The function of external oversight and the administrative function: separation and cooperation in the 1988 Constitution*

Função de controle externo e função administrativa: separação e colaboração na Constituição de 1988

*Gabriel Heller***
*Guilherme Carvalho e Sousa****

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** Centro Universitário de Brasília, Brasília, DF, Brazil. E-mail: hellergabriel@hotmail.com.
Master of Laws (Uniceub). External Control. Auditor of the Accounting Court of the Federal District. Lawyer.

*** Instituto de Educação Superior de Brasília, Brasília, DF, Brazil. E-mail: guilherme@guilhermecarvalho.adv.br.
Doctor of Laws (PUC-SP). Master of Laws and public policies (Uniceub). Professor at the Centro Universitário Iesb (Brasília/DF). Lawyer. Vice-president of Associação Paulista de Direito Administrativo (APDA).

ABSTRACT

This paper regards the autonomy and specificity of the function of external control in the 1988 Constitution of the Federative Republic of Brazil, which results in the impossibility of classifying the Court of Auditors as administrative, as well as its jurisdiction and processes. In order to provide necessary evidence for this approach, it considers the differentiation of state functions based on their specific aims, and demonstrates the insufficiency of the traditional separation of powers to explain the institutional polycentrism devised by the constitution makers. By distinguishing the means employed and the purposes envisaged in the exercise of the functions of external control and administration, and presenting the duty of inter-organic cooperation established as part of the constitutional checks and balances, it reaches the conclusion that those functions cannot be confounded nor mixed.

KEYWORDS

Separation of powers — external control — Court of Auditors — administrative function — autonomy

RESUMO

O presente artigo versa sobre a autonomia e especificidade da função de controle externo na Constituição de 1988, que resulta na impossibilidade de se classificar como administrativos os Tribunais de Contas, as competências que lhes foram cometidas e os processos que as instrumentalizam. Para tanto, a partir da diferenciação das funções estatais pelas finalidades específicas que lhes são subjacentes, demonstra-se a insuficiência do dogma da tripartição de poderes para explicar o policentrismo institucional traçado pelo constituinte. Distinguindo-se os meios empregados e os fins visados no exercício das funções de controle externo e de administração, e apresentando-se o dever de cooperação interorgânica estabelecido como parte do mecanismo de checks and balances da Carta Fundamental, evidencia-se a inconfundibilidade entre as duas funções.

PALAVRAS-CHAVE

Separação de poderes — controle externo — Tribunal de Contas — função administrativa — autonomia

1. Introduction

The activities of the Court of Auditors in Brazil are usually classified, in the opinion of jurists, as exercising an administrative function.[1] Although those bodies have not been allocated typical administration powers, which are characteristically executive in nature, there is a marked reluctance in surpassing this established and short-sighted view of the constitutional and administrative classification of the Accounting Courts.

Scrutiny, as the duties of a given body must be classified, is not merely an academic exercise devoid of consequences in the real world. On the contrary, this subject matter is inexorably related to the daily functioning of the government, insofar as it influences the legal framework applicable to the entities and their processes, achieving the objectives constitutionally allocated to them and, at the end of the day, the exercise of subjective rights.

Furthermore, this is an issue that partially overlaps with the functional autonomy of the Court of Auditors, a notorious and constitutionally relevant issue. This is because, as these institutions are duty bound to exercise external control of the public administration, together with the Legislative Power, the configuration of their powers and the underlying legal framework directly concerns the mechanisms of checks and balances defined by the Constitution-Making Power.

Having said this, the intention of this article is to show that the institutional setup of the 1988 Constitution of the Federative Republic of Brazil granted autonomy to the external control function undertaken primarily by the Court of Auditors, although appointed by the Legislative Power. It is intended to show that as a consequence of this autonomy, the investigations and rulings of these courts do not represent typical administrative processes, for which reason one cannot apply to them, sic et simpliciter, the rules and doctrines governing these procedures.

To correctly understand the Brazilian constitutional and administrative structure, it is necessary to clarify, from the outset, the deficiency in the classification of the three classic functions of the state — the legislative, the executive and the judiciary. As will be argued, this separation of functions

[1] See, for example, BANDEIRA DE MELLO, Celso Antônio. O enquadramento constitucional do Tribunal de Contas. In: FREITAS, Ney José de (Coord.). Tribunais de contas: aspectos polêmicos: estudos em homenagem ao conselheiro João Féder. Belo Horizonte: Fórum, 2009. pg. 71-72.

represents dogma that is not only inconsistent with the complexity of the contemporary state, but also conflicts with a systematic analysis of the 1988 Constitution of the Federative Republic of Brazil.

Thus, it will be argued that the functions of the state need to be differentiated based on the duty of powers allocated to the sovereignty bodies instituted by the 1988 Constitution of the Federative Republic of Brazil, understood as being "stable structural forms intended for expressing the power of the state"[2], including the Court of Auditors. Consequently, the prevailing constitutional scenario will serve to analyze the powers of these bodies that originated and have developed within one of the three classical powers but which, given the evolution and the need of the contemporary state, were transferred to a specific and autonomous body and jointly comprise a new function of the state.

Given this scenario, based on the distinction between the methods employed and the purposes intended in the exercise of the external control function by the Court of Auditors, as well as the administrative function, emphasis will be given to showing that the nature of these functions cannot be confused. Finally, we will show the manner in which the former contributes to the latter, revealing at the same time their diversity and harmony.

Bearing in mind that article 75 of the 1988 Constitution of the Federative Republic of Brazil imposes the application of constitutional rules pertaining to the Federal Court of Auditors (TCU) and its state and municipal peers, it should be pointed out that unless otherwise indicated, all statements regarding the TCU apply equally to the other Accounting Courts.

