The control of public administration and the conflict between the decisions of the TCU and the deliberations of the CNJ*

O controle da administração pública e o conflito entre as decisões do TCU e as deliberações do CNJ

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ABSTRACT

This article proposes to promote the debate about the supposed conflict arising from the decisions issued by the Federal Audit Court and the National Council of Justice, in the exercise, respectively, of the internal and external controls of the public administration. Based on the premise that these are different types of public administration control, in a classification according to the controlling agent, we will try to demonstrate that there is no reason for the CNJ to not comply, or not to enforce, the decisions issued by TCU. It is intended to bring to reflection the prevalence of TCU's competence when acting in the exercise of its administrative jurisdiction. To this end, we used the qualitative method of scientific investigation that focuses on the subjective character of the analyzed object.

KEYWORDS

Federal Audit Court — National Council of Justice — control of public administration — conflict of decisions — prevalence of external control

RESUMO

Este artigo propõe-se promover o debate acerca do suposto conflito oriundo das decisões emanadas do Tribunal de Contas da União e do Conselho Nacional de Justiça, no exercício, respectivamente, dos controles internos e externos da administração pública. Partindo da premissa de que se trata de espécies distintas de controle da administração pública, numa classificação de acordo com o agente controlador, buscar-se-á demonstrar que inexiste razão ao CNJ para não cumprir, ou não fazer cumprir, as decisões expedidas pelo TCU. Pretende-se trazer à reflexão a prevalência da competência do TCU quando atua no exercício de sua jurisdição administrativa. Para tal, utilizou-se o método qualitativo de investigação científica que foca o caráter subjetivo do objeto analisado

PALAVRAS-CHAVE

Tribunal de Contas da União — Conselho Nacional de Justiça — controle da administração pública — conflito de decisões — prevalência do controle externo

1. Introduction

The word "control" comes from the Latin contra rotulum, through the French contrôle. It suggests a record of comparison with the original, a verification of data. Control means establishing conformity of one thing in relation to another, justifying the need for an ideal role model or standard, a measure referenced in the execution of the control activity.

Odete Medauar[1] teaches that the control of public administration is the verification of compliance with a canon, implying that the controlling agent adopts a measure or proposal as a result of the judgment formed.

For Di Pietro,[2] "the purpose of control is to ensure that the Administration acts in accordance with the principles imposed on it by the legal system". She goes on: "control constitutes a power--a duty of the bodies the law attributes this function to, precisely for its corrective purpose".

It is, therefore, an activity that cannot be renounced or delayed, at the risk of failing in its purpose and responsibility. The obligation is integrated with the function of the state.

The control activity is an instrument guaranteeing the individual and inter-subjective development of the citizen in relation to the State, focused on those who hold power and act on his or her behalf.

The control of public administration seeks to verify the legitimacy and potential of the means and analyze the end (the final cause) of the State action, to identify the correspondence between "antecedents and consequents", "predicted form and proposed end" as regards "performance and purpose achieved".[3]

International standards have long entailed the need to control administrative action. Art. 15 of the Declaration of Human and Citizen's Rights guarantees that "Society has the right to demand an account from all public agents in its administration". In Brazilian law, by constitutional determination, in particular the 1988 Constitution, the State is subject to an effective apparatus of control systems and agents, which act to prevent the administration from taking actions outside institutionalized limits.

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1 MEDAUAR, Odete. Controle da administração pública. São Paulo: Revista dos Tribunais, 1993. p. 22.

2 DI PIETRO, Maria Sylvia Zanella. Direito administrativo. 17. ed. São Paulo: Atlas, 2004. p. 622-623.

3 FRANÇA, Phillip Gil. O controle da administração pública. 2. ed. São Paulo: Revista dos Tribunais. p. 81.

There are several types of control. Based on the traditional teaching of Hely Lopes Meirelles,[4] the types and forms of administrative activity control are divided according to organs of power or authority; foundation; location of the organ; when occurring; aspect of control. The species of control vis à-vis the controlling agent is the object of the present text.

The 1988 Constitution established the democratic rule of law and brought significant advances to the practice of public administration control, providing for the creation of internal and external State systems, aimed at guaranteeing the legality and effectiveness, among other aspects, of public service management.

The current study references the framework of the Constitution, specifically analysis of the internal and external control systems enshrined in the constitutional order. Art. 74 provides for structured, integrated control of the three powers, attributing therein competence to verify the legality of administrative acts and contracts, to evaluate the results and efficiency of budgeting and financial and patrimonial management by federal administration.

