutional rule establishes the impossibility of accumulation of positions, except for the cases defined by law. III - The right to choose one of the positions generates good faith of the public agent and therefore cannot be subsumed into the legal type of Law 8429/1992. IV - Impossibility of reimbursement to the public coffers of what was received as remuneration.

The author's argument focuses on the understanding that the characterization of the unlawful act requires the element malice (bad faith) and that the law removes this element from the unlawful accumulation when the public employee chooses one of the positions within the legal deadline, pursuant to paragraph 5 of article 133 of Law 8112/1990. He quotes an excerpt of the vote of a judgment of the Superior Court of Justice (STJ), in the Ordinary Appeal in the Writ of Mandamus 11.197/RJ, to reinforce that the "option" removes the bad faith from the unlawful accumulation, declaring it as an act of good faith:

To continue, if the accumulation is illegal, the employee must choose (which is a right) in order to remedy this unlawfulness. It is not about assuming the employee's bad faith. It is about only considering of good faith the employee who, in becoming aware of the unlawfulness of their employment status, exercised the right to remain in the public service, choosing one of the positions. […] The objective with this measure is, therefore, only to guarantee that the employee is given the right of option, so that they may choose one of the positions. If, nonetheless, they do not wish to do it, (it is then) characterized the bad faith, because then it shall be objectively characterized their intention of accumulating positions.

Contrary to what can be inferred from the provision transcribed above, the STJ did not analyze the legitimacy, morality or constitutionality of the "option", nor the integrity an "opting employee". Nor could it do so in the context of an Ordinary Appeal in which the ruling ratified a decision of the Court of Justice of Rio de Janeiro (TJ/RJ) against the dismissed employee. In fact, there are decisions of the STJ that consider the illegal accumulation an act of administrative dishonesty, depending on the legislation applicable in each case, regardless if it is characterized by a lack of choice from the employee. In the context of a Special Appeal – Resp 1129423/SP - , for example, the STJ upheld a decision of the previous court that understood that the administrative dishonesty had been characterized as a result of the accumulation of three public municipal positions by a political agent. Summary: "Civil and administrative procedural. Public civil lawsuit. Dishonesty. Unlawful accumulation of positions. Former mayor. Application of law 8429/1992. Compatibility with Executive Law 201/1967. Deficiency in justification. Precedent 284/STF".

There is also a ruling that considers that bad faith is characterized when there is a false statement (Appeal in Writ of Mandamus – RMS 24643/MG):

> CONSTITUTIONAL. ADMINISTRATIVE. (…) ABSENCE OF GOOD FAITH IN THE EMPLOYEE'S CONDUCT. (…) 5. The statute of limitations of 5 (five) years of the right of the Administration to invalidate administrative acts which result in favorable effects to the recipients is not considered when bad faith is characterized. Hypothesis in which the appellant made a statement that was not true when she took office in her second job. She stated that she did not have another job funded by the public coffers.

Case law of the Federal Supreme Court (STF) also authorizes to analyze the agent's accountability case by case, depending on the procedural truth, according to what may be inferred from the summary of the Writ of Mandamus MS 26085//DF, which would remove the conclusive immunity nature of the "option":

> WRIT OF MANDAMUS. […] 1. The compatibility of the working schedules is an indispensable requirement to acknowledge the lawfulness of the accumulation of public positions. The accumulation of jobs is illegal when both of them are subjected to the 40-hour-per-week working regime and one of them requires exclusive dedication. […] 3. The acknowledgment of the unlawfulness of the accumulation of salaries does not automatically establish the reimbursement to the public coffers of the values received, except if the employee's bad faith is proved, which was not demonstrated in this case. […].

On the other hand, some wrongdoings committed by those who illegally accumulate are typified as crime, as is the case of false statement of non-accumulation, which is characterized as false representation, as subsumed under a judgment of the STF itself in the Extraordinary Appeal (RE) 86863/ES:

> CRIME OF FALSE REPRESENTATION. THE APPELLEE HAD THE LEGAL DUTY OF DECLARING THE PUBLIC POSITIONS THEY HELD, INCLUDING IN PRIVATE AND PUBLIC JOINT STOCK COMPANIES, BECAUSE IT WAS THEIR OBLIGATION […].

Thus, the mentioned study by Mattos (2006) proves to be incomplete and partial, as it limits itself to the literality of one of the confronted laws (Law 8112/1990), disputing only the scope of the other (Law 8429/1992). In addition, it fails when it specifies that the purpose of the study was to oppose the dishonesty lawsuits filed by the Public Prosecution of São Paulo against employees that exercised the "right of option". Well, the author, while addressing cases in São Paulo, did not quote any legislation of the State nor did he exemplify any concrete situation of a Public Prosecution action in São Paulo that he deems absurd. His article, however, serves here to show, once again, the controversy within the application of the Law (activity of the Public Prosecution and of the judicial system of São Paulo versus the administrative activity) generated by the legal provision being disputed.

Thus, although the courts have not denied application to the legal provision in question and the STF has not declared it unconstitutional, since it was not provoked to do so by a Direct Action of Unconstitutionality [ADI], there is room for confusion by the legal professionals and for diverging decisions by the administrative and judicial bodies. Another bad effect of the current provision of paragraph 5 of article 133 of Law 8112/1990 is the potential to legal controversies.

5 CONCLUSION

PROPOSED ALTERNATIVES

By the concept of dishonesty contained in article 11 of Law 8429/1992, the unlawful and unconstitutional accumulation of public positions are subsumed, in principle, into that sub-genre of dishonesty. Besides, it falls within the classification provided in subsection I of the aforementioned article 11: "To perform an act aiming at a purpose forbidden by law or by a regulation or that differs from that provided in the rule of competence".

In effect, the federal public employee who participates in a public entrance examination, takes office and begins working in a job that does not allow accumulation is clearly being dishonest and

disloyal to the institutions (Constitution, law, public bodies involved). Besides, such conduct often leads to the complicity of employees, with typically immoral behavior (dishonest, partial, illegal and disloyal), according to the same subsection I of article 11 of Law 8429/1992.

Therefore, the legal treatment to be given by Law 8112/1990 must be the opposite of the current one: the unconstitutional accumulation of public jobs proves to be legally abominable, being considered, as a rule, a dishonest act, with presumed bad faith. In order to fight it, it would be necessary to have a history of measures taken by the employee, that pointed to a different direction, towards signs or evidence of good faith, such as: timely and truthful declaration of accumulation of jobs, formal consultation to the public bodies in question with respect to the lawfulness of the accumulation, adequate attendance and performance in the accumulated jobs and other positive conducts and initiatives.

The law that deals with unlawful acts must establish the corresponding penalties. In this specific case, there should be levels of sanctions as well as the obvious and imperative dismissal from the unlawfully accumulated job. As an example, the penalties could include dismissal or suspension from the remaining position, reimbursement proportional to the incompatibility of the working hours, fine and establishment of the unlawful accumulation as administrative dishonesty. To accomplish that, the aggravating factors of the offense should be considered. Some of the are recurrence of accumulation, multiple accumulation, false statement, non-compliance with the corresponding working hours, the overlap of working hours and the employment in more than one job (a more cunning subcategory of non-compliance with working hours, as is the case, for example, of the employee who has been assigned or requested to take another position, in which case they will end up working at the same place, holding two positions, but with a single working schedule), the failure to comply with the department's request and the combined practice of unlawful acts.

As an example, this "right of option" should only serve to provide the employee who acted in good faith with the opportunity to choose the position he/she wishes to keep, before the competent public entity (in which the last admission occurred) acts pursuant to its legal duty and dismisses them. Having the option to choose one of the accumulated unlawful positions would characterize a benefit to the employee that proved their good faith. Otherwise, if they did not prove their honesty in the accumulation, there should be a range of penalties proportional to the gravity of the offences committed, to be imposed by the entities involved and offended, after the due investigative process and legal defense.

Thus, it is reasonable that the lack of option for one of the positions, when the employee is summoned, characterizes the employee's willingness to persist in the unlawful practice, making it clear the presumed bad faith or reinforcing the already verified one. The option for one of the positions, on the other hand, must only benefit those who have undeniably acted in good faith, when there are no other irregularities characterizing bad faith.

Instead of establishing rules that tolerate the unconstitutionality, distort the dishonest acts and as a result, even encourage the continued and recurrent unlawful accumulations, the law could have dealt with this subject in the way suggested above and should have approached the elements that characterize the bad faith, its cases and relevant penalties.

In face of the problems inherent to the legal provision in question, and considering the urgent need

to change it, what is required of conscientious citizens, academics of applied social sciences and Law, of control authorities, entities and individuals who elaborate and are part of social and state control, is that they somehow make an intervention on the mentioned unconstitutionality, making the efforts they can. It is important to cease the unconstitutional practice that damages the Brazilian State and Nation, affecting public coffers and services, hindering the State's social activity, especially in the critical and important areas of health and education, which are the ones most vulnerable to the misconduct in question.

As possible actions, there is the production of critical and constructive works, such as this study, in order to join a continuous and progressive effort to form opinion and to support the performance in the judicial or legislative sphere by those entitled. Judicially, there is the possibility of filing a Direct Action of Unconstitutionality [ADI] by the those legitimized, which include the Presidency of the Republic, the Directing Boards of the federal, state and municipal Legislative Houses, the governors, the attorney general of the Republic, the Brazilian Bar Association (OAB), the political parties represented in the National Congress (CN) and confederations of labor unions or professional associations of a nationwide nature. In the legislative sphere, there is the possibility of initiatives such as the creation of a bill or a provisional executive act to change and improve the relevant provisions of Law 8112/1990 (and of Law 8429/1992).

In a general way and conclusively, there is a strong argument for changing the legal provision in question, in view of its unconstitutionality, taking into account that it is not in line with the notorious constitutional principles of morality, efficiency, reasonableness and proportionality. Neither is it in line with the constitutional principle of the accountability of wrongdoings (Article 37, paragraph 5t, of the Federal Constitution). Social, academic and state initiatives are urgent and will be most welcome.

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Integrated Contracting Regime: Binding or Discretionary?

Jessé Torres Pereira Junior
Debtor at Justice Court; Professor and coordinator of graduate courses in Administrative Law at the School of Magistracy and the School of Judiciary Administration of the Justice Court in the State of Rio de Janeiro. Guest professor of specialization in Public Law courses at the School of Law, Rio, of Getúlio Vargas Foundation.