2. The deficiency of the tripartite classification of state functions in Brazilian positive law

Article 2 of the 1988 Constitution of the Federative Republic of Brazil stated that the federal government consists of three powers: the Legislative, the Executive and the Judiciary. This division reflects the classical separation which, if not purely created by Montesquieu, in France, and Madison in the

[2] MOREIRA NETO, Diogo de Figueiredo. O parlamento e a sociedade como destinatários do trabalho dos Tribunais de Contas. Revista Brasileira de Direito Público, Belo Horizonte, yr. 1, No. 2, pg. 11 July/Sept. 2003. The referenced pages of this article correspond to its digital version available at: <http://bidforum.com.br/bidBiblioteca_periodico_telacheia_pesquisa.aspx?i=12523&p=6>. Accessed on: Feb. 20, 2017.

United States of America, was developed by them in such a way that it took root in the Western world from the XVIII century onwards.[3]

Madison, when commenting on Montesquieu's theory — based, in turn, on the separation of powers defined in England from the 1701 Act of Settlement — states clearly that the institutions responsible for carrying out the functions of the state, in order to mutually control one another for the benefit of society and its citizens, could not be totally separated, since they had to work together and in harmony.[4] In this respect, although understanding that Madison's ideals differ from that of Montesquieu precisely because they provide for separation, Grau stresses that the erroneous intention of the French thinker was to establish a balance between the established powers.[5]

Defending that, since the advent of the Republic, Brazil has implemented a separation of powers along the lines of Montesquieu — rather than of Madison — the professor of the University of São Paulo distinguishes powers and functions and, with the support of Canotilho, argues that "separation" exists in each legal order specifically in the manner in which it was designed.[6] In other words, one cannot handle the tripartite division of powers and functions as an unquestionable and self-applicable dogma, but by examining the peculiarities of the subject constitutional order of the study. This is what we will now do regarding the separation of functions within the 1988 Constitution of the Federative Republic of Brazil.

2.1 The duties-powers of the sovereignty entities as a distinguishing criterion of state functions

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3 Cf. BONAVIDES, Paulo. Ciência política. 24th ed. São Paulo: Malheiros, 2017. pg. 146-150.

4 The founding father of the United States of America explicitly mentions the "impossibility and inexpediency of avoiding any mixture whatever of these departments" and states that the doctrine of Montesquieu "goes no further than to prohibit any one of the entire departments from exercising the powers of another department". This is, therefore, compatible with Montesquieu's affirmation that the three Powers are not only obligated to progress, rather they are "obligated to progress in a concerted manner". Cf. HAMILTON, Alexander; JAY, John; MADISON, James. The federalist papers. Section l.: Black & White Publications, 2015. pg. 150-151; and MONTESQUIEU, Charles de Secondat, baron de. O espírito das leis. 3rd ed. São Paulo: Martins Fontes, 2005. pg. 176.

5 GRAU, Eros Roberto. O direito posto e o direito pressuposto. 9th revised and enlarged edition. São Paulo: Malheiros, 2014. pg. 223 and 229-230.

6 Ibid., pg. 244.

Administrative law was born on the back of the constitutionalist wave of the XVIII century, when public administration was seen as an element entirely dependent on and subordinated to the Executive Power.[7] Indiscernible from the absolutist state it was attempting to replace, the role of the state was understood to be the exercise of powers that should be limited on behalf of the legal assets that they defended: freedom and equality before the law.

The liberal state that arose demanded abstention by the state, so that the relationship between duty and power was, above all, a duty to limit the power. If the powers of this threatening Leviathan were recognized, these should not exceed — in number and quality — what was strictly necessary to guarantee freedom, property and equality before the law.

However, societies evolved and, with them, States. Since the onset of the XX century, there has been a generalized perception that the guarantor State was not enough for a socially harmonious edifice. The duties of the State would no longer be confined to abstaining from intervening in society, except to protect and guarantee certain rights. Industrial society demanded public institutions engaged in fostering minimum conditions for the decent survival of its citizens, i.e. a provider State.

The onset of technology and the specialization that society underwent at the turn of the XIX century forced the State to intervene,[8] so that the slow and gradual social achievements became mere interests in rights, some of them in subjective public rights whereby the holder could exercise them via a corresponding procedural lawsuit.[9] The public administration, in its capacity as a function whose hallmark is professionalization, specialization and permanence would have to decouple from the function of government[10] in order to be able to bring about rights that would then become the fundamental issue of administrative law.[11]

Here, function is understood to be the situation in which "someone is subjected to the duty of searching, in someone else's interest, for the response

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7 BAPTISTA, Patrícia. Transformações do direito administrativo. Rio de Janeiro: Renovar, 2003. pg. 3 and 54.

8 HESSE, Konrad. Elementos de direito constitucional da República Federativa da Alemanha. Translated by Luís Afonso Heck from the 20th German ed. Porto Alegre: Sergio Antonio Fabris, 1998. pg. 173.

9 FERRAZ JR., Tércio Sampaio. Introdução ao estudo do direito. 4th ed. São Paulo: Atlas, 2003. pg. 150-153.

10 SOUZA JUNIOR, Cezar Saldanha. O tribunal constitucional como poder: uma nova teoria da divisão dos poderes. São Paulo: Memória Jurídica, 2002. pg. 89.

11 Patrícia Baptista, Transformações do direito administrativo, op. cit., pg. 22-23.

to a certain purpose".[12] From this concept, one can extract the basic characters of a function, namely, the person possessing duties (payers), duties (means), the person whose interest the function serves (receivers) and the intended purpose (objective).

In this respect, all power or capacity for subjection attributed to government entities and officials will be an instrument for the purpose that characterizes the function. This idea of attributing responsibility for serving others converges with the approximation, suggested by jurists, between the powers of the government and the fiduciary powers.[13]

Ratifying this understanding, Bandeira de Mello demonstrates that the handling of powers arises as a condition for government to fulfill its duties, its function, since without these powers it would be incapable of fulfilling the purpose attributed to it for the benefit of others. It follows, then, that such powers are solely and exclusively attributed in order to render possible obedience to the duties to which it is linked.[14] Summarizing, one can argue that in a sequence of constraints, the intended purpose creates the function, which imposes duties for whose fulfilment powers are granted.

