Fiscalização a serviço da sociedade

REVISTA do TCU

Federal Court of Accounts Journal • Brazil • year 45 • Issue nº 128 • September/December 2013 • English version

Interview with Paulo Soares Bugarin, Prosecutor General of the Public Prosecutor within the Federal Court of Accounts

Federative Republic of Brazil

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Vision Statement
To be an institution of excellence in control and to contribute to the improvement of public administration.

Mission Statement
To oversee the public administration and contribute to its improvement, for the benefit of society.

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Letter to the Reader

Dear reader,

It is a great pleasure to publish this new edition of the TCU Journal, covering the last quarter of 2013. With this edition we close our publishing activities for 2013.

Our interviewee Prosecutor General Paulo Bugarin, of the Federal Public Ministry within the TCU, talks about carrying out a public function with dignity and competence and about the consolidation of the Public Ministry of Accounts throughout the country.

In the Highlights section, we are proud to announce that the Federal Court of Accounts was awarded the prize Guia Você S/A 2013 (granted by a magazine that specializes in professional development). In addition, we feature articles on public governance, risk management, and TCU's performance in public works guidance and in the audits on the 2016 Summer Olympic Games expenses.

We also feature the articles by TCU employees Selma Serpa and Glória Merola, on systems for monitoring and evaluation of government programs of the federal public administration and by Remilson Candeia, also a TCU employee, who writes about autopoiesis applied to the courts of accounts.

The articles also discuss issues such as the principle of segregation of duties, software development outsourcing both in Brazil and in the United States, and the integration of the Differentiated System for Public Contracts in Public Administration.

We hope you enjoy this publication that aims at disseminating actions related to the control and oversight of public resources as well as enabling interaction with the Federal Court of Accounts and other institutions.

Good reading and see you soon!

Bruno Spada

Aroldo Cedraz de Oliveira
is Minister of the Federal Court of Accounts and Editorial Council Supervisor.

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A Public Servant par Excellence

Paulo Soares Soares Bugarin
Prosecutor General of the Office of the Public Prosecutor within the Federal Court of Accounts

The new Prosecutor General of the Office of the Public Prosecutor within the Federal Court of Accounts – Brazil (MPTCU), Paulo Soares Bugarin, holds undergraduate degrees in Economical Sciences and in Law froy the University of Brasília (UnB). He has a Master Recherche (Diplôme d'Etudes Approfondies) in business management and economics froy the Université de Paris I – Sorbonne. He has a Master in Public Law from UnB, and a specialist degree in Constitutional Law from the Universidad de Salamanca. He is a member of the Société Française de Finances Publiques, of the Institut International de Sciences Fiscales, and of the Brazilian Academy of Economic, Political, and Social Sciences – National Academy of Economics. He held the offices of Federal Revenue Service Tax Auditor, National Treasury Prosecutor, and Prosecutor of the Office of the Public Prosecutor within the Federal Court of Accounts – Brazil. He was Deputy Prosecutor General from April 1995 until July 2013, when he was inaugurated as Prosecutor General. Paulo Bugarin talked to the TCU Journal about his perspectives as head of the MPTCU and about the main challenges facing the Institution, among other topics.

1. You have an extensive career in public life. In the Office of the Public Prosecutor within TCU alone it's been almost 20 years. Now you are taking over as Prosecutor General. What does this new step represent?

First of all, I expect to be able to meet the expectations placed on me. I consider it a great achievement to have reached the summit of the career I embraced with the best of my abilities and dedication over nineteen years ago.

As I highlighted in my inauguration address, I regard myself as a public servant by option and vocation! I firmly believe in the dignified and competent exercise of state functions, which is the duty

of all those who take over any Public Administration office, employment, or function.

I have always understood that all public agents have the duty of giving the most of themselves in the fulfillment of their mission. He/She must relentlessly seek professional improvement, taking advantage of, but not limiting himself/herself to, the innumerous and constant technical-functional improvement opportunities provided by the Public Administration itself, without prejudice to his/her personal process of ethical and human strengthening.

That is how I tried to guide my professional career in the government sector, since my first and enriching graduate experience that began in 1984 at the Université Paris I – Panthéon-Sorbonne. At that time, I already held the office of economist at the Ministry of Finance, conquered by means of public examinations.

In short, I aim to strengthen our Institution, acting in an integrated and collaborative way with my illustrious colleagues and independently and actively, and cooperating to improve oversight of the Brazilian Public Administration, in a dynamic and progressive partnership with the Federal Court of Accounts - Brazil.

Did the inauguration of your father as a TCU minister in 1976 influence the direction your career took in the public finances area?

Since 1976, when my dear and later father Bento José Bugarin was inaugurated as a member of this Illustrious Collegiate of the Court of Accounts, the TCU has in several ways been a significant part of my life and of my entire family's life. Thus, at home I learned to experience, admire, and respect this centenarian Institution.