Marinês Restelatto Dotti
Lawyer of the Union. Especialist in State Law, as well as Law and Economy by the Federal University of Rio Grande do Sul (UFRGS). Professor in the specialization course of Public Law with emphasis in Administrative Law at UniRitter - Laureate International Universities.

ABSTRACT

The choice of the integrated contracting regime is based on situations where the market offers more than one possible technical solution for the execution of a work or service, unknown to the Public Administration, giving the contractor the freedom to choose the most effective methodology, i.e., the one capable of actually producing the desired outcomes. When there is the possibility of using different methodologies in the execution of a work or service, they should refer to aspects of greater magnitude and quality, capable of engendering a real competition between proposals involving several methodologies, to ensure gains to the Public Administration. When transferring to private initiative the responsibility for the development of the projects and execution of the object, providing in the notice only a pre-project that makes it possible to characterize it, the Brazilian legal system introduces a contracting regime that conforms to the species associated with the result obligations. No longer limited to the basic project previously established in the notice's annex, it is possible for the contractor to use a specific solution of execution that, in the end, meets the conditions set forth in the notice.

Keywords: Integrated contracting. Advantageousness. Preferential regime. Assessment. Contract amendments. Risk matrix.

1. NORMATIVE CONTEXT

The integrated contracting regime has, in Brazilian Administrative Law – which obtained it from extensive international experience[1] –, a normative precedent in now revoked Decree 2,745/1998, which regulated the simplified tender procedure of Petróleo Brasileiro S.A. (PETROBRAS)[2], in the following terms:

> 1.9 Whenever economically advisable, PETROBRAS may adopt the integrated contracting regime, comprising basic design and/or detailing, execution of works and services, assembly, testing, pre-operation and all other operations deemed necessary and sufficient for the final delivery of the object, with the solidity and safety specified.

In the Brazilian legal system in force, the use of the integrated contracting regime in the bidding of engineering works and services is foreseen in Law 12,462/2011, which governs the Differentiated Public Procurement Regime (RDC). See below:

> Art. 9. The integrated contracting regime may be adopted in the bidding of engineering works and services within the context of the RDC, provided it is technically and economically justified.
>
> Paragraph 1. Integrated contracting comprises the design and development of the basic and executive projects, the execution of engineering works and services, assembly, testing, pre-operation and all other operations deemed necessary and sufficient for the final delivery of the object.
>
> Paragraph 2. In case of integrated contracting:
>
> I – the notice shall contain a pre engineering project containing the technical documents intended to enable the characterization of the work or service, including:
>
> a) the demonstration and rationale of the program of needs, the overall vision of the investments and the definitions of the service level desired;
>
> b) the conditions of solidity, safety, durability and the deadline, according to the provisions laid out in the *caput* and paragraph 1 of art. 6 of this Law;
>
> c) the architectural project's aesthetics; and
>
> d) the adequacy to public interest parameters, to economy in use, to the ease of implementation, to the environmental impacts involved and to accessibility;
>
> II – the value of the contract will be estimated based on the values practiced by the market, on the amounts paid by the Public Administration for similar works and services, or on the evaluation of the work's total cost, using a synthetic budget or an expeditious or parametric methodology; and
>
> III – the judgment criterion adopted will be that of technique and price.
>
> Paragraph 3. In case the presentation of projects with differentiated execution methodologies is allowed in the pre project, the notice will establish objective criteria for evaluation and judgment of the proposals.

> Paragraph 4. If the integrated contracting regime is adopted, it is forbidden to add amendments to the signed contracts, except in the following cases:
>
> I – to recompose the economic-financial balance lost due to a fortuitous event or force majeure; and
>
> II – due to the need to improve the technical adequacy of the design or specifications in relation to the contract's objectives, at the Public Administration's request, provided it is not a result of omissions or errors committed by the contractor, in accordance with the limits of the first paragraph
>
> of art. 65 of Law 8,666, of June 21, 1993.

As laid out in the caput of art. 9 of Law 12,462/2011, the Public Administration may adopt the integrated contracting regime, as long as a rationale shows it is technically and economically adequate. The public administrator's discretion also stems from another RDC device, i.e., art. 8, paragraph 1, which establishes the preferential use of the integrated contracting regime alongside the overall price and integral contracting regimes.

2. TECHNICAL AND ECONOMIC PREFERENCE

Whatever the elected regime – the preferential ones or the others –, it is essential to justify clearly the technical and economic advantage of the solution adopted. As this is, so to speak, a discretionary choice of the manager in each case, both in relation to the Public Power's bidding and contracting procedures, there is possibility of controlling administrative discretion based on the motives expressed. The relevance of the motivation does not lie only on the association with the motives revealed. It is also important to demonstrate that, being a regime that the law declares preferential, the integrated contracting regime may only be replaced by another model if said model is shown to be superior in a specific case.

It should be noted that the TCU used Judgment 1,388/2016-Plenary to inform the Ministry of Transport, Ports and Civil Aviation (MTPA) that the option for the integrated contracting regime, as per subsection II of art. 9 of Law 12,462/2011 ("Art. 9. The integrated contracting regime may be adopted in the bidding of engineering works and services within the context of the RDC, provided it is justified technically and economically and that its object involves at least one of the following conditions: (...) II – possibility of execution with different methodologies ;"), must be based on objective studies that justify it technically and economically. In addition, one must consider the expectation of advantages in terms of competitiveness, time, price and quality, in comparison with other contracting regimes, especially the overall price contracting regime. Among other aspects and when possible, it should be compared to the international practice regarding its use when procuring the same type of work, generic rationales that are applicable to any enterprise being forbidden.

3. OBJECTIVE PARAMETERS

Based on a comparative analysis of contracts that have already been concluded or other

data available, the advantages and disadvantages (monetary or otherwise) of the use of the integrated contracting regime must be quantified, and a detailed rationale is required in case it is impossible to valuation of the parameters. Also according to the Federal Court of Accounts, in the tenders that adopt the integrated contracting regime covered by subsection II of art. 9 of Law 12,462/2011, it is mandatory to include in the notices objective criteria for evaluation and judgment of proposals with admissible differentiated executive methodologies. This complies with paragraph 3 of the same article ("*In case the presentation of projects with differentiated execution methodologies is allowed in the pre engineering project, the notice will establish objective criteria for evaluation and judgment of the proposals*.")

Thus, we can conclude that works and services characterized by techniques, methodologies, and conditions usually employed, identifiable and known by the Administration, are not in line with the integrated contracting regime of Law 12,462/2011. That is, using the integrated contracting regime is not admissible when the object of the tender already has a complete basic and/or executive project, since the solutions will be previously defined, bypassing the conditions set forth in art. 9 of the law for application by the institute.

According to the Federal Court of Accounts, under the terms of art. 9 of Law 12,462/2011, in order to choose the integrated contracting regime there must be technical and economic justification. From the economic perspective, the administration must demonstrate, in monetary terms, that the total expenses to be incurred with the implementation of the enterprise will be lower than those incurred with other contracting regimes. From the technical perspective, it must demonstrate that the object's characteristics allow real competition between contractors for the design of different methodologies/technologies that lead to solutions that the Public Power can use advantageously (Judgment 1,850/2015-Plenary, Rapporteur Minister Benjamin Zymler, Process No. 011,588/2014-4).

Law 13,303/2016, which foresees the legal status of public companies, mixed-capital corporations and their subsidiaries, also contains provisions on the use of the integrated contracting regime. See below:

> Art. 42. In the bidding and contracting of works and services by public and mixed-capital companies, the following definitions shall be complied with:
>
> [...]
>
> 6 – integrated contracting: comprises the design and development of the basic and executive projects, the execution of engineering works and services, assembly, testing, pre-operation and all other operations deemed as necessary and sufficient for the final delivery of the object, as laid out in paragraphs 1, 2 and 3 of this article;
>
> [...]
>
> Paragraph 4. In the case of bidding of engineering works and services, the public and mixed-capital companies covered by this law shall use semi-

> integrated contracting, foreseen in item 5 of the caput, being responsible for the design or contracting of the basic project before the tender mentioned in this paragraph takes place. They can also use other modalities foreseen in the subsections of this article's caput, if this option is duly justified.
>
> Paragraph 5. For the purposes of the final part of paragraph 4, the absence of a basic project shall not be accepted as justification for the adoption of the integrated contracting modality.

According to Law 13,303/2016, the absence of a basic project shall not be accepted as justification for the adoption of the integrated contracting regime. If the state-owned company is able to define, with a high degree of precision, the object of the contract and the conditions for its perfect execution, it must design or contract the basic project and choose another regime for the indirect execution of works and services. Therefore, it cannot adopt the integrated contracting regime because it does not have a basic project, when it is able to define the ideal solution.

4. INCLUDED IN A NEW GENERAL DRAFT BILL

Draft Bill 6,814, of 2017 (prior to Senate Draft Bill 559, of 2013), which seeks to repeal Law 8,666/1993, Law 10,520/2002 and arts. 1 to 47 of Law 12462/2011, also contains provisions on the integrated contracting regime. See below:

> Art. 5. For the purposes of this Law, the following is considered:
>
> [...]
>
> 30 – integrated contracting: contracting regime where the contractor is responsible for designing and developing the complete and executive projects, performing engineering works and services, providing goods or special services, assembling, testing, pre-operating and all other operations deemed as necessary and sufficient for the final delivery of the object, with remuneration based on the overall price, depending on the stage of the contract's execution;
>
> [...]
>
> Art. 41. In the indirect execution of engineering works and services, the following regimes are allowed:
>
> 1 – unit price regime;
>
> 2 – overall price regime;
>
> 3 – integral regime;
>
> 4 – contracting by task;

> **5 – integrated contracting;**
>
> 6 – semi-integrated contracting;
>
> 7 – provision of associated service. (emphasis added)

Use of the integrated contracting is justified in the aforementioned laws and draft bill: there are situations in which the Public Administration needs to contract the execution of a work or service with a detailed design it does not have enough technical knowledge to carry out. However, the execution may be provided by business entities that are active in the field of the object of the tender. That is why this regime confers greater autonomy to the contractor so they can come up with technical and/or operational solutions, unknown to the Administration, that are essential to execute the object satisfactorily,

According to the Federal Court of Account's opinion in Judgement 1,388/2016-Plenary:

> In these tenders, contractors have greater freedom to innovate and seek the constructive methodology they regard most adequate for the object's execution. This greater freedom may allow bidders to envisage alternatives with lower costs than the one that would have been established by the basic project. These lower costs, in a competitive environment, will lead to proposals that are more advantageous for the Administration, favoring the principle of economy. That is, the economic impacts caused by greater uncertainties about the work's budget during bidding can be counterbalanced by the possibility of the contractor seeking better solutions during execution of the contract.