Madison had already argued in the XVIII century that powers were nothing but ways of achieving a necessary end and that, on granting a power, the first question to be decided is whether that power is necessary for the well-being of the community. If so, the next step would be to define the safeguards in order for that power not to be distorted to the detriment of that community[15].

It follows, then, that powers — in a non-organic sense — are no more than means — essential, but means. Taking precedence over duties as the immediate raison d'être of powers, the latter cannot "exceed what is necessary for fulfilling the purpose that justifies them".[16] That is why, under a rule of law with a manifest objective of achieving social ends (article 3 of the 1988 Constitution of the Federative Republic of Brazil), we have to always refer to duties-powers.

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[12] BANDEIRA DE MELLO, Celso Antônio. Curso de direito administrativo. 33. Revised and updated edition up to Constitutional Amendment 92, dated July 2, 2016. São Paulo: Malheiros, 2016. pg. 100.

[13] MOREIRA NETO, Diogo de Figueiredo. Legitimidade e discricionariedade: novas reflexões sobre os limites e controles da discricionariedade. Rio de Janeiro: Forense, 2001. pg. 39.

[14] Celso Antônio Bandeira de Mello, Curso de direito administrativo, op. cit., pg. 100.

[15] Alexander Hamilton, John Jay and James Madison, The federalist papers, op. cit., pg. 125.

[16] Celso Antônio Bandeira de Mello, Curso de direito administrativo, op. cit., pg. 102. Likewise, see Eros Roberto Grau, O direito posto e o direito pressuposto, op. cit., pg. 232.

In the sense defended so far, Adilson Dallari sees in the conception of the duty-power a radical change of direction in administrative law which, until very recently, regarded legal relationships as an expression of power, not of purposes classified by the law as in the public interest. In verbis:

> The study of the history of administrative law is an examination of the path taken since a conception centered on power up to the point of equilibrium between prerogatives and subjections, between the powers and the means and instruments for containing them, but always guided by the satisfaction of the public interest.[17]

This enables us to detect in the 1988 Constitution of the Federative Republic of Brazil duty-power plexuses that depart from the classical tripartition whose responsibility falls on bodies that also do not fit the liberal dogma of the XVIII century. As Ackerman points out, by mechanically following the Montesquieu canon, we are blinding ourselves to the appearance of new institutional forms that cannot be classified as legislative, executive or judiciary bodies.[18]

The criterion proposed for identification of state functions — the set of duties-powers attributed to the sovereignty bodies — understanding those duties-powers as means of producing effects and the achievement of a given public purpose — to a certain extent comes close to Paulo Modesto's idea that functions must be distinguished based on their specific legal efficacy, irrespective of the origin or material content of the acts performed.[19]

Given the particular purpose of protecting the Treasury and guaranteeing a good government (objective) granted to the Legislative Power and, primarily, to the Courts of Auditors (payers), to be achieved through their own powers established in the Constitution (means), to the benefit of society (receiver),one must distinguish a specific function of external control. Thus, bearing in mind particularly the set of duties-powers which the constitutional convention handed down to the Courts of Auditors, it is necessary to understand this as a component of the group of sovereign bodies, that is, as one of the centers

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[17] DALLARI, Adilson Abreu. Os poderes administrativos e as relações jurídico-administrativas. Revista de Informação Legislativa, Brasília, yr. 36, No. 141, pg. 77, Jan./Mar. 1999.

[18] ACKERMAN, Bruce. Adeus, Montesquieu. Revista de Direito Administrativo, Rio de Janeiro, vol. 265, pg. 13-23, Jan./Abr. 2014. pg. 15.

[19] MODESTO, Paulo. Função administrativa. Revista Trimestral de Direito Público, São Paulo, No. 2, 1993, pg. 218.

of attribution to which state power has been allocated with a unique public function to be performed.[20]

2.2 The Court of Auditors as the "heir" of the authority of the classical three Powers

The Courts of Auditors are not bodies whose sudden disappearance would violate democratic, republican principles and those of the separation of powers. So much so that recognizably democratic and politically stable countries like Canada, the United States and the United Kingdom do not have an Accounting Court.

The same cannot be said of the external control function: every country that acknowledges its citizens' right to sound management of res publica, which strives to prevent arbitrariness in the management of the public purse, has an entity with a delegated external control function. This function, quite often shared with the Legislative Power, can be performed by bodies known as the Office of the Auditor-General or Controller-General, by Courts of Auditors comprising one of the classical three powers or by Courts of Auditors that do not pertain to the structure of any power, thereby being seen as autonomous, extra-constitutional bodies.[21] This choice is up to the constitutional conventional or, where there is absolutely no constitutional provision, the legislator.

As examples of Auditors-General or Controllers-General we have the Office of the Auditor General in Canada, the Government Accountability Office in the United States, and the National Audit Office in the United Kingdom. These are entities whose manifestations are single-person in nature (auditor-general or controller-general), in contrast to the collective nature of the rulings of Courts of Auditors. Although their work enjoys recognized independence, the direct clientele of these bodies are the respective parliaments, the initial addressees of the conclusions resulting from scrutinizing the public accounts.

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[20] Diogo de Figueiredo Moreira Neto, O parlamento e a sociedade como destinatários do trabalho dos Tribunais de Contas, op. cit., pg. 12.

[21] BRITTO, Carlos Ayres. O regime constitucional dos Tribunais de Contas. Interesse Público, Belo Horizonte, yr 4, No. 13, pg. 2 and 7, Jan./Mar. 2002. The referenced pages of this article correspond to its digital version available at: <http://bidforum.com.br/bidBiblioteca_periodico_telacheia_pesquisa.aspx?i=5954&p=l>. Accessed on: Sep 1, 2015.