The 1988 constitution also established in its various norms, especially those inscribed in arts. 70 and 71, external control of the public administration, under the responsibility of the Legislative Power, with the help of the audit courts.

Thus, we seek to analyze the competences of the National Council of Justice (CNJ) and Federal Audit Court (TCU), as internal and external control bodies, respectively, with special focus on the alleged conflict of decisions of these entities in the control of public administration reserved to each one; to determine an adequate solution to this issue. The text brings to the debate discussion of conflicts arising from the actions of the TCU and the CNJ, where the object is the Judiciary, so that the study is limited to the controlling agents of this power. The qualitative method was adopted, with the starting point the conceptualization of internal and external controls and their historical evolution, analyzing concrete cases extracted from decisions handed down by the TCU and the CNJ. To this end, detailed research was carried out, with review of national legislation and TCU, CNJ and STF websites.

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[4] MEIRELLES, Hely Lopes. Direito administrativo brasileiro. 12. ed. São Paulo: Revista dos Tribunais, 1986. p. 566-627.

2. The CNJ as an internal control agent of the Judiciary Branch

It the duty of the public administration to monitor its own actions and decisions. Its purpose is to pursue the legality, efficiency, and effectiveness of public action, in addition to preserving public authority from harm.

Management self-control goes beyond reviewing capacity. It is, above all, a preventive instrument, against illegality, a guide for the exercise of discretionary power. According to Hely Lopes Meirelles,[5] due to legal and moral considerations, the administrative act must not only obey juridical law, but also the ethical law of the institution itself; in latin: *"non omne quod licet honestum est"* ("not everything that is legal is honest").

For Miguel Seabra Fagundes,[6] the self-control given to public administration must correct defects and make improvements in the general interest, compensating individual rights that may have been denied or neglected due to an error or omission in law enforcement.

Marçal Justen Filho[7] states that internal control is configured, even more so nowadays, as a true competence of public administration. That is why, he explains, internal control mechanisms are included in the tasks of a portion of public administrators, entailing the responsibility to continuously investigate the legality and timeliness of actions.

Thus, it is the duty of public administration to be attentive to the supervision of its own acts, to implement procedures to curb and correct deviations, in a timely fashion, to avoid negative impact on those affected. It is in this context that the power of self-governance must be exercised, to provide society with certainty and confidence that administrative machinery will function according to the strictest criteria of legality, efficiency, and effectiveness.

Phillip Gil France[8] suggests two feasibility pillars for the self-control of public administration. First, the necessary idea of hierarchical structuring of administration, which arises from the exercise of power, to enable prompt and efficient action, monitored by a higher authority and, as required, corrected in case of error or shortcomings. The second pillar arises from the exercise of

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5 Ibid., p. 84.

6 FAGUNDES, Miguel Seabra. O controle dos atos administrativos pelo Poder Judiciário. 7. ed. Atualização de Gustavo Binenbojm. Rio de Janeiro: Forense, 2005. p. 126.

7 JUSTEN FILHO, Marçal. Curso de direito administrativo. 10. ed. São Paulo: Revista dos Tribunais, 2014. p. 1.204.

8 Phillip Gil França, O controle da administração pública, op. cit., p. 84.

another administrative power — disciplinary power, through which agents falling short in the exercise of duties are identified and held accountable, with an appropriate sanction applied, as applicable, to inhibit further error and maintain administrative reliability.

With this objective of self-control of public administration, the Federal Constitution of 1988 provided, in arts. 31, 70 and 74, for an internal control system as a means of implementation. This system is characterized by specific administrative management tools, and represents, in each sphere of authority and federated unit involved, a vital instrument for monitoring and improving activity, to fulfill the constitutional dictates of public service legality, efficiency and effectiveness.

In general, an internal control system operates according to the following functions: ombudsman (receiving and processing complaints from society); comptroller or government audit (investigation of legality and efficiency); correction (checking for failures in the exercise of duty and applying corresponding sanctions).

The Federal Constitution of 1988, pursuant to item II of art. 74, gave the internal control system, among other powers, the task of verifying legality and evaluating results as to the effectiveness of financial and professional management of public entities, as well as checking the application of public resources by persons falling under private law.