Bento Bugarin, a Tenured Professor of Finance and Tax Law at the University of Brasília, undoubtedly had a considerable influence on my studies and my reflections about the broad, complex, and interdisciplinary topic of Public Finance.

My initial education as an economist has also been an important contribution to my growing interest in the government financial phenomena and its consequences for the Country's development and for the quality of life of its population.

After my inauguration as Prosecutor of the Office of the Public Prosecutor within the TCU on November 16, 1994, this old connection naturally became closer and was inexorably and permanently consolidated.

> *"Brazil is going through a moment of huge and legitimate social and popular claims. Society has been urgently demanding a more legitimate and efficient performance on the part of the State in the delivery of essential public services."*

And what is the main challenge of this new office as head of the MPTCU?

Brazil is going through a moment of huge and legitimate social and popular claims. Society has been urgently demanding a more legitimate and efficient performance on the part of the State in the delivery of essential public services.

This scenario reveals the undeniable importance of Oversight and, in the federal sphere, the importance of the Federal Court of Accounts – Brazil as an inducer of the permanent and progressive improvement of the Public Administration in its multiple dimensions, thus favoring, among other aspects, the improvement of the state governance instruments.

The challenges as the Prosecutor General are huge. I hope to be capable of facing them with the courage and wisdom necessary for the constant functional improvement and institutional strengthening of our Office of the Public Prosecutor. For this purpose, as already pointed out, I consider the constant support of my illustrious peers of the Office of the Public Prosecutor at this Court to be essential.

I regard as paramount, in this broad context, to highlight the permanent efforts employed by the National Association of the Members of the Office of the Public Prosecutor of Accounts – AMPCON, to fully and permanently value the performance of the Prosecutors of Accounts throughout Brazil.

A corollary of the strengthening of the Office of the Public Prosecutor of Accounts is the exaltation of the Courts of Accounts in their fundamental mission as overseers of the sound, efficient, legitimate, and economic allocation of scarce public funds.

What are your perspectives for the institution?

It should be pointed out that the structuring of the Office of the Public Prosecutor of Accounts is recent in many State/City Courts of Accounts, which demonstrates that this is an institution still under construction and that faces challenges in order to be consolidated and, sometimes, to make itself heard within the very institutions where it performs.

In the specific case of the Office of the Public Prosecutor within the TCU, I can state that our work is a paradigm for all other Offices of the Public Prosecutors of Accounts, in view of the always respectful and cooperative relationship existing between our institution and the TCU.

In my understanding, greater integration between all Offices of Public Prosecutors of Accounts, as well as with the Federal and State Offices of Public Prosecutors is extremely healthy in the current scenario, not only to defend public assets but also to improve the performance of national Public Administration, providing the population at large with a better quality of life.

The Office of the Public Prosecutor must be mindful of the actions developed by the TCU, but must have its own north as well, seeking to meet the multiple demands received directly, characterizing itself as an important channel of permanent contact with society.

5- Society's demand for a more effective fight against corruption and for the provision of more efficient public services has been growing and growing. In this context, how do you believe that the offices of public prosecutors of accounts can contribute to the improvement of public administration?

I consider that fighting corruption in our huge and complex Country is an absolute priority of all those who have the duty of watching over public affairs. Public managers, lawmakers, judges, members of the Public Prosecution Service, internal and external auditors; all have the duty of fighting this evil that has been spreading in our society, acting in the most integrated way possible.

Brazilian citizens are entitled to having the management of public funds, therefore their funds, carried out with the utmost efficiency and transparency possible.

Inefficiency and ineffectiveness of the government's performance are the Siamese twins of corruption, present in multiple dimensions of our political-social scenario.

A recent survey disclosed by the press reveals that the three main popular complaints and claims refer to serious and structural public health, education, and security problems.

They are undoubtedly legitimate manifestations of a society quickly maturing, becoming fully aware of its individual and collective rights.

The Courts of Accounts indisputably have a strategic role in the combat to these publicly acknowledged deficiencies, and the Office of the Public Prosecutor of Accounts is an essential partner in this journey.

The quest for public management improvement necessarily involves closer integration amongst the oversight bodies and the Public Administration, a phenomenon which as a matter of fact is already present in the federal sphere.

Naturally, the respective institutional areas of work must be respected, which does not mean isolation. On the contrary, the necessary and constitutional harmonization among bodies, agencies, and Public Powers must be enforced in the permanent fight for the effective consolidation of a true Democratic Rule of Law in our Country, turning the fundamental republican and ethical-juridical postulate of dignity of the human person into a full social reality.

6-In the MPTCU case, which would be the main mechanisms of action used?