In turn, the Accounting Court in Portugal is a typical case of a body that is a part of one of the three traditional powers — the Judiciary. There, the Court of Auditors can be found in the chapter dealing with the organization of the courts, in accordance with article 209 thereof, one of the "categories of courts" alongside the lower and appellate courts, the administrative and fiscal courts and the supreme courts (the Supreme Court of Justice and the Supreme Administrative Court).[22]

Lastly, although their functions include providing assistance to the Legislative Power, the Courts of Auditors in Brazil and France are examples of independent bodies whose missions and authority derive directly from the respective constitutions.[23]

During the imperial regime (1822-89), Brazil was equipped with administrative bodies whose duties included monitoring revenues and controlling the accounts, considered by the legal theory of the time to be courts for administrative litigation;[24] they lacked, however, the autonomy and independence that would become the hallmark of the Courts of Auditors. On evidencing the regrettable absence of this body, in 1845, under a proposal by Manoel Alves Branco, discussion arose about creating the Accounting Court of the Empire. Nevertheless, even with the consent of the Public Treasury Commission of the Chamber of Deputies, the idea did not take root here until the fall of the Empire.[25]

With the advent of the Republic, thanks to the studies and efforts of Ruy Barbosa,[26] Brazil opted to allocate to the Court of Auditors the task of externally controlling the public administration, as a rule, under a system

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[22] Worthy of note is the fact that the Portuguese Constitution does not expressly provide for, as is traditionally the case in Brazil, a "Judiciary Power", addressing this in Chapter V ("Courts"). Available at: <www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx>. Accessed on: Jan. 12, 2018.

[23] Cf. 1988 Constitution of the Federative Republic of Brazil, art. 70 to 75, and Constitution du 4 octobre 1958, art. 47-2. Available, respectively, at: <www.planalto.gov.br/ccivil_03/constituicao/ConstituicaoCompilado.htm> and <www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du4-octobre-1958/texte-integral-de-la-constitution-du-4-octobre-1958-en-vigueur.5074.html>. Accessed on: Mar. 16, 2018. It is worth pointing out that, in the most notable work on administrative law at the time of the Empire, when analyzing the administrative courts of Brazil and France, the viscount of Uruguay includes the French Accounting Court as part of the administrative litigation of that country. See URUGUAI, Visconde do. Ensaio sobre o direito administrativo. In: CARVALHO, José Murilo de (Org.). Visconde do Uruguai. São Paulo: Ed. 34, 2002. pg. 193.

[24] Ibid., pg. 192.

[25] BARBOSA, Ruy. Tribunal de Contas. In: BRASIL. Ministério da Fazenda. Relatório do ministro da Fazenda do ano de 1890. Rio de Janeiro: Imprensa Nacional, 1891. pg. 450-452.

[26] Ibid., passim.

of collaboration (or co-participation) with the Legislative Power. In topical constitutional terms, one can summarize the history of the Accounting Court in the following manner: in 1891, it was briefly provided for in the General Provisions; in 1934, together with the Prosecutors' Office, it was to be found in the chapter referring to "entities of cooperation in governmental activities"; in 1937, it received its own exclusive chapter;[27] and it was only from 1946 onwards that it was included in the same chapter as the Legislative Power.

Following the path taken since the collapse of Estado Novo (New State), the constitutional convention of 1988 stated that responsibility for external control is the remit of the National Congress, but that its duties must be undertaken with the assistance of the Federal Court of Auditors, for which reason it was expressly allocated, along with several notably ancillary powers,[28] a range of exclusive duties to be carried out solely and exclusively by the Court.

The fact is that just like the bodies responsible for the function, the set of duties-powers comprising external control is not identical in all countries and eras. In Brazil, all the republican constitutions amended the powers of the Court of Auditors, which turns out to be natural and understandable, as there is no body like one of the classical organic powers of the State. As specified here, the Court inherits its duties from the traditional centers of attribution.

The financial control responsibility of the Court of Auditors, for example, derives from the first function of Parliament, control of the enforcement of the law, even preceding the legislative function that would name the corresponding organic power and characterize it within the modern State.[29] This prerogative of overseeing compliance with the law is linked to the achievement of the British nobility in the sense of forcing the monarch to obtain its consent to levy new taxes.[30]

For this reason, when characterizing external control and differentiating it from strictly parliamentary control, Odete Medauar talks about institutions

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[27] Seabra Fagundes argues, however, that the Accounting Court was a part of the Executive power at that time. See SEABRA FAGUNDES, M. O controle dos atos administrativos pelo Poder Judiciário. 5th ed. Rio de Janeiro: Forense, 1979. pg. 136.

[28] E.g., article 71, I, VII and XI of the 1988 Constitution of the Federative Republic of Brazil.

[29] AMARAL JÚNIOR, José Levi Mello. O Poder Legislativo na democracia contemporânea: a função de controle político dos Parlamentos na democracia contemporânea. Revista de Informação Legislativa, Brasília, yr. 42, No. 168, pg. 15, Oct./Dec. 2005; and AMARAL JÚNIOR, José Levi Mello. Sobre a organização de poderes em Montesquieu: comentários ao capítulo VI do livro XI de O espírito das leis. Revista dos Tribunais. São Paulo, yr. 97, vol. 868, pg. 60, Feb. 2008.

[30] José Levi Mello Amaral Júnior, O Poder Legislativo na democracia contemporânea, op. cit., pg. 8.

that "take their strength from Parliament" or which represent a certain "extension" of the Legislative Power.[31] The truth is that the transfer of powers to a specialized body is a measure that meets the public requirements arising from the implementation of technology by, and specialization of, the public administration, shows convergence with the advances of constitutionalism itself[32] and confirms a heralded transformation of the contemporary State that is becoming a mosaic of functions with a vocation for serving a plural society.[33]

Thus, the Federal Constitution attributed the duties-powers of oversight — arising from the Legislative Power — to the Court of Auditors as an independent mediator between the Power authorizing the expense and the one that executes it on a daily basis.[34] In the current Constitution, this power can be seen, e.g., in article 71, VI.

There are also cases in which the attribution of the Court derives from an original or typically administrative responsibility. If, in the past, it was possible to record in advance all acts of government that resulted in expenditures for the Treasury (1934 Constitution, article 101, paragraph 1), as a task intended for control, but with administrative contours, today the duty of recording applies only to those acts that create expenses through an extended lapse of time: acts for admitting full-time personnel and for granting retirement and pensions (article 71, III, 1988 Constitution of the Federative Republic of Brazil).