In the sphere of federal Executive Power, Decree no. 3.591/2000 and Law no. 10.180/2001 established an internal control system, attributing to the Comptroller General of the Union the function of a central body in charge of normative guidance and technical supervision of its entities.

Within the scope of the Judiciary, Constitutional Amendment no. 45, 2004 (the so-called Reform of the Judiciary), pursuant to art. 103-B of the Federal Constitution, enabled the creation of the CNJ, to exercise internal control of that power. To counter damage to the image of the Judiciary, EC No. 45/2004 introduced the most profound changes in the Brazilian judiciary, creating the CNJ as a body to promote greater transparency, with the mission to control the administrative and financial performance of the Judiciary.

Implemented on June 14, 2005, the CNJ is part of the Judiciary Branch, headquartered in the city of Brasília (DF) and operating nationwide. Its mission is to develop judicial policies that promote the effectiveness and unity of the Judiciary, directed toward the values of justice and social harmony, to improve the work of the Brazilian judicial system, especially regarding administrative and procedural control and transparency. The CNJ deals with

the judicial activity of any and all jurisdictional courts in the country, issuing normative acts and recommendations.

As an internal control body, the CNJ acts in the regulation of management, defining strategic planning, goals, and institutional assessment within the Judiciary, as the highest power in this sphere.

The Federal Supreme Court, in the *Ação Direta de Inconstitucionalidade* (ADI), judgment No. 3,367, referred to the CNJ as an internal control body of the Judiciary. This conclusion is backed by the constitutional norms present in point 4, item II of article 103-B, which attributes to the CNJ the control of the administrative and financial performance of the Judiciary Branch. The CNJ itself, in editing Resolution no. 86, of September 8, 2009, recognized this activity, in determining the Courts that are part of the Judiciary Branch which create internal control units or nuclei, thus regulating art. 74 of CF/88.

3. TCU role in exercising external control

Known as a system of checks and balances, the theory of separation of powers emerged with the formation of the liberal state, characterized by private free enterprise and a lower degree of state interference in individual freedoms. It consists of the monitoring of power by power itself, with characteristic autonomy given to each constituted entity, but the strong presence of overarching power. The classic tripartition of powers prevails in most nations. Article 16 of the French Declaration of the Rights of Man and Citizens, 1789, is provided for in the Brazilian Federal Constitution, art. 2, in an express rule dividing each of the republican powers in the country.

The separation of powers is a basic organizing principle in most democratic states. It inspired several constitutional orders based on the fundamental freedoms of man, as a striking feature of the liberal, social, and democratic state.

The Federative Republic of Brazil is based on the fundamental principle of separation of the Legislative, Executive and Judiciary Powers, structured in terms of independence and harmony. This fundamental principle is the basis of our democratic rule of law, formalized in the manifest intention to attribute distinct functions to different powers, to guarantee the exercise of individual and collective rights. It is an essential principle of the legitimacy of the Brazilian State.

In Brazil, the control of one power over another is termed the external control of public administration. This can be defined as a set of control actions developed by an organizational structure, through its own activities, procedures, and resources, foreign to the structure that is the object of control, with the task to inspect, verify and correct. External control is understood as that performed by an agency outside the structures of the controlled entity, whose purpose is to guarantee the full effectiveness of government administrative actions.

Without prejudice to the existence and performance of other bodies that carry out external control, such as the Public Prosecution Office, police, Judiciary, and the authority itself, the focus here is the control exercised by the Legislative Power with the assistance of the Audit Courts.

The 1988 Constitution provided for the existence of the TCU, of the State or Municipal Audit courts (the creation of the latter being prohibited after the CF/88) — normatively, regarding Legislative Power, but with constitutional autonomy, not being linked or subordinated to this power. This was also the position of the Supreme Court, at the time of the *Ação Direta de Inconstitucionalidade* No. 1.140-5[9] judgment, under rapporteur Minister Sidney Sanches.

> However, the Audit Courts are not subordinate or dependent bodies of the Legislative Power, given they have administrative and financial autonomy, pursuant to article 73, head paragraph, of the Federal Constitution, which grants them the attributions provided for in article 96, relating to the Judiciary.