The lack of definition of the execution method in the pre project developed by the Administration, granting bidders greater freedom to apply different methodologies during the contract's execution, frees the tender notice from technical requirements(professional and operational). This encourages the participation of a greater number of bidders and, therefore, makes it possible to obtain proposals that are more favorable for the contracting entity.

5. COMPETENCE TO PRODUCE BASIC AND EXECUTIVE PROJECTS

A common and distinctive feature of the integrated contracting regime, based on the aforementioned laws (Law 12,462/2011 and Law 13,303/2016) and draft bill, is the transfer of production of the basic project – referred to as *complete project*[3] in Draft Bill 6,814, of 2017 – and executive project[4] from the Public Administration to the winning bidder (contractor). Thus, in the internal phase of the bidding process, the Public Administration is only responsible for the creation of a pre project (which will be included in the bidding notice as an annex), based on previous technical studies, which will inform the elaboration of the basic (or complete) and executive projects by the winning bidder (contractor).

The pre-project[5] comprises the specifications and techniques to be employed, the definition of the work fronts, the sequence of activities, the use and characteristics of the necessary equipment and the activities associated with the object's execution, to avoid possible external interference.

See below Minister Benjamin Zymler's opinion in Judgment 1,388/2016-Plenary:

> That is, the pre-project should not be an imprecise or incomplete document, which does not adequately define the object. It should be a detailed engineering work that, by in-depth analysis of the best possible alternative chosen based on the technical and economic feasibility studies that precede it, allows the Administration to demonstrate how the public interest must be met. All this without preventing that innovations incorporated by the private initiative improve even more the advantageousness in fulfilling the needs of the program.

It is fundamental that the Public Administration bases the pre-project and the public notice on indicators of purposes and results that the successful bidder must produce. In this way, the contractor will have greater autonomy to define the methods of execution of the object and possible solutions for the achievement of results and purposes. Therefore, the integrated contracting regime is adopted in the pursuit of results, relativizing the means to achieve them.

The Administration's recognition that the market has innovative technical solutions and that, therefore, the task of designing the basic project can be superiorly performed by private initiative, does not exempt it from the responsibility of judging the basic project created by a third party, rejecting it if it disregards previously established technical and economic requirements, which should also be foreseen and defined in the proceedings, along with objective criteria for the judgement of the technical solutions presented (judgment criterion based on the combination of technique and price).

6. CONTRACT AMENDMENTS

The integrated contracting regime forbids the formalization of contract amendments. See below the provision related to this prohibition in Law 12,462/2011:

> Art. 9. [...]
>
> Paragraph 4. If the integrated contracting regime is adopted, it is forbidden to add amendments to the signed contracts, except in the following cases:
>
> I – to recompose the economic-financial balance lost due to a fortuitous event or force majeure; and
>
> II – due to the need to improve the technical adequacy of the design or specifications in relation to the contract's objectives, at the Public Administration's request, provided it is not a result of omissions or errors by the contractor, in accordance with the limits laid out in the first paragraph of art. 65 of Law 8,666, of June 21, 1993.

Also in Law 6,814, of 2017:

> Art. 101. [...]

> Paragraph 9. If the integrated contracting regime is adopted, it is forbidden to change contract values, except in the following cases:
>
> I – to recompose the economic-financial balance lost due to a fortuitous event or force majeure; and
>
> II – due to the need to improve the technical adequacy of the design or specifications in relation to the contract's objectives, at the Public Administration's request, provided it is not a result of omissions or errors by the contractor, in accordance with the limits laid out in the first paragraph.

The prohibition of the addition of amendments to the contract under the integrated contracting regime, except in the two exceptional cases listed [6], is the compensation for the greater autonomy conferred to the contractor in the definition of the technical and operational specifications related to the object and its execution, laid out in the basic and executive projects. In other words, the contractor will absorb any mistakes when producing the basic and executive projects and will not be able to pass on costs derived thereof to the Administration. This is because changes in the project are only allowed to recompose the equilibrium of the contract's economic-financial equation – a hypothesis, in principle, eliminated if there is an error by the bidder who created the project. Changes are also admitted in the interest of the Administration – a hypothesis that would be justified when the changes correct deficiencies or omissions by the Administration when creating the pre project or due to supervening events, and provided the amendment does not change the nature the object of the contract.

The two exceptional hypotheses, which authorize the Administration to change the contract relationship that was initially agreed upon, are subject to Art. 37, 21, of the Federal Constitution:

> Art. 37 [...]
>
> 21 – except in the cases specified in the legislation, works, services, purchases and sales will be contracted through a public bidding process that ensures equality of conditions to all competitors, with clauses that establish payment obligations, maintaining the effective conditions of the proposal in the terms of the law, which will only allow the demands of technical and economic qualification deemed as indispensable for the obligations' fulfillment.

The administrative contract aims to meet the needs of the Administration and, reflectively, public interest. The contractor is entitled to obtain profit that is legitimate and inherent to its business activity, derived from the remuneration defined in the contract's financial clauses. The remuneration shall be ensured in the original terms that were agreed upon, and in the course of the contract's execution, preserving the initial burden/remuneration relationship that the Federal Constitution seeks to ensure when it establishes the maintenance of the proposal's effective conditions (art. 37, 21.) If, on the one hand, the Administration has the power-duty to unilaterally change the regulatory or service clauses of its contracts, on the other, the contractor has the right to maintain the economic-financial equation in specific situations that may compromise the contract's fulfillment, whether due to unilateral changes, unforeseeable circumstances or force majeure.

It should be noted that the hypothesis of addition of amendments under the integrated contracting regime, are *numerus clausus*, i.e., do not admit analogical or extensive interpretations, only occurring in the strict terms of the established regulation.

An evaluation performed by the Ministry of Transparency and Comptroller General of the Union (CGU)[7] on the results achieved by the National Department of Transport Infrastructure (DNIT) with the use of the RDC, indicated the reduction of amendments under the integrated contracting regime compared to other indirect execution regimes adopted by the entity, but not their complete elimination. CGU found that the adoption of integrated contracting reduced the number of amendments in DNIT's works, mainly those related to changes in the value of the contract, but did not eliminate them: amendments were formalized in 40% of the completed works and in 31% of those in progress.

The percentage of amendments identified by CGU is considerable since, in the integrated contracting regime, any gains or charges arising from the solutions adopted by the contractor in the creation of the basic project must be earned or supported solely and exclusively by private initiative, regardless of the existence of a risk matrix disciplining the contacting process. On the other hand, any omissions or lack of definition in the pre project, as a rule, does not lead to the signing of contract amendment terms, because a pre project is not a basic project.

7. RISK MATRIX

According to art. 9, paragraph 5, of Law 12,462/2011, and Law 13,190/2015, if the pre project includes a risk allocation matrix between the Public Administration and the contractor, the estimated value of the contract may consider a risk rate compatible with the bid object and with the contingencies attributed to the contractor, in accordance with the methodology predefined by the contracting entity, which should, in principle, inhibit contract amendments aimed at the contract value's recomposition. The reason for this additional value (risk rate) in the bidder's proposal is to exclude, according to the scope of the risk transferred, amendments related to inaccuracies in the project considered during the bidding process.

In integrated contracting, according to TCU, it is essential to include the detailed risk matrix in the notice, allocating to each party the risks that are inherent to the enterprise (Judgment 2,980/2015-Plenary, Rapporteur Minister Ana Arraes, Process No. 034,015/2012-4).

In the integrated contracting regime, the greater restrictions to signing contract amendments is an additional risk for the bidders, so any risks projected by the Administration in the pre engineering project should be priced and considered in the respective proposals offered by them.

The risk matrix is the tool that defines the objective distribution of responsibilities associated with events derived from the contracting process, which is relevant for the characterization of the object and of the respective responsibilities of its future execution. It is also important so bidders can dimension their proposals. It falls within the scope of the pre engineering project, in compliance with the principles of legal certainty, isonomy, objective judgment, efficiency, and pursuit of the best proposal. It is usually represented by a graph containing two coordinated axes showing, with the indication of future events that may affect the contract's execution, the probability/risk of their occurrence and their impact on the enterprise. The risk matrix

identifies the main factors that may influence execution of the object, allowing the evaluation of strategies of allocation or mitigation of possible risks and of the probability of occurrence of events, indicating the respective financial impacts on the contract. The distribution of risks in the integrated contracting regime, according to the capacity of each bidder to price and manage them, contributes to the reduction of the enterprise's final cost.

8. CONCLUSION

One of the indirect execution regimes foreseen in the Brazilian legal system is that of integrated contracting. This regime distinguishes itself by transferring to the contractor the responsibility for the creation of the basic and executive projects, in addition to the execution of the work or service, assembly, testing, pre-operation, and all other operations deemed as necessary and sufficient for the final delivery of the object. The Public Administration is only responsible for the creation of a pre project, based on previous technical studies, which will help the successful bidder in the creation of the basic and executive projects.

The choice of the regime is based on situations where the market offers more than one possible technical solution for the execution of a work or service, unknown to the Public Administration, giving the contractor the freedom to choose the most effective methodology, i.e., the one capable of actually producing the desired outcomes. When the condition to be met is the possibility of using different methodologies in the execution of a work or service, they should refer to aspects of greater magnitude and quality, capable of engendering a real competition between proposals involving several methodologies and ensuring real gains.

From TCU's perspective, when transferring to private initiative the responsibility for the development of the project and execution of the object, providing in the notice only a pre project that makes it possible to characterize it, the Brazilian legal system introduces a contracting regime that conforms to the type associated with the obligations of results. No longer limited to the basic project previously established in the notice's annex, it is possible for the contractor to use a specific execution solution that, in the end, meets the conditions set forth in the notice. It is expected that not defining these limitations in the pre project will lead to an increase in competitiveness and, therefore, to more advantageous proposals for the Administration.

Thus, we perceive the advantages for the Administration of using the integrated contracting regime. The lack of delineation regarding the manner of execution in the pre project gives the contractor greater freedom to apply differentiated methodologies during the contract's execution. This frees the Administration from the requirements of technical (professional and operational) qualification laid out in the bidding notice and promotes the participation of a greater number of bidders, which, in turn, makes it possible to obtain proposals that are more advantageous. For the contractor, choosing the best solution to be used in the contract's execution influences the final cost of the work or service, particularly due to the possibility of efficiently allocating the risks involved and better managing and mitigating them.

