Brazilian Courts of Accounts: competencies for the administrative and the jurisdiction functions*

Tribunais de Contas: competentes constitucionalmente para o exercício das funções administrativa e jurisdicional

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ABSTRACT

This article interprets the norms of the 1988 Constitution of the Federative Republic of Brazil regarding the external control activity of the Federal Court of Accounts, especially the norm of item II of article 71 of the Constitution, in order to know if the Brazilian Constitution gave jurisdictional competencies for this Court.

KEYWORDS

Constitutional law — administrative law — external control — Audit Office — jurisdictional function — administrative function

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RESUMO

Este artigo interpreta as normas da Constituição da República Federativa do Brasil de 1988 referentes à atividade de controle externo ao encargo do Tribunal de Contas da União, em especial a norma do inciso II do artigo 71 da Constituição, a fim de avaliar se teria sido entregue às Cortes de Contas o exercício da função jurisdicional.

PALAVRAS-CHAVE

Direito constitucional — direito administrativo — controle externo — Tribunal de Contas — função jurisdicional — função administrativa

I. Introduction

The primary objective of this article is to research the external control activity as outlined by our original constitutional assembly of 1988 and the subsequent derivatives of 1998,[1] in order to determine what State functions were allocated to the Brazilian Courts of Accounts by the 1988 Constitution of the Federative Republic of Brazil (CRFB/88).

As we know, studies have previously been made of the state functions of the Courts of Accounts, with two divergent lines of argument: one limiting their competencies exclusively to administrative functions;[2] and the other which considers that the Courts of Accounts exercise both functions: administrative (sections I, III, IV, V, VI, VII, IX, X and XI of Article 71) and jurisdictional (section II).[3]

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1 In this context, constitutional amendments 19 and 20 of 1998.

2 It is probable that a majority of native scholars believe that the Courts of Accounts exercise only an administrative function. This group consists of highly regarded jurists such as: MASAGÃO, Mário. *Curso de direito administrativo*. 6th ed. São Paulo: Revista dos Tribunais, 1977; MELLO, Oswaldo Aranha Bandeira de. Tribunais de Contas: natureza, alcance and efeitos de suas funções. *RDP*, São Paulo, n. 73, pg. 182, 1982; CRETELLA JÚNIOR, José. Natureza das decisões do Tribunal de Contas. *Revista de Informação Legislativa*, v. 24, n. 94, pg. 183-198, Apr./Jun. 1987; MEIRELLES, Hely Lopes. *Direito administrativo brasileiro*. 23rd ed. São Paulo: Revista dos Tribunais, 1998; MEDAUAR, Odete. *A processualidade no direito administrativo*. 2nd ed. São Paulo: Revista dos Tribunais, 2008; FIGUEIREDO, Lúcia Valle. *Curso de direito administrativo*. 8th ed. São Paulo: Malheiros, 2006; DI PIETRO, Maria Sylvia Zanella. *Direito administrativo*. 27th ed. São Paulo: Atlas, 2014; SILVA, José Afonso da. *Curso de direito constitucional positivo*. 29th ed. São Paulo: Malheiros, 2007; and others.

3 Four excellent theses have recently been produced on this subject: PARDINI, Frederico. Tribunal de Contas da União: órgão de destaque constitucional. Thesis (doctorate in law) —

This debate has been the subject of countless excellent academic studies in the past, including doctoral theses. I think it would be useful to list here, if only in passing, the key commentators and their positions, so as to facilitate the development of the argument in future chapters.

II. The argument that the Courts of Accounts exercise only an administrative function

As mentioned in a footnote (no. 2), native commentators of weight hold that the Courts of Accounts exercise solely an administrative function: Mário Masagão, Oswaldo Aranha Bandeira de Mello, Themístocles Cavalcanti,[4] José Cretella Júnior, Hely Lopes Meirelles,[5] Odete Medauar, Lúcia Valle Figueiredo, Maria Sylvia Zanella Di Pietro,[6] José Afonso da Silva,[7] José Rubens Costa,[8] Toshio Mukai[9] and others.

The majority of these authors, as well as Marcia Pelegrini in her recent doctoral thesis, argue that there is an obstacle to the recognition of the exercise of a jurisdictional function by the Courts of Accounts because of the

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Law School, Universidade Federal de Minas Gerais, Belo Horizonte, 1997; BUSQUETS, Cristina Del Pilar Pinheiro. A configuração jurídica do Tribunal de Contas: o processo e o tempo. Thesis (doctorate in law) — Postgraduate Law Studies Program, Pontifícia Universidade Católica de São Paulo, São Paulo, 2010; PELEGRINI, Marcia. A competência sancionatória do Tribunal de Contas no exercício da função controladora: contornos constitucionais. Thesis (doctorate in state law) — Department of Postgraduate Studies in Law, Pontifícia Universidade Católica de São Paulo, São Paulo, 2008; and COSTA, Luiz Bernardo Dias. *Tribunal de Contas*: evolução e principais atribuições no estado democrático de direito. Belo Horizonte: Fórum, 2006. With the exception of Marcia Pelegrini, these writers believe that the Courts of Accounts also exercise a jurisdictional function when judging the accounts of those who use public funds.

4 CAVALCANTI, Themístocles Brandão. O Tribunal de Contas — órgão constitucional — funções próprias e funções delegadas. *Revista de Direito Administrativo*, Rio de Janeiro, v. 109, pg. 1-10, Jan. 1972.

5 Para Hely Lopes Meirelles (Direito administrativo brasileiro, op. cit., pg. 62), "since they are administrative acts, they include legal or judicial control".

6 According to Di Pietro, "This is not a jurisdictional function, because the Court only examines the accounts, from a technical aspect, and does not consider the responsibility of the public agent, which is the exclusive duty of the Judiciary". Maria Sylvia Zanella Di Pietro, Direito administrativo, op. cit., pg. 826.

7 For José Afonso da Silva, the Court of Accounts "does not judge people or decide conflicts of interest, but only exercises a technical judgment of accounts [...].We are thus also in agreement that the Court of Accounts is a technical body, not a jurisdictional one" (José Afonso da Silva, Curso de direito constitucional positivo, op. cit., pg. 167).

8 COSTA, José Rubens. Controle jurisdicional dos atos decisórios dos Tribunais de Contas. *Boletim de Direito Administrativo*, São Paulo, v. 12, n. 6, pg. 341-356, Jun. 1996.

9 MUKAI, Toshio. Os Tribunais de Contas no Brasil e a coisa julgada. *Revista do Tribunal de Contas da União*, v. 27, n. 70, pg. 83-86, Oct./Dec. 1996.

"principle of unity of jurisdiction", because "their decisions do not have the force of *res judicata*" and because of the absence of "a political nature for their attributions".[10]

José Cretella Júnior's paper on this subject is probably the most detailed. Basically, he argues that in Brazil administrative litigation as such does not exist, and that the Judiciary has a monopoly of jurisdiction; and that it would be absurd to imagine the possibility of the Courts of Accounts holding the two functions — administrative and jurisdictional — simultaneously, since he who administers does not judge, and he who judges does not administer.[11]

Ellen Gracie,[12] in an article about the possibility of the Judiciary amending the decisions of the Courts of Accounts, uses the argument that, when there is a judicial review of administrative acts, such as the decisions of the Federal Court of Accounts (TCU), the Judiciary will in "certain cases be logically authorized to reexamine the merits", but must "preserve the essential competencies of the administration". However, she shows that the vast majority of the judgments of the Federal Supreme Court (STF) which are based on decisions of the Court of Accounts concentrate only on issues of legality and on serious procedural irregularities.[13]

There is also a comment by Heráclito Salles[14] from the 1970s, in which he invokes the theory of process and argues that there is no force of *res judicata* in the decisions of the Courts of Accounts, since the State is required to depend on the Judiciary itself to execute their rulings.

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10 PELEGRINI, Márcia. *A competência sancionatória do Tribunal de Contas: contornos constitucionais*. Belo Horizonte: Fórum, 2014. pg. 100.

11 José Cretella Júnior, Natureza das decisões do Tribunal de Contas, op. cit., pg. 198.

12 GRACIE, Ellen. Notas sobre a revisão judicial das decisões do Tribunal de Contas da União pelo Supremo Tribunal Federal. *Fórum de Contratação e Gestão Pública FCGP*, Belo Horizonte, yr. 7, n. 82, Oct. 2008.

13 The author concludes: "According to article 5, XXXV of the Constitution, 'the law shall not exclude from the appreciation of the Judiciary an injury or threat to law' and this principle entails the universal axiom according to which no matter involving interests or rights can be removed from the examination of the competent natural court. [...]Thus the principle of non-obviation of judicial examination is valid for us under all circumstances. In view of this, the external control of the accounting, financial, budgetary, operational and patrimonial activity of the federal government and of the direct and indirect administration entities, in relation to legality, legitimacy, economics, application of subsidies and waiver of revenues (Article 70 of the Constitution), in the charge of the Nacional Congress, and exercised with the help of the Court of Accounts (Article 71 of the Constitution), is normally subject to the same regime of judicial control". Ibid., pg. 26.

14 SALLES, Heráclito. Natureza, autonomia e duplicidade da função Tribunais de Contas. *Revista do Tribunal de Contas da União*, v. 7, n. 14, pg. 2-22, Dec. 1976.

Marçal Justen Filho,[15] in his *Course on administrative law*, although he does not recognize the exercise of a jurisdictional function by the Courts of Accounts, asserts that:

> [...]it would be possible to talk about a Court of Accounts acting in a *quasi-jurisdictional* way. [...]No other body in the Executive or the Legislative Branch has been entrusted by the Constitution with powers of judgment, including in terms of relevance and efficacy, equivalent to those of the Court of Accounts.

There are those who try to have it both ways, for although they argue that the Courts of Accounts exercise only an administrative function, they believe that their rulings are not subject to review by the Judiciary as to merit. One of these, Benjamin Zymler[16], argues that the Courts of Accounts do not possess a jurisdictional function, but that this does not prevent the existence of a procedural relationship which basically establishes the judgment of merit as being within their constitutional competency.

This shows how polemical the issue is in our legal literature; totally contrary interpretations that seek to outline the positioning and the administrative nature of the Courts of Accounts. And the controversy is even more heated when we consider the following analyses, which uphold that there is a jurisdictional function held by these Courts of Accounts.

III. The argument that the Courts of Accounts also exercise a jurisdictional function

Although they form a minority in academic circles in Brazil, we cannot overlook the academic weight of the classical Brazilian jurists who defend the exercise of a jurisdictional function by the Courts of Accounts, such as Pontes de Miranda[17] and Seabra Fagundes.[18] For the former, in view of the

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[15] JUSTEN FILHO, Marçal. *Curso de direito administrativo*. 12th ed. São Paulo: Revista dos Tribunais, 2016. pg. 1206 and 1211.

