Restitution and punishment in the control of administrative acts and contracts: the different forms of liability by the Court of Accounts*

Reparação e sanção no controle de atos e contratos administrativos: as diferentes formas de responsabilização pelo Tribunal de Contas

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ABSTRACT

This paper aims to differentiate the two forms of liability by the Court of Accounts in the control of administrative acts and contracts: the order of restitution and the application of punishments. Based on bibliographical and documentary sources, including statutes and judicial rulings, we attribute a financial-civil nature to the former, resulting in a peculiar regulation of its own, influenced by civil law. Regarding the application of penalties, we argue that the external control sanctions have a financialadministrative legal nature and constitute an autonomous branch of punitive law that shares, with criminal law and sanctioning administrative law, a common constitutional origin, oriented for the protection and promotion of fundamental rights.

KEYWORDS

Court of Accounts — external control — accountability — order of restitution — sanctions

RESUMO

O presente artigo diferencia as duas formas de responsabilização pelo Tribunal de Contas no controle dos atos e contratos administrativos: a condenação ao ressarcimento ao erário e a aplicação de sanções. A partir de pesquisa bibliográfica e documental, incluindo legislação e jurisprudência, atribui-se à primeira uma natureza financeiro-civil, da qual decorre um regime jurídico próprio com influxos do direito civil. Já no caso da aplicação de penalidades, defende-se que as sanções a cargo do controle externo têm natureza jurídica financeiro-administrativa e constituem um ramo autônomo do direito punitivo que compartilha, com o direito penal e o direito administrativo sancionador, uma origem constitucional comum, orientada para a proteção e a promoção dos direitos fundamentais.

PALAVRAS-CHAVE

Tribunal de Contas — controle externo — responsabilização — imputação de débito — sanções

Introduction

Disregarding the amounts spent on personnel expenses and government debt, it is relatively safe to claim that the largest share of the budget of the various units of the Federation is intended to cover expenses with contracts arising from selection processes, whether biddings themselves or cases of dismissal/no-bidding contract — exemption and non-requirement. Since the Court of Accounts appears as an agency constitutionally devoted to the external control of the public administration under the accounting, financial, budgetary, patrimonial, and operational aspects, having legality, legitimacy and economy as parameters (Article 70 and Article 71, Brazilian Federal Supreme Court), it sounds natural that biddings and contracts are ordinary objects of its work.

Consolidating the constitutional provisions, in Law No. 8.666/1993 (Brazilian Federal Acquisition Law), the legislator made it clear that the Court of Accounts is responsible for controlling expenses arising from contracts and other instruments governed by that law, and also increased the legitimacy of representation before the agency, granting this prerogative to any natural person or legal entity (Article. 113, *Caput*, and Item 1). Although there are no doubts about the institution competence to charge debts and apply the sanctions provided for by law (Article 71, II, VIII, and Item 3, Constitution of the Federal Republic of Brazil), a more tormenting question arises regarding the possibilities and limits of these kinds of accountability imposed to public and private agents by the Court of Accounts.

In this regard, the first obstacle consists in the adequate categorization of the different hypotheses of accountability legitimized by the Brazilian Constitution and by the infra-constitutional legislation. In order to overcome this difficulty, a division of the accountability gender into two types is proposed: accountability-restitution and accountability-punishment. It is known that both the imputation of debt and the application of penalties can be understood, in terms of the general theory of law, as "sanction" — a consequence established by the legal system in reaction to a given conduct practiced by an individual[1]; however, for the purposes of this article, the use of the term sanction is restricted to the sense of punishment.

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[1] Cf. KELSEN, Hans. *Teoria pura do direito*. Translation of the Austrian edition of 1960: João Baptista Machado. 6. ed. São Paulo: Martins Fontes, 1998. p. 37 and 45.

This elucidation is important because much of the confusion verified in the doctrine and courts precedents dedicated to the theme originates from the indiscriminate addressing of these different types of accountability as "sanction". Likewise, the distressing character shared by the imputation of debt, the application of penalties and, still, by the adoption of "provisional remedies"[2], leads to a series of inconsistencies in the theory and practice of the Court of Accounts.

These are, therefore, forms of *accountability* in public finance, expressly authorized by the Brazilian positive law and attributed to the external control agency. Since the Court of Accounts is an import of European continental law at the time of the transition from Empire to Republic[3], when relevant, some parallels will be drawn with Courts of Accounts of the Old Continent, particularly those of France and Spain[4].

The first part of this study is dedicated to the characterization of the imputation of debt by the Court of Accounts, showing its financial-civil nature, which brings it closer to a legal regime that is proper of the civil liability. Therefore, the applicability of the solidarity hypotheses, provided for in the Civil Code to cases in which the agent's financial-civil liability is evident, is defended; in the same way, to configure duty to restitute the damage to the treasury, the exemption of intention is advocated.

In the second and last part of the article, external control sanctions are presented as a peculiar category of punitive law, that still lacks in-depth debate on doctrine and caselaw[5]. The approach of the controlling, administrative and criminal spheres is addressed with regard to the punishment of misconducting

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[2] For a criticism of the indiscriminate use of the term "provisional remedies" for temporary provisions within the scope of the Courts of Accounts, defending their adoption of categories that are specific to Civil Procedure, cf. SCAPIN, Romano. *A expedição de provimentos provisórios pelos Tribunais de Contas*: das "medidas cautelares" à técnica antecipatória no controle externo brasileiro. Belo Horizonte: Forum, 2019, p. 166-186.

[3] Cf. 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. p. 450 and 453.

[4] In France, the first country to establish a Court of Accounts (Cour des Comptes), the agency is one of Napoleon's legacies, having a reference to the law that created it (Loi du 16 September 1807) among the great institutional achievements of the French emperor, in Hôtel des Invalides, where his remains lie. On the validity and usefulness of the legal comparison between the Courts of Accounts of Brazil and Spain, cf. HELLER, Gabriel. Jurisdição e fiscalização do Tribunal de Contas: estudo comparado do controle externo no Brasil e na Espanha. In: COIMBRA, Wilber Carlos dos Santos (Org.). *Os avanços dos Tribunais de Contas nos 30 anos da Constituição Federal de 1988*. Porto Velho: TCE-RO, 2018.

[5] Dividing punitive law into criminal law and sanctioning administrative law, but moving away from it the "management responsibility measures", cf. OSÓRIO, Fábio Medina. *Direito administrativo sancionador*. 5. ed. Revised and expanded edition. São Paulo: Revista dos Tribunais, 2015, *passim*, and, specifically, p. 114-116 and 117-120.

agents, highlighting the mitigation of the criminal definition requirement in the first two. Finally, the possibility of the public agent's conviction for fault is discussed in view of the amendments promoted in the Introduction Act to Brazilian Law Rules (LINDB) by Law No. 13.655/2018.

1. On the financial-civil legal nature of the imputation of debt

The jurisdiction of the Court of Accounts to impute debt is expressly provided for in Item 3 of Article 71 of the Brazilian Constitution, which makes this decision as effective as an executable instrument. When enshrining the possibility that the Court constitutes in debt the one whose conduct results in damage to the treasury, the Brazilian Constitution imposed, in the "accounts jurisdiction", a mean for implementing civil liability.