Besides written opinions in account proceedings, verbal manifestations at Court Sessions, and filing appeals, I point out the preparation of Complaints as a paramount instrument for the work of the MPTCU, with the purpose of improving the quality of public services provided to the population and of checking the economy, efficiency, and legality of multiple management acts concerning a broad universe of public policies of undeniable social relevance.

As an example, I can cite the complaint by means of which the MPTCU questioned the public policies involving the enforcement of the Domestic Violence Act ["Maria da Penha Act"] (Judgment no. 403/2013-Plenary).

The referred work attempted to assess the actions to fight domestic and family violence against women, focusing on the enforcement of Law no. 11340/2006 and on structuring specialized assistance services.

The audit performed by the TCU yielded a diagnose about the subject and was capable of demonstrating that there are many improvement opportunities, as the assistance network is below idealization and suffers from various problems such as a lack of physical spaces, scarce human resources, lack of qualification of public agents involved, accumulation of cases at specialized courts, and the delay to grant urgent protective measures, not to mention the disarticulation of the various services of the so-called assistance network.

Such conclusions also emphasized the need for a higher level of awareness amongst legal professionals regarding gender issues, encompassing domestic and family violence, as well as the need to address these issues in educational institutions, including primary and secondary schools.

As a result, several recommendations were submitted, aiming at improving actions to face domestic and family violence against women, a true social epidemic in our Country.

Likewise, the national campaign "Office of the Public Prosecutor of Accounts for Full Accessibility", launched in 2011 by AMPCON, reached important repercussions for society.

Within the TCU sphere, the referred initiative motivated a broad and in-depth performance audit carried out to assess the accessibility conditions for people with special needs at Federal Administration bodies and entities, which resulted in a series of relevant determinations and recommendations to several bodies with the purpose of adequating public buildings and spaces (Judgment no. 2170/2012-Plenary).

"Consequently, a significant growth has been observed, year in, year out, in the recovery of amounts owed by accountable parties ordered to pay debits or whom were fined by the Federal Court of Accounts – Brazil. This is the fruit of a relevant increase in the number of execution actions filed, in the amounts of money frozen or pledged, and in installment payment settlements."

7- An effective growth in executive collection case results has been observed in recent years. How was this evolution? What is the reason for this growth?

This improvement is due to a set of factors. The most important of them undoubtedly was the partnership entered into with the AGU [Federal Government General Counsel's Office], which sped-up the filing of execution actions. The MPTCU began to forward documentation containing fundamental information for debt collections, such as surveys of responsible parties' assets. In turn, the AGU began to dedicate special attention to executive collection cases, improving follow-up of execution actions.

Moreover, within the MP/TCU several operational measures were adopted which streamlined the preparation of documents that are a part of executive collection processes, a result of extensive collaboration with the various technical units of the TCU.

Consequently, a significant growth has been observed, year in, year out, in the recovery of amounts owed by accountable parties ordered to pay debits or whom were fined by the Federal Court of Accounts – Brazil. This is the fruit of a relevant increase in the number of execution actions filed, in the amounts of money frozen or pledged, and in installment payment settlements.

Finally, the recent implementation of the electronic processing for executive collections is noteworthy, which represents one more factor contributing to reduce the timeframe between TCU sentencing and the legal collection of the debt, an extremely important aspect to increase execution incomes.

International study for Public Governance Strengthening

When public expenses in Brazil are analyzed both from the point of view of "how much" and "how" money is spent, advancement points and improvement opportunities can be found. Even though fiscal credibility in Brazil is subject to accounting maneuvers, the country has had some progress regarding the control of expenses, as for example the goals met by the government and the primary surplus achieved since 1999. As to the quality of public expenses, the public services provided fall short of the expectations of fulfilling the needs of the population, even though the budget is well balanced.

Moreover, the Federal Court of Accounts has noticed the repetition of problems found in previous audits. "Basic design and detailed engineering errors, errors during bidding processes and execution of contracts, and errors in environmental studies are examples that repeat themselves year after year. Therefore, it is necessary to work on the causes of these problems so that our work can generate better results", said the president of TCU, Minister Augusto Nardes.

In order to find ways to reverse the situation mentioned above through auditing and counseling, and – from a structuring approach perspective – and

in order to address the causes of the difficulties, the Federal Court of Accounts established a partnership with the Organization for Economic Co-operation and Development (OECD) in order to perform an international study about public governance.

OECD is an international organization formed by 34 countries which aims at providing a platform for comparison of economic policies, solving common problems and coordinating national and international policies. The organization is also known for establishing political dialogs with the purpose of sharing opinions about the best practices to be followed.

The cooperation agreement signed on October 8th at TCU's headquarters in Brasília, provides for the performance of the study "Strengthening of Public Governance: Good Practices and the Role of Supreme Audit Institutions". Besides TCU, 12 SAIs will take part in it, namely the European Court of Auditors and the SAIs of South Africa, Canada, Chile, South Korea, United States, France, Holland, India, Mexico, Poland and Portugal.