[16] ZYMLER, Benjamin. *Processo administrativo no Tribunal de Contas da União*. Serzedello Corrêa Awards 1996 — prize-winning monographs. Brasília: Instituto Serzedello Corrêa, 1997.

[17] MIRANDA, Francisco Cavalcanti Pontes de. *Comentários à Constituição de 1946*. Rio de Janeiro: Imprensa Nacional, 1947. pg. 141.

[18] FAGUNDES, Miguel Seabra. *O controle dos atos administrativos pelo Poder Judiciário*. 6th ed. São Paulo: Saraiva, 1984.

normative literality, there has been no doubt since 1934 about the jurisdictional competence of the Courts of Accounts. And according to Seabra Fagundes, in relation to the accounting aspect, "the Court of Accounts has been delegated the jurisdictional appreciation of certain individual situations (those of the people responsible for the patrimonial assets of the State)".[19]

In my research, I also found two recent doctoral theses,[20] by Frederico Pardini and Cristina Del Pilar Pinheiro Busquets, on the Courts of Accounts.[21] In both cases their authors believe that the Courts of Accounts also exercise a jurisdictional function (Article 71, section II, of the CFRB/88).

There is also the position of the former judge of the TCU, Luciano Brandão Alves de Souza,[22] who was involved in the discussions that led the constitutional assembly to promulgate the CRFB/88, and for whom the "Court of Accounts is, in short, a public body subject to external control, invested with its own, private jurisdictional powers, throughout Brazil, over matters which are included in its highly detailed list of attributions".[23] A similar line is taken by Carlos Eduardo Thompson Flores Lenz[24], who quotes Ruy Cirne Lime in his defense of the special jurisdiction of the Courts of Accounts.[25]

Nor could we ever ignore the many important articles by Jorge Ulisses Jacoby Fernandes[26] on the theme *Courts of Accounts*, in particular the one which defines the possibilities for review by the judiciary of decisions of the Courts of Accounts.

The chorus is joined by Bento José Bugarin,[27] Julio Cesar Manhães de Araujo[28] and Athos Gusmão Carneiro[29], who argue that the Constitution admits two cases of "anomalous jurisdiction": the first being the judgment by

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19 Ibid., pg. 122.

20 Frederico Pardini, Tribunal de Contas da União, op. cit.; Cristina Del Pilar Pinheiro Busquets, A configuração jurídica do Tribunal de Contas, op. cit.

21 The thesis of Marcia Pelegrini on the other hand, although it deals with the Court of Accounts, has a more limited scope and focuses on its powers to sanction.

22 SOUZA, Luciano Brandão Alves de. A Constituição de 1988 e o Tribunal de Contas da União. *Revista de Direito Administrativo*, Rio de Janeiro, v. 175, pg. 36-46, Feb. 1989.

23 Ibid., pg. 45.

24 LENZ, Carlos Eduardo Thompson Flores. O Tribunal de Contas e o Poder Judiciário. *Revista de Direito Administrativo,* Rio de Janeiro, v. 238, pg. 265-282, Jan. 2004.

25 Ibid., pg. 272.

26 FERNANDES, Jorge Ulisses Jacoby. Limites à revisibilidade judicial das decisões dos Tribunais de Contas. *Revista do Tribunal de Contas da União*, n. 70, pg. 39-71, Oct./Dec. 1996.

27 BUGARIN, Bento José. O Tribunal de Contas da União e o controle externo no Brasil. *Revista do Tribunal de Contas da União*, Brasília, yr. 12, n. 27, pg. 25-61, Dec. 1982.

28 ARAUJO, Julio Cesar Manhães de. *Controle da atividade administrativa pelo Tribunal de Contas na Constituição de 1988.* Curitiba: Juruá, 2010.

29 CARNEIRO, Athos Gusmão. *Jurisdição e competência*. 18th ed. São Paulo: Saraiva, 2012.

the Federal Senate of impeachable offences by the President of the Republic; and the second, judgments by the Courts of Accounts of the accounts of those responsible for the treasury.

All this goes to show the extent to which the topic has been debated.[30] Without any pretense of settling a polemical doctrinaire discussion that has been going on for decades, I shall seek to trace the lines of interpretation that have led me to the conviction that our 1988 Constitution of the Federative Republic of Brazil conferred both competencies on the Courts of Accounts: administrative and jurisdictional.

IV. Courts of Accounts and their competencies according to constitutional norms

Miguel Seabra Fagundes's[31] well-known work *The control of administrative acts by the Judiciary* describes the three different state functions — legislative, administrative and jurisdictional —, where:

a) the legislative function is the one that produces legal norms (general, abstract and obligatory) as innovations in the legal order;
b) the purpose of the administrative function is to apply in concrete situations the general and abstract legal norms produced by the legislative function;
c) the jurisdictional function also applies in concrete situations the general legal norms created by the legislative function, but with its own qualifier in relation to the administrative function: that it applies the legal norms in a definitive way.

To analyze which of these state functions were entrusted by the original constitutional assembly to the TCU, the scientist of law must embark upon an interpretation of the Constitution itself,[32] and in this writer's view must follow

[30] The debate on the subject is so complex that there are even some, such as Carlos Ayres Britto, who have started suggesting that the Courts of Accounts in Brasil do not exercise any of the three traditional functions of the State, but rather a fourth, which would be called the external control function. However I do not think that this is the right interpretative path to pursue at this time.

[31] Miguel Seabra Seabra, O controle dos atos administrativos pelo Poder Judiciário, op. cit.

[32] As its name suggests, the Constitution constitutes the State, determining how it should be organized, what functions it should exercise and what principles will guide it, as well demonstrated by José Joaquim Gomes Canotilho and many other exponents of the Theory of the Constitution.

the hermeneutical procedure proposed by Karl Larenz,[33] namely: to start with a literal interpretation, evaluating its correlation and alignment with the systematic interpretation, and, finally, confirming it with the historical, teleological interpretation.

IV.1 The literal or semantic interpretation

By means of a literal interpretation of the propositions contained in arts. 70 and 71, the Courts of Accounts were given the duty and power to bring proceedings for auditing accounts against agents and/or individuals or legal entities, to investigate them and then judge the legality, the legitimacy and the economics of the accounts in these proceedings, sanctioning those responsible.

In allocating these competencies, CRFB/88 uses the verb "to judge" only in the following articles:

a) "Article 49. It is the exclusive competency of the National Congress:
[...]
IX — **to judge** the accounts rendered annually by the President of the Republic and to consider reports on the execution of the government's plans;"

b) "Article 52. The Federal Senate is exclusively responsible for:
I — prosecuting and **judging** the President and the Vice-President of the Republic for crimes of responsibility, and the Ministers of State and the Commanders of the Navy, the Army and the Air Force for related crimes of the same nature; (Wording of Constitutional Amendment No. 23, of 09/02/99)
II — prosecuting and **judging** the Justices of the Federal Supreme Court, the members of the National Council of Justice and the National Council of the Public Prosecutor's Office, the Federal Attorney General and the Federal Advocate General for crimes of responsibility;" (Wording of Constitutional Amendment No. 45, of 2004)

[33] LARENZ, Karl. *Metodologia da ciência do direito*. 3rd ed. Translated by José Lamego. Lisbon: Calouste Gulbenkian, 1997.

c) "Article 71. External control shall be exercised by the National Congress with the help of the Federal Court of Accounts, which is responsible for:
[...]
II — **judging** the accounts of the administrators and others responsible for the public monies, assets and values of the direct and indirect administration, including the foundations and companies established and maintained by the federal government, and their accounts that give rise to loss, misappropriation or other irregularity to the detriment of the public purse;" (our emphasis).

d) And, of course, in Chapter III, *The Judiciary*, in arts. 96, 102, 105, 108, 109, 114, 124, 125.

The constitutional assembly was quite correct in its use of the word *judge* when it determined the competencies of these bodies; in all the articles and sections where the word appears, the intention is clearly that which is contained in Portuguese language dictionaries: "to take a decision, to resolve with the status of judge or arbitrator; to render a judgment; to sentence" (Houaiss, 2009:1138).

In each of these occasions it is impossible to replace the concept *judge* by another synonymous word, such as *sentence* or *decide,* since these would not be adequate from a scientific point of view, such actions being merely components of the broader action of judging. The judge judges and, for this purpose, he has to make interlocutory decisions and the terminative decision called a *sentence.* The court judges and, for the purpose, also has to make interlocutory decisions and cast votes which, in a collegiate body, will constitute a ruling.

An interesting curiosity: the constitutional assembly used the term *judge* 28 times; in 24 of them it used it actually to deliver the competency of judging; only on four occasions (arts. 72; 84, XI; 103; 130) is the term used with the clear and obvious meaning of *deem* — "calling for the measures which it may judge necessary" — or with the identical meaning: calling for the measures which it may deem necessary.

One has to ask: is it possible that the CRFB/88 is in error only in section II of article 71?

IV.2 The systematic interpretation

Anyone can make a mistake. If there was a norm or principle in the constitution conflicting with section II of Article 71, then one could argue that the word *judge* contained in it is inappropriate.[34] To find such a conflict, it is necessary, as Karl Larenz shows, to undertake a systematic interpretation of the text of the constitution, both from a material and a formal perspective.

IV.2.a Systematic interpretation of the formal aspect

From a formal viewpoint, one can start with the express inclusion of the word *jurisdição*[35] (jurisdiction) in Article 73, main section, according to which the TCU "consists of nine Judges, has its headquarters in the Federal District, employs its own complement of staff and has *jurisdiction* throughout the country, exercising, as appropriate, the attributions listed in Article 96" (our emphasis).

Still from the formal viewpoint, paragraphs 3 and 4 of Article 73 provide that the "Judges of the Federal Court of Accounts shall have the same guarantees, prerogatives, impediments, salaries and benefits as the Judges of the Superior Court of Justice", and that its auditors, "when in the exercise of their other judicial duties", shall have the same guarantees and impediments as the judges of the Federal Regional Court. There is no other occasion on which the constitutional assembly gave a similar stature of *judicial*[36] to the duties of a body possessing only administrative competency.

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[34] An interesting excerpt from the text of Luís Roberto Barroso reads "The interpreter of the Constitution must work on the assumption that all the words in its text have a function and a specific meaning. There are no superfluous words in the Constitution, nor should we assume that the constitutional assembly entered into contradictions or committed technical errors.

What is more, it is ideal if, as far as possible, the words used in the constitution should always have the same meaning when they appear in more than one passage. In any case, any ambiguity in the text must be settled by considering the spirit of the provision and by recourse to other methods of interpretation". BARROSO, Luís Roberto. *Interpretação e aplicação da Constituição.* 5th ed. São Paulo: Saraiva, 2003. pg. 130.