Opening Title IX — "On Civil Liability" and its Chapter I — "On the Obligation to Indemnify", Article 927 of the Civil Code (CC) establishes that anyone who, due to an illegal act, causes harm to others, is obliged to restitute it; the text expressly refers to Article 186 of the same legal diploma, that conceptualizes the illegal act as the violation of the right causing damage to a third party, arising from "voluntary action or omission, negligence or recklessness". It is seen, therefore, that the duty to compensate public treasury, resulting from a loss caused to the administration, is nothing but an obligation to indemnify.

For this reason, it is emphasized that the function of the indemnity is exclusively restitutive of the damages caused, and not punitive of the conduct. No wonder Article 944 of the Brazilian Constitution stipulates that, as a rule, the indemnity will be measured by the extent of the damage[6], whereas in the sanction — whether criminal or administrative —, the individual's degree of guilt interferes decisively[7].

Notwithstanding, the occurrence of damage to the Treasury is not enough in itself to attract the judgment of the Court of Accounts[8], under

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[6] The sole Item of Article 944 authorizes the judge to reduce the indemnity if there is an excessive disproportion between the severity of the fault and the damage.

[7] CAVALIERI FILHO, Sergio. *Programa de responsabilidade civil*. 6. ed. São Paulo: Malheiros, 2005. p. 54.

[8] For a comparative analysis on the jurisdictional character of the judgment of accounts by the external control agency, cf. Gabriel Heller, Jurisdição e fiscalização do Tribunal de Contas, op. cit., p. 23-29.

penalty of turning it into a substitute for the Courts of Public Finance of the Judiciary. In fact, admitting the possibility that the external control agency can impose debt in the event of any damage to the treasury would constitute an undue extension of its attributions, which invariably stem from its specific and unmistakable function of external control of the public administration[9].

1.1 On the judgment of accounts as a condition for liability-restitution

The mere statement of the referred Item 3 of Article 71 of the Brazilian Constitution — "imputation of debt or fine" — indicates the essential distinction between the Court judgement jurisdiction, concerning the reconstitution to the treasury, and its punishing jurisdiction, even though both cases imply value debts. However, as stated, the verification of damage to the treasury is not a sufficient condition to arise an action by the Court of Accounts.

According to Articles 70 and 71 of the Brazilian Constitution, the jurisdiction of accounts lends itself to the external control of the administration, and not simply and indistinctly to the protection of the treasury. Thus, the competence to judge the accounts of whoever generates losses to the treasury (Article 71, II, *in fine*) only emerges in face of the exercise of administrative function (in a broad sense) by the public agent. This means that if an individual who has no special subject link with the public administration harms it, the paths to restitution will be either an administrative or a judicial process, but not an external control process (or accounts process)[10].

On the other hand, if the damage was perpetrated by an agent in the exercise of administrative function, individually or with the participation of private agents, it represents an evident case of competence of the external

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[9] HELLER, Gabriel; SOUSA, Guilherme Carvalho e. Função de controle externo e função administrativa: separação e colaboração na Constituição de 1988. *Revista de Direito Administrativo*. Rio de Janeiro, v. 278, n. 2, p. 71-96, May/Aug. 2019. It should be noted that the Law No. 13.655/2018, which amended the LINDB, differentiated, for the first time in the legislative sphere, the functions —named "spheres" — "administrative, controlling and judicial" (Article 20, *caput*, of LINDB).

[10] Highlighting the exceptional nature of private civil liability within the scope of the Court of Accounts without a public agent in the passive sphere, cf. JACOBY FERNANDES, Jorge Ulisses. *Tomada de contas especial*: desenvolvimento do processo na Administração Pública e nos Tribunais de Contas. 7. ed. Revised, updated and expanded. Belo Horizonte: Forum, 2017. p. 117-118.

control agency to judge the accounts. And it is like that because public administration practices are the object of external control, especially those that generate expenditures, such as contractual execution. Among the typical cases that give rise to the judgment of accounts with imputation of debt, overprice and payments without proof of delivery of goods or without performing the service provided for in the contract can be cited.

Under these circumstances, the Court's jurisdiction to adjudicate accounts emerges, pursuant to Article 71, II, *in fine*, of the Brazilian Constitution. We should note that the constituent separated the generic jurisdiction to judge accounts into two types: the ordinary judgment of administrators and other persons responsible for public money, goods and values, operated in terms of accounts rendering or takeover, and the extraordinary judgment, brought about by loss, theft or other irregularity resulting in damage to the treasury.

In exercising this assignment, the majority of Brazilian Courts of Accounts, following the paradigm of the Federal Court of Accounts (TCU), adopt the special account procedure (TCE)[11]. The TCE assumes the existence of evidence of damage to the public treasury[12], which can be established in three different ways: 1) by the public administration, *ex offic*io, with the remittance of the proceeds of its administrative process to the Court of Accounts, for judgment; 2) by the public administration, following determination of the external control agency or recommendation of the internal control agency; 3) by the Court of Accounts itself, in conversion of a prior inspection process[13]. In any case, whether there is or not a so-called "internal phase" of the TCE, which takes place at the administrative level, the competence for judgment lies with the controlling sphere, that is, the Court of Accounts[14].

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[11] CESTARI, Renata Constante et al. Tomada de contas especial: um importante mecanismo de controle no âmbito dos Tribunais de Contas. *Revista da Faculdade de Direito da Universidade de São Paulo*, No. 111, p. 596, Jan./Dec. 2016.

[12] Among these indications is the omission in the duty to render accounts.

[13] FERRAZ, Luciano de Araújo. Tomada de contas especial, responsabilidade civil e processo administrativo disciplinar. *Fórum Administrativo*, Belo Horizonte, yr. 3, No. 26, p. 2, Apr. 2003. There are also federated entities in which the TCE can be directly established by the internal control agency.

[14] TCU, by means of Normative Instruction (IN), exempted the jurisdictional agencies from forwarding the special accounts whose calculated debt is lower than the so-called "limit value", except for the hypothesis of express determination otherwise. Currently, within the scope of the TCU, this value is R$100,000.00 (one hundred thousand reais), according to Article 6, I, of IN No. 71/2012. The Court of Accounts of the Federal District issued a similar rule (Resolution No. 102/1998), based on Item of Article 9 of its Organic Law (District Complementary Law No. 1/1994).

As defined by Article 8 of Law No. 8.443/1992 (Organic Law of TCU — LOTCU), the TCE aims to investigate the facts, quantify the damage and identify those responsible for it, enabling, in the end, that a decision is taken on these accounts, which, insofar as it imputes a debt or imposes a fine, will be as effective as an executable instrument. In contrast to its Spanish counterpart, which has full jurisdiction with regard to "accounting liability"[15], in Brazil, the Court of Accounts is not authorized to execute its judgments, thus being in charge only of constituting the debt and convicting the one responsible for it.

The TCE resembles, on its goals, the action for damages of the judicial area. Comparative analysis shows the pertinence of the parallel: in Continental Europe in general, judgment by the Court of Accounts is part of the so-called "administrative litigation"[16]. For example, in France, Article L315-2 of the *Code des jurisdictions financières* establishes the competence of the Council of State to judge the revocation appeal against the decisions of the *Cour des Comptes*; in Spain, Article 52.2 of Ley 7/1988 (Law of Operation of the Court of Accounts) provides that the *Sala* (Panel) of the Administrative Litigation Chamber of the Supreme Court is competent to judge revocation and review appeals filed against judgments of the Courts of Accounts.