However, an evaluation undertaken by the Ministry of Transparency and CGU on the results achieved by DNIT with the use of the RDC, with emphasis on the adoption of the integrated contracting regime, reveals the existence of a considerable number of contract amendments

(formalization of amendments in 40% of the completed works and in 31% of those in progress). This happened despite an express legal provision prohibiting them except in two exceptional cases (a) to recompose the economic and financial balance lost due to a fortuitous event or force majeure and (b) because of the need to improve the technical adequacy of the design or specifications in relation to the contract's objectives, at the request of the Public Administration, provided they are not the result of omissions or errors by the contractor, in accordance with the limits laid out in the first paragraph of art. 65, of Law No. 8,666/1993).

The considerable number of amendments registered by CGU in DNIT's contracts shows that the integrated contracting regime needs to be improved. Perhaps producing a pre project that is more detailed and has an excellent level of technical adequacy in view of the objectives of the contract, without reaching the basic project level, may contribute to the desired reduction in contract amendments. Perhaps qualified and efficient performance of the oversight designated to monitor the contract's execution will produce this reduction; perhaps demonstrating the performance/functionality of what was executed in each stage, and not just at the end of the execution, can also produces this effect.

Certainly, the combination of all these measures, along with the precise establishment of the fractions of the object in which the contractor will be free to adopt innovative methodological or technological solutions, in terms of modifying those previously outlined in the pre project, will enable the identity between the execution and the solution laid out in the pre project. The inclusion of the risk matrix in the pre project, allocating to each party the risks inherent to the work or service to be executed, will also tend to reduce the number of amendments under the integrated contracting regime. Not to mention its institution as preferential regime for the execution of works and services, which is also in Draft Bill 6,814, of 2017.

If this occurs, the answer to the intriguing question posed in the title of this article may be that which has always, in the doctrine established, the proportion between binding nature and discretion in public management. That is, strictly speaking, there is no totally binding or totally discretionary act. What exists are nuances of binding or discretionary, according to the regulation in force, with the purpose of offering elements that enable the public manager to distinguish the solution that best meets the results of public interest, according to the circumstances of each case. If these factual and normative circumstances prove that solution A is superior to solution B, administrative decision becomes bound to the former. In other words, the integrated contracting regime will be preferential and therefore mandatory whenever it is its superiority over the other regimes for the execution of a particular work or service is unequivocally to demonstrated. Under these circumstances, not adopting it will violate the law and subject managers to answer for a choice that goes against the principle of efficiency, possibly making them guilty of administrative impropriety.

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NOTES

1 Judgment 1,388/2016-Plenary, of the Federal Court of Accounts (TCU), refers to the use of the integrated contracting regime in international legal systems. See below: "10. Although recent in our legal system, except for the provision in Petrobras' Contract Regulation (Decree 2,745/1998), this is a widely disseminated practice at the international level, being also applied in financing carried out by the World Bank, and which has shown good results . 11. Directive 18/04 of the European Parliament – pertaining to public procurement – establishes as follows: '*In view of the diversity of public works contracts, contracting authorities should be able to make provision for contracts for the design and execution of work to be awarded either separately or jointly. It is not the intention of this Directive to prescribe either joint or separate contract awards*.' 12. The Federal Acquisition Regulation (FAR) of the United States (item 36,302) also foresees the combination of design and construction in a single contract. 13. According to José Antônio Pessoa Neto and Marcelo Bruto da Costa Correia, in their work *Regime Diferenciado de Contratação* (RDC): *uma perspectiva gerencial* (Curitiba, Negócios Públicos do Brasil, 2015, p. 115), the model has been applied by the public sector in countries such as France, United Kingdom, Greece, Sweden, Mexico, United States, Australia, Thailand, Singapore, in works of various complexities such as buildings, hospitals, highways, railways and industrial facilities. According to the authors, in 2013, the model was adopted in the United States in about 30% of the universe – excluding military and residential works – of government construction contracting. 14. It should be noted, therefore, that this is not an innovation without basis or precedent, but rather a model already tested in other countries, and that can yield good results in Brazil. It is certainly not a universal solution for the public contracting of engineering works and services, but rather an option that may, in certain circumstances, better serve the public interest." (Rapporteur Minister Ana Arraes, Process No. 030,958/2014-8).

2 In the entity's current regulation (Decision of October 25, 2017, published in the Official Journal (DOU) of January 15, 2018), there is also a provision concerning the integrated contracting regime, based on Law 13,303/2016.

3 Art. 5. [...] 23 – complete project: a set of necessary and sufficient elements, with an adequate level of precision, to characterize the work(s) or service(s) established as the bidding's object, based on previous technical studies to ensure the technical feasibility and appropriate treatment of the enterprise's environmental impact, and to allow the evaluation of its costs and the definition of its methods and execution period, containing the following elements: a) development of the chosen solution, so as to provide an overall perspective on the enterprise and identify all its constituent elements with clarity; b) global and localized technical solutions, sufficiently detailed to minimize the need for reformulation or variants during the phases of creation of the executive project and execution and assembly of the works; c) identification of the types of services to be performed and of the materials and equipment to be incorporated in the work, as well as their specifications, to ensure the best results for the enterprise and executive security in the use of the object for the purposes for which it is intended, considering all identifiable risks and hazards, without detracting from the competitive nature of their execution; d) information that enables the study and deduction of the

construction methods, provisional installations and organizational conditions of the enterprise, without frustrating the competitive nature of its execution; e) subsidies for the assembly of the work's management and bidding plan, comprising its programming, supply strategy, inspection standards and other necessary data in each case; f) detailed budget of the work's overall cost, based on the proper monetary valuation of services and supplies;

4 According to a precedent of the Federal Court of Accounts: "The administration shall require the contractors under the integrated contracting regime to submit a detailed budget containing descriptions, measure units, unit values and prices of all construction services, along with the respective compositions of the unit costs, as well as the detailing of social burdens and BDI rate, according to art. 2, sole paragraph, of Law No. 12,462/2011, applicable to all contract execution regimes of the RDC, and to Precedent 258 of the TCU" (Judgment 2,433/2016-Plenary, Rapporteur Minister Benjamin Zymler, Process No. 025,990/2015-2).

5 Art. 74, paragraph 1, of Decree 7,581/11, which regulates Law 12,462/11, after repeating the requirements listed in art. 9º, paragraph 2, of this same law, regarding the technical documents that must be included in the preliminary design, added the following: (a) planning of the engineering work or service; (b) previous projects or studies that support the design adopted; (c) topographic and cadastral analyses; (d) surveying results; (e) descriptive memorial of the building's elements, construction components and materials, to establish minimum standards for contracting.

6 According to a precedent of the TCU: "19. The prohibition of the addition of amendments to the contracts signed under the integrated contracting regime of the Differentiated Contracts Regimes is not absolute, and has the aim of ensuring that the risks assumed by private initiative are in fact attributed to it in the execution stage" (Judgment 1,541/2014-Plenary, Rapporteur Minister Benjamin Zymler, Process No. 004,877/2014-4).

7 Synthesis of the report, extracted from the Ministry's website (http://www.cgu.gov.br/noticias/2017/02/ministerio-da-transparencia-avalia-adocao-do-regime-diferenciado-de-contratacao-no-dnit). The audit confirmed, in DNIT's RDC, the reduction in the term of the three execution regimes (overall price, unit price and integrated contracting), when compared to Law 8,666/1993. However, it indicated a high rate of unsuccessful bidding, with many notices being repeated, especially those under the integrated contracting regime, where noncompliance with the deadline established in the notices for presentation and approval of the project is frequent. The Ministry noted that the adoption of integrated contracting has reduced amendments in DNIT's works, mainly those related to the change in the contract's value. However, this regime does not eliminate the amendments, as they occurred in 40% of the completed works and in 31% of those in progress. The number of amendments tends to increase because larger, more complex works are still in progress, and because of the recent resource constraints. Data show a smaller number of participants and reduction in the discounts obtained in the works under the integrated contracting regime. The auditors found that, when integrated contracting is adopted, the final cost to be paid by the Administration is, on average, 7.5% higher than under the unit price regime and 6.9% higher than under the overall price regime. These percentages were obtained by weighting the average risk rates, discounts and amendments. The RDC allowed the use of new technologies and methodologies by the contractors, but allowed weaknesses in the preliminary design to lead to (sometimes disproportionate) gains, which were fully absorbed by the private partners, such as engineering gains. Recommendations and provisions. The Ministry of Transparency recommended the DNIT: to use, preferably, the RDC in electronic form, where greater competition and, consequently, greater discounts have been observed, in addition to greater transparency of procedures; not to use the percentage of 2% of the contractual value to estimate the value of the engineering risk insurance

policies, and to adopt the value calculated based on the price of the policies that were previously granted to the entity, which is, on average, one tenth of the value questioned by CGU; to include the risk matrix in the notices, in order to explain the exact responsibilities and burdens to be assumed by private initiative in all regimes. The first two recommendations have already been complied with by the entity examined. Regarding the third, DNIT reported using the risk matrix in all RDC Integrada's notices and committed itself to evaluating the possibility of extending the practice to the other two regimes. The Ministry of Transparency remains in the joint search for solutions and systematically monitors the adoption of measures by the managers.

The Adversary System and the Right to a Fair Hearing in the State-Owned Enterprises Law (Law 13303/2016)

Welder Lima
Masters' Student in Social Law, Lawyer, Economist, Specialist in Budget and Finances Management of the Public Sector, Member of Thematic Comissions of OAB (DF), Aide in Management of Shopping and Hiring at Bank of Brazil S.A.

ABSTRACT

This study is about the adversary system and the right to a fair hearing in the scope of the administrative sanctions referred to in Brazilian Law 13303/2016. The State-Owned Enterprises Law (LE) inaugurated a new hiring regime for state-owned enterprises (SOEs), which began to adopt, preponderantly, the Private Law regime, unlike what occurred under Law 8666/1993, in which the Public Law regime prevailed. This established a condition of equality in the contractual relationship between the Administration and the supplier, eliminating prerogatives of the Public Administration that were valid under Law 8666/1993. After introducing the initial concepts relevant to better understand the subject, we discuss the adversary system and the right to a fair hearing, emphasizing that state-owned enterprises were not fully exempt from observing the Public Law regime, even with the advent of the LE, since characteristics typical of Administrative Law remain in the law. In this step, we conclude that the adversary system and the right to a fair hearing must be observed when punitive claims are involved, meaning that the LE has failed to provide for the possibility of appeal, which is an indissociable part of the constitutional right to a full defense. Thus, the internal regulations of state-owned enterprises must use the legislation related to the subject, such as Law 9784/1999, as a complement, including in the case of a state or municipal company, as already decided by the Brazilian Superior Court of Justice (STJ).