The executive traits of this peculiar power inserted at the heart of external control give rise, however, to doubts and contentions in jurists' opinions and case law about the legal nature of the acts of retirement and, consequently, of the effects that the manifestations peculiar to the government and the Court of Auditors produce. As it is not the objective of this article to deal specifically and in depth with the problems of the role of the Court of Auditors in performing the power in article 71, III of the 1988 Constitution of the Federative Republic of Brazil, attention should be drawn to the accurate analysis of the issue provided by Eurico Bitencourt Neto and Luísa Cristina Pinto e Netto.[35]

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31 MEDAUAR, Odete. Controle da administração pública. 3rd revised, updated and enlarged edition. São Paulo: Revista dos Tribunais, 2014. pg. 104.

32 TORRES, Ricardo Lobo. O Tribunal de Contas e o controle da legalidade, economicidade e legitimidade. Revista de Informação Legislativa, Brasília, vol. 31, No. 121, pg. 265, Jan./Mar. 1994.

33 MOREIRA NETO, Diogo de Figueiredo. Quatro paradigmas do direito administrativo pós-moderno: legitimidade, finalidade, eficiência, resultados. Belo Horizonte: Fórum, 2008. pg. 54-55.

34 Ruy Barbosa, Tribunal de Contas, op. cit., pg. 453.

35 BITENCOURT NETO, Eurico; NETTO, Luísa Cristina Pinto and Binding Precedent No. 3 of the Brazilian Federal Supreme Court: reflexões críticas sobre a teoria dos atos complexos e compostos e o direito fundamental ao contraditório e à ampla defesa. In: PEREIRA, Flávio

Furthermore, it is worth pointing out that the constitutional convention of 1988 granted the Court of Auditors duties-powers to decide that, if they cannot be understood in a historical context as an inheritance from the Judiciary, they retain great similarity in relation to the role of the latter. Observe, in this respect, the powers to appreciate accounts (article 71, II) and impose sanctions (article 71, VIII), in addition to determining the adoption of measures to correctly apply the law (article 71, IX) and to suspend, if such determination is not complied with, the challenged act (article 71, X). Clearly, this involves rulings with efficacies of a condemnatory and mandatory — or even execution nature — in the case of suspension. It would be no exaggeration, also, to mention the general power to grant interlocutory relief typical of the Judiciary, but recognized and widely accepted by the Brazilian Federal Supreme Court vis-à-vis the Court of Auditors.[36]

Having revealed the most appropriate criterion for classifying the functions of the contemporary State, and having explained in detail the powers of the Court of Auditors to perform the external control function, one can now move on to the crux of the idea defended here, namely that it is impossible to confuse the external control function of the Court of Auditors with the administrative function in the 1988 Constitution of the Federative Republic of Brazil.

3. The impossibility of confusing the external control of the Court of Auditors with the administrative function

The development of public law, in Brazil, as overseas, has placed on a higher pedestal the functional (finalistic) criteria to the detriment of organic (subjective) aspects in the studies of legal-political phenomena. Nor could it

Henrique Unes et al. (Coord.). O Direito Administrativo na jurisprudência do STF e do STJ: homenagem ao professor Celso Antônio Bandeira de Mello. Belo Horizonte: Fórum, 2014.

[36] BRAZIL. Brazilian Federal Supreme Court. Writ of Mandamus. MS 24.510/DF. Plenary Session. Judge Rapporteur Ellen Gracie. Brasília, March 19, 2003. Available at: <http://stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28MS%24%2ESCLA%2E+E+24510%2ENUME%2E%29+OU+%28MS%2EACMS%2E+ADJ2+24510%2EACMS%2E%29&base=baseAcordaos&url=http://tinyurl.com/c8pewp3>. Accessed on: Jan 15, 2018. For an in-depth and critical look at the general power to grant interlocutory of the Accounting Courts, See SCAPIN, Romano. A expedição de provimentos provisórios pelos Tribunais de Contas: das "medidas cautelares" à técnica antecipatória no controle externo brasileiro. Dissertation (Master's degree) - Graduate Law Program of Universidade Federal do Rio Grande do Sul, Porto Alegre, 2016, pg. 139-149.

be any different, at times when the material provisions of the constitutions are overhyped, that is, those rules that set out the State's objectives and the rights of its citizens.

Indeed, the organic criterion cannot explain the legal framework of cases of joint or supplementary action by constitutional bodies in exercising the same function,[37] as is the case of external control. Thus, in the opinion of jurists, there is a robust understanding that the performance of state functions by sovereignty bodies is not exclusive, rather predominant, in the manner defined by the Federal Constitution.[38]

This notwithstanding, the run-of-the mill consideration of the administrative function as a residual function covering all actions not representing formulation of general and abstract rules (legislation) or the composition of lawsuits (jurisdiction) is not compatible with the development of public law, particularly in Brazil.

To establish the grounds for the agreement put forward here to avoid identifying the finalistic role of the Court of Auditors with typically administrative activities, let us now distinguish the means employed and the perceived ends in exercising the functions of external control and administration. Rounding off and corroborating the argument put forward, we will produce evidence that external control under the responsibility of the Court of Auditors adds a peculiar input to the administration function.

3.1 The distinction of the means employed and the perceived ends in the performance of the external control and administration functions

The role of the Court of Auditors and, ipso facto, the processes that render it operational could be identified with the administrative function based on two arguments: firstly, of an adverse nature, would include external control of the Accounting Court as an administrative function because there is nothing tying it to either the legislative function — it does not manifest itself by means

[37] Paulo Modesto, Função administrativa, op. cit., pg. 217.