Anyway, in the form of the aforementioned Article 8 of LOTCU, the TCE is not restricted to cases of damage occurrence, but shall also be established in cases of omission in the duty to render accounts, of not proving the application of resources transferred by the entity or of embezzlement or misapplication of money, goods or public values ("irregular accountability")[17].

Liability consists in a successive legal duty, arising from the violation of an original legal duty[18]. Within the scope of the "accounting jurisdiction",

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[15] GARRIDO FALLA, Fernando; PALOMAR OLMEDA, Alberto; LOSADA GONZÁLEZ, Herminio. *Tratado de derecho administrativo*. Volumen III: La justicia administrativa. 2. ed. Madri: Tecnos, 2006. p. 353 and 358. Such understanding comes from the interpretation of Article 117.3 of the 1978 Spanish Constitution together with Article 46.1 of Ley Orgániza 2/1982, del Tribunal de Cuentas, and Article 85 of Ley 7/1988, de Funcionamiento del Tribunal de Cuentas. Cf. Gabriel Heller, Jurisdição e fiscalização do Tribunal de Contas: estudo comparado do controle externo no Brasil e na Espanha, op. cit., p. 29.

[16] The recognition that, in Brazil, the system of single jurisdiction was adopted, rejecting the idea of administrative litigation in the Continental European way, is at the origin of the doctrinal and jurisprudential dispute about the legal nature of the judgment of accounts by the external control agency and of the limits of its review by the Judiciary. In that regard, with differing opinions, cf. CARNEIRO, Athos Gusmão. *Jurisdição e competência*. 18. ed. São Paulo: Saraiva, 2012. p. 41-43, and CRETELLA JÚNIOR, José. Natureza das decisões do Tribunal de Contas. *Revista de Informação Legislativa*, Brasília, yr. 24, No. 94, p. 185-189, Apr./Jun. 1987.

[17] Jorge Ulisses Jacoby Fernandes, *Tomada de contas especial*, op. cit., p. 43-44.

[18] Sergio Cavalieri Filho, *Programa de responsabilidade civil*, op. cit., p. 24.

the original legal duties, whose non-observation gives rise to liability, are the lawful application of public resources, for the specific purposes legally defined, the correct and reliable accountability and, more broadly, the general duty of not causing harm to others (*neminem laedere*).

Thus, we perceive a complex of financial-constitutional obligations— submitted to the control of the Court of Accounts — which receives the influx of the civilian legal regime, since it has the assets of a legal entity as object. Therefore, we recognize the process of judgment of accounts as having a financial-civil nature, from which derives the possibility of imputing debt by the external control agency[19].

In the case of a civil liability hypothesis, which does not depend on the occurrence of a functional violation giving rise to administrative proceedings[20], it is necessary to repeat the applicability of civil law institutes in the judgment of accounts, with the dispositions required by their financial-constitutional origin[21].

1.2 On the applicability of civil solidarity in liability-restitution

From the wording of the law, the concept of the joint and several debt (passive solidarity) arises, a situation in which, in the same obligation more than one debtor competes, each responsible for the entire debt (Article 264 of the Constitution of the Federative Republic of Brazil)[22]. Thus, the compulsory solidarity is marked by subjective plurality and objective unity[23]. The subsequent legal provision explains that solidarity results either from the law or from the will of the parties, and cannot be presumed.

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[19] As already mentioned, the hypotheses of applying punishment due to the judgment of accounts will be addressed in the second chapter of this article.

[20] Luciano de Araújo Ferraz, Tomada de contas especial, responsabilidade civil e processo administrativo disciplinar, op. cit.

[21] Among the peculiarities of the procedures for the compensation to the treasury, the imprescriptibility of the claim for restitution stands out, it was relativized by the STF in the judgment of Special Appeal (Recurso Especial) No. 852.475 (with no published judgment yet), to restrict the imprescriptibility to cases of intentional fraud. The question of the imprescriptibility of actions for reimbursement to the treasury based on a decision of the Court of Accounts, a topic that also had its general repercussion recognized in Special Appeal (Recurso Especial) No. 636,886, depends on further analysis and debate.

[22] Due to the practical inapplicability in the sphere of account control, we no longer discuss the active aspect of joint and several credit.

[23] Nobre Junior, Edilson Pereira. Solidariedade e responsabilidade civil. In: RODRIGUES JUNIOR, Otavio Luiz; MAMEDE, Gladston; ROCHA, Maria Vital da (Coord.). *Responsabilidade civil contemporânea*: em homenagem a Sílvio de Salvo Venosa. São Paulo: Atlas, 2011. p. 528.

If an express rule is required — either legal or conventional — for the application of the civil institute, it is necessary, for the purposes of this article, to verify the hypotheses of solidarity affecting the jurisdiction of accounts.

At the top of the legal system, the Brazilian Constitution, a provision for solidarity is identified in cases where, when aware of any irregularity or illegality, those responsible for internal control fail to inform the Court of Accounts (Item1 of Article 74). Thus establishing, in accordance with the duty of internal control to support external control (Article 74, IV, of the Constitution of the Federative Republic of Brazil), an obligation to report any irregularities of which it becomes aware.

Despite the fact that the duty to report applies to "any irregularity or illegality", solidarity itself can only apply in cases where there is an imputation of debt. This is because, as a civil law institute, it is not to be confused with the co-authorship of the punitive law. Obviously, the internal control agent may suffer sanctions in the administrative, controlling and judicial spheres for unlawful omission in cases where there is no debt, but they will be relatively autonomous with respect to the original irregularity. Solidarity means co-responsibility for an obligation, not for a penalty. In the application of sanctions — no matter in which sphere —, the principle of penalty individualization applies (Article 5, XLVI, of the Constitution of the Federative Republic of Brazil).

LOTCU provides for the solidarity of the administrative authority that, being competent for this purpose, fails to adopt measures that aim the establishment of special accountability in the cases provided for by law. It is not too much to stress that the phrase "*under penalty* of joint liability", present in both the Brazilian Constitution and LOTCU, does not convert solidarity into a sanction, into a punitive law institute. It is just an expression of the Portuguese language that explains a consequence for unwanted behavior[24], so much so that the Civil Code and the uncodified civil legislation are lavish in the use of the expression[25].

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[24] Conversely, understanding that the expression gives a punitive character to solidarity, cf. Jorge Ulisses Jacoby Fernandes, *Tomada de contas especial*, op. cit., p. 267.

[25] Mentioning, as examples, Articles 308 and 446 of the Civil Code, and Article 53 of Law No. 11.101/2005 (Bankruptcy Law). Also recognizing the absence of a criminal character arising from the expression "under the penalty of", is the vote of Minister Moreira Alves in HC (Habeas Corpus) 77.527/MG, cf. Brazilian Supreme Federal Court. Habeas Corpus. *HC 77.527/MG*. Full Court. Rapporteur: Min. Marco Aurelio. Rapporteur for Judgment: Min. Moreira Alves. Judged on 9/23/1998. Published on the *DJ* on 4/16/2004.

For its turn, the Brazilian Federal Acquisition Law also brings some specific provisions for the applicability of the institute. The following are solidary, based on this diploma: 1) the public agent and the supplier or service provider, for damage resulting from overpricing in cases of exemption and non-requirement of bidding (Item 2 of Article 25); 2) the joint ventures (Article 33, V); and 3) the members of the bidding commissions for the acts performed by them, except in the case of divergent individual position duly substantiated and recorded in the minutes (Item3 of Article 51).