Keywords: Public Law. Private Law. Adversary System. Right to a fair hearing. State-Owned Enterprises Law. Administrative sanctions.

1 INTRODUCTION

Brazilian Law 13303/2016, known as the State-Owned Enterprises Law (LE), came to comply with the provisions of the first paragraph of article 173 of the Federal Constitution (FC), establishing the legal status of public companies and mixed-capital companies. Among other aspects, the LE provides for bidding and contracting, including administrative sanctions against suppliers.

Before Law 13303/2016, public companies and mixed-capital companies were subject to the provisions of Law 8666/1993, which also provided for bidding, contracting, and administrative sanctions against offending suppliers.

Regarding administrative sanctions, Law 8666/1993 provides for a proceeding that encompasses the adversary system and the right to a fair hearing. On the other hand, Law 13303/2016 has a quite limited text concerning this aspect, leaving it up to the respective internal regulations of the public companies and mixed-capital companies to establish a specific rule, respecting, however, the principles that must be observed by the Public Administration, according to item II of Art. 173 of the FC, namely:

> Art. 173. With the exception of the cases provided for in this Constitution, direct exploitation of economic activity by the State shall only be permitted when necessary for the imperatives of national security or a relevant collective interest, as defined by law.
>
> §1st. The law shall establish the legal regime of public companies, mixed-capital companies and their subsidiaries that engage in the economic activities of production or marketing of goods or services, providing for:
>
> [...]
>
> III. competitive bidding and contracting of works, services, purchases, and transfers, observing the principles of Public Administration; (emphasis added)

In this step, the present work intends to investigate whether the LE provided a proceeding sufficiently capable of preserving the adversary system and the right to a fair hearing regarding the application of administrative penalties in the face of irregularities practiced by suppliers contracted in the scope of the mentioned law.

2 INITIAL CONCEPTS

For the development of the proposed theme, it is necessary to explain some initial concepts, as follows.

2.1 PUBLIC LAW

As Alexandrino (2010, p. 42)[1] teaches, Public Law disciplines the relations between society and the State and the relations of the state entities among each other. In the scope of Public Law, the collective interests (public interest) prevail over individual interests (private). In the words of the author mentioned above:

> Thus, when the State acts in defense of the public interest, it enjoys certain prerogatives that place it in a legal position of superiority before the private,

1 ALEXANDRINO, Marcelo. Direito Administrativo descomplicado / Marcelo Alexandrino, Vicente Paulo. 18. ed. rev. e atual. Rio de Janeiro: Forense; São Paulo: Método, 2010.

> evidently in compliance with the law and respecting the individual assurances consecrated by the legal framework.

Therefore, within the scope of Private Law, the State will be in a differentiated position in relation to the individual, enjoying certain prerogatives justified by the fact that the interests under which the State performs, the public interest, has primacy over the private interests (principle of the supremacy of the public interest).

2.2 PRIVATE LAW

In turn, the objective of Private Law is to regulate the legal relations among private individuals. Civil Law (Civil Code) is an example of a part of Private Law.

In the relations covered by Private Law, there is equality of prerogatives and treatment among the parties, even if the State is one of such parties. On the other hand, in any situation in which one observes the possibility of reflexes on collective interests, the Public Law standards must be applied. Hence, even if the predominant relation is Private Law, whenever collective interests are involved Public Law standards will be employed subsidiarily.

2.3 ADMINISTRATIVE LAW

In the words of Maria Sylvia Zanella Di Pietro (2009, p. 49) [2], Administrative Law may be understood as:

> The branch of Public Law whose objects are the agencies, agents, and administrative legal persons who comprise the Public Administration, the non-contentious legal activity it exerts, and the assets that it uses to achieve its ends, of public nature.

Administrative Law is considered a branch of Public Law. However, it is not restricted to the legal relations governed by Public Law because, even in the cases in which the Administration takes part in a legal relation within the scope of Private Law, it must obey the principles observable by the entire Public Administration related to the branch of Administrative Law. Some of these are probity, publicity, and public interest, among others.

3 CONTRACTING REGIME IN LAW 13303/2016

The LE inaugurates a new contracting regime, different from the one adopted in Law 8666/1993, which adopts Public Law precepts and, on a supplementary basis, Private Law provisions, while Law 13303/2016 adopts the Private Law precepts as a rule, as shown below:

> Art. 54. The administrative contracts referred to in this law are governed by its clauses and by the Public Law precepts, applying to them, on a supplementary basis, the principles of the general theory of contracts and the Private Law provisions. (Law 8666/1993)

2 DI PIETRO, Maria Sylvia Zanella. Direito Administrativo. 22. ed. São Paulo: Atlas, 2009.

> Art. 68. The contracts referred to in this law are governed by its clauses, by the provisions of this law, and the Private Law precepts. (Law 13303/2016)

Thus, the new legislation provides bilaterality in contractual relations, which typically occurs in private relations, to the detriment of the systematics verified within the scope of Law 8666/1993, in which the Administration enjoyed prerogatives that put it in a position of advantage over the contractor.

As an example, there is no longer the possibility of unilateral contract modifications such as additions and suppressions, to which the contractor used to be obliged, in case this was the will of the Administration, if the percentages stipulated in Law 8666/1993 are respected.

It is also no longer possible to terminate the contract unilaterally – one of the forms of contract termination provided for in the 1993 legislation, as shown next:

> Art. 58. The legal regime of the administrative contracts instituted by this law confers to the Administration, in relation to these contracts, the prerogative of:
>
> I - modifying them, unilaterally, to better suit the public interest purposes, provided the rights of the contractor are respected;
>
> II - terminate them, unilaterally, in the cases specified in item I of article 79 of this law;

Thus, the forms of contract termination and sanctioning hypotheses must be stated expressly in the contract. Moreover, any contractual modifications must have the consensus of both parties.

In spite of the prevalence of the Public Law norms, there is still an incidence of Public Law in the contractual relations among state-owned enterprises, mixed-capital companies, and the contractees. This is because the LE itself has Administrative Law norms (branch of Public Law), such as bidding procedures and administrative sanctions. In such cases, evidently, the Public Law rules regarding such matters must apply, extracted from Law 13303/2016 itself and from the internal regulations to which its 40th article alludes, as shown below:

> Art. 40. State-owned enterprises and mixed-capital companies should publish and keep updated an internal regulation of biddings and contracts, compatible with the provisions of this law, notably concerning:
>
> [...]
>
> VIII - the application of penalties;
>
> [...]

One must observe that the LE refers to the internal regulation of state-owned enterprises the rules of biddings, contracts, and sanctions, which must align with the provisions of the LE.

Although not expressed in the law, it is important to emphasize that the internal regulations

are not exempt from also aligning with the Public Law norms in the matters in which the LE is not sufficient to regulate the hypotheses that involve it, using the sparse legislation and the principles tangible to the Public Administration.

4 SANCTIONS TO SUPPLIERS

The possibility of application of penalties due to irregularities in the execution of the contract constitutes a binding administrative act The Administration does not have discretion in the face of the materiality of an objectively measurable administrative wrong. That is, in the occurrence of a situation contemplated in the contract as punishable, the Administration shall initiate the administrative proceeding to investigate the occurrence and, if applicable, apply the appropriate administrative penalty.

From the viewpoint of administrative sanctions, the LE reveals some alterations compared to the previous legal regulations (Law 8666/1993). The LE removed from the list of sanctions the *blacklist* declaration, maintaining the sanctions of warning, fine, temporary suspension of bidding, and impediment of entering into a contract with the sanctioning entity, as per its 83rd article. Moreover, the deadline for the presentation of prior defense was extended to ten working days, compared to five working days provided for in Law 8666/1993.

However, Law 13303/2016 failed to provide for the possibility of filing an appeal. Since the LE is silent on the possibility of presenting an administrative appeal, it is understood that the respective internal regulations of the state-owned enterprises must provide for it, given that the right to the adversary system and to a fair hearing, which encompasses the possibility of an appeal, is a constitutional precept, as we will analyszein the following topic.

5 THE ADVERSARY SYSTEM AND THE RIGHT TO A FAIR HEARING - POSSIBILITY OF APPEAL

The adversary system is understood as the possibility of the person under the jurisdiction of the Administration contradict what is being attributed to them, with the Administration making them aware of what they are being accused of, as well as the opportunity to manifest themselves.

The right to a fair hearing aims to assure all forms of manifestation by the interested party, enabling them to gather evidence, make requirements, and present appeals against the decisions of the Administration. It is, therefore, a consequence of the adversary system.

The adversary system and the right to a fair hearing are provided for in the constitution, appearing on the list of fundamental rights and assurances, according to the article 5, item LV, of the FC. This provision assures to litigant persons in a judicial or administrative process, and to accused persons in general, the adversary system and the right to a fair hearing, with the means and resources inherent to it. In this step, the possibility of an appeal stems from an express constitutional provision, as an integrating part of the adversary system and the right to a fair hearing. In the lessons of Sérgio Ferraz and Adilson Dallari (2001, p. 21-22) [3], the practical

3 FERRAZ, Sérgio; DALLARI, Adilson Abreu. Processo Administrativo. São Paulo: Malheiros Editores, 2001. p. 21-22.

realization of the democratic principle involves the possibility of the person under the jurisdiction of the Administration participating in the administrative decisions. To this end, it is essential that the citizen be able to make requests to the Administration, including presenting appeals.

According to the thinking of Gilmar Ferreira Mendes (2009, p. 602) [4], the Brazilian Federal Supreme Court (STF) established an understanding that the adversary system and the right to a fair hearing are assured in administrative processes.

José dos Santos Carvalho Filho (2009, p. 905) [5], when mentioning item LV, of the article 5 of the FC, states that the right to a fair hearing will not be complete if it is not assured to the interested person the right to file appeals. Appeals are how the interested person can convey to the superiors of the decision maker the knowledge of possible arbitrariness.

In the face of the above, we see that Law 13303/2016 failed in not providing for the possibility of an appeal, with the internal regulations of state-owned enterprises having to fill this gap, observing the subsidiary legislation, so to avoid the judicialization of the controversy and consequent annulment of the administrative acts.

6 THE APPLICABILITY OF LAW 9784/1999 TO STATE-OWNED ENTERPRISES

Let us consider the inapplicability of Law 8666/1993 to state-owned enterprises after the advent of Law 13303/2016. With the exception of criminal clauses, as provided in article 41 of the PCL, and of the tie-break criteria in biddings provided in article 55, item II, also of the PCL, we have that Law 9784/1999 seems to be the most suitable to fill the gaps left by the new legislation concerning the adversary system and the right to a fair hearing, which are constitutional prerogatives to be safeguarded.