The constitutional function of the Audit Court is to exercise financial and budgetary control of public administration, as a representative of the Legislative Power. Eduardo Lobo Botelho Gualazzi[10] states that the Brazilian Audit Courts are a para-judicial administrative body, functionally autonomous, whose purpose is to exercise, ex officio, external, factual and

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[9] STF. Ação Direta de Inconstitucionalidade: ADI no 1.140-5. Relator: ministro Sidney Sanches. DJ: 3/2/2003. STF, 2003. Available at: http://portal.stf.jus.br/processos/detalhe.asp?incidente=1599708. Accessed on: Dec. 23, 2019.

[10] GUALAZZI, Eduardo Lobo Botelho. Regime jurídico dos Tribunais de Contas. São Paulo: Revista dos Tribunais, 1992. p. 187.

legal control over the financial-budgetary process, vis-a vis the three State powers, without jurisdictional definitiveness".

As the constitutional order provides that external control is exercised by the National Congress with the assistance of the TCU, this body must exercise financial and budgetary control of federal public administration (in the case of the TCU), aiding the Legislative Power, which is also responsible for inspection activity. Therefore, the role of the Audit Court should not be confused with its nature, since, despite acting in support of the Legislative Power with the function of state control, it is, in fact, an independent body, not linked to any of the powers of the republic, with administrative and financial autonomy.

In the judgment *Suspensão de Segurança* No. 1308-RJ,[11] by the Federal Supreme Court, Celso de Mello expressly recognized the essential nature of the Audit Courts, as "instruments of unquestionable relevance in the defense of the essential postulates that inform the organization of Public Administration and the behavior of its agents, especially emphasizing the principles of administrative morality, impersonality and legality".

External control as provided for in the Federal Constitution of 1988 can be defined as a set of actions developed by an organization, with its own procedures, activities, and resources, unrelated to the controlled structure, aimed at inspection, verification and correction; as with the political control exercised by the Legislative Power, and by the Audit Court, responsible for financial control. Its focus is the probity of the public administrator and regularity of the custody of public assets and values, as well as the faithful implementation of the state budget; thus, a political control of accounting and financial legality.

The TCU, the body responsible for external control in support of the Legislative Power, is responsible for addressing issues at different levels and spheres of power, amid constant changes, such as technological evolution, the accelerated pace of information production, the complexity of the State and its relations with society and, especially, the popular demand for quality public administration.

[11] STF. Suspensão de Segurança: SS 1308-RJ. Relator: ministro Celso de Mello. DJ: 19/10/1998. STF, 1998. Available at: http://portal.stf.jus.br/processos/detalhe.asp?incidente=1732003. Accessed on: Dec. 24, 2019.

4. The conflict prompted by the CNJ, between its deliberations and decisions of the TCU

It is important to highlight that the organization of current public administration, in the context of a polycentrism, entails diverse mechanisms of internal and external control of activity, especially in scope. As highlighted by Floriano de Azevedo Marques Neto,[12] the dimensions affecting the comprehensive structure of public administration may be presented in terms of control of power, means and objectives. Internal and external control systems operate in all, often at odds in their decisions.

It is the role of a body within the public administration internal or external control system to materialize its findings through deliberations directed at the power or entity in question. Whether through auditing, inspection, compliance verification or monitoring of previous deliberations, both the TCU and the CNJ issue decisions that result in recommendations (advice) or determinations (in the sense of defining or delimiting) vis a vis the controlled body, which must respond in terms of compliance or justification for none-acceptance.

A problem arises when constituent bodies of the internal and external control system issue deliberations that conflict with each other. In addition to the supposed conflict of competence and attribution, a point of interest of this text, there is the legal uncertainty to which the public administrator addressed is submitted, due to doubt as to which decision should be followed; this raises issues of responsibility for any non-compliance with the manifestation of a control body.

It is not difficult to observe contradictions between TCU and CNJ decisions. In 2011, the TCU debated the matter in Decision no. 8.890/2011-TCU-Primeira Câmara, (rapporteur Minister Augusto Nardes). The judgment concluded that the TCU decisions prevailed in the exercise of external control of public administration in support of Legislative Power, at the cost of the CNJ deliberations. There were several fundamental arguments in favor of the conclusion. We will consider each one.

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[12] MARQUES NETO, Floriano de Azevedo. Os grandes desafios do controle da administração pública. In: MODESTO, Paulo (Coord.). Nova organização administrativa brasileira. Belo Horizonte: Fórum, 2009. p. 201.