However, the most common source of solidarity is based on co-participation in the perpetration of damage, as provided for in Article 942 of the Civil Code, by stating that, if the offense has more than one author, everyone will be jointly liable for the restitution; the sole Item of this Article emphasizes the applicability of the institute by stipulating that co-authors are jointly responsible with the authors. This is, in fact, the generic provision for solidarity in civil liability, which applies with no distinction when there is indemnifiable damage.

It is important to highlight the exemption of prior agreement or of the uniqueness of the faults committed for the referred provisions to apply, since the legislator's intention was to provide for a faster and more effective restitution payment[26]. There is, therefore, no need for the duty to be based on the same cause or legal basis[27].

It should be stressed that the recognition of solidarity by the Court of Accounts is a duty, not a faculty. This is so because it is up to the creditor — in this case, to the entity, through its Attorney General or branch office —, to choose the debtor from whom the debt will be charged, and not to the judge.

In order to conclude the proposed approach on financial-civil liability, the subjective element required for the imputation of debt is yet to be addressed.

1.3 On the exemption from intent to carry out liability-restitution

It is evident that strict liability, that is, regardless of fault *lato sensu*, is an exception in the Brazilian legal system[28], generally requiring an express

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[26] Edilson Pereira Nobre Junior, Solidariedade e responsabilidade civil, op. cit., p. 532-533. In the same sense, cf. Lyra Junior, Eduardo M. G. de. Notas sobre a solidariedade passiva no novo Código Civil. *Revista de Direito Privado*, v. 4, No. 13, p. 38-40, Jan./Mar. 2003.

[27] Ibid., p. 36.

[28] Fábio Medina Osório, *Direito administrativo sancionador*, op. cit., p. 372-373 and 377-378; ZYMLER, Benjamin. *Direito administrativo e controle*. 4. ed. Belo Horizonte: Fórum, 2015, p. 207.

rule (sole Item of Article 927 of the Civil Code)[29]. It is not different in cases of damage to the treasury determined by the Court of Accounts, in which the imputation of debt is unfeasible if the intent or any of the fault modalities in the strict sense (negligence, imprudence or malpractice) is not verified.

In this sense, the exemption of uniqueness of conducts and prior agreement between the co-responsible parties does not authorize the control agency, when judging accounts, to attribute joint debt simply due to the hierarchical position of a certain agent. Restitution liability demands the demonstration of a specific action or omission on the agent's part qualified by the subjective element.

A controversial issue concerns the possibility of condemning to restitution of damages to the treasury in cases of vitiated bidding or contract in which the contractor's assistance for the nullity of the acts is found. The sole Item of Article 59 of the Brazilian Federal Acquisition Law states that "[a] nullity does not exonerate the Administration from the duty to indemnify the contractor for what was performed up to the date it is declared and for other regularly proven losses", except in the hypothesis that the illegality is attributable to the contractor.

This means that, in case of bad faith of the supplier or service provider, no payment would be due, and, once made, it should be recovered[30]. We could object that the thesis defended would result in the administration unjust enrichment; the matter requires more careful analysis, however.

At first, it is the law itself that allows the treasury to make this "enrichment", making it, *a priori*, lawful. Even so, it would be plausible to claim that this legal provision is unconstitutional, among other grounds, for violation of the right to property; this contestation can be answered with two arguments: 1) the contractor, when carrying out illegal acts that lead to the nullity of the procedures, assumes the risk of not receiving consideration for what he has done; 2) indemnifying a bad faith supplier ends up rewarding him, because, in the worst case, once the defect is discovered, he will not suffer any loss, but only stop earning profits.

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[29] There is no need for specific normative provision "when the activity normally carried out by the author of the damage implies, by its nature, a risk to the rights of others" (sole Item of Article 927).

[30] In a convergent sense, but apparently expanding too much the possibilities of reimbursement to the treasury, cf. MEDINA, Marcelo Borges de Mattos. Dano ao erário em hipóteses de licitação ou contrato viciado. *Revista de Direito Administrativo*. Rio de Janeiro, v. 254, p. 29 and 32, May/Aug. 2010.

For the purposes of the present study, more relevant than addressing specific cases like the mentioned one, is to analyze whether the amendments made to LINDB by Law No. 13.655/2018 altered the possibility of liability for damages to the treasury where only one of the fault modalities is present *stricto sensu*.

Article 28 of the LINDB states that "[the] public agent will personally answer for his decisions or technical opinions in case of intent or gross error". A hasty reading of this provision could lead to the idea that the Court of Accounts or even the Judiciary could not charge the agent with debt in the event of negligence that results in damage to the treasury, for example, but only in face of intent or gross error. However, this does not seem to be the interpretation of the law.

As often repeated, the law is not interpreted "in strips" [31], that is, no legal text should be applied in isolation, detached from the whole legal system, which constitutes a true system. The same is true for the normative statement under examination, which deserves systematic interpretation.

The liability-restitution conveyed by the Court of Accounts has, for the reasons already explained, financial-civil nature, applying, as a rule, the civilist legal regime, with the dispositions demanded by public law, also regarding the scope of competence of the Court, as mentioned. This is the fault-based liability, resulting from the general principle of *neminem laedere* or the duty of accountability, with the assumption of wrongful conduct in the broad sense (intent or fault in the strict sense).

Therefore, the assumption that LINDB would have excluded the liability-restitution of the public agent for fault would constitute an admission of a privilege that would offend the idea of treasury protection brought within the Brazilian Constitution (Article 34, VII, *d*, Item 5 of Article 37 and Article 71, II and VIII) and would be contrary to Item 6 of Article 37, which provides for the State's right of return *vis-à-vis* the agent responsible for damage in cases of intent or fault[32]; more importantly, it would patently violate the isonomy.

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[31] GRAU, Eros Roberto. *Por que tenho medo dos juízes*: a interpretação/aplicação do direito e os princípios. 8. ed. Recast of the essay and speech on the interpretation/application of the law. São Paulo: Malheiros, 2017. p. 86-87.

[32] For a criticism on Article 28 of LINDB, pointing, in particular, to unconstitutionality for violation of Item6 of Article 37, cf. OLIVEIRA, Odilon Cavallari de. Alterações à Lei de Introdução às Normas de Direito Brasileiro e controle. In: PINTO, Élida Graziane et al. *Política pública e controle*: um diálogo interdisciplinar em face da Lei nº 13.655/2018, que alterou a Lei de Introdução às Normas de Direito Brasileiro. Belo Horizonte: Fórum, 2018. p. 80-86.

This is stated because, by relativizing the imputation of debt due to negligence, malpractice or imprudence, the public agent would be considered a special category of citizen, of those who do not answer for damage to the treasury perpetrated culpably; this would create an unacceptable privilege precisely for those who have a special duty to take good care of public assets. Evidently, this was not the intention of Law No. 13.655/2018 — nor could it be —, since it would also distort the civil rules, which, unlike the criminal law, as a rule, equates fault and intent for the purpose of restitution, doing no distinction even between degrees of fault[33].

In view of the foregoing, liability-restitution is understood as legallyconsistent, that is, the imputation of debt to a public agent based on culpably caused damage to the treasury. Article 28 of the LINDB, therefore, refers to the liability-restitution, subject of the second and last part of this study.