[35] The word jurisdição ("jurisdiction") appears in the CRFB/88 31 times, and in 29 cases it is used to mean attribution of the courts of the Judiciary, in one case for the Court of Accounts and in one other single case for the administration of the treasury. This means, for the TCU, a certain constitutional coherence.

[36] According to the Michaelis dictionary, the word judicatura, a feminine noun, means "1 Position or dignity of a judge. 2 Legal. Exercise of the function of judge; duration of such exercise. 3 Power to judge. 4 Judicial power. 5 Court". Available at: <http://michaelis.uol.com.br/moderno/portugues/definicao/judicatura%20_988263.html>. Accessed on: Nov. 20, 2016.

The very name given by the CRFB/88 to this body is *Court*, unlike the other administrative bodies that issue administrative decisions, such as councils, ministries, secretariats, agencies, the inspector general's office, the public prosecutor's office, state agencies or financial or tax administration. The CRFB/88 does not contain a single wrong use of the word *court*, which appears always in the sense of a collegiate body of magistrates.[37]

So from a formal aspect, there is no appearance of any conflict that could remove the force of the verb *judge.*

IV.2.b Systematic interpretation of the material aspect

As to the material perspective, there are interesting analyses to be made.

A) Non-violation of the condition of tripartite powers

In relation to constitutional principles, the first step is to assess the Tripartite Division of Powers ("Article 2 The federal powers, independent but in harmony with each other, are the Legislative Branch, the Executive Branch and the Judiciary."): as widely agreed by the best legal literature,[38] each of these three bodies can exercise one, two or even three of the functions of State (legislative, administrative and jurisdictional). This is so much so that:

a) the Executive Branch, in addition to its preeminent **administrative function,** is authorized to exercise a **legislative function** when it issues provisional measures and delegated laws (arts. 59, 62 and 68 of the CRFB/88);

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[37] For Álvaro Guilherme Miranda, the Courts of Accounts, unlike audit departments and controllerships, have a collegiate structure consisting of members holding office for life — like the Judiciary Branch — and who legitimately exercise jurisdictional and coercive powers over private citizens. MIRANDA, Álvaro Guilherme. Mudança institucional do Tribunal de Contas: os oito modelos debatidos na Constituinte de 1988 para o sistema de fiscalização do Brasil. Dissertation (Master's degree) — Postgraduate Program in Public Policy, Strategy and Development, Economics Institute, Universidade Federal do Rio de Janeiro, Rio de Janeiro, 2009.

[38] In relation to the possibility of the accumulation of typical and atypical functions by state authorities, we have CANOTILHO, José Joaquim Gomes. *Direito constitucional e teoria da Constituição*. 7th ed. Coimbra: Almedina, 2003; José Afonso da Silva, Curso de direito constitucional positivo, op. cit.; MENDES, Gilmar Ferreira; COELHO, Inocêncio Mártires; BRANCO, Paulo Gustavo Gonet. *Curso de direito constitucional*. 4th ed. São Paulo: Saraiva, 2009; NOVELINO, Marcelo. *Direito constitucional*. 6th ed. Rio de Janeiro: Método, 2012; Maria Sylvia Zanella Di Pietro, Direito administrativo, op. cit.; and BULOS, Uadi Lammêgo. *Curso de direito constitucional.* 8th ed. São Paulo: Saraiva, 2014.

b) the Legislative Branch exercises: a **legislative function,** when it issues supplementary laws, ordinary laws, legislative decrees and resolutions of the Federal Senate (Article 59); and an **administrative function,** when it is required to manage and administer autonomously its two houses, the Chamber of Deputies and the Federal Senate; a **jurisdictional function,** when it judges the accounts rendered by the president or judges the president for impeachable crimes (arts. 49, IX; and 52), and also, through the Court of Accounts (an autonomous and independent body which is however part of the Legislative Branch),[39] when it judges the accounts of those who use public funds (Article 71, section II); and
c) the Judicial Branch, in addition to its primary **jurisdictional function**, is required to exercise an **administrative function** when it manages and administrates its organic autonomous structures.[40]

So there is no threat to the above-mentioned principal of Tripartite Division of Powers in the fact that the original constitutional assembly itself allocated to one of the bodies which it created this or that function.[41]

B) No monopoly of jurisdictional functions by the Judicial Branch

A more substantial doubt arises from the possible affront to the principle known as the *Unity of Jurisdiction,* since an almost overwhelming majority

[39] According to the CRFB/88, the Federal Court of Accounts is a part of the Legislative Branch, without its own legal personality. However, it has its specific competencies which cannot be exercised by other entities, and not even the National Congress can substitute for it. Therefore the TCU is an autonomous and independent body, responsible for its internal administrative management, without interference from any other body.

[40] There are also some jurists who consider that the bodies of the Judiciary have been entrusted with the exercise of a legislative function, even if in atypical form, when for example, they issue their internal regulations. This is a controversial matter which I do not intend to pursue in this article.

[41] Marçal Justen Filho recognizes the same division in his Curso de direito administrativo (op. cit., pg. 118), making the interesting and courageous comment that we need to move on from an eighteenth century belief in a mere Tripartite Division of Powers and add two more powers that are completely autonomous and independent from the others: the Public Prosecutor's Office and the Federal Court of Accounts. This is a fascinating discussion that really deserves to be pursued. However the purpose of this article is much more limited and I have no pretensions to dwell on such philosophical reflections. Another related question is, if we created two more powers, would they also exercise two new functions? Or would the Public Prosecutor's Officer exercise a new function of general fiscalization, and the Court of Accounts the function of fiscalization of accounts? Is the administrative function equivalent to the function of fiscalization?

of Brazilian legal literature[42] and part of the Judiciary[43] hold that our 1988 Constitution of the Federative Republic of Brazil is based on this model, because of the provisions of Article 5, section XXXV, which reads "the law shall not exclude from appreciation by the Judiciary any violation of or threat to the law".

To some extent, this question can be resolved by the previous affirmation, which demonstrated the possibility that the constitutional assembly might entrust exercise of a jurisdictional function to the Federal Senate, for example. Furthermore, the Federal Supreme Court, the highest interpreter of the Constitution, recognizes the exclusive competency of this Legislative House to exercise judicial activities when an impeachable crime has been committed by the President of the Republic or other public agents, as defined in Article 52, sections I and II, of the CRFB/88.

This understanding was formalized in the historic judgment of the "Collor Case" by means of Writ of Mandamus No. 21.564/DF[44] and, similarly, in the recent judgment of an injunction in ADPF No. 378/DF,[45] referring to the rite of the process of impeachment of President Dilma Rousseff. In this context, it is necessary to quote extracts from both decisions:

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42 This is the view of CARVALHO FILHO, José dos Santos. *Manual de direito administrativo*. 16th ed. Rio de Janeiro: Lumens Juris, 2006; DIAS, Ronaldo Brêtas de Carvalho. *Processo constitucional e o estado democrático de direito*. Belo Horizonte: Del Rey, 2010; CINTRA, Antonio Carlos de Araújo; GRINOVER, Ada Pellegrini; DINAMARCO, Cândido Rangel. *Teoria geral do processo*. 30th ed. São Paulo: Malheiros, 2014; and Maria Sylvia Zanella Di Pietro, Direito administrativo, op. cit.

43 I quote from a recent ruling handed down by Min. Marco Aurélio: "The existence of parajurisdictional bodies, such as the Federal Court of Accounts, does not contradict the fact that, in Brazil, jurisdiction is unitary, since we do not have Administrative Litigation as happens in other countries. 2) This unity — which arises from the principle of non-obviation of jurisdictional control (or of the ubiquity of justice) [Article 5, XXXV] —, also does not contradict the sovereign and permanent character of the decisions of the Courts of Accounts, when exercising their specific constitutional competencies (Article 71, of the FC). So it is necessary for a desirable harmony to be observed between the constitutionally established competencies". BRAZIL. Federal Supreme Court. Appeal to the Supreme Court 629.711/RJ. Rapporteur: Min. Marco Aurélio de Mello. Diário de Justiça Eletrônico, Brasília, 11 Nov. 2015. Available at: <www.stf.jus.br/portal/jurisprudencia/visualizarEmenta.asp?s1=000246569&base=baseMonocraticas>. Accessed on: Oct. 3, 2016.

44 BRAZIL. Federal Supreme Court. Writ of Mandamus 21564. Rapporteur: Octavio Gallotti — Full Court. Diário de Justiça, Brasília, 27 Aug. 1993. Available at: <www.stf.jus.br/arquivo/cms/sobrestfconhecastfjulgamentohistorico/anexo/ms21564.pdf>. Accessed on: Oct. 3, 2016.

45 BRAZIL. Federal Supreme Court. Preliminary Injunction on ADPF 378. Rapporteur: Edson Fachin — Full Court. Diário de Justiça Eletrônico, Brasília, Mar. 8, 2016. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=10444582>. Accessed on: Oct. 3, 2016.

> [...]Impeachment of the President of the Republic: the Federal Senate is responsible for prosecution and judgment of the President of the Republic for impeachable crimes (FC, Article 52, I; Article 86, para. 1, II), after the instatement of proceedings has been authorized by a two-thirds majority of the Chamber of Deputies (FC, Article 51, I), or the accusation has been admitted (FC, Article 86). *That is to say: the impeachment of the President of the Republic is to be prosecuted and judged by the Senate. The Senate, not the Chamber of Deputies, will formulate the accusation (indictment) and will issue the judgment (FC, Article 51, I; Article 52, I; Article 86, para. 1, II, para. 2*) [...]In principle this was the case under the previous regime, but now the Federal Senate is responsible not only for judging but also for prosecuting the case, which means in the High Chamber, where the evidentiary phase of the proceeding is implemented and the evidence considered to be necessary or appropriate is heard.
>
> [...]Additionally, the expression "prosecute and judge" is found in a number of passages in the Constitution (arts. 52, I and II; 102, I; 105, I; 108, I; 109, main section; 114, main section; 124, main section; and 125, paras. 4 and 5), always in the context of the exercise of judicial functions. In all these situations, it is always natural for the body judging to make a preliminary analysis of whether the accusation is proper. There is no intention of obliging the judging body to take a case to its utmost consequences without first analyzing its viability. This would prevent the body from exercising its judicial function adequately.