As stated in Judgment no. 8.890/2011-TCU-Primeira Câmara, the TCU signed an understanding that its external control results in binding decisions regarding the powers of the republic, as the Federal Constitution (art. 71, item IV) gave it competence to carry out inspections in all administrative entities, of all powers, while resolutions emanating from the CNJ are addressed only to Judiciary bodies.

Law No. 8443, of July 16, 1992, provides for the jurisdiction and attributions of the TCU, reproducing the constitutional powers assigned to it. Among these, there is the possibility that the Federal Audit Court may apply penalties including imputation of a debt or fine, with the effect of an enforceable ruling, in addition to a decree of temporary unavailability of assets.

Also included in the 8.890/2011-TCU-Primeira Câmara judgment is the understanding that the CNJ is an internal control organ of the Judiciary Branch, like a control organ of other powers of the republic. It goes on to state that the Federal Constitution of 1988 expressly provides, as one of the attributions of the internal control system, support for bodies that are part of the external control system. According to the understanding of the TCU, the support provided by the CNJ, as an internal control body, does not annul the role of the Audit Court, not implying a departure from its constitutional competence.

With the same legal nature as the CNJ, also created in Constitutional Amendment No. 45/2004, the National Council of the Public Prosecution Office (CNMP) submits to the deliberations of the TCE, meaning there is no just reason for the CNJ to behave differently. Judgment no. 8.890/2011-TCU-Primeira Câmara issued by the TCU clarifies the position of the court to understand that the exercise of external control activity of public administration, in support of activities of the Legislative Power, arises precisely from the separation of powers and the system of brakes and counterweights. The competence and performance of the TCU cannot, according to the understanding established in the Judgment, be removed, or even mitigated, in favor of that of the internal control system of the controlled power, given that constitutional and infra-constitutional rules support the full exercise of that Court, without exception to the Judiciary. Angerico Alves Barroso Filho[13] points out that in this judgment, the TCU synthesized the understanding that the control of public

[13] BARROSO FILHO, Angerico Alves. O controle externo versus o controle interno e administrativo: análise do suposto conflito de competência entre o CNJ e o TCU. Revista do TCU, Brasília, n. 139, 2017.

administration is an activity typical of the National Congress, exercised with the assistance of the TCU, based on the principle of separation of powers and control; meaning this constitutional attribution cannot be removed in favor of the performance of internal and administrative control, not even specific control prompted by the CNJ.

On the contrary, the CNJ on several occasions established an understanding that conflicts with that agreed upon in Judgment no. 8.890/2011-TCU-Primeira Câmara. The nature of the CNJ is that of a higher Judiciary body and for that reason it has attributions of its own, not to be confused with those of the TCU.

In the judgment Pedido de Providências (PP) No. 445, the CNJ decided that its deliberations prevail over those emanating from the TCU. The understanding of the Judiciary Branch control body has two premises. First, the CNJ claims there is no hierarchy involving internal control and external control of public administration, and for this reason CNJ and TCU are not hierarchically different, ruling out the idea of prevalence of TCU decisions. Second, it ruled that the CNJ exercises the power of self-protection of Judiciary public administration, with the Council as the internal control body of this power.

In another judgment, Pedido de Providência No. 200810000020521, the CNJ reinforced the thesis of PP no. 450 adding the attribution of deconstitution and review of administrative acts, as well as the application of disciplinary sanctions. In the judgment PP No. 200810000020521, the CNJ understood that neither one nor the other should intervene in the competence that, according to the Council, belongs to each of the bodies.

Already in consideration of Consultation No. 007136-29.2010.2.00.0000, the CNJ recognizes the possibility of competition of attributions between the bodies, but not in the control of the administrative function of the Judiciary. However, in the Consultation, the CNJ clearly states that, in case of a constitutional or legal norm, there is no delimitation for a solution to possible confusion of deliberations arising from the TCU and the CNJ. Councilor Marcelo Neves explained that the specialization criterion could be used as an instrument to settle the dispute, according to which the CNJ is a privileged body in the control of Judiciary Power, carrying out its duties in the exercise of administrative self-governance.

From the precepts suggested by the CNJ, key questions arise. Item II of Point 4 of art. 103-B of the Federal Constitution of 1988 establishes there is no prejudice to the powers of the TCU because of the action of the CNJ. What is the scope of this constitutional rule? What did the legislator intend?