2. On the financial-administrative legal nature of sanctions of external control

Not every normative deviation generates direct and quantifiable financial damage to the government, nor are the powers of the Court of Accounts strictly restricted to the financial aspect. The Brazilian Constitution stipulated that the Court of Accounts, in final assistance to the Legislative and in the exercise of its own and non-delegable duties, would be responsible for supervising the public administration on accounting, patrimonial, budgetary, operational and financial aspects (Arts. 70 and 71 of Constitution of Federative Republic of Brazil).

On the one hand, the constitutional text greatly expands the object of control under the Court's responsibility, encompassing "anything that involves or may possibly involve any amount of public revenue or expenditure, of any nature or kind, in any capacity"[34]; on the other hand, it limits it, making it clear that "the Court of Accounts is not a Council of State"[35], in the sense that it does not have jurisdiction over any and all matters pertaining to public

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[33] Sergio Cavalieri Filho, *Programa de responsabilidade civil*, op. cit., p. 62.

[34] GUALAZZI, Eduardo Lobo Botelho. *Regime jurídico dos Tribunais de Contas*. São Paulo: Revista dos Tribunais, 1992. p. 197.

[35] SUNDFELD, Carlos Ari; CÂMARA, Jacintho Arruda. Competências de controle dos Tribunais de Contas: possibilidades e limites. In: SUNDFELD, Carlos Ari (Org.). *Contratações públicas e seu controle*. São Paulo: Malheiros, 2013. p. 181.

administration, nor does it constitute a substitute for the Judiciary, that is, it is not its job to grant the protection of subjective rights or personal interests of anyone[36].

Thus, there are two basic purposes underlying the work of the Court of Accounts: protection of the treasury and promotion of good public administration[37]. Therefore, the treasury and the good administration appear as the legal assets under supervision of the external control agency; for their protection, in addition to supervisory and mandatory attributions, the Court was granted with a sanctioning power, provided for in Article. 71, VIII, of the Constitution of Federative Rebublic of Brazil.

According to the constitutional text, the Court shall "apply to the responsible parties, in the event of illegality of expenditure or irregularity of accounts, the sanctions provided for by law", including "fine proportional to the damage caused to the treasury". Since they are sanctions, they certainly fall under the so-called "punitive law"[38]; however, be it due to its own configuration, to the specificity of the implementing agency, or to the teleological element that characterizes it, liability-sanction within the scope of the Court of Accounts has a unique legal nature: financial-administrative.

2.1 On the approaching of the controlling, administrative and criminal spheres in accountability-punishment

Just as liability for reimbursement in the controlling sphere approaches civil liability, sanction in the controlling sphere comes close to sanction in criminal law and in sanctioning administrative law, constituting types of the punitive law. Such an approach implies the recognition that the types do not mingle, but have common contents and general principles applicable to

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[36] Luciano de Araújo Ferraz, Tomada de contas especial, responsabilidade civil e processo administrativo disciplinar, op. cit. Digital version.

[37] In a similar sense, Willeman points out three specific objectives for control institutions such as the Court of Accounts: holding agents accountable for deviations and inappropriate behavior, requiring accountability of public managers, and monitoring the implementation of public policies, to ensure that plans and programs of the government achieve their purposes. Cf. WILLEMAN, Marianna Montebello. *Accountability democrática e o desenho institucional dos tribunais de contas no Brasil*. Belo Horizonte: Fórum, 2017. p. 64.

[38] In rejecting the existence of a unitary state *ius puniendi*, Fábio Medina Osório mentions "a distinct type of unity, based on the recognition of the differences and basic nucleus of reasoning of rules and principles with content that are common to Punitive Law"; cf. Fábio Medina Osório, *Direito administrativo sancionador*, op. cit., p. 140.

all areas, although their effective consequences may differ according to the specific case.

The unity in the branches of punitive law is its "common constitutional origin", from which result commands of action and inaction limiting the discretion of decision-makers in the application of penalties, bearing in mind the determining duty of promoting and protecting fundamental rights[39]. Therefore, administrative and controlling agencies are prevented from considering unlawful conducts not provided for by law and from applying sanctions not provided for by law (Article 5, XXXIX, of the Constitution of the Federative Republic of Brazil), neither can they collect from the heirs the punitive fines applied to agents who die (Article 5, XLV, of the Constitution of the Federative Republic of Brazil). With regard to the latter prohibition, it should be emphasized that the fact that the fine is considered a "debt of value" for the purpose of execution does not change its punitive nature — not compensatory or contractual; likewise, its impact on the subject's assets does not enable the overcoming of the constitutional command that grants fundamental rights and is applicable to the state *ius puniendi* as a whole[40].

As far as there is no dispute about the scope of criminal law and the exclusive power of the Judiciary to apply the sanctions that are specific to that branch, it is necessary to differentiate external control and administrative sanctions.

The doctrine devoted to the subject is not unanimous concerning the concept of administrative sanction. There are those who define it as the sanction resulting from an infraction found by means of an administrative procedure, before an administrative authority, with the administration acting as a party interested in a legal relationship, holding no power of judicial act[41]; on the other hand, there are those who reject the link of the concept with the implementing agency and with the exercise of administrative function, requiring, for its configuration, that

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[39] Fábio Medina Osório, *Direito administrativo sancionador*, op. cit., p. 156 and 219.

[40] In the same sense, cf. Oliveira, Regis Fernandes de. *Infrações e sanções administrativas*. 3. ed. Revised, updated and expanded edition. São Paulo: Revista dos Tribunais, 2012. p. 51. In divergence, cf. AGUIAR, Mauro da Motta. A possibilidade de aplicação de multas pelo Tribunal de Contas da União, e a permanência de sua validade, no caso de gestores ou responsáveis que venham a falecer. In: BRASIL. Tribunal de Contas da União. *Sociedade democrática, direito público e controle externo*. Brasília: Universidade de Brasília, 2006. p. 449-455; BORGES, Maria Cecília. Da aplicação das sanções de multa e ressarcimento ao Erário pelos Tribunais de Contas e de sua transmissibilidade aos sucessores do gestor público falecido. *Revista Controle*, Fortaleza, v. 11, No. 1, p. 20-23, Jan./June 2013.

[41] Regis Fernandes de Oliveira, *Infrações e sanções administrativas*, op. cit., p. 34.

the distressing effects are imposed by the public administration "materially considered", by the Judiciary or even by corporations of public law, to individuals and legal entities subject or not to special subjection relations with the State, "with a repressive or disciplinary purpose, within the scope of formal and material application of Administrative Law"[42].

Whichever the concept adopted, external control sanctions are not to be confused with administrative ones. Like any sanction, those applied by the Court of Accounts consist of a distressing effect imposed on a subject as a result of an unlawful act with a generic purpose of general and special prevention, that is, with the objective of, through punishment-repression, preventing other individuals and the offender himself from repeating the illegal behavior. However, the legal regime of the Courts of Accounts, although it does cover administrative law, is not identical to it[43], because the external control agency does not carry out activities that are typical of the administrative function (public service, promotion, intervention and administrative police)[44].

In this direction, the external control punishing power is linked to what the authorized doctrine calls "Law of Liabilities", which "can address risks and their variables, as well as graduate public obligations"[45]; as previously mentioned, it is part of *accountability in public finance*. Also needing distinction is the performance of the Court, the specific teleological element of penalties application by the Court of Accounts, in the form established by the constituent assembly, lies in granting both the performance of the public administration in accordance with the law and the effectiveness of the Court's decisions[46].

In order to characterize its punitive competence more deeply and accurately, it is necessary to examine the extent of the impact of the principle of legal type in accountability-sanction under the responsibility of the Court of Accounts.