Moreover, the STF, when judging Writ of Mandamus No. 16.255/DF,[46] decided along the same lines when confronted with the argument of an alleged monopoly of jurisdiction by the Judiciary. Judges Evandro Lins e Silva (rapporteur of the unanimous vote), Aliomar Baleeiro, Hermes Lima, Victor Nunes Leal, Luiz Gallotti and Vilas Boas held as follows:

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[46] BRAZIL. Federal Supreme Court. Writ of Mandamus 16.255/DF. Rapporteur: Min. Evandro Lins — Full Court. Diário de Justiça, Brasília, Oct. 5, 1966. Available at: <www.stf.jus.br/portal/jurisprudencia/visualizarEmenta.asp?s1=000152299&base=baseAcordaos>. Accessed on: Dec. 5, 2016.

> [...]As in earlier (constitutions), in the Charter of 45 the jurisdictional monopoly of the Judiciary remained practically intact. The only exceptions were matters which, although relating to jurisdiction, the constitutional assembly entrusted to non-judicial bodies — the "impeachment" process, attributed, because of its markedly political nature, to the successive competency of the two houses of the National Congress (FC articles 59, no. I, 62, I and II, 88, 92 and 100), and the judgment of the accounts of those responsible for monies and other assets of the State or of the public agencies which, in view of the technical and accounting skills required, are entrusted to the Court of Accounts (FC — article 77, II) [...].

However, the solution is even simpler when one realizes that there is no incompatibility in the wording of the constitution between section XXXV of Article 5 and the said arts. 49, 52 and 71, since section XXXV expressly states that it is the **law** that shall not exclude from appreciation by the Judiciary any violation of or threat to the law. This section does not determine that another constitutional norm may not do so.

The word *law* cannot be interpreted in any way other than that contained in the text of the constitution itself, namely the new legal norms produced by means of the following instruments which are authorized to embody them: supplementary law, ordinary law, delegated law, provisional measure, legislative decree, resolution of the Federal Senate (Article 59); we also have the laws produced by express constitutional command by the legislative branches of the member states, the Federal District and municipalities.

At the most we could reflect more on the extension of the word *law* to include amendments to the Constitution, in the sense that it would not be appropriate for an amendment to remove from the Judiciary the appreciation of violations of or threats to the law. But this discussion does not advance our discussion of the case in point, since the alleged delivery of a jurisdictional function to the Federal Senate and the TCU was made by the original constitutional assembly.

I think therefore that it is wrong to argue that in Brazil there is a monopoly of the jurisdictional function[47] by the Judicial Branch. It may even

[47] In particular, Hely Lopes Meirelles, Direito administrativo brasileiro, op. cit.; THEODORO JÚNIOR, Humberto. *Curso de direito processual civil*. 53rd ed. Rio de Janeiro: Forense, 2012; Antonio Carlos de Araújo Cintra, Ada Pellegrini Grinover and Cândido Rangel Dinamarco,

be the case that this has always been the current feeling of everyday practice in Brazil, including a number of legal rulings to this effect,[48] but to use this as the foundation for a categorical assertion that the CRFB/88 created this monopoly does not seem to be sustainable in view of a correct interpretation of the constitution.

C) No prejudice of the concept of res judicata

Some jurists[49] also assert that the Courts of Accounts do not exercise jurisdiction because their decisions do not constitute *res judicata*![50] This proposition is the crux of the argument: jurisdictional decisions are those that are definitive in nature, as Miguel Seabra Fagundes correctly argues.

As is well known, *res judicata* occurs when a decision becomes definitive, and cannot easily be revised. If we accept that the Constitution entrusted to the Courts of Accounts the function of judging the accounts of those who use public resources, the immediate consequence is that their decisions will take on the attribute of definitiveness, in other words of *res judicata*. So from a logical point of view, any attempt to supplant the literal interpretation of the text of the constitution with this argument lacks validity.

But there is in the CRFB/88 a clear norm which confers certainty on the condemnatory rulings of the TCU, similar to the condemnatory awards issued

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Teoria geral do processo, op. cit.; and MELLO, Celso Antônio Bandeira de. *Curso de direito administrativo.* 30th ed. São Paulo: Malheiros, 2013.

48 For this, see: BRAZIL. Superior Court of Justice. Special Appeal 1.115.161/RS. Rapporteur: Min. Luiz Fux — First Panel. *Diário de Justiça Eletrônico,* Brasília, Mar. 22, 2010; BRAZIL. Federal Regional Court (4th Region). Process 2004.71.06.002162-5. Rapporteur: Maria Lúcia Luz Leiria. Florianopolis, Apr. 28, 2010; BRAZIL. Federal Regional Court (1st Region). *Process 2005.34.00.037672-7.* Rapporteur: Kassio Nunes Marques. Brasília, Aug. 8, 2014; BRAZIL. Federal Regional Court (1st Region). *Process 0005166-62.2011.4.01.0000.* Rapporteur: Fagundes de Deus. Brasília, Sep. 9, 2011; BRAZIL. Federal Regional Court (1st Region). Process 0054331-44.2012.4.01.0000. Brasília, Sep. 30, 2013.

49 This point of view is defended by Hely Lopes Meirelles, Mareia Pelegrini, Maria Sylvia Zanella Di Pietro and José dos Santos Carvalho Filho.

50 This understanding is shared by the Brazilian courts which, with rare exceptions, have recognized the merely technical and administrative character of the decisions of the Court of Accounts which, in theory, would therefore not result in res judicata in regard to the Judiciary. For this, see: BRAZIL. Superior Court of Justice. Special Appeal 1.032.732/CE. Rapporteur: Min. Benedito Gonçalves — First Panel. *Diário de Justiça Eletrônico,* Brasília, Sep. 8, 2015; BRAZIL. Superior Court of Justice. Special Appeal 472.399/AL. Rapporteur: José Delgado — First Panel. *Diário de Justiça Eletrônico,* Brasília, Dec. 19, 2002; BRAZIL. Federal Supreme Court. Writ of Mandamus 28.343/DF. Rapporteur: Min. Marco Aurélio de Mello — First Panel. *Diário de Justiça Eletrônico,* Brasília, Oct. 16, 2014.

by the Judiciary. This norm is enshrined in Article 71, para. 3, whereby "the decisions of the Court resulting in the imputation of a debit or fine shall have the efficacy of execution instrument".

The question posed by these norms deserves prominence, because section II determines the competency to judge people's accounts, section IV to apply sanctions, and the following paragraph 3 confers certainty on the debit or fine decided, establishing them as execution instruments. What this means is that there is nothing more to discuss as to the merits of the decision, but only procedural errors, and this is in fact the current understanding of the Federal Supreme Court, as we shall see below.

Not for nothing do Pontes de Miranda and Miguel Seabra Fagundes regard as normal the definitive character of the decisions of the Courts of Accounts when they are auditing accounts, recognizing that they have a jurisdictional accounting function.

Another argument to the contrary is that the decisions of the Courts of Accounts do not represent *res judicata* because they can be challenged by a writ of mandamus, which can be judged by the STF, as is explicit in the Constitution.[51]

This argument is also insufficient to eliminate the possible jurisdictional function of the Courts of Accounts, since as is very clearly stated in the Constitution, Article 5, section LXIX:

> a writ of mandamus shall be granted to protect a fixed, certain right not covered by *habeas corpus* or *habeas data*, when the person responsible for the illegality or abuse of power is a public authority or the agent of a legal entity exercising State attributions. [Brazil, 1988]

Even a judge of the STF or STJ can practice illegality or abuse of power in exercising a jurisdictional function. In this context, the ruling handed down in MS No. 33.412/RS is relevant:[52]

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[51] The authorities supporting this view include Carlos Ayres Britto, who states that decisions of the judges of the TCU can be challenged by filing a writ of mandamus with the Federal Supreme Court. BRITTO, Carlos Ayres. O regime constitucional dos Tribunais de Contas. *Revista Diálogo Jurídico*, Salvador, yr. 1, n. 9, pg. 8, Dec. 2001.

[52] BRAZIL. Federal Supreme Court. Writ of Mandamus 33.412/RS. Rapporteur: Min. Celso de Mello — Second Panel. *Diário de Justiça Eletrônico*, Brasília, Nov. 12, 2015. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=9772238>. Accessed on: Oct. 4, 2016.

> WRIT OF MANDAMUS FILED AGAINST A RULING ISSUED BY A FEDERAL HIGHER COURT — TOTAL ABSENCE OF JURISDICTION OF THE FEDERAL SUPREME COURT — APPLICABILITY OF ART. 21, VI, OF THE LOMAN — INCLUSION IN THE CONSTITUTION OF 1988 — WRIT OF MANDAMUS NOT HEARD — APPEAL DENIED.
>
> The Federal Supreme Court is not competent to prosecute and judge a writ of mandamus filed against a decision of a Federal Higher Court (the STJ, in this case). Precedent 624/STF.
>
> Precedents.— Case-law of the Federal Supreme Court — which has confirmed the full inclusion of Article 21, VI, of the LOMAN in the Constitution of 1988 (RTJ 133/633) — has stressed that the courts themselves are empowered, originally, to prosecute and judge writs of mandamus filed against their actions and omissions. Precedents.

And it is only to be expected that the STF has issued countless decisions[53] clarifying the limits of the Judiciary in appreciating rulings issued by judges of the TCU. An example of these decisions is quoted below:[54]

> [...] 4. In this case, the ruling appealed against was upheld: "APPEAL — action to annul an administrative act — Municipal Council Paulínia — Court of Accounts rejected the accounts for the years 1997 and 1998 — respect to the principles of fair hearing, full defense and due legal process — the Judiciary cannot judge the merit of the question, but only

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[53] See also: BRAZIL. Federal Supreme Court. Direct Action of Unconstitutionality 3.715. Rapporteur: Min. Gilmar Mendes — Full Court. Diário de Justiça Eletrônico, Brasília, Oct. 30, 2014; BRAZIL. Federal Supreme Court. Writ of Mandamus 25.763/DF. Rapporteur: Min. Eros Grau — Full Court. Diário de Justiça Eletrônico, Brasília, Aug. 3, 2015; BRAZIL. Federal Supreme Court. Writ of Mandamus 28.074/DF. Rapporteur: Min. Cármen Lúcia — Full Court. Diário de Justiça Eletrônico, Brasília, Jun. 14, 2012; BRAZIL. Federal Supreme Court. Writ of Mandamus 22.828/DF. Rapporteur: Min. Néri da Silveira — Full Court. Diário de Justiça Eletrônico, Brasília, Jun. 14, 2002; BRAZIL. Federal Supreme Court. Writ of Mandamus 7.280/DF. Rapporteur: Min. Henrique D'Avilla — Full Court. *Diário de Justiça Eletrônico,* Brasília, Aug. 17, 1960; BRAZIL. Federal Supreme Court. Writ of Mandamus 25.116/DF. Rapporteur: Min. Carlos Ayres Britto — Full Court. *Diário de Justiça Eletrônico,* Brasília, Feb. 10, 2011; BRAZIL. Federal Supreme Court. Writ of Mandamus 28.333/DF. Rapporteur: Min. Ricardo Lewandowski. *Diário de Justiça Eletrônico,* Brasília, Feb. 27, 2012.