[38] CARVALHO FILHO, José dos Santos. Manual de direito administrativo. 24th revised, enlarged and updated edition. Rio de Janeiro: Lumen Juris, 2011. pg. 2, and FIGUEIREDO, Lúcia Valle. Curso de direito administrativo. São Paulo: Malheiros, 2008. pg. 33.

of general and abstract rules[39], or the judiciary function — it does not resolve conflicts that arise between citizens;[40] secondly, of a finalistic nature, it would be equivalent to the control and administration tasks because they are striving for the same objective: to promote the public interest and foster the well-being of society. However, neither of these approaches deserves to prosper.

As already pointed out, the negative criterion for identifying and classifying state functions is incapable of explaining the conjugation of efforts by the Accounting Court and the Legislative Power in exercising external control. In the wake of the categorical emphasis on the specialized opinion of jurists, one cannot talk about external control without the contribution from the Court of Auditors,[41] nor will it be argued that with the exception of the acts undertaken for self-management, the Legislative Power performs an administrative function.

Such is the distance between the external control function and the administrative function that one can still find enlightened academics who, given their indelible attachment to the dogma of the tripartite functions and the identification of the functions with one of the three classical powers, classify the supervision of merit and legality of the acts of the government as part of the legislative function.[42] However, just as Ruy Barbosa argued in defending the creation of the Court of Auditors, this constitutes an entity of the bench inserted between the government and the legislature — not merely with an organic bias, but especially with a functional bias.[43]

In turn, the proximity of the role of the Court of Auditors to the function of government based on the pursuit of the public interest, is not supported by the simple fact that this is the purpose of absolutely all state bodies, whether established in the constitution or by infra-constitutional order.[44] No act and no state body obtains legitimacy other than through its ultimate purpose of fostering the well-being of society, in such a manner that this criterion is of no use for identifying and characterizing the functions of the State.

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39 AZAMBUJA, Darcy. Teoria geral do Estado. 44th ed. São Paulo: Globo, 2005. pg. 176.

40 Ibid.

41 Carlos Ayres Britto, O regime constitucional dos Tribunais de Contas, op. cit., pg. 3; and Diogo de Figueiredo Moreira Neto, O parlamento e a sociedade como destinatários do trabalho dos Tribunais de Contas, op. cit., pg. 17.

42 See, in this respect, BARROSO, Luís Roberto. Temas de direito constitucional. 2nd ed. Rio de Janeiro: Renovar, 2006. ch. I, pg. 224.

43 Ruy Barbosa, Tribunal de Contas, op. cit., pg. 450.

44 See Darcy Azambuja, Teoria geral do Estado, op. cit., pg. 123 and 125.

However, if, as the ultimate purpose, the search for the common good is not a useful aspect for differentiating these functions, an examination of the immediate objectives linked to the sovereignty bodies certainly appears to be advantageous for this aspiration. The fact is that by distributing the exercise of power across several centers of attribution, the aim of the Constitution is precisely for the immediate, actual and concatenated purposes to lead to that ultimate aim.

Thus, it is correct to deal with the administration as a function service,[45] because it is the execution of political decisions and provisions of technical nature that serve the needs of community life.[46] As Hesse succinctly put it, execution — or administration — is not a mere collective concept for everything that is not legislation and jurisdiction, rather it indicates "becoming a direct state asset".[47]

If the "the administration relationship" is the "legal relationship structured around the impact of a cogent purpose" in which duty prevails,[48] this is not a generic purpose that underlies every action of the state, but those concrete purposes allocated to specific bodies — commonly subordinated to the Executive Power. It is up to the public administration, therefore, to play a direct role, to bring about what the Constitution and the laws have promised to society — or, in the words of Eros Grau, "to cure in the sense of promoting the public interest within the confines of legality".[49]

When characterizing the administrative function, Di Pietro summarizes the four types of activity encompassed within this concept, namely, public utility, development, intervention and government police.[50] This conception also enables a differentiation of the administrative function in the strict sense, which covers only the four-pronged approach of the professor of the University of São Paulo to the administrative function in the widest sense, which also includes the internal actions of each body, that is, the support activities (e.g.,

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45 Cezar Saldanha Souza Junior, O Tribunal Constitucional como poder, op. cit., pg. 89.

46 LOEWENSTEIN, Karl. Teoría de la constitución. 2nd ed., 4th reprint. Barcelona: Ariel, 1986. pg. 66-67.

47 Konrad Hesse, Elementos de direito constitucional da República Federativa da Alemanha, op. cit., pg. 397.

48 LIMA, Ruy Cirne. Princípios de direito administrativo. 6th ed. São Paulo: Revista dos Tribunais, 1987. pg. 51-52.

49 GRAU, Eros Roberto. Decisão de Tribunal de Contas, não confirmada por Decreto Legislativo, não vincula atuação da administração. Revista Trimestral de Direito Público, São Paulo, No. 17, pg. 110, 1997.

50 DI PIETRO, Maria Sylvia Zanella. Discricionariedade administrativa na Constituição de 1988. 3rd ed. São Paulo: Atlas, 2012. pg. 247.

biddings and competitive examinations) undertaken by virtually all public bodies.

And it is to all this activity — lato sensu administration — that external control will apply, a control which is, above all else, the limitation of power. Whether to ensure that the rules are obeyed to the letter in competitive examinations and contracting, or to ensure that the public services are provided in the appropriate manner and attain their goals, the work of the Court of Auditors is predominantly one of verification.

In this respect, the external control body assumes no direct responsibility in government.[51] In other words, while the responsibility of the administrative function is to make proper use of public assets and valuables in order to achieve its objectives, the Accounting Court represents special protection for those assets and valuable — material and immaterial.[52] The administrative function aims both to be and to act in the proper manner; the purpose of the external control function is to check whether the government has managed to be and to act in the proper manner.

If the immediate ends of the two functions differ — this would be enough to recognize that there can be no confusion between them —, the means for achieving them are also different. On this point, we have to revisit the issue of the powers of the Court of Auditors to clearly link the duties and powers allocated to that body.