The focus shall be to analyze the governance of public policies in role-model countries in order to identify and disseminate good practices that may be adopted in Brazil in all spheres of government, as well as in other countries.

According to Augusto Nardes, this work is expected to last for approximately 40 months, from 2013 to 2016. For the Brazilian Federal Court of Accounts it represents another step towards the strengthening of public governance, which can be analyzed from the points of view of the Society and of the State, federal entities, government spheres, organizations and institutions, intra-organizational positions and public policies. The study is intended for the central organizations of the government (TCU, the Chamber of Deputies, Federal Senate, Chief of Staff's Office, Ministry of Finance, Ministry of Planning, Budget and Management, and the Office of the Comptroller General (CGU)).

The choice of the organizations that are to take part in the study considered key-agents in structuring governance of the systems related to the three fundamental moments of the public policy cycles: formulating; implementing; monitoring and evaluating public policies. "These divisions, however, must not be deemed as limitations to TCU as to taking actions regarding public policy execution sectors", says TCU's auditor and coordinator of the technical team for the project, Paulo Roberto Simões Bijus.

STAGES OF THE TCU-OECD STUDY

The study will be divided into four stages: development of an analytic structure regarding public governance, good practices and the role of SAIs; report on comparative practices based on the analysis of the previous stage; in-depth study of the Brazilian context and discussion about the role of TCU in strengthening public governance; issuance and publication of the study.

Besides identifying, analyzing and disseminating good governance practices, other benefits expected from the study include demonstrating governance aspects to be prioritized and improved in the countries involved in the study; assisting the process of formulating public policies; and, especially, identifying good practices on external control related to governance strengthening of the public policy cycle. "Moreover, as the study gathers data from the SAIs, it shall proactively contribute for the general atmosphere of confidence and governance of a country", says Augusto Nardes.

Survey indicates need for improvements regarding risk management in indirect administration

Any individual or organization is always subject to risks. As for organizations, whether they are public or private, the occurrence of a risk situation can directly impact the accomplishment of objectives. Therefore, it is paramount to prevent them in order to guarantee the effectiveness of actions and objectives and, sometimes, even to ensure the survival of a company.

Risks are any events or circumstances in an organization – whether internal or external – that have the potential to compromise the achievement of objectives or desired results. This includes, for example, changes in the political scenario, exchange rate oscillations, social conflicts, technological obsolescence, changes in statutes or regulations, natural disasters, reduction in financial or human resources, and many other general or company-specific situations.

In order to prevent the impact of such events in the effectiveness of organizations, some work principles and processes have been developed in order to identify and monitor risks, plan response actions and implement them so as to generate a safer environment. This is called risk management.

When the given organization belongs to the public sector, risk management becomes even more relevant. A negative impact in the effectiveness of actions compromises services provided to citizens.

Therefore, the Federal Court of Accounts has elaborated a survey in order to evaluate the maturity of risk management in several sectors of the Brazilian federal indirect public administration by means of the construction and publication of an indicator that stimulates improvement in risk management regarding the public sector.

For that effect, a questionnaire was given to 66 indirect administration entities selected through relevance and materiality criteria, and 65 of them replied (98.5% reply rate).
The questionnaire was developed from the risk management evaluation model of the British government with some adaptations from COSO (Committee of Sponsoring Organizations of the Treadway Commission) and ISO 31000/2009 models.

Four dimensions were evaluated: risk management environment (including leadership, policies and strategies, and personnel sub-dimensions) risk management processes (risk identification and evaluation, and risk response sub-dimensions), risk management in partnerships, and results.

The analysis of the answers indicates that two thirds of the Brazilian federal indirect public administration have basic and intermediate levels regarding risk management. Only 9% are considered advanced.

As for the evaluation by area, the financial sector had the highest average – 65% – followed by the petroleum sector that presented 61% maturity. From the ten participating regulatory agencies, four of them presented initial maturity status; three were classified as basic level and three as intermediate level. The report presented "situations where the maturity of the agencies was significantly lower than that of the companies under their regulatory actions".

For each evaluated sector, the TCU indicated measures that may be taken in order to implement or improve risk management. Among them is the implementation of strategic planning, the search for an active involvement of high administration in the implementation of risk management and constant qualification of managers and employees involved.

GOVERNANCE

"The improvement of management and performance of public entities is one of TCU's main desired results and it has been classified by its administration as one of the main purposes of auditing", said minister Ana Arraes. "This is because it is clear that good governance results in the efficiency of governmental actions, with reduction of public funds waste due to administrative deficiencies and to consequent improvement of social and economic advances for the entire Brazilian population", she said.