[54] BRAZIL. Federal Supreme Court. Appeal to the Supreme Court 662.458/SP. Rapporteur: Min. Luiz Fux — First Panel. *Diário de Justiça Eletrônico,* Brasília, Jun. 20, 2012. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=2198521>. Accessed on: Oct. 4, 2016.

procedural irregularities — Appeal dismissed." 5. Procedural appeal which is not accepted.

Thus there is still no reason to deny the force of the expressions *judge, judicial decision, jurisdiction, court.*

D) The force of execution instrument

There is also the position of Luciano Ferraz[55] and of Justice Marco Aurélio Mello[56] who hold that the exercise of a jurisdictional function by the Courts of Accounts is ruled out not only by the Unity of Jurisdiction but also because of the fact that our Code of Civil Procedure does not include decisions of the Courts of Accounts in the list of what is considered to be judicial execution instrument, and because there is a possibility of a discussion in court of the merits of the TCU's decisions by means of motions to stay execution.

This argument too is unacceptable for excluding express constitutional commands. Once again, if infraconstitutional law is unable to achieve the manifest wishes of the Constitution, the problem is with the former, not the latter. We cannot interpret the Constitution through a reading of the laws, since it is the laws that must always seek to demonstrate their validity in terms of that Greater Law, not the other way round.

E) The meaning of judging people's accounts

There is also a school, as we saw earlier, that seeks to maintain that the CRFB/88 did not give the Courts of Accounts competency to judge people, but only to judge people's accounts, and that therefore they exercise neither

[55] FERRAZ, Luciano. *Controle da administração pública*. Elementos para a compreensão dos Tribunais de Contas. Belo Horizonte: Mandamentos, 1999.

[56] "Decision on Appeal to the Supreme Court — Non-obviation of jurisdictional control — Continuation denied. 1. The Federal Regional Court of the 2nd Region dismissed the appeal for the following reasons: Administrative. Embargos on execution of extrajudicial title. Ruling of the TCU. Nature. Binding administrative act. Jurisdictional control. Possibility. Principle of ubiquity of justice. Article 5, xxxv, of the FC. Article 745, section v, of the CPC." Brazil, Federal Supreme Court, Appeal to the Supreme Court 629.711/RJ, op. cit.

criminal nor civil jurisdiction. This would totally remove recognition of their jurisdictional function.

This argument is hard to sustain, for the following reasons:

a) Irrespective of whether jurisdiction is civil, criminal or of accounts, always, always and always what a magistrate has to decide is whether action taken by certain persons was or was not in accordance with the legal framework. As simple as that. Men judge their peers for their acts or omissions, for the choices they make in the real world.

b) The Constitution establishes in section VIII of Article 71 that the Courts of Accounts must impose "on those responsible, in the case of illegal expenses or irregular accounts, the sanctions provided for by law, which, among other penalties, shall set a fine proportional to the damage to the public purse". In other words, the correct interpretation of section II taken together with section VIII of Article 71 can only be that the Court of Accounts will judge the legality and the regularity of the accounts rendered by someone if that someone has acted illegally, in which case their person or their property will be subject to a sanction, which must be determined by law.

c) This affirmation could only be accepted if the constitutional norm gave the Courts of Accounts the competency to judge someone's accounts while at the same time prohibiting them from imposing any sanction on the person judged. In this absurd hypothesis, if it were to occur, in fact the state function given to the Courts of Accounts would no longer be jurisdictional, since it would serve only as a mere opinion on the basis of which some other body would decide on and impose the appropriate sanction.

d) The fact is that, in the case of the rendering of accounts for the use, collection, management, administration or safekeeping of public funds, the ones to judge whether such funds have been legally applied are the Courts of Accounts. It would not make sense for the constitutional assembly to give this duty and power to the Courts of Accounts and to allow another body to do the same. If on top of not using money from the public purse correctly the person responsible has also violated, let us say, the law of administrative misdemeanor, it will be the duty of the Public Prosecutor's Office or the respective Public Advocate Office to bring a case before the Judiciary. If while using the money the person responsible has embezzled some of it, they must at the same time be prosecuted in a criminal court other than that

in which the misdemeanor case is being heard. This is because they have violated different laws: the law of correct application of public funds, the law of administrative misdemeanor and the criminal law. There is no difficulty in understanding the natural division between state bodies.

For these simple reasons, we cannot accept such allegations as a basis for eliminating the clear and obvious constitutional norm indicated in section II of Article 71.

F) The incompatibility between auditing and judging

Another line of confrontation with the recognition of the exercise of a jurisdictional function by the Courts of Accounts is in the discussion about the precise legal content of this **function.** This line of legal literature argument is very well defended by Cretella Júnior, who asserts that a precondition of this attribution of judging is the passive position of the magistrate, who is waiting to be called to decide, and that it is not appropriate to attribute to the same entity at the same time both the functions — of administering and of judging.[57]

This assertion raises two objective issues:

a) The same body should not apply a law ex officio and also judge conflicts that may arise in applying the law;
b) The concept of a jurisdictional function presupposes the passivity of the body which exercises it until called up to act.

[57] Here is an excerpt from the article: "In clear contrast with administrative activity, which involves the application of the law 'ex offício', without provocation, jurisdictional activity is provoked, by an initiative of or on behalf of the interested party, and for this reason, in Brazil, no judge will grant a jurisdictional relief without a request from or on behalf of the interested party, in legal cases and form (Article 2 of the CPC (LGL\1973\5)), with the civil process thus commencing on the initiative of the party and subsequently being developed by official impulse (Article 262 of the CPC (LGL\1973\5)). 'Procedat Administratio ex officio', but 'ne procedat judex ex officio' — these are the two principles which demonstrate the difference between the Administration and the Judiciary, because, in the latter, no one can be a judge if there is no player ('nem o judex sine actore'). The initial inertia of the Judiciary contrasts with the initial dynamism of the Administration; without a case being brought, jurisdictional activity does not begin, while administrative activity — as a general rule — does not depend on an interested party". José Cretella Júnior, Natureza das decisões do Tribunal de Contas, op. cit., pg. 195.

Indeed, these two issues are the bases of two other principles contained in the CRFB/88: that of Due Process of Law and that of a Fair Hearing and a Full Defense.

It is even tempting to recognize that it would really make no sense to allow the Courts of Accounts to exercise pure administrative activity when they investigate, consider, express an opinion, inspect, disallow, audit, represent; and, immediately afterwards, in the exercise of jurisdiction, to bring a prosecution and judge someone's accounts, with the imposition of a sanction. This is why it is totally comprehensible when Cretella Júnior (and so many others)[58] appear to rail against the theory of jurisdiction for the Courts of Accounts. Here is an apposite extract from the writing of this expert in administrative law:

> [...]Francesco Carnelutti, on the basis of organic criteria, Piero Calamandrei in his criticism of Carnelutti, and, finally, Giovanni Cristofolini have made a profound study of the difference between jurisdiction and administration. Cristofolini concluded that the distinction lies less in the logical basis than in the realm of history and politics, since "administration is the activity of the State directed at achieving its ends, by satisfying the interests which the State considers to be its own, while jurisdiction is the activity of the State directed at satisfying the collective interest tending to the settlement of actions through the establishment of concrete commands addressed to the owner of the interests under litigation". In conceptual terms, jurisdiction is an element of administration, but became separate from it because of the political need to ensure the proper independence of the bodies charged with achieving this collective objective of such enormous importance [...]When a Court of Accounts reviews accounts or examines the initial "concession" of retirements, pensions and reforms, it is to a certain degree exercising "an activity aimed at achieving a collective interest tending to the settlement of actions, and not in view of the establishment of concrete commands directed to the owners of interests under litigation, in conflict", to use the precise, technical language of Cristofolini. No; in these, as in all the other cases, the Court of Accounts administers, applies the law ex officio,

[58] In the view of Carlos Ayres Britto (O regime constitucional dos Tribunais de Contas, op. cit., pg. 9), the uncomfortable truth that the Federal Court of Accounts acts ex offício, unlike the Judiciary, reinforces the fact that it does not conform to the jurisdictional function.

> by exercising, also in the words of Cristofolini, an "activity aimed at achieving its ends by satisfying interests that the State considers its own, and not the interests of two conflicting parties who ask the State for a jurisdictional relief".[59]

We have here two important questions: the first I have mentioned earlier, that of expecting the Court of Accounts to do much less than the Constitution empowered it to do, as if it was simply a rubber stamp for the rendering of accounts, i.e.: have you rendered accounts or not? Good, then it's rubber stamped and approved!

This is not the way it is. To decide on whether accounts have been rendered or not, there must be a complex mental process of analysis of the law and of the facts, similarly to what happens in any criminal or civil proceeding.

Secondly, from this proceeding will come the conviction of a human being, who is deprived of assets or rights; not as it used to be, when the conduct of a public manager was merely rebuked, but without any sanction.

In fact, the difficulty of Cretella Júnior is entirely due to the fact that in Brazil no real practical consensus has yet been reached on the underlying role of the Courts of Accounts.

So, one might ask: where is the problem indicated by Cretella Júnior? Is it in the CRFB/88? Or perhaps in the infraconstitutional customs and legislation that have not resolved the need to organize the Courts of Accounts properly and give them the tools to exercise the competencies created for them by constitutional norms?

As everyone know, the Constitution creates state bodies, gives them their respective competencies, establishes the principles according to which they should act and, lastly, determines the legislative function (which it creates) that will produce the normative framework necessary to ensure that these bodies, within their competencies, can properly manage the attributions entrusted to them.

If the infraconstitutional lawmakers have been incapable of achieving this desirable state of affairs, it is not the problem of the Constitution. It would be society's duty, with the support of the scientific community of the law, to identify flaws in the legislation and call for improvements in the legal framework of this or that body or entity. And it seems that this is the case.

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[59] José Cretella Júnior, Natureza das decisões do Tribunal de Contas, op. cit., pg. 197.

It is also important to draw attention to the theory of Alexandre Mariotti,[60] whereby at a certain moment he asserts that the provisions of Article 6 of Law No. 8.443/1992[61] confirm that the decisions of the TCU are merely administrative, and can be amended by the Judiciary. Without going too deeply into the specific interpretation of this Article 6 and its precept "without prejudice to the provisions of section XXXV of Article 5 of the Federal Constitution", we are confronted once again with a complete reversal of the hierarchy of the legal order. The law is not an instrument of change of the constitutional text.