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42 Fábio Medina Osório, *Direito administrativo sancionador*, op. cit., p. 106-107.

43 In similar sense, Fábio Medina Osório, *Direito administrativo sancionador*, op. cit., p. 118 and 120.

44 DI PIETRO. Maria Sylvia Zanella. *Discricionariedade administrativa na Constituição de 1988*. 3. ed. São Paulo: Atlas, 2012. p. 247.

45 Fábio Medina Osório, *Direito administrativo sancionador*, op. cit., p. 119.

46 PELEGRINI, Marcia. *A competência sancionatória do Tribunal de Contas*: contornos constitucionais. Belo Horizonte: Fórum, 2014. p. 69-70.

2.2 On the mitigation of the principle of legal type in accountability-sanction

The Brazilian Constitution doubly subjects the public administration to the principle of legality: directly, in its Article 37, meaning that public agents shall only act according to the order or permission of the law; indirectly, in Article 5, II, when stating that no one will be obliged to do or not to do anything except under the law, denoting that the administration cannot impose actions, omissions or punishments on individuals, except under legal provision. The legal type principle, in turn, constitutes a higher degree of limitation to the administrator, applicable to the punitive law as a whole, that conditions the exercise of the state *ius puniendi* to the explanation in law of the behavior whose non-compliance gives rise to punishment.

Criminal dogmatics adopts the concept of "conglobating typicality", demanding, for the conduct to be considered typical, its antinormativity (opposition to the rule) and its material typicality, that is, its offense to legally protected goods chosen by the legislator[47]. With the necessary adaptations and relativisations, this notion is accepted within the scope of administrative sanctioning law and external control sanctions, since it implements the principle of legal security, which demands the certainty and predictability of the law and shows itself more relevant the greater the risk of limiting fundamental rights[48].

In short, the principle of typicality constitutes a guarantee to members of the society that they will not suffer distressing effects in their legal sphere for conducts that are not explicitly considered illicit, as well as a possibility of anticipating the consequences of their acts. It is admitted, even in criminal law, the existence of the so-called "blank criminal rules", those that require complementation in order to understand its scope[49], and also of the "open types", which, due to the impossibility to predict and describe all possible behaviors, need to be complemented by the interpreter[50]. If this is the case in criminal law, we will found more reason for that in the other branches

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47 GRECO, Rogério. *Curso de direito penal*: parte geral (Articles 1 to 120 of the Criminal Code). 15. ed. Rio de Janeiro: Impetus, 2013. p. 159.

48 In convergence, cf. Marcia Pelegrini, *A competência sancionatória do Tribunal de Contas*, op. cit., p. 76.

49 Rogério Greco, *Curso de direito penal*, op. cit., p. 20-21.

50 Ibid., p. 168.

of punitive law, which, as a rule, involve less restriction to the responsible person and have a smaller scope of protection.

The Brazilian Constitution relegated to the legislator the task of establishing which conduct would be considered illegal in the sphere of control of the Court of Accounts and the respective punishment. However, in so doing, the constituent did not grant total freedom to the Legislative Branch: as extracted from Item VIII of Article 71, the external control sanctions are linked to the expenditure illegality or to accounts irregularity and must include a fine proportional to the damage caused to the treasury —in cases where there is imputation of debt, obviously.

In fulfilling the constitutional precepts and standardizing external control violations and sanctions, the legislator did so in an evidently comprehensive manner. In the federal domain, the infractions that give rise to financial-administrative liability are, in short: 1) damage to the treasury (Article 57 of LOTCU)[51]; 2) accounts deemed irregular without imputation of debt (Article 58, I, of LOTCU); 3) serious violation of the legal or regulatory rule (Article 58, II, of LOTCU); 4) illegal or uneconomic act that results in unjustified damage to the treasury (Article 58, III, of LOTCU); 5) failure to comply with the Court's determination (Article 58, VII, and Item 1, of the LOTCU); 6) failure to comply with due diligence (Article 58, IV, of LOTCU); 7) obstructing the free exercise of inspections and audits (Article 58, V, of LOTCU); 8) evasion of process, document or information (Article 58, VI, of LOTCU); and 9) "administrative infractions against public finance laws": 9.1) failing to disclose or send the tax management report to the Legislative Branch and the Court of Accounts, within the terms and conditions established by law; 9.2) proposing an annual budget directives law that does not include fiscal targets as provided by law; 9.3) failing to issue an act determining the limitation of commitment and financial transaction, in the cases and conditions established by law; and 9.4) failing to order or promote, in the form and within the terms of the law, the execution of a measure to reduce the amount of the total expenditure on personnel that has exceeded the allocation per Power of the maximum limit (Article 5, I to IV, of Law No. 10.028/2000)[52].

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[51] Observe that damage to the treasury gives rise, at the same time, to liability-restitution (financial-civil liability) and to liability-sanction (financial-administrative liability). In this case, the fine following the judgment of the accounts irregularity must be proportional to the imputed debt.

[52] LEBRÃO, Roberto M.; GOMES, Emerson C. da S.; MOURÃO, Licurgo. Fiscalização financeira e orçamentária. In: OLIVEIRA, Regis Fernandes de (Gen. Coord.). *Lições de direito financeiro*.

simple reading of this list of conducts makes it possible for us us to see that the Parliament has, as a rule, instituted open types — so open that in the doctrine some understand the existence of "atypical illicit acts", which, although they do not violate the Constitution, "weaken guarantees related to legality and typicality"[53]. Here, recognizing the maximum openness of the illicit, without considering them "atypical", is the preference.

In any case, more than the types opening and their regulation by infralegal acts of the Court of Accounts, the kinds of illicit are the ones to face doctrinal opposition, to the point of being attributed the mark of unconstitutional. The core of the allegation is in the constitutional link to "expenditure illegality or accounts irregularity", which would prevent the legislator from creating infractions that are not identified with these two cases, as in the hypotheses of non-compliance with the determination of the Court and obstruction of inspections[54].

It is, however, a fragile argument, based on an interpretation of the law "in strips", and already faced and overcome by the Federal Supreme Court[55]. The fact is that the function of external control of public administration, exercised by the Court of Accounts, in cooperation or collaboration with the Legislative Branch, has a very broad object and, although it focuses primarily on the analysis of expenditures and the judgment of accounts, it is not restricted to them; on the contrary, we cannot talk about a decision on expenses or on accounts without examining the acts and procedures related to the aspects that fall within the jurisdiction of the Court, namely, accounting, financial, budgetary, proprietary and operational, and to the exam parameters — legality, legitimacy and economy (Article 70 of the Constitution of the Federative Republic of Brazil).

For this reason, it is absolutely valid to punish public agents for actions and omissions that violate, *e.g.*, the provisions of both Law No. 4.320/1964 and the Brazilian Federal Acquisition Law, which establish the steps that lead to an adequate and safe application of public resources.

São Paulo: Revista dos Tribunais, 2016. p. 144. The infractions provided for in the LOTCU are, in general, repeated in the organic laws of the other Courts of Accounts of the country; the types provided for in Law No. 10.028/2000, for its turn, are applicable to all entities, pursuant to Item2 of Article 5 of this law.

53 Fábio Medina Osório, *Direito administrativo sancionador*, op. cit., p. 120.

54 In this regard, cf. Marcia Pelegrini, *A competência sancionatória do Tribunal de Contas*, op. cit., p. 126-128.

55 STF. Extraordinary Appeal. *RE 190.985/SC*. Full Court. Rapporteur: Min. Néri da Silveira. Judged on February 14, 1996. Published in *DJ* on August 24, 2001.