In the judgment of PP no. 445, the CNJ considered the debate and presented its understanding of premises that must be addressed. According to the Council, the CNJ is positioned as the highest internal control body of the Judiciary, which implies the transfer of administrative jurisdictional competence to the CNJ, while the TCU, with external control, has supposedly different institutional purposes, so that there is no competing or excluding competence. There should be no hierarchy or interference by the CNJ with the constitutional attributions given to the TCU.

Furthermore, the CNJ states that the STF consolidated the understanding that the TCU has no competence to impose rectification of administrative acts on audited bodies, given that the administration may do so, citing Precedent no. 473 of the STF. In this way, the public administrator in the exercise of his or her administrative authority within the scope of the Judiciary would not be subject to the decisions of the TCU when complying with the resolutions of the CNJ.

With respect to the CNJ position, its assumptions deserve some attention. An alleged conflict between TCU decisions and CNJ deliberations must be resolved based on the constitutional framework, to ensure legal certainty for administration of the Judiciary. According to constitutional scope, the external control of the federal public administration is an activity typical of the Legislative Power, where the TCU acts in support, so that the attributions and competences of the Audit Court are provided for in the Supreme Law. Furthermore, the CNJ was created to be and acts as the internal control body of the Judiciary Branch, and its performance is without prejudice to TCU competence. No reservation regarding the attributions of the TCU in relation to the competence of the CNJ exists in the constitutional text, as the legislator wished.

It is a constitutional provision that the purpose of the internal control system is to support external control in the exercise of its institutional mission, i.e., it is the CNJ which provides due support and advice to the TCU, or other external control body, when exercising jurisdiction of the Court in examining administrative acts of the Judiciary.

For these reasons, and invoking the criterion of specialization, prompted by the CNJ in the assessment of Consultation no. 007136-29.2010.2.00.0000, it is concluded that, even though the CNJ is a specialized body in the control of the Judiciary, it is part of the internal control system of that power, and its deliberations cannot rule out TCU decisions made in the exercise of external control expressly provided for in the Federal Constitution of 1988.

The CNJ, to justify the departure from TCU deliberations that conflict with its own, adopts the criterion of specialty, using the premise that it is an internal specialized body within the scope of the Judiciary Branch, and its attribution to control administrative and financial aspects of the Judiciary is particular in relation to external control; its decisions, in conclusion, must be complied with in preference to those issued by TCU. This is clear when reading *Pedido de Providências* No. 445, wherein the CNJ rapporteur signed an understanding that the managers of the Judiciary Branch must follow the decisions of the Council and that, for this very reason, they would not be subject to the control exercised by the TCU.

The arguments raised by the CNJ are subject to scrutiny which deprives them of support. In the *Ação Direta de Inconstitucionalidade* ADI no. 3,367 judgment the STF concluded the CNJ is an organ of Judiciary internal control system, a harmonious understanding within the scope of the CNJ itself. Considering it is the constitutional task of internal control to support external control, how can the former depart from the decisions of the control body to which it owes a supporting function? If the understanding of the CNJ prevails, invoking the criterion of specialty, could the internal control system of the Executive Branch also emerge regarding deliberations?

The understanding established by the CNJ is not supported by the constitutional text. Rather, it goes against the provisions of the Federal Constitution, whose art. 103-B, point 4, item II, provides that the CNJ has powers to assess the legality of administrative acts performed by members or bodies of the Judiciary, having authority to deconstitute or review them or set a deadline for the adoption of measures necessary for compliance with the law, without prejudice to the competence of the TCU.

It is based on the doctrine, as pointed out by Evandro Martins Guerra,[14] that submission of public administration to external control includes even the organs of internal control of the republican powers.

Although it is unquestionable, even within the scope of the CNJ, that the Council exercises internal Judiciary control, there is a peculiarity in the CNJ invalidating administrative acts of judicial bodies (when other entities comprising the internal control system of the Executive, or even the Legislature, have no such attribution), suggesting corrective measures or practices or their abstention. It seems clear, in fact, that they have no coercive

[14] GUERRA, Evandro Martins. Os controles externo e interno da administração pública. 2. ed. Belo Horizonte: Fórum, 2005. p. 263.

power to comply with what they instruct. However, this characteristic of the CNJ does not mean the Council may order the judiciary bodies not to comply with TCU decisions.