G) The exercise of hybrid functions by the Courts of Accounts

Another very interesting line of thought to be noted is the one that recognizes hybrid functions in the Court of Accounts — neither legislative, nor administrative, nor jurisdictional. It is as if the CRFB/88 had created a fourth, hybrid, type called *accounting proceedings.*

A highly articulate supporter of this view is Carlos Ayres Britto. I cannot do better than to quote him verbatim:

> [...]7.7. This is the backdrop for a supplementary proposition: the proposition that the proceedings instated by the Courts of Accounts have their own ontology. They are accounting proceedings, not parliamentary proceedings, or judicial ones, or administrative ones. That they are not parliamentary or judicial proceedings we have already noted and indeed justified (bearing in mind only that Parliaments make decisions on criteria of opportunity and convenience). To show that they are not administrative proceedings, it is enough to demonstrate that the Accounts Institutions do not judge their own actions (this is done by the administrative bodies), but those of other bodies, other public agents, other people, in short. What they do is the consequence of a preceding event (the administrative one), not an originating procedure. And their institutional operation is not

[60] MARIOTTI, Alexandre. O devido processo legal. Thesis (doctorate in law) — Universidade Federal do Rio Grande do Sul, Porto Alegre, 2008. Available at: <www.lume.ufrgs.br/bitstream/handle/10183/13555/000651057.pdf?1>. Accessed on: Dec. 1, 2016.

[61] In this context, article 6 of Law No. 8.443/92 provides that: "The persons indicated in sections I to VI of Article 5 of this law are subject to a review of accounts and, with the exception of the provisions of section XXXV of Article 5 of the Federal Constitution, only by decision of the Federal Court of Accounts can they be released from this responsibility".

> truly deriving competencies from the law in order to act, but seeing if someone who has derived competencies from the law in order to act was authorized to do so and to what extent. [Britto, 2001:10]

To reach this conclusion, the author recognizes that the judgments made by the Courts of Accounts have "the force or the irrevocability of res judicata",[62] however this is not their core activity, as it is for the Judiciary, because the judgment of accounts for these Courts of Accounts is a means to attain an end, the end being external control. This is why their function is neither administrative nor jurisdictional.

According to a premise adopted as true in this article, the State exercises three functions, and the nature of its jurisdictional function is to apply the law definitively, in other words, this is precisely the purpose of jurisdiction. So it is clear that to adopt new criteria for qualifying the nature of the functions of the State is to propose a profound philosophical reflection which could lead the science of the law into realms as yet unknown.

Furthermore, at first sight it does not seem to me that the criteria proposed by Britto are acceptable, seeing that the jurisdictional function (like the other ones) uses different instruments to achieve equally different objectives. Each different type of action has or can have differing purposes, in particular when one considers the wide variety of procedural instruments currently available in different areas of the law, such as procedural, criminal, electoral, civil, labor and military, and that within each of these areas there are variables such as actions for indemnity or for misdemeanor, for search and seizure or for crimes against human life.

A constant development in the philosophical approach to the functions of the modern State is always healthy, but I believe it is not appropriate for this work.

H) The rule of the Constitution over the law

Looked at exclusively from the perspective of the Constitution, the attributions granted to the Courts of Accounts by Article 71 are many, including those of auditing and judging.

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[62] Carlos Ayres Britto, O regime constitucional dos Tribunais de Contas, op. cit., pg. 8.

To deal with the justified concern of important jurists that our legal system does not offer legal certainty without the Unity of Jurisdiction, because the Courts of Accounts do not have the capacity to comply with due legal process, it would be enough, for example, for the organic law of each of these Courts of Accounts to have two different internal organizations: one for its administrative activities and the other for its jurisdictional function. Similarly, the organic law would have to create two distinct procedures: one merely administrative, for administrative functions, and the other, quite different, for its jurisdictional function.[63]

Let us see if this situation can be resolved by the law and not, because of its insufficiency, disfigure the Constitution.

The critical phrase of Justice Sepúlveda Pertence, when reading his essential vote on the judgment of writ of mandamus No. 23.550-1/DF,[64] sums up some of the issues raised in this discussion, because it challenges our mania for inverting the order of Brazil's judicial dynamics "in whatever manner, if the intention is to insist on the bad habit of Brazilian authorities of inverting the normative pyramid of ordinances, so as to believe less in the Constitution than in the common law".

We must therefore use a systematic interpretation of the text of the constitution, to recognize that the Courts of Accounts exercise two of the state functions: administrative, for matters covered by sections I, III, IV, V, VI, VII, VIII, IX, X and XI of Article 71; and jurisdictional for section II, combined with VIII, of Article 71.

IV.3 Teleological interpretation

Teleological interpretation will have the same result, since the CRFB/88 entrusted the special duty to the Courts of Accounts for them to use technical skills to decide on the accounts of those responsible for public funds, protecting their judges with the same guarantees as enjoyed by the judges of the STJ.

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[63] It should be remembered that criminal prosecution has two phases which occur in the same natural court: the investigation phase and the criminal case per se.

[64] BRAZIL. Federal Supreme Court. Writ of Mandamus 23.550/DF. Rapporteur: Min. Marco Aurélio — Full Court. *Diário de Justiça,* Brasília, Oct. 31, 2001. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=85979>. Accessed on: Oct. 5, 2016.

It would be senseless and purposeless if the CRFB/88 gave this duty and power to the Courts of Accounts and ended up transferring the same debate to a non-specialist body. To prevent this happening, the CRFB/88 established, as we have seen, that awards issued by the TCU should have executive force, and the government only has to go to court for enforcement, since the instrument is clear legal.[65]

In addition, the STF has repeatedly ruled that it is not the responsibility of the Judiciary to review the merit of decisions[66] of the Courts of Accounts, in view of the expertise of these courts to exercise their competencies (the natural judge for considering accounts is the Court of Accounts, by express constitutional command).

We can start to demonstrate this by once more quoting from the vote of Justice Sepúlveda Pertence on Writ of Mandamus No. 23550-1/DF, which showed that the control functions of the Court of Accounts have a *quasi-jurisdictional* content.

> On the other hand, if due legal process is guaranteed for common administrative proceedings, *a fortiori* it is undeniable that it must govern the performance of all the control functions of the Court of Accounts, of a quasi-jurisdictional nature (Brazil, 2001).

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[65] It is interesting to note the predominant case law position on the subject: "ADMINISTRATIVE. ADMINISTRATIVE MISCONDUCT. DIVERSION OF PUBLIC MONIES TO PERSONAL BANK ACCOUNT. REIMBURSEMENT. SENTENCING BY THE TCU. EXECUTION INSTRUMENT. NO NEED FOR FURTHER SENTENCING IN COURT [...]2. Since the appellant had been sentenced by the Federal Court of Accounts to repay all the losses caused to the public purse, in an execution instrument for a fixed amount sufficient to represent execution (Article 71, para. 3 - FC), the proposal for a further sentencing in court should not prevail and makes no sense. 3. Appeal partially upheld". BRAZIL. Federal Regional Court (1st Region). *Process 0032598-85.2004.4.01.3400.* Rapporteur: Olindo Menezes — Fourth Panel. Brasília, Feb. 10, 2015. Available at: <http://arquivo.trfl.jus.br/PesquisaMenuArquivo.asp?p1=200434000416833&pA=200434000416833&pN=325988520044013400>. Accessed on: Dec. 3, 2016.

[66] In this context: "On determining the extent of responsibility for public monies, the Court of Accounts is doing something that is not subject to revision by the courts unless there is manifest procedural illegality. Writ of mandamus not heard". BRAZIL. Federal Supreme Court. Writ of Mandamus 7.280. Rapporteur: Min. Henrique D'Avilla — Full Court. Diário de Justiça, Section 1. 08/17/1960. Available at: http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?sl=MS(7280%20.NUME.)&base=baseAcordaos. Accessed on: Oct. 5, 2016. Similarly, "[...]it cannot be suggested that the Judiciary should exercise the competency attributed by the constitution, in substitution of the Court of Accounts. 4. Writ of Mandamus denied. BRAZIL. Federal Supreme Court. Writ of Mandamus 22.752. Rapporteur: Min. Néri da Silveira — Full Court. *Diário de Justiça,* Brasília, Jun. 21, 2002. Available at: <www.stf.jus.br/portal/jurisprudencia/visualizarEmenta.asp?s1=000017602&base=baseAcordaos>. Accessed on: Oct. 5, 2016.

And so, if the STF[67] interprets arts. 70 and 71 on the basis that: (1) the Judiciary cannot review the merit of decisions of the Courts of Accounts, but only procedural matters in the event of violation of fundamental rights and guarantees.

And if Article 71, para. 3, of the CRFB/88 gives the duty and power to the Courts of Accounts to: (2) issue at the end of their adverse judgment proceedings execution instruments against people.

Then 1 + 2 = the decisions of these courts end up with the attribute of definitiveness.[68]

If these decisions have the attribute of definitiveness (and this is what characterizes the jurisdictional function, as argued by Seabra Fagundes and Pontes de Miranda, among so many others), then here too will we have as a practical teleological effect on life in Brazil the exercise of a jurisdictional function by the Courts of Accounts.

IV.4 The historical interpretation

Lastly, a historical interpretation supports the argument that the Courts of Accounts exercise a jurisdictional function. The verb *to judge* was nothing new in 1988; it was used in earlier Constitutions, and Pontes de Miranda[69] was one of the most ardent defenders of this interpretation, as his comments on the Constitution of 1946 show:

> The Court of Accounts is an institution from 1891, from 1934, from 1937 and from 1946. However we have to understand that the institution depends on the structure it is given by the Constitution as a whole and the new attributions granted to it. At the time of the Constitution of 1891,

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[67] Although it is hotly debated in the case-law, as we saw with the legal literature, on numerous occasions the Federal Regional Courts have taken the same line as the STF. For this, see: BRAZIL. Federal Regional Court (1st Region). *Process 0016753-61.2000.4.01.3300.* Rapporteur: Selene Maria de Almeida — Fifth Panel. Brasília, May 31, 2007; BRAZIL. Federal Regional Court (5th Region). *Process 432.559.* Rapporteur: Frederico Pinto de Azevedo — Third Panel. Recife, Oct. 8, 2010; BRAZIL. Federal Regional Court (5th Region). *Process 136.258.* Rapporteur: Geraldo Apoliano — Third Panel. Recife, Mar. 4, 2004.

[68] It is interesting to note that, probably for this reason, Sepúlveda Pertence refers, with intelligence and perspicacity, to the function of the Courts of Accounts as "quasi-jurisdictional" — since the Judiciary cannot review the merit of their decisions, it is jurisdictional; but as it can review procedural matters, it is quasi.

[69] Francisco Cavalcanti Pontes de Miranda, Comentários à Constituição de 1946, op. cit.