Law 9784/1999 regulates the administrative process in the scope of the federal Public Administration, direct and indirect, according to the express diction contained in its 1st article: "*This law establishes basic norms about the administrative process in the scope of the direct and indirect federal Administration (...)*".

In the meantime, according to precedents in STJ[6], in the case of absence of specific legislation in the scope of the member states, Law 9784/1999 may also be employed if a local law is absent.

Therefore, even with the advent of Law 13303/2016, the administrative process that sanctions suppliers did not have its regulation fully elucidated. It is up to the internal regulations of state-

4 MENDES, Gilmar Ferreira.Curso de Direito Constitucional. 4. ed. São Paulo: Saraiva, 2009. p. 602.

5 CARVALHO FILHO, José dos Santos. Manual de Direito Administrativo. 21. ed. ver. ampl. e atual. Rio de Janeiro: Lumen Juris, 2009. p. 905.

6 STJ. AGRAVO DE INSTRUMENTO: Ag. 1.384.939 - SP (2011/0009128-9). Relator: Ministro Mauro Campbell Marques. DJ 25/03/2011. Jusbrasil, 2011. Disponível em: <https://stj.jusbrasil.com.br/jurisprudencia/18498626/ag-1384939>. Acesso em: 15 jun. 2018.

owned enterprises to observe the legislation that governs the matter, the state laws in the case of states and municipalities, and in the absence thereof, Law 9784/1999, which, without a question, must also be observed by federal state-owned enterprises as per express legal provision.

7 CONCLUSION

The LE modified the contracting regime that was in force up to its advent, namely the Public Law, regime, which was governed under Law 8666/1993, and the Private Law regime prevailed.

As a result, the Administration and the supplier are now in a condition of equality in the contractual relationship. .The Administration no longer enjoys prerogatives granted to it by Law 8666/1993 such as the imposition of contract expansion or reduction of up to 25%, or even the possibility of unilateral termination.

Even when under the regime of Private Law, the Administration was not dismissed from observing the Public Law regime, given that Law 13303/2016 itself brings, in its core, institutes of the Administrative Law such as biddings and administrative sanctions to suppliers. Regarding such aspects, the Administration shall guide itself by the Public Law norms and, naturally, by the basic principles that govern the Public Administration.

Regarding the sanctions to suppliers, Law 13303/2016 failed in not providing for the possibility of filing appeals, thus hurting the principles of the adversary system and the right to a fair hearing. Hence, the internal regulations of state-owned enterprises must resort to legislations correlated to the subject so that their regulations provide for the rites and minimum deadlines for filing appeals.

In the case of federal state-owned enterprises, Law 9784/1999, which regulates the administrative process of the federal direct and indirect Administration, shall be observed. In turn, in the scope of states and municipalities, the respective legislation pertinent to the theme shall be the parameter for the internal regulations of state and municipal state-owned enterprises. In the absence of specific legislation, states and municipalities may employ law 9784/1999, as already decided by the STJ.

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Performance Audits with Focus on the Principle of Effectiveness: a Brief Overview of the Brazilian Courts of Accounts

Luiz Gilberto Monclaro Mury
Public Auditor at the Rio Grande do Sul Court of Accounts, undergraduate in Economy with a Doctorate in International Strategic Studies. In Novermber of 2017 began a project in the Post-doctorate program at UFRGS Faculty of Economic Sciences with the theme: Methods of impact evaluation as a support to operational audits.

ABSTRACT

According to the standards of the International Organization of Supreme Audit Institutions (INTOSAI), performance audit consists of independent and objective examination of the aspects of economy, efficiency, efficacy, and effectiveness of governmental organizations, programs, and activities, in order to assess the performance of public management. Given the relevance of the topic, this article aims to investigate whether the performance audits carried out by the Brazilian courts of accounts analyze the effectiveness of public expenditure, that is, if the impact generated on the target population is measured. For this purpose, a questionnaire was sent to auditors of the Brazilian courts of accounts, whose preliminary result stressed that performance audits in Brazil only analyze economy, efficiency, and efficacy regarding public expenditure.

Keywords: Performance audit. Court of accounts. Effectiveness.

1 INTRODUCTION

Most democratic nations have an institution, established by the national Constitution or by the national supreme legislative body, whose purpose is independent and technical auditing of the public sector. Such institutions are known as the Supreme Audit Institutions (SAIs). In countries such as Australia, Austria, Canada, China, Colombia, USA, Israel, New Zealand, Peru, and United Kingdom, they are structured as Audit Institutions or Offices of the Comptroller General. The respective head of these institutions is an auditor or comptroller-general, who sets the strategic direction of the organization and is publicly accountable for the work carried out. In turn, in countries such as Germany, Belgium, Brazil, Spain, France, Greece, Italy, Japan, Portugal, and Uruguay, SAIs are structured as courts of accounts, whose main decisions regarding public expenditure are taken by a collective body of ministers or directors. In Brazil, the external public control system consists of the Federal Court of Accounts (TCU), the Court of Accounts of the Federal District

(TCDF), 26 state courts of accounts[1] (TCEs) and six[2] courts of accounts that have municipal jurisdiction (TCMs) (ROCHA, 2002).

Until the early 1970s, the main goal of SAIs was formal control, focusing on verification of compliance regarding public expenditure, the legality of administrative acts, as well as reliability of financial statements. Such work system suffered changes by virtue of financial problems in the states, which were caused by four socioeconomic factors: (i) the tax crisis, which resulted from the overload of activities undertaken by governments in the post 2nd World War period and denial of taxpayers, who refused to pay additional taxes for being unable to establish a direct correlation between increase of government resources and improvement of public services; (ii) harmful effects of the oil crisis that started in 1973 on the world economy; (iii) the crisis of the Welfare State[3]: given that modern neoliberal governments considered as privileges what was seen by pressure groups as achievements; and (iv) the phenomenon of globalization, which weakened the power of governments to control financial and commercial flows and to dictate macroeconomic policies (ABRUCIO, 1997).

In parallel to the demand for increased levels of efficiency, economy, and transparency in public expenditure, due to the financial crisis experienced, several countries made changes to their public services based on economic theories and principles developed for private sector modeling (VABO, 2009). Such wave of reforms, referred to in specialized literature as New Public Management (NPM), aimed to render public service more efficient and citizen-oriented, using management models of the private sector.

The term NPM was first used by Christopher Hood (1991), in his article *A public management for all seasons?,* in which he presented the principles of the approach, namely: (i) stress on the private sector styles of management for public management practices; (ii) performance measurement for the public sector; (iii) stress on greater discipline and parsimony in resource use.

The first NPM practices were developed in the United Kingdom, under the direction of former Prime Minister Margaret Thatcher, who made changes to the public management policy in areas such as organizational methods, labor relations, expense planning, financial management, auditing, evaluation, and procurement. Thatcher's successor, John Major, maintained the public management policy in the agenda of the conservative government, launching programs, such as *Competing for Quality, Cost Accounting and Budgeting,* and *Private Finance Initiative.*

The NPM model has spread worldwide, with the promise of facing two bureaucratic problems: the excess of procedures and low level of accountability of bureaucrats before the political system and before society (SANO, 2003). The basic proposal was to render public management flexible and to increase *accountability*[4]*,* with a new form of service provision, focused on the consumer-client. In this sense, not only was it necessary to change the methodology and focus of the public sector by means of greater financial control, increased efficiency, definition of goals and delegation of powers, but also to follow up on the results achieved. According to Albuquerque (2006, page 14):

> Several discussions on how to face this crisis initiated in the economic area, and further expanded to the field of Public Management, with questions regarding State dimension and role, efficiency in public expenditure, relations between

> government and society, public service organization, and management models and processes.
>
> 'Accordingly, for government audit institutions to be able to assess the new public management model, it became necessary to conduct performance analysis of public expenditure, in addition to financial and compliance analyses, regarding the aspects of economy, efficiency, and efficacy' (ARAÚJO, 2008).

According to Pollit *et al.* (2008), the considerable appeal of performance audit lies in the promise of answering whether public programs and policies effectively work and whether they are carried out in the most efficient way possible. Given the importance of the matter, a survey was conducted, among Brazilian public auditors, to answer the following question: do performance audits carried out in Brazil assess the effectiveness of public expenditure? With the purpose of offering an answer to this question, this article is structured in five sections, in addition to this introduction and to the final considerations. Section 2 presents a short description of specialized literature regarding the historical evolution of performance audit. Section 3 shows standardization of performance audit according to INTOSAI[5]. Section 4, in turn, discusses the methodology for conducting the research that supports this article, while section 5 is reserved for the analysis of information collected.

2 PERFORMANCE AUDIT: HISTORICAL EVOLUTION

According to Araújo (2008), the first official data concerning assessment of economy and efficiency in public management date back to the INTOSAI Congress held in 1971, in Canada, when the concept of comprehensive audit was presented. According to this new vision of auditing, in addition to the analysis of accounting responsibility conducted until that moment, it was further necessary to assess responsibility from the administrative and programmatic perspectives, which involve matters of economy and efficiency in the use of public resources. Furthermore, such new audit model, also referred to as integrated audit, would analyze the achievement of the proposed government goals, considering costs incurred and benefits achieved.

In 1972, the body responsible for conducting audits, assessments and investigations of the United States Congress (GAO)[6] published the first version of the book *Government auditing standards*, which was last revised in 2011. In its first edition, the book already stresses the need for comprehensive auditing in institutions that manage public resources, in accordance with the notion of comprehensive audit presented in the INTOSAI Congress held in 1971 (Source: http://www.gao.gov/assets/680/676159.pdf, page 2, accessed on 03/20/2018).

In 1976, such notions were presented at the 9th GAO Annual Seminar, and the auditing of the aspects of economy, efficiency and effectiveness started being referred to as *performance audit*[7] (MORSE, 1976). The position was globally consolidated in the Final Declaration of the 9th International Congress of Supreme Audit Institutions, held in Lima, Peru, in 1977:

> Section 4. Legality audit, regularity audit and performance audit:
>
> 1. The traditional task of Supreme Audit Institutions is to audit the legality and regularity of financial management and of accounting.