Modern studies of civil procedure give rise to the teaching that process differs from mere procedure (a sequence of acts) given the teleology underlying its relationship with the state function.[53] Thus, to the extent that we cannot deny the eminently instrumental function of the process,[54] from the teleological perspective and definitive recognition of its public — as opposed to private nature[55] —, there is no doubt that what determines the essence are the purposes for which it is intended, inexorably linked to what the respective state function has to undertake.

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51 NUÑEZ PÉREZ, Manuel. Relaciones del control externo con el Poder Legislativo. Revista Española de Control Externo, Madri, vol. 8, No. 23, pg. 131, 2006.

52 ATALIBA, Geraldo. Propostas à constituinte sobre ação fiscalizadora dos Tribunais de Contas. Revista do Tribunal de Contas do Estado de São Paulo, São Paulo, No. 54, pg. 87-106, July 1986. pg. 94.

53 MARINONI, Luiz Guilherme. Teoria geral do processo. 3rd ed. São Paulo: Revista dos Tribunais, 2008. pg. 390-391.

54 SILVA, Ovídio A. Baptista da. Curso de processo civil, volume 1: processo de conhecimento. 7th revised and updated edition. Rio de Janeiro: Forense, 2006. pg. 104.

55 Luiz Guilherme Marinoni, Teoria geral do processo, op. cit., pg. 389.

For that reason, the external control process is the one that serves as the instrument for protecting the public treasury and for guaranteeing proper government, for which the Court of Auditors is responsible.[56] In this sense, administrative process refers not to every process of a legislative or judiciary nature, rather to the one through which the public administration manages to put into practice its duties-powers in order to carry out the administrative function. Treating the external control process as an administrative process therefore implies subverting the (control) function on behalf of the object (administrative acts and contracts), a confusion that does not sit well with the current stage of the studies in public law.

At the same time, it is no exaggeration to assert that, although it can act on its own, external control always reacts on account of an actual or potential action of the government In this respect, the decisions of the Court of Auditors, unlike administrative decisions and acts, serve firstly and immediately to protect the law, not to comply with material tasks imposed by the constitution or the law.[57]

To the extent that it encompasses duties-powers for limiting and ordering the acts of the three Powers provided for in article 2 of the 1988 Constitution of the Federative Republic of Brazil — and those of the autonomous bodies — the external control function plays a role in the mechanism of checks and balances enshrined in the Constitution of the Republic. Coherent with the office and specificity of the external control process, the Constitution attributed to the Court of Auditors a range of instrumental powers, that is, the means for carrying out this task,[58] a circumstance that leads Ricardo Lobo Torres to argue that, given what the Constitution literally says, the entity not only helps Parliament, but also the public administration and the community itself.[59] And it is this contribution that the remaining topic will deal with.

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[56] For the argument and conclusion converging with what has been expounded here, but referred to as "process of accounts", See Romano Scapin, A expedição de provimentos provisórios pelos Tribunais de Contas, op. cit., pg. 87.

[57] Hesse uses this characteristic to differentiate the judiciary function from the legislative and executive functions, See Konrad Hesse, Elementos de direito constitucional da República Federativa da Alemanha, op. cit., pg. 413.

[58] Even before the enactment of the 1988 Constitution of the Federative Republic of Brazil, Geraldo Ataliba had linked "the accounting courts" to the creation of instruments and conditions that would make the republican principle a reality. See Geraldo Ataliba, Propostas à constituinte sobre ação fiscalizadora dos Tribunais de Contas, op. cit., pg. 90.

[59] TORRES, Ricardo Lobo. Tratado de direito constitucional, financeiro e tributário, volume V: o orçamento na Constituição. 3rd revised and updated edition. Rio de Janeiro: Renovar, 2008. pg. 482.

3.2 The contribution of the external control function to the administration function

In the typically accurate teachings of Norberto Bobbio, "pointing out the path and following it to the end are two different things".[60] The Court of Auditors was not created to follow the path or to define it beyond what the law says; however, it has the duty-power, that is, the obligation and the means to discover it or to help find it.

But, the argument of Jacoby Fernandes, that the external control system of the 1988 Constitution of the Federative Republic of Brazil aims to verify, supervise and correct acts is not entirely precise,[61] because such an assertion mixes the means employed with the immediate objective of the control and with what quite often exceeds the duties of the Court of Auditors. Supervision, verification and correction are indeed duties-powers that must always be employed and explained under the cloak of the function of protecting the treasury and ensuring good administration.

However, although sometimes performing the proper acts of verification, the Accounting Court lacks the authority to adopt measures capable of correcting what the administration is doing. This is because, to protect the autonomy enjoyed by the other sovereignty bodies, the Constitution does not authorize the Court to determine actions and suspend acts as it sees fit[62].

Given these circumstances, and because it cannot relinquish its function, its raison d'etre, the body will have to play another less active, yet no less modest role: that of a collaborator of the public administration.[63] It is worth emphasizing that it will cooperate with the administrative function in its latent sense, engaging in acts and contracts also entered into by the Legislative and Judiciary powers.[64]

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60 BOBBIO, Norberto. A era dos direitos. New edition. Rio de Janeiro: Elsevier, 2004. pg. 51.

61 FERNANDES, Jorge Ulisses Jacoby. Tribunais de Contas do Brasil: jurisdição e competência. 3rd revised, updated and enlarged edition. Belo Horizonte: Fórum, 2012. pg. 120.

62 HELLER, Gabriel. Controle externo e separação de Poderes na Constituição de 1988: fundamentos e eficácia jurídica das determinações e recomendações do Tribunal de Contas. Dissertation (Master's degree) LLM and Juris Doctor Program, Centro Universitário de Brasília (Uniceub), Brasília, 2019, pg. 124-147.

63 It is absolutely valid to also classify the authority of the Audit Courts to determine and suspend as collaboration with the government so that here, by excluding them, one is dealing with collaboration in the strictest sense, which cannot be identified as a more direct authority for correction.

64 This would be what is commonly referred to as "typical functions". See José dos Santos Carvalho Filho, Manual de Direito Administrativo, op. cit., pg. 2.