> the Court of Accounts and its delegates were empowered to review accounts; it was the Constitution of 1934 which gave it the nature of a judgment body, which ordinary laws were unable to do. Decree No. 392, of October 8, 1896, paragraph 1, 2), describes the functioning of the Court of Accounts as a "Court of Justice with jurisdiction over litigation and administrative matters", and Article 3 went into more detail. The budget law of 1918 describes it as a "Court of Law for judging the accounts of those responsible, establishing the legal relationship between them and the Public Treasury". Then it was unconstitutional; today it is not. Today the Court of Accounts judges and, accordingly, establishes the legal relationship between those responsible and the Public Treasury. As to crimes, the Court of Accounts continues to have no jurisdiction. But it judges the accounts, and this is of the greatest importance. While the Constitution of 1891 was in force, case-law differed on the need for and the value of reviewing accounts.[70]

The same was true of the Constitution of 1967:

> Article 71 — The finances and budget of the federal government shall be inspected by the National Congress using external controls, and the internal control systems of the Executive, instated by law. para. 1 — The external control by the National Congress shall be exercised with the help of the Court of Accounts and will include consideration of the accounts of the President of the Republic, the performance of the functions of financial and budgetary auditing, and the judgment of the accounts of the administrators and others responsible for public assets and values.
>
> [...]
>
> para. 4 — Judgment of the correctness of the accounts of the administrators and others responsible will be based on accounting surveys, audit certificates and pronouncements of the administrative authorities, in addition to the inspections referred to in the previous paragraph.
>
> [...]
>
> Article 73 — The Court of Accounts has its headquarters in the capital city of the Federal Republic and jurisdiction throughout the country.

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[70] Francisco Cavalcanti Pontes de Miranda, Comentários à Constituição de 1946, op. cit., pg. 78.

> para. 1 — The Court shall exercise, as appropriate, the attributions provided for in Article 110, and shall have its own complement of staff.
> para. 2 — The law shall provide for the organization of the Court and may divide it into Chambers and delegate authority or create bodies to help it in carrying out its functions and for decentralizing its work.
> para. 3 — The Judges of the Court of Accounts shall be appointed by the President of the Republic, after the names have been approved by the Federal Senate, and they must be Brazilian citizens, more than thirty-five years of age, of good moral standing and recognized for their knowledge of the law, economics, finance or public administration; and they shall have the same guarantees, prerogatives, compensation and impediments as the Judges of the Federal Court of Appeals.
> [...]
> para. 8 — The Court of Accounts shall judge the legality of the initial grants of retirement, reforms and pensions, and subsequent improvements shall not depend on its decision..

Finally, it is important to remember, as Jacoby Fernandes[71] shows, that important monographs have been written about the recognized jurisdictional function of the Courts of Accounts ever since the Constitution of 1891. He considers that from the historical point of view, there is no doubt about the exercise of this function by the Courts of Accounts.

V. Conclusion

I conclude that there is nothing fortuitous or unexpected, in historical terms, in the fact that the several earlier constitutions have contained this normative framework whereby the Courts of Accounts have both functions: administrative and jurisdictional. However, there is one undeniable fact that we must recognize, and that is that the Courts of Accounts have never obtained from the infraconstitutional legislators the instruments or the organization they need to exercise their jurisdictional tasks to the full.

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[71] Jorge Ulisses Jacoby Fernandes, Limites à revisibilidade judicial das decisões dos Tribunais de Contas, op. cit.

They were relegated to a secondary role in history, highly limited and hostage to the weight of our centralizing and authoritarian State, where the Executive exercised almost monarchical powers, suffocating all and sundry.[72] Since 1988 the TCU has been recovering its role, but without sufficient legal support to exercise its functions with legal certainty for the Brazilian State and its citizens. The best interpretation of the CRFB/88 is that the external control activity includes both functions:

a) **jurisdictional:** in the case of Congress, for judging the accounts of the President of the Republic (Article 49, section IX), and in the case of the TCU, for judging the accounts of the others responsible for the public treasury (Article 71, section II);
b) **administrative:** for the TCU in respect of the other sections of Article 71.

Notwithstanding all the old disagreements, all the decisions of the Courts of Accounts have a significant effect on those that they audit and bring major consequences, such as the need for their proceedings to obey due legal process, and to respect the principle of a Fair Hearing and Full Defense.

This is so essential that the STF regarded it as necessary and opportune to issue a Binding Precedent, No. 3, to clear up any doubt by providing that "in proceedings before the Federal Court of Accounts a fair hearing and full defense are assured when the decision can lead to the annulment or revocation of an administrative act to the benefit of the interested party".

It is a matter of urgency to promote a thorough and wide-ranging discussion about these Courts of Accounts, which are increasingly important

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[72] In the same context, the very interesting study of Álvaro Miranda is worth quoting: "To conclude this chapter, we can highlight the following issues. First of all, the Court of Accounts was always, from the beginning of the Republic, fated to be an instrument of patronage. This was due to the fact that it was the exclusive prerogative of the head of the Executive Branch to appoint the administrators of the body. Even though this selection was submitted to the Senate under the Constitutions of 1891, 1934, 1946 and 1967/1969, or to the Federal Council, under the Charter of 1937, the appointment (choice) was always made by the President of the Republic. The Senate could withhold its approval of the name, but it could not indicate another one, as this could only be done by the head of the Executive. This gave the President of Republic great influence in the exchange of favors for the appointment of sponsored politicians to strategic public positions, one of them being the 'magistracy' of the Court of Accounts [...]Secondly, a crucial and contradictory time for the Court of Accounts was the period of military rule. Although the Constitution of 1967 had extended its powers, the military government withdrew them with decrees and infraconstitutional laws. It is possible that the strengthening of the body in the Constitution of 1988 was a reaction to the previous period, aimed at recovering functions that were inherent to its work". Álvaro Guilherme Miranda, Mudança institucional do Tribunal de Contas, op. cit., pg. 74.

in the lives of Brazilian citizens, and which deserve the organization and procedures necessary for exercising their functions.

References

ARAUJO, Julio Cesar Manhães de. *Controle da atividade administrativa pelo Tribunal de Contas na Constituição de 1988.* Curitiba: Juruá, 2010.

BARROSO, Luís Roberto. *Interpretação e aplicação da Constituição.* 5th ed. São Paulo: Saraiva, 2003.

BRAZIL. *Constituição da República Federativa do Brasil.* Brasília, DF: Federal Senate; Centro Gráfico, 1988.

BRAZIL. Superior Court of Justice. Special Appeal 472.399/AL. Rapporteur: José Delgado — First Panel. *Diário de Justiça Eletrônico,* Brasília, Dec. 19, 2002.

____. Superior Court of Justice. Special Appeal 1.032.732/CE. Rapporteur: Min. Benedito Gonçalves — First Panel. *Diário de Justiça Eletrônico,* Brasília, Sep. 8, 2015.

____. Superior Court of Justice. Special Appeal 1.115.161/RS. Rapporteur: Min. Luiz Fux — First Panel. *Diário de Justiça Eletrônico,* Brasília, Mar. 22, 2010.

____. Federal Supreme Court. Direct Action of Unconstitutionality 3.715. Rapporteur: Min. Gilmar Mendes — Full Court. *Diário de Justiça Eletrônico,* Brasília, Oct. 30, 2014.

____. Federal Supreme Court. Writ of Mandamus 7.280/DF. Rapporteur: Min. Henrique D'Avilla — Full Court. *Diário de Justiça Eletrônico,* Brasília, Aug. 18, 1960.

____. Federal Supreme Court. Writ of Mandamus 16.255/DF. Rapporteur: Min. Evandro Lins — Full Court. *Diário de Justice,* Brasília, Oct. 5, 1966. Available at: <www.stf.jus.br/portal/jurisprudencia/visualizarEmenta.asp?s1=000152299&base=baseAcordaos>. Accessed on: Dec. 5, 2016.

____. Federal Supreme Court. Writ of Mandamus 21.564. Rapporteur: Octavio Gallotti — Full Court. *Diário de Justice,* Brasília, 27 Aug. 1993. Available at: <www.stf.jus.br/arquivo/cms/sobrestfconhecastfjulgamentohistorico/anexo/ms21564.pdf>. Accessed on: Oct. 3, 2016.

____. Federal Supreme Court. Writ of Mandamus 22.752. Rapporteur: Min. Néri da Silveira — Full Court. *Diário de Justice,* Brasília, Jun. 21, 2002. Available at: <www.stf.jus.br/portal/jurisprudencia/visualizarEmenta.asp?s1=000017602&base=baseAcordaos>. Accessed on: Oct. 5, 2016.

____. Federal Supreme Court. Writ of Mandamus 22.828/DF. Rapporteur: Min. Néri da Silveira — Full Court. *Diário de Justiça Eletrônico,* Brasília, Jun. 14, 2002.

____. Federal Supreme Court. Writ of Mandamus 23.550/DF. Rapporteur: Min. Marco Aurélio — Full Court. *Diário de Justice,* Brasília, Oct. 31, 2001. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=85979>. Accessed on: Oct. 5, 2016.

____. Federal Supreme Court. Writ of Mandamus 25.116/DF. Rapporteur: Min. Carlos Ayres Britto — Full Court. *Diário de Justiça Eletrônico,* Brasília, Feb. 10, 2011.

____. Federal Supreme Court. Writ of Mandamus 25.763/DF. Rapporteur: Min. Eros Grau — Full Court. *Diário de Justiça Eletrônico,* Brasília, Aug. 3, 2015.

____. Federal Supreme Court. Writ of Mandamus 28.074/DF. Rapporteur: Min. Cármen Lúcia — Full Court. *Diário de Justiça Eletrônico,* Brasília, Jun. 14, 2012.

____. Federal Supreme Court. Writ of Mandamus 28.333/DF. Rapporteur: Min. Ricardo Lewandowski. *Diário de Justiça Eletrônico,* Brasília, Feb. 27, 2012.

____. Federal Supreme Court. Writ of Mandamus 28.343/DF. Rapporteur: Min. Marco Aurélio de Mello — First Panel. *Diário de Justiça Eletrônico,* Brasília, Oct. 16, 2014.

____. Federal Supreme Court. Writ of Mandamus 33.412/RS. Rapporteur: Min. Celso de Mello — Second Panel. *Diário de Justiça Eletrônico,* Brasília, Nov. 12, 2015. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=9772238>. Accessed on: Oct. 4, 2016.

____. Federal Supreme Court. Preliminary Injunction on ADPF 378. Rapporteur: Edson Fachin — Full Court. *Diário de Justiça Eletrônico,* Brasília, Mar. 8, 2016. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=10444582>. Accessed on: Oct. 3, 2016.