> 2. In addition to this type of audit, which retains its significance, there is another equally important type of audit – performance audit – which is oriented towards examining the performance, , economy, efficiency and effectiveness of public administration. Performance audit covers not only specific financial operations, but also the full range of government activity including both organizational and administrative systems.
>
> 3. The Supreme Audit Institution's audit objectives – legality, regularity, economy, efficiency and effectiveness of financial management – are basically of equal importance. However, it is for each Supreme Audit Institution to determine its priorities, on a case-by-case basis. (Source: http://portal.tcu.gov.br/fiscalizacao-e-controle/auditoria/normas-nternacionais/, page 5, accessed on 09/16/2017, emphasis added).

Thus, SAIs started regulating performance auditing in their respective countries, such as the 1982 Local Governance Financial Act, in the United Kingdom, which established that performance audits were also to be carried out in the local government. The National Audit Office (NAO)[8] defines performance audit as value for money, which consists in the obligation of assessing the value received by the taxpayer in the form of goods and services from the government in exchange for the taxes that he or she pays[9] (ARAÚJO, 2008, page 48).

In Brazil, the 1988 Federal Constitution (CF) broadened the scope of control over public resources by introducing the concept of operational control and search for economy, according to article 70 of CF:

> Control of accounts, finances, budget, operations and property of the Union and of the agencies of the direct and indirect administration, as to legality, legitimacy, economy, application of subsidies and waiver of revenues, shall be exercised by the National Congress, by means of external control and of the internal control system of each Branch. (emphasis added)

Constitutional Amendment no. 19/1998, in turn, introduced the concept of efficiency as a constitutional principle, modifying article 37 of the Federal Constitution, which reads as follows:

> The direct administration and indirect administration in any of the branches of the Union, the states, the Federal District and the Municipalities shall obey the principles of legality, impersonality, morality, publicity, and efficiency [...] (emphasis added)

According to Cobra (2014), the National Congress of Brazil (CN) is responsible for political external control, while TCU is responsible for the financial control of the direct and indirect administration of the other Branches of Power. The constitution also establishes participation of state courts of accounts in the control exercised by the state legislatures and municipal councils. The exceptions are the municipalities of Rio de Janeiro and São Paulo, which have specific courts of accounts, and for the states of Bahia, Pará and Goiás, which have one Court of Accounts for the state administration and another one for the municipal administration.

In order to qualify its staff to carry out the performance audit modality of the Public Administration, in 1998, TCU entered into a technical cooperation agreement with the Department for International Development (DFID) of the United Kingdom. This agreement resulted in the publication of the *Manual de Auditoria de Natureza Operacional no ano 2000* (2000 Performance Audit Manual), which was later updated, in 2010, under the title *Manual de Auditoria Operacional* (Performance Audit Manual).

TCU initially divided performance audits into two modalities: one focused on analysis of economy, efficiency and efficacy of management and the other one referred to as program evaluation, whose purpose was to exam the effectiveness of government programs and projects. In the most recent version, TCU combined the two modalities, defining performance audit as *"independent and objective examination of the aspects of economy, efficiency, efficacy and effectiveness of government organizations, programs and activities, with the purpose of promoting improved public management"* (TCU, 2010, page 11). Under this system, external control would not be limited to processes, and would encompass analysis of the results of public management in audits carried out. In practice, the institution responsible for control would change from auditor to consultant with the purpose of improving the action of public managers instead of simply judging such action (COBRA, 2014, p. 25).

The following section presents the international standards created by INTOSAI that serve as grounds for performance auditing.

3 REGULATION OF PERFORMANCE AUDITING

Performance audits have specific characteristics of their own, which differentiate them from traditional audits. In contrast to compliance audits, which adopt relatively fixed standards, performance audits have greater flexibility to select topics, objects of the audit, work methods and ways to report the audit findings, due to the variety and complexity of the matters involved (TCU, 2010, page 15).

Nevertheless, INTOSAI, aiming to encourage SAIs to conduct government audits that are independent and effective, established international standards for standardization of procedures and conducts. INTOSAI has a framework called INTOSAI Framework of Professional Standards (IFPP). This framework has three types of pronouncements:

Principles (INTOSAI-P) – they are fundamental principles that have a comprehensive significance for the IFPP and therefore are at the top part of the framework. They deal with the roles and functions of an SAI and can be informative for governments, parliaments and for society in general. They can be used as reference to establish SAI mandates. They cover aspects such as independence, transparency, and accountability.

Standards (ISSAI) – they present standards that are mandatory for SAIs that intend to adhere to INTOSAI standards. They establish the basic concepts and principles that define public sector audit and the different types of audit: financial, performance, and compliance. They also deal with aspects such as ethics and quality control.

Guidelines (GUID) – they are the INTOSAI guidelines to support implementation of the ISSAIs. They translate the fundamental audit principles into operational guidance that is more specific and detailed. There are also GUIDs related to thematic areas (Environmental Audit, IT Audit, Public

Debt Audit, etc.), which help the auditor understand the specific subject and apply the relevant standards to audits that involve these thematic areas.

According to ISSAI 300, performance audits are defined as follows

> Performance auditing, as carried out by SAIs, is an independent, objective and reliable examination of whether government undertakings, systems, operations, programs, activities or organizations are operating in accordance with the principles of economy, efficiency and effectiveness[10] and whether there is room for improvement. (Source: http://portal.tcu.gov.br/fiscalizacao-e-controle / auditoria/normas-internacionais/, accessed on 09/21/2017, emphasis added).

The same ISSAI standard 300 (page 2) defines the principles of economy, efficiency and effectiveness in the following manner:

- The principle of economy means minimizing the costs of resources. The resources used should be available in due time, in and of appropriate quantity and quality and at the best price.

- The principle of efficiency means getting the most from the available resources. It is concerned with the relationship between resources employed and outputs delivered in terms of quantity, quality and timing.

- The principle of effectiveness concerns meeting the objectives set and achieving the intended results.

In order to carry out audits focused on the principles of economy and efficiency, process evaluation is adopted, which Gertler *et al.* (2016) defines as *"evaluation that focuses on the manner in which a program is implemented and operated; whether it complies with its original design, documenting its development and operation"*. In order to audit the principle of effectiveness, in turn, there is need to conduct impact evaluation, which Gertler *et al.* (2016) defines as *"evaluation that establishes causal connection between a program or intervention and a set of results. Impact evaluation provides answer to the following question: what is the impact (or causal effect) of a program on an outcome of interest?"* Barros (2012) corroborates such definition, stating that impact of the program is defined as the contrast between two situations: a real one (the situation of the participants after having participated in the project) and hypothetical one (the situation in which they would be, if they had not had the opportunity to participate in the program).

In cases involving assessment of the aspects of economy, efficiency and even efficacy, in addition to the reports there are usually monitoring actions; impact evaluations, in turn, which aim to verify the effectiveness of public expenditure, are conducted within a predetermined period of time.

Process evaluation and impact evaluation also differ as to their respective methodologies. While the use of questionnaires, interviews, direct observation and existing data applies to process evaluation, all methods of impact evaluation, to some extent, deal with the matter of cause and effect. According to Gertler *et al.* (2016, page 39):

> To be able to estimate the causal effect or impact of a program on outcomes, any method chosen must estimate the so-called

> counterfactual, that is, what the outcome would have been for program participants if they had not participated in the program. In practice, impact evaluation requires that the evaluator find a comparison group to estimate what would have happened to the program participants without the program and, subsequently, to draw comparisons to the treatment group that received the program (emphasis added).

In order to identify whether performance audits focused on the principle of effectiveness are carried out in Brazil, research was conducted in the Brazilian courts of accounts. The methodology used is explained in the next section of this article.

4 RESEARCH METHODOLOGY

Santos (2006) primarily classifies research in relation to goals, which may be explanatory, descriptive or exploratory. In relation to research sources, they are divided into bibliographic sources, sources arising from lab experiments or sources arising from fieldwork. Finally, in relation to data collection procedure to gather information needed to reach conclusions regarding a fact, phenomenon or process, it may involve experiments, case studies, bibliographic or documental search, research-action, participative research, quantitative research and qualitative research.

Based on the abovementioned initial background, methodology for the research conducted was defined as having exploratory goals, and the sources used consist of bibliographic sources and performance audit reports that were received. Data collection procedure consisted of qualitative research conducted by means of a questionnaire that was sent to auditors of Brazilian courts of accounts[11].

The concept of methodology mentioned in this article does not refer to the strategy for conducting performance audits, referring, instead, to ways to collect data that allow for quantitative analyses on the matter to be audited. The *Manual de Auditoria Operacional do TCU (2010)* (2010 TCU Performance Audit Manual) shows several techniques for data collection, including questionnaires, interviews, direct observation and use of existing data, being the latter the object of this research. According to the Manual:

> In General, data analysis is an interactive procedure. That is, initial analyses are conducted in the stage of planning and are refined during development of the audit. A vast variety of analysis techniques may be adopted in performance auditing, including multivariate statistical analysis, data envelopment analysis, regression analysis. (Source: TCU, 2010, page 66, emphasis added).

Considering that this research is of an academic nature, we decided to contact directly, via email, public servants of each Brazilian court of accounts that carries out performance audits. As a result, answers received express the views and opinions of the servants and do not reflect the official position of the courts of accounts regarding such auditing modality.

Until completion of this article, auditors from 23 of the 33 courts of accounts in Brazil had answered the questionnaire, and part of them sent performance audit reports. Some answers were sent by

public servants that prepare AOP or that are in charge of their direct supervision. Some courts have requested that we forward the questionnaire using an information access form. Finally, there were cases in which the contact was established through the Office of the Ombudsman of the institution.

The material received allows the study of performance audits carried out in Brazil from different perspectives; however, due to the need to delimit the length of the article, we decided to analyze only the principle of effectiveness, which, according to the World Bank (GERTLER *et al.*, 2016), is conducted by means of impact evaluations.

The questionnaire begins by requesting information regarding the structure of the court for carrying out performance audits and the main aspects that are object of AOPs. The questions that follow are partially based on a script proposed by ISSAI Standard 3000 (page 5) and seek to identify the principles guiding performance audits carried out in Brazil.

In the next section, the research findings will be presented. The full questionnaire is in Attachment I.

5 RESULTS

Preliminary analysis of information received indicates similarities between the Brazilian courts of accounts. Auditors from 13 of 23 courts that answered the questionnaire said their courts have a structure of their own to conduct performance audits (even if such structure is not always exclusive). In relation to the matters audited, the ones involving education, primary health care, environment and public safety/prison system are the ones that prevail.