This idea converges with what is alluded to in the thinking of Eros Grau about the prevalence of cooperation in the system of the division of functions of the Federal Constitution. In spite of the fact that the clear and uncorruptible wording of article 2 of the 1988 Constitution of the Federative Republic of Brazil avoids embracing exaggerations that consider the Court of Auditors — as well as the Prosecutors' Office — a "fourth Power", one has to bear in mind that, inserted in the very concept of inter-entity, i.e., external control, is the notion of several holders of power that cooperate in government.[65]

The exercise of this duty-power, as a rule, arises when it appears that the improvement of the public administration either claims for acts not required to faithfully uphold the law — which usually means entering the manager's discretionary space — or lacks legislative interposition. In these cases, the entity behaves like a type of management consultant,[66] so that its resolutions take on the form of a recommendation, as opposed to a determination, which has mandatory efficacy and binding force.

In the case of recommendations for adopting strictly administrative measures, one can see a feature of induction, but also of pressure on the administrator. Thus, they may arise, as a suggestion of a facere, in the wake of a determination to not do, since if control cannot replace the public manager, it has the duty-power to "signal, in good time, how the administrative powers cannot be used".[67]

Indeed, it usually turns out to be easier to order abstention on account of a mistake that breaks the law, based on the detection of bad management that also breaks the law, than to issue an order to commit a specific action to the exclusion of all others, thus allowing the legislation to be upheld.

On the other hand, if when it issues recommendations for legislative innovation, or when it sends reports about its activities (article 71, paragraph 4, 1988 Constitution of the Federative Republic of Brazil) or provides information requested about the inspections under its remit (article 71, VII, 1988 Constitution of the Federative Republic of Brazil) to Parliament, the Court of Auditors fulfills its duty of assistance generically established in the main paragraph of article 70 of the 1988 Constitution of the Federative Republic of

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[65] Karl Loewenstein, Teoría de la constitución, op. cit., pg. 232.

[66] LIMA, Dagomar Henriques. Responsabilização por desempenho e controle externo da administração pública. Revista do Tribunal de Contas da União, Brasília, No. 111, pg. 37, Jan./Apr. 2008.

[67] FREITAS, Juarez. Direito fundamental à boa administração pública. 3rd ed. São Paulo: Malheiros, 2014. pg. 66.

Brazil. After all, as Canotilho points out, the Legislative Power as the home of the people's representatives remains the primary financial controller of the State[68] — even in Portugal, where the Accounting Court was constitutionally established as an entity of the Judiciary.

While the "micro power" of the "techno-bureaucracy" unbalances the control function in the traditional — out-of-date — molds[69] of the division of functions, the Accounting Court is always positioned as the counterweight that reestablishes equilibrium in favor of control. This gives rise to the major difficulty of our time in conceiving external control of the public administration without an entity like the Court of Auditors, and the reason why the people's representatives got it right when they instituted the mechanisms of checks and balances in the 1988 Constitution.

Finally, one must mention a cooperative power of the external control body which, although absent from the list in article 71 of the 1988 Constitution of the Federative Republic of Brazil, has been included in many of the organic laws governing the Courts of Auditors in Brazil: the advisory power.[70] This refers to the possibility of the Court clarifying doubts involving the application of legal and regulatory provisions concerning subject matters under its remit, which involves an initial opinion on those matters, but not in concrete cases (paragraph 2 of article 1 of Federal Law No. 8.443/1992).

Justifying his proposal for including a similar attribution in the Constitution under preparation at the time, Geraldo Ataliba pointed out its merits referring to the possibility of the control entity acting not to shut down the government or frighten innovators, but rather to provide "legal comfort" to those government officials who "are about to innovate, create or intend to embark in new directions".[71] Evidently, the advisory task enhances and confirms the duty-power of collaboration by the external control function with the administrative function.

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[68] CANOTILHO, José Joaquim Gomes. Tribunal de Contas como instância dinamizadora do princípio republicano. Revista do Tribunal de Contas de Santa Catarina, Florianópolis, vol. 5, No. 6, pg. 25, Sept. 2008.

[69] Maria Sylvia Zanella Di Pietro. Discricionariedade administrativa na Constituição de 1988, op. cit., pg. 26.

[70] As an example, see article 1, XVII, of Federal Law No. 8.443/1992.

[71] Geraldo Ataliba, Propostas à constituinte sobre ação fiscalizadora dos Tribunais de Contas, op. cit., pg. 95.

4. Conclusion

Using a revised bibliography and an analysis of the applicable legislation, the purpose here was to differentiate the external control and the administration functions as configured in the 1988 Constitution of the Federative Republic of Brazil, in order to demonstrate the autonomy of external control within the Brazilian legal system.

Initially, it was shown that state functions must be differentiated and characterized based on the duties-powers attributed to the different sovereignty bodies instituted by the Constitution, including the Court of Auditors, jointly responsible with the Legislative Power for external control of the public administration. Thus, external control was defined as a specific and autonomous function consisting of its own constitutional powers, with the purpose of protecting the treasury and guaranteeing good government. With this, it was possible to provide proof that the dogma of the tripartition of powers and functions, while apparently adopted in its pure model by the constitutional convention, is now out of date on account of the advent of new functions and new centers of allocation of state power.

By going into depth in these conclusions, it was possible to compare the means employed and the ends envisaged in exercising external control and administrative functions to show the patently obvious impossibility of confusing the external control process with the administrative process. It was argued that while external control acts after the event, on account of an actual or potential act by managers, with the immediate aim of protecting the treasury and the propriety of administrative action, administration constitutes a service function that seeks to fulfill material tasks attributed under the constitution or by law.

Lastly, corroborating the other results of the study, the conclusion was drawn that the external control function encompasses a duty of collaboration with the public administration, which the Court of Auditors engages in with the latter, but also in support of Parliament. The outcome clearly shows that the external control function cannot be confused with the administrative function, with the Court of Auditors responsible for indicating to the administration the way forward, occasionally correcting the path taken, but never taking that path on its behalf.

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