____. Federal Supreme Court. Extraordinary Appeal 629.711/RJ. Rapporteur: Min. Marco Aurélio de Mello. *Diário de Justiça Eletrônico,* Brasília, Nov. 11,

2015. Available at: <www.stf.jus.br/portal/jurisprudencia/visualizarEmenta.asp?s1=000246569&base=baseMonocratica>. Accessed on: Oct. 3, 2016.

____. Federal Supreme Court. Extraordinary Appeal 662.458/SP. Rapporteur: Min. Luiz Fux — First Panel. *Diário de Justiça Eletrônico,* Brasília, Jun. 20, 2012. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=2198521>. Accessed on: Oct. 4, 2016.

____. Federal Supreme Court. Writ of Mandamus 23.550 / DF. Rapporteur for Ruling: Min. Sepúlveda Pertence. Full Court. *Diário de Justiça Eletrônico,* Brasília, Oct. 31, 2001. Available at: <www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?sl=%28MS%24%2ESCLA%2E+E+23550%2ENUME%2E%29+OU+%28MS%2EACMS%2E+ADJ2+23550%2EACMS%2E%29&base=baseAcordaos&url=http://tinyurl.com/a4cozkj>. Accessed on: Mar. 17, 2018.

____. Federal Regional Court (1st Region). *Process 0005166-62.2011.4.01.0000.* Rapporteur: Fagundes de Deus. Brasília, Sep. 9, 2011.

____. Federal Regional Court (1st Region). *Process 0016753-61.2000.4.01.3300.* Rapporteur: Selene Maria de Almeida — Fifth Panel. Brasília, May 31, 2007.

____. Federal Regional Court (1st Region). *Process 0054331— 44.2012.4.01.0000.* Brasília, Sep. 30, 2013.

____. Federal Regional Court (1st Region). *Process 2005.34.00.037672-7.* Rapporteur: Kassio Nunes Marques. Brasília, Aug. 8, 2014.

____. Federal Regional Court (1st Region). *Process 0032598-85.2004.4.01.3400.* Rapporteur: Olindo Menezes — Fourth Panel. Brasília, Feb. 10, 2015. Available at: <http://arquivo.trfl.jus.br/PesquisaMenuArquivo.asp?p1=200434000416833&pA=200434000416833&pN=325988520044013400>. Accessed on: Dec. 3, 2016.

____. Federal Regional Court (4th Region). *Process 2004.71.06.002162-5.* Rapporteur: Maria Lúcia Luz Leiria. Florianopolis, Apr. 28, 2010.

____. Federal Regional Court (5th Region). *Process 136.258.* Rapporteur: Geraldo Apoliano — Third Panel. Recife, Mar. 4, 2004.

____. Federal Regional Court (5th Region). *Process 432.559.* Rapporteur: Frederico Pinto de Azevedo — Third Panel. Recife, Oct. 8, 2010.

BRITTO, Carlos Ayres. O regime constitutional dos Tribunais de Contas. *Revista Diálogo Jurídico,* Salvador, yr. 1, n. 9, Dec. 2001.

BUGARIN, Bento José. O Tribunal de Contas da União e o controle externo no Brasil. *Revista do Tribunal de Contas da União,* Brasília, yr. 12, n. 27, pg. 25-61, Dec. 1982.

BULOS, Uadi Lammêgo. *Curso de direito constitucional.* 8th ed. São Paulo: Saraiva, 2014.

BUSQUETS, Cristina Del Pilar Pinheiro. *A configuração jurídica do Tribunal de Contas:* o processo e o tempo. Thesis (doctorate in law) — Postgraduate Law Studies Program, Pontifícia Universidade Católica de São Paulo, São Paulo, 2010.

CANOTILHO, José Joaquim Gomes. *Direito constitucional e teoria da Constituição.* 7th ed. Coimbra: Almedina, 2003.

CARNEIRO, Athos Gusmão. *Jurisdição e competência.* 18th ed. São Paulo: Saraiva, 2012.

CARVALHO FILHO, José dos Santos. *Manual de direito administrativo.* 16th ed. Rio de Janeiro: Lumen Juris, 2006.

CAVALCANTI, Themístocles Brandão. O Tribunal de Contas — órgão constitucional — funções próprias e funções delegadas. *Revista de Direito Administrativo,* Rio de Janeiro, v. 109, pg. 1-10, Jan. 1972.

CINTRA, Antonio Carlos de Araújo; GRINOVER, Ada Pellegrini; DINAMARCO, Cândido Rangel. *Teoria geral do processo.* 30th ed. São Paulo: Malheiros, 2014.

COSTA, José Rubens. Controle jurisdictional dos atos decisórios dos Tribunais de Contas. *Boletim de Direito Administrativo,* São Paulo, v. 12, n. 6, pg. 341-356, Jun. 1996.

COSTA, Luiz Bernardo Dias. *Tribunal de Contas:* evolução e principais atribuições no estado democrático de direito. Belo Horizonte: Fórum, 2006.

CRETELLA JÚNIOR, José. Natureza das decisões do Tribunal de Contas. *Revista de Informação Legislativa,* v. 24, n. 94, pg. 183-198, Apr./Jun. 1987.

DI PIETRO, Maria Sylvia Zanella. *Direito administrativo.* 27th ed. São Paulo: Atlas, 2014.

DIAS, Ronaldo Brêtas de Carvalho. *Processo constitutional e o estado democrático de direito.* Belo Horizonte: Del Rey, 2010.

FAGUNDES, Miguel Seabra. *O controle dos atos administrativos pelo Poder Judiciário.* 6th ed. São Paulo: Saraiva, 1984.

FERNANDES, Jorge Ulisses Jacoby. Limites à revisibilidade judicial das decisões dos Tribunais de Contas. *Revista do Tribunal de Contas da União,* n. 70, pg. 39-71, Oct./Dec. 1996.

FERRAZ, Luciano. *Controle da administração pública.* Elementos para a compreensão dos Tribunais de Contas. Belo Horizonte: Mandamentos, 1999.

FIGUEIREDO, Lúcia Valle. *Curso de direito administrativo.* 8th ed. São Paulo: Malheiros, 2006.

GRACIE, Ellen. Notas sobre a revisão judicial das decisões do Tribunal de Contas da União pelo Supreme Tribunal Federal. *Fórum de Contratação e Gestão Pública FCGP,* Belo Horizonte, yr. 7, n. 82, Oct. 2008.

HOUAISS, Antônio; VILLAR, Mauro de Salles. *Dicionário Houaiss de língua portuguesa.* Prepared by the Antônio Houaiss Institute of Lexicography and Portuguese Language Database. Rio de Janeiro: Objetiva, 2009.

JUSTEN FILHO, Marçal. *Curso de direito administrativo.* 12th ed. São Paulo: Revista dos Tribunais, 2016.

LARENZ, Karl. *Metodologia da ciência do direito.* 3rd ed. Translated by José Lamego. Lisbon: Calouste Gulbenkian, 1997.

LENZ, Carlos Eduardo Thompson Flores. O Tribunal de Contas e o Poder Judiciário. *Revista de Direito Administrativo,* Rio de Janeiro, v. 238, pg. 265-282, Jan. 2004.

MARIOTTI, Alexandre. *O devido processo legal.* Thesis (doctorate in law) — Universidade Federal do Rio Grande do Sul, Porto Alegre, 2008. Available at: <www.lume.ufrgs.br/bitstream/handle/10183/13555/000651057.pdf71> Accessed on: Dec. 1, 2016.

MASAGÃO, Mário. *Curso de direito administrativo.* 6th ed. São Paulo: Revista dos Tribunais, 1977.

MEDAUAR, Odete. *A processualidade no direito administrativo.* 2nd ed. São Paulo: Revista dos Tribunais, 2008.

MEIRELLES, Hely Lopes. *Direito administrativo brasileiro.* 23rd ed. São Paulo: Revista dos Tribunais, 1998.

MELLO, Celso Antônio Bandeira de. *Curso de direito administrativo.* 30th ed. São Paulo: Malheiros, 2013.

MELLO, Oswaldo Aranha Bandeira de. Tribunais de Contas: natureza, alcance e efeitos de suas funções. *RDP*, São Paulo, no. 73, pg. 181-192, 1982.

MENDES, Gilmar Ferreira; COELHO, Inocêncio Mártires; BRANCO, Paulo Gustavo Gonet. *Curso de direito constitucional.* 4th ed. São Paulo: Saraiva, 2009.

MIRANDA, Álvaro Guilherme. *Mudança institucional do Tribunal de Contas:* os oito modelos debatidos na Constituente de 1988 para o sistema de fiscalização do Brasil. Dissertation (Master's degree) — Postgraduate Program in Public Policy, Strategy and Development, Economics Institute, Universidade Federal do Rio de Janeiro, Rio de Janeiro, 2009.

MIRANDA, Francisco Cavalcanti Pontes de. *Comentários à Constituição de 1946.* Rio de Janeiro: Imprensa Nacional, 1947.

MUKAI, Toshio. Os Tribunais de Contas no Brasil e a coisa julgada. *Revista do Tribunal de Contas da União,* v. 27, n. 70, pg. 83-86, Oct./Dec. 1996.

NOVELINO, Marcelo. *Direito constitucional.* 6th ed. Rio de Janeiro: Método, 2012.

PARDINI, Frederico. *Tribunal de Contas da União:* órgão de destaque constitucional. Thesis (doctorate in law) — Law School, Universidade Federal de Minas Gerais, Belo Horizonte, 1997.

PELEGRINI, Marcia. *A competência sancionatória do Tribunal de Contas no exercício da função controladora:* contornos constitucionais. Thesis (doctorate in constitutional law) — Department of Postgraduate Studies in Law, Pontifícia Universidade Católica de São Paulo, São Paulo, 2008.

SALLES, Heráclito. Natureza, autonomia e duplicidade da função dos Tribunais de Contas. *Revista do Tribunal de Contas da União,* v. 7, n. 14, pg. 2-22, Dec. 1976.

SILVA, José Afonso da. *Curso de direito constitucional positivo.* 29th ed. São Paulo: Malheiros, 2007.

SOUZA, Luciano Brandão Alves de. A Constituição de 1988 e o Tribunal de Contas da União. *Revista de Direito Administrativo*, Rio de Janeiro, v. 175, pg. 36-46, Feb. 1989.

THEODORO JÚNIOR, Humberto. *Curso de direito processual civil.* 53rd ed. Rio de Janeiro: Forense, 2012.

ZYMLER, Benjamin. *Processo administrativo no Tribunal de Contas da União.* Serzedello Corrêa Awards 1996 — prize-winning monographs. Brasília: Instituto Serzedello Corrêa, 1997.