Based on the competence of determining the invalidation of administrative acts within the scope of the Judiciary, the CNJ invokes the exercise of power of self-protection and the criterion of specialization to interfere with the duty to comply with TCU decisions. The possibility of invalidating administrative acts by the Judiciary brings the CNJ closer to the status of a management body, which, in fact, gives strength to the performance of external control. The power of self-protection exercised by the Judiciary, through its internal control body, the CNJ, is one common to the entire public administration, and none of its bodies and entities is entitled to invoke the removal of decisions from external control exercised by the Legislative Power in support of the Audit Courts.

The power of invalidation of administrative acts by the CNJ, added to the premise that it is a special control body of the Judiciary Branch (applying the criterion of specialty) never finds support in the national law to remove decisions from external control. On the contrary, such arguments imply, with greater need, action of the Legislative Power and of the Courts and Auditors.

Another issue to be overcome concerns whether the specialty criteria, put forward by the CNJ, is sufficient to justify the insurgency of the Judiciary with respect to external control of public administration carried out by the Legislative Power with the help of the TCU. According to the premise established by the CNJ, the fact that its powers counter in part those of the TCU but are specifically provided for in item II, point 4 of art. 103-B of the Federal Constitution of 1988, it is possible to affirm such constitutional provisions that establish their attributions are special in relation to those of external control exercised by the National Congress in support of the TCU.

Such an understanding, however, does not carry weight. Certainly, the legislator, when devising the attributions of the CNJ, aimed at superior directive competence, assigning it the exercise of internal control of the Judiciary to ensure compliance with the principles of public administration, including disciplinary and correctional functions. It is difficult to conclude the legislator would wish to withdraw the external control competence of the Legislative Power, to reduce the principle of separation of powers and dislocate the activity of one power in favor of another; mitigating the system of breaks and counterweights, by giving the Judiciary its own exclusive competence to regulate itself. without the control of any other power. If this

were so, exceptional powers of self-protection would be attributed to the Judiciary, offending the principle of separation of powers, based, among other factors, on the reciprocal subjection of one power to the other.

Contrary to what the CNJ claims, its function has, since its inception, been to be a directive, administrative and financial body of the Judiciary, acting as an internal control entity, without in any way interfering in the exercise of external control by the Legislative Power.

It remains clear that the constitutional mission of the internal and external control systems is well placed and are, therefore, unmistakable.

This allows for no other conclusion, especially as the constitutional text itself, through Amendment No. 45/2004, limits CNJ attributions in case of prejudice to the exercise of the TCU competences.

The assumption of non-existence of hierarchy between internal control and external control systems and invocation of the specialty criterion do not legally support CNJ non-compliance with TCU decisions; if the Council's understanding prevailed it would offend the principle of separation of powers, which would weaken the authority of the Legislative Power in external control of public administration and mitigate, or distance, inspection activities of the National Congress in relation to the Judiciary Power, strengthening the latter in relation to the other powers.

The thesis defended here finds support in the ideas of Gustavo Binenbojm,[15] who affirms the positivist conception that the law contains the law in its entirety has been overcome. Thus, we have the foundation of public administration in the legal order as a whole, no longer just the law enacted. Administrative activity must be carried out in direct connection with the Federal Constitution, which justifies a significant change in administrative activity control parameters, which comes closer to legality than the idea of strict legality, with direct and ever stronger principles.

Germana de Oliveira Moraes[16] uses the term "principled law" to assert that legality by itself no longer defines acts of public administration and, therefore, general constitutional principles, as well as sectoral principles of public administration, should increasingly be the guiding instruments.

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[15] BINENBOJM, Gustavo. Uma teoria do direito administrativo: direitos fundamentais, democracia e constitucionalização. 3. ed. Rio de Janeiro: Renovar, 2014. p. 220-221.

[16] MORAES, Germana de Oliveira. Controle jurisdicional da administração pública. São Paulo: Dialética, 2004. p. 41.

It is in this sense that the principle of separation of powers should serve as a guide for the TCU; exercise of external control of public administration, should not be removed due to the attributions of the CNJ, acting as a Judicial internal control agent.

According the CNJ proposal (and current practice), an administrative act performed by a body of the Judiciary Branch could not be analyzed and decided upon by the TCU, as it is submitted to the CNJ and Judiciary Branch (when it is exercising jurisdiction). According to the constitutional provision, most members of the CNJ come from the magistracy, meaning greater sensitivity, requiring external control, which further weakens the premise established by the CNJ itself.