Publication provides guidance to managers regarding public works

The Federal Court of Accounts (TCU) launched the 3rd edition of the booklet "Public Works: basic recommendations for Contracting and Overseeing Public Works and Buildings", with the purpose of guiding organizations and entities in the Public Administration that do not have specialized technical teams – as, for example, city hall of small and medium-sized cities – regarding procedures to be adopted to carry out those works: from bidding to construction, going through the elaboration of projects and their respective oversight. The material can also be used by bigger cities as well as by other public institutions.

The new edition of the publication updates some information and counts on new readings of abridgements recently approved by TCU that have some connection with the subject: public works. The publication uses simple language and enables understanding by people who are not specialized in the civil construction area. TCU makes use of its pedagogical position and tries to minimize method and performance shortcomings in order to ensure a proper and transparent execution of those works by means of the guidance provided in the booklet.

The booklet was elaborated to monitor conventional structure – houses, buildings, health units, etc. – since they are the most common undertaking of small municipal town halls. There are, however, generic items that are applicable to other works.

The content of the booklet addresses legal matters that govern the contracting of construction work by the Public Administration in general, especially the Bidding and Contracts Statute (Law No. 8666/1993), and some rulings and abridgements from TCU's precedents. The purpose is to warn about the recommendable legal and regulatory procedures regarding the execution of a certain undertaking, without exhausting the subject or analyzing in detail the legislation about the subject.

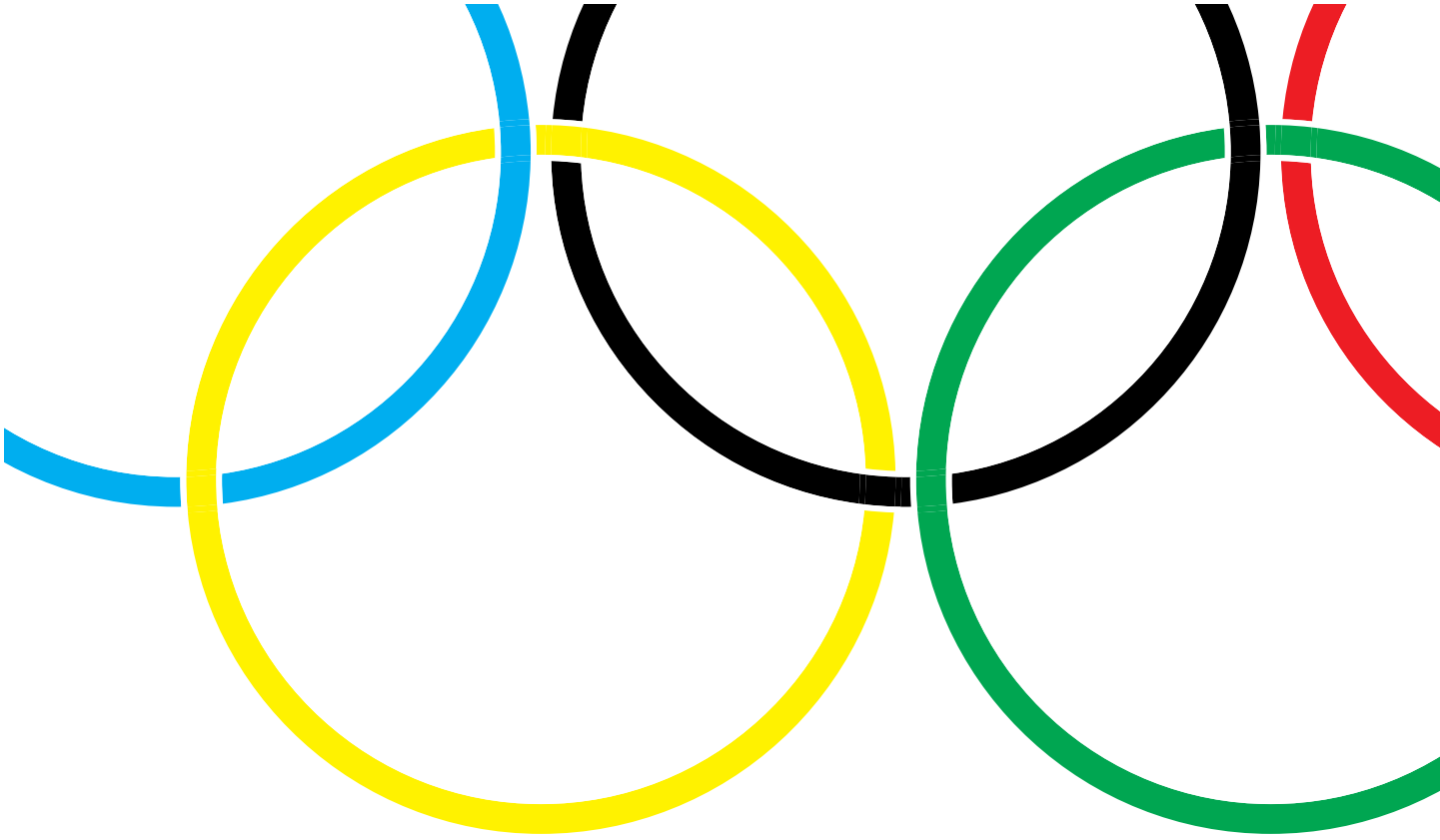
The publication is available for free download at the TCU Website: www.tcu.gov.br .