In view of the foregoing, it appears that the Brazilian Constitution requires that the behaviors typified by the legislator, directly or indirectly, relate to the defects in expenses made or to accounts irregularity. Since the respective organic laws are the ones that establish acts and facts that give rise to judgment for accounts irregularity, there will only be unconstitutionality of infraction types when they do not have a correlation and assumption nexus with the situations that cause rejection of the accounts or declaration of illegality of the expenditure.

As an example, take the case of non-compliance with determinations of the control agency: such commands only take place in the face of violation of rules linked to its scope of competence (Article 71, IX, of the Constitution of the Federative Republic of Brazil); thus, failure to comply with the Court's decisions implies, albeit indirectly, illegality at some point in the expenditure or accountability procedures. Similarly, the irregularity of accounts can be due either to non-compliance with the Court's determinations or omission in the duty to render accounts; now, obstruction to inspection and evasion of documents and information are flagrant ways of violating the accountability duty, and there is no way to conclude that the types foreseen by the legislator are unconstitutional for offending Item VIII of Article 71 of the Brazilian Constitution.

In the administrative and controlling sanctioning spheres, the acceptance of a mitigation of the typicality requirement calls for emphasis on the lack of jurisdiction of the administrative and controlling agencies to create types of infraction or sanctions, which must always be provided for by law. Furthermore, it is worth highlighting the duty of the *ius puniendi* applicator to, in view of the relativization of the "principle of the maximum legal taxation", observe the "principle of the maximum interpretative taxation", which prohibits the use of analogy *in malam partem*[56].

Once the incidence of the principles of legality and specificity in the exercise of sanctioning powers by the Court of Accounts is analyzed, the subjective element of the financial-administrative infraction still needs examination, in order to discuss the feasibility of liability-sanction based on *stricto sensu* fault.

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[56] ZAFFARONI, E. Raúl et al. *Direito penal brasileiro*: primeiro volume. 2. ed. Rio de Janeiro: Revan, 2003. p. 207-208.

2.3 On serious fault as a subjective element of the sanctionable breach

Until the advent of Law No. 13.655/2018, it was settled in the doctrine and in the decisions of Brazilian courts that, for the application of financial-administrative sanctions, the evidence of the public agent typical faulty conduct was enough. An exception to this understanding was outlined by the Federal Supreme Court in the judgement of a Writ of Mandamus in which a fine imposed by the Federal Court of Accounts to a lawyer, due to the contribution of his legal opinion to the illegality perpetrated in an administrative proceeding, was contested[57].

However, by including Article 28 in LINDB, the legislator offered the Brazilian legal system another source of legal uncertainty. Providing that "[the] public agent will personally answer for his decisions or technical opinions in case of intent or gross error", the statement seems to suggest that the *mens legis* would be to depart liability from acts performed with negligence, recklessness or malpractice.

However, a more careful analysis leads to a not-so-extreme conclusion, mainly taking into account the veto affixed by the President of the Republic to Item1 of the provision, which defined "gross error" in an excessively broad way and greatly extended the discretion of the manager, making him virtually immune to accountability, and increasing legal uncertainty[58]. As the defenders of the bill themselves recognized, in the days before the promulgation of the legal diploma, the "gross error" provided for in the rule covers negligence, recklessness, and serious malpractice[59]. Therefore, "serious fault" must be understood as an inexcusable violation of the duty of care by the public agent[60].

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[57] STF. Whit of Mandamus. *MS 24.073/DF*. Full Court. Rapporteur: Min. Carlos Velloso. Judged on November, 6, 2002. Published in *DJ* on October 31, 2003.

[58] The veto to Item1 had the following wording: "A decision or opinion based on precedentes or doctrine is not considered a gross error, even if not pacified, in general orientation or, still, in a reasonable interpretation, even if it is not accepted later by control or judicial agencies". The statement was clearly a safe conduct for the public agent to perpetrate illegalities and an attack on the stabilizing function of the law.

[59] MARQUES NETO, Floriano de Azevedo et al. *Resposta aos comentários tecidos pela Consultoria Jurídica do TCU ao PL nª 7.448/2017*. Available at: <www.sbdp.org.br/wp/wp-content/uploads/2018/04/Parecer-apoio-ao-PL-7.448-17.pdf>. Access on: 19 Aug 2018.

[60] Civilist doctrine mentions a "gross lack of caution" in fault that approaches the "assumption of risk of the Criminal Law". Cf. Sergio Cavalieri Filho, *Programa de responsabilidade civil*, op. cit., p. 62.

In practice, the "gross" character of the error will inexorably be the object of analysis in each specific case, and it is up to the judge, after the contradictory rule, to base his decision in one sense or the other. Following this reasoning, it is understood that liability-sanction in charge of the Court of Accounts is only possible when at least the subjective fault element is present, qualified by a high degree of reprobability.

In fact, from the point of view of external control, little or nothing has changed with the advent of the new legislation. After all, within the scope of the Courts of Accounts, there were no doubts about the unsuitability of conviction in cases of light fault and also of the judge's duty to "consider the adequacy of the measure implemented by the manager to pre-existing boundary conditions"[61], as now reinforces Item1 of Article 22 of LINDB.

If, in criminal law, the exceptionality of the unintentional crime remains uncontested (Sole Item of Article 18 of the Criminal Code), in the liability-sanction of financial-administrative nature, the faulty infraction remains legally consistent and effective and, therefore, possible. Nothing more logical, as far as the public agent, expected to be prepared for the tasks he voluntarily assumes and aware of his legal duties, has a special obligation to act according to the law and to the good management of public affairs.

Conclusion

The Court of Accounts is a constitutional extraction agency that, in cooperation with the Legislative Branch, is responsible for exercising external control of the public administration. The purposes that characterize this autonomous and unmistakable function are the protection of the treasury and the promotion of good administration.

In order to carry out its task, *accountability* in public finances, which constitutes its essence, its *raison d'être*, the Court of Accounts received from the Brazilian Constitution a range of control functions, as well as two specifically capable of generating distressing effects on individuals and legal entities: the jurisdiction both to convict those who cause damage to the treasury in debt and to apply the sanctions legally provided for illicit acts related to their scope of action.

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[61] Benjamin Zymler, *Direito administrativo e controle*, op. cit., p. 208-209.

This article was devoted to identifying the differences between the legal regimes underlying the exercise of these two tasks. As for the imputation of debt, we concluded that it was a liability of a reparatory nature, with the intention of reimbursement for damage caused to the assets of others, which is why it is attributed a financial-civil legal nature.

Thus, we defended the applicability of the civil joint and several debt institute, with the increase of the solidarity causes provided for in the rules of public law. Likewise, the sufficiency of fault was perceived as a subjective element giving rise to liability, being Article 28 of LINDB, introduced by Law No. 13.655/2018, not applicable to liability-reparation.

With regard to liability-sanction, we demonstrated its financial-administrative nature, able to give it autonomous space and purposes, alongside criminal law and sanctioning administrative law, as a kind of punitive law. Although there is no full unity in punitive law, a fundamental common origin in the Brazilian Constitution is admitted, which gives its component branches an identity, at least concerning the basic purposes of sanctions application and the limits imposed on the competent agencies in this area, in order to protect themselves and promote fundamental rights.