The TCU has a harmonious understanding in the sense that the CNJ, or any other federal public administration body, cannot breach, or dictate, its decision, and the entities under jurisdiction must ensure compliance with deliberations of the external control, and, in case of disagreement, call the Judiciary Branch to resolve the dispute.

The STF, in the judgment ADI no. 3.367, established that the CNJ performs the standard activity of administrative and financial control of the Judiciary. The main proposal of the Associação dos Magistrados Brasileiros (AMB), in the face of EC provisions no. 45/2004 (Judiciary Reform) ADI no. 3.367, addressed the idea that the institution of the CNJ violated the principle of separation of powers, submitting the Judiciary of the states to a control body located within the framework of the Union. In his vote, rapporteur Cezar Peluso discarded the hypothesis raised by the AMB, stating that the powers attributed to the CNJ would not imply prejudice to the constitutional independence of the Judiciary. During his deliberations, approved by a majority, the rapporteur of ADI no. 3.367 states, on several occasions, that the CNJ has the nature of an internal administrative control body of the Judiciary; that its competence to re-examine administrative acts of the Judiciary bodies could not conflict with that of external control constitutionally attributed to the Legislative Branch, with the assistance of the Audit Courts.

Through the Writ of Mandamus (MS) no. 31.556-DF the Attorney General of the Union questioned the decision of the CNJ to enable the Regional Labor Court of the 2nd Region to adopt a working day of four hours for judicial analysts for specialized support in medicine, contradicting the position of the TCU that decided on the illegality of this. The STF, in the *mandamus*, understood that the decision of the CNJ was in line with the jurisprudence of the Supreme Court, supporting the understanding that it is has power

to withdraw decisions of the TCU. The position of the Supreme Court is equivocal, and if such understanding remains, a new definition of attributions and competences of public administration internal and external control systems for Judiciary activity is necessary.

5. Final Considerations

Control of public administration is an essential activity for the State, to ensure the best execution of public service and thus guarantee the full exercise of citizenship and improvement of democracy.

One of the great challenges for contemporary administrative law is how to control a public administration that, by its natural growth, has fostered possibilities for abuse and excess.

The new constitutional order of 1988 strengthened control activity and established the creation of internal and external control systems for administrative activity, providing that public administration, direct or indirect, must allow for entities that exercise control over the acts of State.

To ensure efficient state activity, the internal control system is an essential instrument. Within the scope of the Judiciary, the CNJ represents an attempt to implement this system, so that Brazilian judicial activity may evolve and better provide the population with a timely, fair judicial service. Internal control should support external control — which does not detract from its fundamental importance for any organization — understood in a broad way and not limited only to financial and administrative aspects: a set of actions and methods implemented within a given administrative entity, generating a culture of transparency, and allowing comparisons to be made between expected results and those achieved.

By virtue of constitutional provision, external control of public administration is an activity attributed to the Legislative Power, with the help of the Audit Courts, whose powers are established in the Constitution, regulated by means of infra-constitutional legislation.

We should note that there is no hierarchy involving internal and external control. The systems are complementary. The function of internal control is to support external control: guide public authorities to avoid errors, carry out preventive control, collect subsidies through concomitant control to determine improvements, and review current activities, correcting them even before the performance of external control.

The conflict studied arose from the unsustainable understanding of the CNJ that there is supposed competition between its powers and those assigned to the TCU, and that its deliberations should prevail over decisions emanating from external control of the public administration. Such an understanding, if it prevails, can cause disharmony, and infringe the performance of external control, not acting vis a vis bodies of the Judiciary, which, in turn, will be subject solely to the control exercised by it.

This understanding cannot prosper since the Federal Constitution of 1988 leaves no doubt that the competences and attributions of the CNJ must be exercised without prejudice to the decisions of the TCU.

There is no way to accept the premise established by the CNJ, as it is a specific internal control body of the Judiciary Branch, and for that reason should not submit to external control by the National Congress and the TCU. This untenable argument would remove the typical function of the Legislative Power (supervision) and mitigate the principle of separation of powers, creating a dangerous exception to reciprocal control.

The CNJ is a standard control body, a component of the internal control system, with the peculiar attribute of determining the invalidity of administrative acts performed by bodies of the Judiciary. However, this characteristic is not sufficient for the Council to have the power to determine non-compliance with TCU decisions. If this errant conclusion prevailed, it would, *mutatis mutandis,* authorize the entire public administration to fail to comply with the decisions of the Brazilian Audit Courts, contradicting the current legal system.

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