According to ISSAI international standard 300, performance audits must establish a clearly defined objective that relates to the principles of economy, efficiency and effectiveness. Upon questioning auditors from Brazilian courts of accounts about the principles usually examined, respondents of 16 of 23 courts mentioned efficiency; 13 of them mentioned efficacy; 8 of them mentioned economy; and 7 of them mentioned the principle of effectiveness.

Based on the assumption an impact evaluation is necessary to verify the effectiveness of public policies, programs or expenditure, we analyzed methodologies used in 64 performance audit reports received from the seven courts that had declared they audited the principle of effectiveness. We asked auditors of the other courts of accounts that answered the questionnaire if their institution had occasionally carried out any performance audit with impact evaluation, to which question all replied negatively, considering the answers received until conclusion of this article.

Of the 64 sample reports, only four AOPs used statistical techniques intended to identify the impact of policies.

The first AOP adopted simple regression techniques to assess the relationship between investments in sewage system works and indicators of epidemiological nature and of social development in some municipalities. Notwithstanding the fact that sewage-related actions demand a longer period of time to generate positive impact on health indicators, two findings of the audit are reproduced below:

- Therefore, it is possible to conclude that the group of municipalities that did not receive investments in sewage system works presents a higher mortality rate than the group of municipalities that received investments.

- Therefore, it is possible to conclude that the group of municipalities that did not receive investments in sewage system works presents a higher rate of hospitalization due to acute diarrheal diseases than the group of municipalities that received investments.

Furthermore, the coefficient of correlation between resources invested in works of sanitary sewage system and the Firjan Index of Municipal Development (IFDM)[12] was calculated, *showing that, "the higher the IFDM, the smaller were the resources invested in works of sanitary sewage system, which translated into a coherent expectation, considering that resources were invested in municipalities that presented the lowest social indicators."*

If the analysis in question were to include other variables in the model, it would be possible to assess approximately how much of the reduction of epidemiological indicators may result from the investment in sewage, that is, it would be possible to estimate the actual impact of the investment on the epidemiological indicators.

The second AOP was designed to answer the following question: does innovative high school education contribute to students staying in school, to reducing the school dropout rates of that educational stage and to improving performance and approval of the students? To answer such question, among the auditing techniques used, an impact evaluation of the Innovative High School Program (ProEMI) was conducted by hiring a company with expertise in this type of analysis. Although there were problems regarding the database, forcing the company to analyze only the year of 2012, it was possible to divide students of the 1st to the 3rd year of high school in two groups[13] and to compare school performance and dropout rates of both groups. Among the study conclusions, the following ones are pointed out:

- On average, the grade of the students of ProEMI classes in the subjects of Mathematics and History was superior to that of students attending classes not covered by the program;

- On average, the grade of the students in the subjects of Portuguese, Biology, Geography, Physics and Chemistry did not improved becauseof their participation in ProEMI classes;

- The students that participated in the program presented, on average, a number of absences in all subjects analyzed that is higher than the one of students attending classes not covered by ProEMI[14];

- No difference was found in the approval rate of the students analyzed, regardless of the classes attended by them.

The abovementioned impact evaluation showed occasional flaws in ProEMI in the state evaluated, which would require a qualitative analysis in order to identify the root cause of the problems. In this sense, by serving as a previous "filter", the impact evaluation may support the methodologies usually adopted in performance audits.

The third AOP was designed to evaluate implementation and effectiveness of the National Program for Access to Technical Education and Employment (Pronatec). The team relied on academic

support, which provided the technical knowledge and expertise needed to use the methodology.

The initial objective was to assess whether the students that completed the courses would have greater chances of being employed than the individuals of the control group, who did not participate in the courses of Continued Initial Education (FIC), and if there was any income increase. The analysis used different control groups and different econometric models, with the purpose of verifying whether results remained the same.

Overall, analysis of the conclusive results showed that the impact on employability of students that completed the course varied depending on the students that took the course and on the technological segment. Thus, in order to render courses more effective, it would be important to consider strategies that would optimize course focus, that is, the offer of courses must consider the job market sectors that show greater potential for receiving the students who completed the course and that lack qualified labor. In relation to income, the evaluation showed no conclusive results. Impact evaluation supported some of the proposals presented aiming to correct deficiencies found.

One of the objectives of the fourth AOP was to evaluate the impact of the University for All Program (ProUni) in relation to increased access of scholarship students to higher education, of their continuance and of their academic performance. In order to do so, a consultant was hired, financed with external resources.

In short, the analyses allowed us to conclude the following: i) the program has a positive impact on accessibility to higher education; ii) full scholarship students are more likely to continue studies in comparison to partial scholarship students; and iii) academic performance of scholarship students of ProUni is not inferior to the one of other students that attend private establishments of higher education.

As previously mentioned, article 70 of CF introduced the concept of operational control in Brazil, which is enforced by the courts of accounts. This type of control foresees examination of the aspects of economy, efficiency and effectiveness of public expenditure. The first two principles, in addition to the one of efficacy, have been examined often in performance audits. However, the current research showed that there is room for improvement regarding audits with focus on the principle of effectiveness, since only four reports showed statistical techniques intended to identify the impact of public expenditure. Furthermore, in three of the four reports, there was need to hire external consultants.

In view of the above, we stresses the need for training personnel of the courts of accounts to allow regular effectiveness assessments, thus achieving analysis of public expenditure from all aspects.

6 FINAL CONSIDERATIONS

The purpose of this article was to analyze performance audits that were carried out by the Brazilian courts of accounts with focus on the principle of effectiveness. The beginning of this article showed a brief overview of the historical evolution of performance auditing. Section 3 showed standardization of performance auditing, according to INTOSAI. Section 4, in turn, described the methodology for conducting the research that supported this article, while section 5 dealt with the analysis of information collected.

Assessment of primary data in the Brazilian courts of accounts indicated that few institutions said they conducted audits with focus on the principle of effectiveness, and, of those, only four reports showed statistical techniques intended to quantitatively identify effectiveness of public expenditure.

Therefore, this article evidenced a gap in performance audits currently carried out in Brazil, which would benefit from the use of impact evaluations to support methodologies usually adopted and, thus, meet the demands of the population for greater control over results of public expenditure.

It is important to point out the following limitations to the work: (i) the bibliographic research on performance auditing was restricted to documents in Portuguese; (ii) answers to the questionnaires express the personal opinions of the public auditors and do not reflect the official position of the courts of accounts, considering that the consultation was not targeted at the institutions. Furthermore, ten courts did not provide answer to the research; and (iii) the sample analyzed, which consists of 62 performance audit reports, is not sufficiently comprehensive to lead to the conclusion that practically no impact evaluation was found in performance audits carried out in Brazil.

In conclusion, the following suggestions are made for future works: (i) to broaden the research scope, by means of consultation with the courts of accounts from other countries; and (ii) to develop methodology that simplifies the statistical tools necessary for performance audits with focus on effectiveness, thus, aiming to disseminate their use.

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APPENDIX

SURVEY ON PERFORMANCE AUDIT

A brief overview of the Court's structure to conduct performance audits.

What are the main topics that are object of performance audits?

What principles do the objectives of performance audits usually carried out by the Court relate to: economy, efficiency, efficacy or effectiveness?

What approaches are primarily used: (i) to examine the proper operation of systems; (ii) to assess whether purposes/impacts of a program/activity were achieved according to plan; (iii) to analyze the causes of specific problems.

In order to do so, are criteria usually used of qualitative or quantitative nature?

Does the Court conduct cost-benefit analyses of public expenditure?

Does the Court resort to the use of indicators in its reports? If the answer is *yes*, please explain what type of indicators are used: (i) monitoring; (ii) outcome; or (iii) impact indicators. Please provide examples for the indicators used.

Which methodologies are usually used: (i) questionnaires; (ii) interviews; (iii) direct observation; (iv) use of existing data; (v) descriptive statistics; (vi) inferential statistics; (vii) others.

Comments (optional)

Finally, I ask you to please send some of the more recent performance audit reports that are available to the public.

Sincerely,

Received on 08/28/2018
Approved on 11/09/2018

NOTES

1 TCEs have jurisdiction over the respective state and over all municipalities that are part of such state, except in the following cases: (i) Bahia, Pará and Goiás, which have one court of accounts for the state administration and another one for the municipal administration; and (ii) São Paulo and Rio de Janeiro, whose capital cities have specific courts of accounts.

2 Currently, there are five courts, since the Court of Accounts of the State of Ceará absorbed the Court of Accounts of the Municipalities of Ceará.

3 Estado de Bem-Estar Social, in Portuguese.

4 Term that does not translate directly to Portuguese. It may be construed as the democratic acceptance of responsibility on the part of government agents by means of two devices: vertical accountability, in which society controls, in bottom-up approach, government leaders (by means of representative voting, plebiscites and councils of public service users, among others) and horizontal accountability, which is defined as the one carried out by mutual checks and balances of the Three Branches of Government and by means of government bodies that control public activities, such as the Brazilian courts of accounts (O'DONNELL, 1998).

5 Apolitical institution, affiliated to UN, whose purpose is the exchange of ideas regarding the best practices of public auditing worldwide. Please access www.intosai.org.

6 Government Accountability Office. In Brazil, such body would have goals similar to the ones of the Office of the Federal Comptroller General (CGU), current Ministry of Transparency, Supervision and Comptroller General of Brazil.

7 *Auditoria de desempenho*, in Portuguese.

8 The National Audit Office is an independent legislative body in the United Kingdom, which is responsible for auditing departments of the central government, government agencies and non-departmental public bodies.

9 In Brazil, the term used for such definition is *Análise Custo-Benefício* (Cost-Benefit Analysis), which consists of a method for assessing the net economic impacts of a public project, determining whether it is feasible from the social welfare perspective, by means of the algebraic sum of its benefits, with deduction of its costs, and both benefits and costs are considered in the current value. Source: Adapted from www.observatorio.pt/download.php?id=218, accessed on 09/20/2017.

10 The term effectiveness encompasses two different concepts in the Portuguese language: efficacy (defined as the scope of the goals scheduled within a certain period of time) and effectiveness (concept related to impacts caused by the government action).

11 TCU, TCDF, 26 TCEs and 5 TCMs.

12 The index, calculated by FIRJAN system of the Federation of Industries of the State of Rio de Janeiro, with local scope, is annually calculated, exclusively based on official data regarding the three main areas of development: Employment and Income, Education and Health.

13 Treatment Group (those registered with ProEMI) and Control Group (those that did not participate in the program).

14 One possible reason for the higher number of absences by students of ProEMI may be the fact that they have a number of classroom hours superior to the ones of the students attending classes not covered by the program.

Author Index

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