As a result of the identified affinity and specificity, we advocated the need to relativize the requirement for typicality in the field of financial-administrative infractions, as well as the constitutionality of infraction types applicable by the Court of Accounts. Finally, we concluded that liability is possible, within the scope of external control, based on serious fault, considering that the amendments undertaken by Law No. 13.655/2018, despite the risk of legal uncertainty they created, will not bring damage to the effectiveness of the sanctioning powers of the external control agent, if interpreted systematically and with due care.

References

AGUIAR, Mauro da Motta. A possibilidade de aplicação de multas pelo Tribunal de Contas da União, e a permanência de sua validade, no caso de gestores ou responsáveis que venham a falecer. In: BRASIL. Tribunal de Contas da União. *Sociedade democrática, direito público e controle externo*. Brasília: Universidade de Brasília, 2006.

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.

BORGES, Maria Cecília. Da aplicação das sanções de multa e ressarcimento ao Erário pelos Tribunais de Contas e de sua transmissibilidade aos sucessores do gestor público falecido. *Revista Controle*, Fortaleza, v. 11, No. 1, p. 18-28, Jan./Jun. 2013.

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

CAVALIERI FILHO, Sergio. *Programa de responsabilidade civil*. 6. ed. São Paulo: Malheiros, 2005.

CESTARI, Renata Constante et al. Tomada de contas especial: um importante mecanismo de controle no âmbito dos Tribunais de Contas. *Revista da Faculdade de Direito da Universidade de São Paulo*, São Paulo, No. 111, p. 587-613, Jan./Dec. 2016.

CRETELLA JÚNIOR, José. Natureza das decisões do Tribunal de Contas. *Revista de Informação Legislativa*, Brasília, yr. 24, No. 94, p. 183-198, Apr./Jun. 1987.

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

FERRAZ, Luciano de Araújo. Controle externo das licitações e contratos administrativos. *Interesse Público*, Belo Horizonte, yr. 5, No. 22, Nov./Dec. 2003. Digital version.

____. Tomada de contas especial, responsabilidade civil e processo administrativo disciplinar. *Fórum Administrativo*, Belo Horizonte, yr. 3, No. 26, Apr. 2003. Digital version.

GARRIDO FALLA, Fernando; PALOMAR OLMEDA, Alberto; LOSADA GONZÁLEZ, Herminio. *Tratado de derecho administrativo*. Volumen III: la justicia administrativa. 2. ed. Madri: Tecnos, 2006.

GRAU, Eros Roberto. *Por que tenho medo dos juízes*: a interpretação/aplicação do direito e os princípios. 8. ed. Recast of the Ensaio e discurso sobre a interpretação/aplicação do direito.. São Paulo: Malheiros, 2017.

GRECO, Rogério. *Curso de direito penal*: parte geral (arts. 1º a 120 do CP). 15. ed. Rio de Janeiro: Impetus, 2013.

GUALAZZI, Eduardo Lobo Botelho. *Regime jurídico dos Tribunais de Contas*. São Paulo: Revista dos Tribunais, 1992.

HELLER, Gabriel. Jurisdição e fiscalização do Tribunal de Contas: estudo comparado do controle externo no Brasil e na Espanha. In: COIMBRA, Wilber Carlos dos Santos (Org.). *Os avanços dos Tribunais de Contas nos 30 anos da Constituição Federal de 1988*. Porto Velho: TCE-RO, 2018. p. 17-35.

HELLER, Gabriel; SOUSA, Guilherme Carvalho e. Função de controle externo e função administrativa: separação e colaboração na Constituição de 1988. *Revista de Direito Administrativo*. Rio de Janeiro, v. 278, No. 2, p. 71-96, May/Aug. 2019.

JACOBY FERNANDES, Jorge Ulisses. *Tomada de contas especial*: desenvolvimento do processo na administração pública e nos Tribunais de Contas. 7. ed. Revised, updated and expanded. Belo Horizonte: Fórum, 2017.

KELSEN, Hans. *Teoria pura do direito*. Translation of the Austrian edition of 1960: João Baptista Machado. 6. ed. São Paulo: Martins Fontes, 1998.

LEBRÃO, Roberto M.; GOMES, Emerson C. da S.; MOURÃO, Licurgo. Fiscalização financeira e orçamentária. In: OLIVEIRA, Regis Fernandes de (Gen. Coord.). *Lições de direito financeiro*. São Paulo: Revista dos Tribunais, 2016. p. 119-151.

LYRA JUNIOR, Eduardo M. G. de. Notas sobre a solidariedade passiva no novo Código Civil. *Revista de Direito Privado*, v. 4, No. 13, p. 29-50, Jan./Mar. 2003.

MARQUES NETO, Floriano de Azevedo et al. *Resposta aos comentários tecidos pela Consultoria Jurídica do TCU ao PL nº 7.448/2017*. Available at: <www.sbdp.org.br/wp/wp-content/uploads/2018/04/Parecer-apoio-ao-PL-7.448-17. pdf>. Access on: 19 Aug. 2018.

MEDINA, Marcelo Borges de Mattos. Dano ao erário em hipóteses de licitação ou contrato viciado. *Revista de Direito Administrativo*, Rio de Janeiro, v. 254, p. 27-38, May/Aug. 2010.

NOBRE JUNIOR, Edilson Pereira. Solidariedade e responsabilidade civil. In: RODRIGUES JUNIOR, Otavio Luiz; MAMEDE, Gladston; ROCHA, Maria Vital da (Coord.). *Responsabilidade civil contemporânea*: em homenagem a Sílvio de Salvo Venosa. São Paulo: Atlas, 2011. p. 528-539.

OLIVEIRA, Odilon Cavallari de. Alterações à Lei de Introdução às Normas de Direito Brasileiro e controle. In: PINTO, Élida Graziane et al. *Política pública e controle*: um diálogo interdisciplinar em face da Lei no. 13.655/2018. Belo Horizonte: Fórum, 2018. p. 23-86.

OLIVEIRA, Regis Fernandes de. *Infrações e sanções administrativas*. 3. ed. Revised, updated and expanded. São Paulo: Revista dos Tribunais, 2012.

OSÓRIO, Fábio Medina. *Direito administrativo sancionador*. 5. ed. Revised, updated and expanded. São Paulo: Revista dos Tribunais, 2015.

PELEGRINI, Marcia. *A competência sancionatória do Tribunal de Contas*: contornos constitucionais. Belo Horizonte: Fórum, 2014.

SCAPIN, Romano. *A expedição de provimentos provisórios pelos Tribunais de Contas*: das "medidas cautelares" à técnica antecipatória no controle externo brasileiro. Belo Horizonte: Fórum, 2019.

SUNDFELD, Carlos Ari; CÂMARA, Jacintho Arruda. Competências de controle dos Tribunais de Contas: possibilidades e limites. In: SUNDFELD, Carlos Ari (Org.). *Contratações públicas e seu controle*. São Paulo: Malheiros, 2013. p. 177-220.

WILLEMAN, Marianna Montebello. *Accountability democrática e o desenho institucional dos tribunais de contas no Brasil*. Belo Horizonte: Fórum, 2017.

ZAFFARONI, E. Raúl et al. *Direito penal brasileiro*: primeiro volume. 2. ed. Rio de Janeiro: Revan, 2003.

ZYMLER, Benjamin. *Direito administrativo e controle*. 4. ed. Belo Horizonte: Fórum, 2015.