TCU receives award for being one of the best public institutions to work for

The Brazilian Federal Court of Accounts (TCU) was elected one of the top five public institutions to work for according to the *Guia Você S/A 2013* magazine. This guide is a survey on organizational climate conducted by *Você S/A* magazine in partnership with *Fundação Instituto de Administração* (Management Institute Foundation) of the University of São Paulo (FIA/USP).

This year, for the first time, public institutions were included in the ranking. About 40 organizations and institutions were evaluated. The five institutions featured in the award were Eletronorte, the Federal Court of Accounts, *Banco do Brasil*, *Banco Central do Brasil* (Brazil´s Central Bank) and Minas Gerais Sanitation Company (Copasa). Items such as strategy and management, leadership, career, salary and benefits, and health were evaluated.

The president of TCU, Minister Augusto Nardes, stated that personnel management is a strategic area for TCU so that, having a qualified and motivated technical staff, the Court may provide good services to citizens. "Here in TCU, the main objective of personnel management is to promote the development of competent and motivated professionals. This is done without ever losing sight of governmental audit and improvement of public management".



TCU and the 2016 Olympic Games

Hosting the Olympic and Paralympic Games in Rio de Janeiro in 2016 is already considered a historical moment for Brazil. This is especially true regarding the legacy that the mega-event can bequeath to Rio de Janeiro and to Brazil.

Since the moment Rio de Janeiro was chosen as host city, the Brazilian Federal Court of Accounts has been preparing itself and joining other audit institutions so as to monitor governmental actions for the preparation of the Olympic Games.

Under the coordination of Minister Aroldo Cedraz de Oliveira, TCU elaborated an oversight plan for the several investment areas. For the elaboration of this plan, experiences gained by the Court when monitoring the preparatory actions for the Pan-American Games, for the Military World Games and for the 2014 World Cup were taken into account.

According to the president of TCU, Minister Augusto Nardes, besides monitoring the legal compliance, the legitimacy and economic feasibility of the projects, TCU's action also intends to ensure good governance of the Games by contributing to

the strengthening of internal oversight, transparency of expenses and accountability regarding the results obtained.

In order to cooperate with strengthening governance during the organization of the sports event, TCU's oversight plan focuses on preventive and proactive action. In this sense, governmental actions are expected to be implemented in a transparent, efficient and effective manner, in compliance with applicable laws and regulatory standards.

The oversight plan includes evaluations of compliance with project timetable, lawfulness of contracts, effectiveness of the security actions plan, capacity building and training of high performance athletes and urban mobility projects.

To minister Aroldo Cedraz, coordinator of the TCU audit , no detail can be left out nor dealt with in an untimely manner. "Only then will we have conditions to establish a plan for possible contingencies that may hinder or even prevent the proper development of the event. All this must grant priority to transparency of government actions and also to those of the Federal Court of Accounts itself", he said.

One of the first control actions performed by TCU was an audit in order to evaluate the management and organization of the Olympic Games. According to the report, the governance of the Games still suffers from a lack of establishment of deadlines, values and responsibilities for actions that need to be developed. Less than three years before the world event, Brazil has not yet produced the document indicating the essential projects and corresponding responsibilities (responsibility matrix).

"TCU and the 2016 Olympics" report cover

In order to reduce risks perceived by the survey, TCU recommended a series of measures and determinations to the institutions that are responsible for the administration of the Games, such as the definition and publication of the projects and corresponding responsibilities.

Another action performed action was the signing of a letter of intent with the Rio de Janeiro State and Municipal Courts of Accounts on September 17th in TCU's headquarters in Brasília.

With basis on the letter of intent, an information network will be created in order to oversee and control public expenses during the organization of the games aiming at boosting agility and efficiency in the exchange of information and in procedures that may involve the protection of public properties and maintenance of administrative probity.

TRANSPARENCY

In order to improve access to information about the oversight of preparatory actions for the Games, TCU issued the report "TCU and the 2016 Olympics". This publication cover aspects related to the commitments made and guarantees offered by Brazil for hosting the Games in the city of Rio de Janeiro. It also describes foreseen investments to be made in order to carry out the event and the audits are also included in the report, giving special attention to the governance of the Games and to the sports facilities, as well as other ongoing control actions.

The report is available for consultation and free download at TCU Website: www.tcu.gov.br.

Outsourcing of Software Development in Brazil and the United States

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ABSTRACT

Outsourcing of information technology by the federal government has been a growing reality since Law 200 of 1967, wherein the legislature sought to reduce the size of Brazil's governmental apparatus, which was then causing bureaucratic problems and hindering growth of the government sector. This article proposes to analyze the evolution of this mode of contracting by Brazilian public agencies, as well as their adherence to present-day software development practices. It also includes a qualitative study of the model for contracting and developing software and compares it to the U.S. Government model. The United States was chosen as a reference for this study because it is the major world consumer of individual IT and has political similarities to Brazil, such as a presidential, capitalist regime and comparable population size.

Key words: Brazilian Government. Contracting. Law. Law 8666, Outsourcing. Software Development. United States Government.

1. INTRODUCTION

The quest for administrative excellence often collides with needs that go beyond the corporation's primary competencies. Moreover, some managers

still believe in their ability to increase company profits by internally carrying out all the service stages necessary for the company's operation. However, in maintaining this stance they risk losing their business focus, suffering damage, and even moving towards insolvency (Cury, 2000; Oliveira, 2004). The evolution of information technology has been very dynamic with new technologies constantly being created, provoking a race among companies attempting to maintain their market position (Boehm 12-29).

The cost of accompanying this evolution is very high and it causes many organizations to delegate information technology activities to outsourcing companies in order to remain technologically up-to-date. Thus, the practice of outsourcing rather than developing projects in-house has become a tool for a competitive differential among businesses.

According to Barthélemy and DiRomualdo, the reasons companies opt to outsource have been well-documented and include cost reductions, better performance and access to broader labor markets (Barthélemy et al. 60-69; DiRomualdo et al. 67-80). Nevertheless, contracting out software development involves complex legal, economic, management and technological issues (Whang. 307-324; Lacity et al. 13-25) which should be meticulously assessed prior to taking an effective decision to opt for this route. Delegating the creation of software to third parties has proven to be no trivial question, despite myths such as outsourcing always being the better choice because it means cuts in costs and personnel (Hernandes, 2007).

The move to outsourcing is also a reality among Brazilian government companies (Hazan 1). The quest to improve processes through information technology tools is a growing reality in public administration, which looks to IT as a tool to increase its capacity to meet the needs of the public. Nevertheless, this concern is not recent as can be seen in Decree 200 of 1967 that regulates the organization of the federal public administration. In this decree the legislature establishes guidelines for administrative reform and its third chapter contains provisions for decentralizing public administration:

> Art. 10. The execution of federal administration activities should be broadly decentralized [...]
>
> § 7° To better free themselves of the tasks of planning, coordination, supervision and control, and in order to impede uncontrolled growth of the administrative machinery, the administration will seek to unburden themselves of the material realization of executive tasks, having recourse whenever

> possible to indirect execution via outsourcing if private enterprise is sufficiently developed and capable of performing executive duties. (Decree Law 200, Brazil, 1967),

Outsourcing is a reality among state-owned companies. But could there be a management system that makes full use of this tool and provides return value, thus generating gains for society? Do the laws that regulate contracting allow the software creation process to be complete, and make transparent and productive contracting possible? The aim of this article is an ethnological study which analyzes the knowledge, beliefs, laws, customs or habits acquired by people as members of society (Edward Tylor, 1871), analyzing the laws that regulate the software contracting process inside the Brazilian and American public administrations. Our proposal presents both pros and cons through practices recognized by the national and international markets. This article also intends to propose changes that can add value to the contacting process in the Brazilian public administration.

2. OUTSOURCING

Monitoring the evolution of information technology has not been an easy task, and in this context both private and public companies need tools that can aid them in meeting this challenge. Thus, contracting outsourced labor has become a tool often used by these companies (Barthélemy et al. 60-69; DiRomualdo et al. 67-80). According to Vazquez, there can be several levels of outsourcing, from writing software code up to outsourcing of the entire systems team (2004).

Other authors have identified features that justify this choice as a way for the contracting party to be relieved of responsibility for the final product (Hernandes, 2007). However, in his article, Pinheiro states that an organization which has not reached maturity in its acquisition process has the same potential for failure as those whose development still lacks consistent processes, and that the biggest problem detected in software acquisitions has to do with management practices inside the companies (Pinheiro, 2006).

Guerra also maintains that organizations must have maturity in their internal processes to manage software development contracts in order to achieve all the expected results. He defines maturity as the ability to manage software development and the maintenance process; in a mature organization the software process is carefully communicated to the existing team and to new personnel, and work activities are undertaken in line with planning, monitoring product quality and customer satisfaction (Guerra, et al. 232).

2.1 DIFFICULTIES

It is well known that characteristics inherent to the information sector can make it difficult for companies and government agencies at the time of acquiring or contracting software. Hernandez highlights four problems: (i) changes in requirements – since contracting delays within public administration cause the requirements found at the beginning of the process to undergo changes; (ii) labor turnover – the information technology market characteristically exchanges professionals among companies in the sector; (iii) loss of knowledge at the end of the contract period – contracts between public companies, often have a limited duration, requiring them to use knowledge management techniques in an attempt to ensure that the knowledge about the product developed remains in the contracting company; (iv) lack of knowledge about integration of work processes – many organization bid out software without broader knowledge of their own work processes and the correlations existing among them (Hernandes, 2007).

Outstanding among the problems presented is the change in requirements during the contracting and development process since, according to Hernandes, the scope of software is usually defined at the start of the project, but will rarely remain the same throughout (2007). According to Watts Humphrey, "Requirements in a system will not be totally known until users have used it" (1995). Peter Wegner further states that "it is not possible to completely specify an interactive system" (1997). However, there is the illusion in the market that it is possible to develop software without modifications and for that reason fixed scope contracts are signed which the client believes have predictable costs, timeframes and scope. The field of requirements engineering recognizes that requirements do not remain static through to the

conclusion of software projects. Many factors make them evolve from their conception to delivery (Kotonya, 1998). Also worth of note is Hadar Ziv's statement that "uncertainty is inherent and inevitable in development of software, processes and products" (1997).

3. BRAZILIAN LAW

Even when they need training for more effective management, state-owned companies are ruled by norms. Contracting by Brazilian public agencies is regulated by various laws, decrees or normative instructions. Among these, the most noteworthy is Law 8666 of 1993, also known as the Law for Public Bids and Contracts, which establishes:

> Art. 1° - This law establishes general rules for administrative bidding and contracts for works, services, including publicity, purchasing, divestiture, and leasing within the scope of the authority of the federal, state, Federal District and municipal governments. (Brazil, 1993).

Upon first analysis of this law, one observes that the legislature sought to assure that public resources were well employed when contracting, purchasing, divesting or leasing property and services. Its text specifically refers to information technology in the following excerpts:

> Art. 24. The bidding process is indispensable […]
>
> XVI - [...] for information technology services provided to domestic government entities, to organs or agencies that make up the public administration, created for this specific purpose;
>
> Art. 45. Judging of the proposals shall be objective, and the bidding committee or those responsible for the call for bids shall do so according to the type of bidding, the criteria previously established in the official convocation and in accordance with the factors referred to exclusively therein, and in such a way as to make it possible for bidders and the control agencies to monitor the process. [...]
>
> § 4° When contracting information technology goods and services, the administration will observe the provisions of Article 3 of Law 8248 of October 23, 1991, taking into account the factors specified in paragraph 2 and is obliged to adopt the "best technique and price" bid type, while permitting the use of other types of bids in the cases listed in Executive Decree (Law 8666 Brazil, 1993).

The following analyzes the context at the time of the creation of the law and the present time.

3.1 THE CONTEXT OF LAW 8666 OF 1993

Information technology in the 1980s focused on sequential processes. Thus, computing systems followed the cascade development approach whose main feature was the requirement to close out the previous stage before beginning the next. This model dominated the way software was developed until the beginning of the 1990s. However, authors such as Frederich Brooks warned of problems generated when a sequential view of tasks is adopted (Brooks 10-19). Tom Gilb discouraged the use of the cascade model to create large software, believing that incremental development was more productive and presented fewer risks with greater possibilities of success (Gilb, 1999).

Nevertheless, the law of public bids and contracts determines that contracting software development contracts should contain characteristics similar to those of an engineering project, in which the planning stage is done with knowledge of all the requirements for project development. This feature can be identified in Law 8666/1993, wherein the legislature determines in Section III – Works and Services that:

> Art. 7° - Bidding for works and services delivery will obey the provisions of this article and specifically the following sequence:
> I - Basic project;
> II - Executive project;
> III - Execution of works and services;
>
> § 1° - The execution of each stage will be preceded by the conclusion and approval of work related to earlier stages by the designated authority, except for the executive project

> which can be developed concomitantly with the execution of the works and services if also authorized by the administration (Law 8666, Brazil, 1993).

The need to obtain all software characteristics while still in the planning stage is evidenced in the definition of the basic project in the law itself:

> Basic Project – set of necessary and sufficient elements with an adequate level of precision to characterize the work, service, or complex of works and services subject of the bid, elaborated on the bases of indications in the preliminary technical studies that assure technical viability and the adequate treatment of the environmental impact of the undertaking, and which makes it possible to evaluate the cost of the work, definition of methods and timeframes for execution; it must contain the following elements:
>
> [...] f) detailed budget of the global cost of the work, based in units of services and provisions which have themselves been evaluated; (Law 8666, Brazil, 1993).

Item f of the law reveals the legislature's belief that a project to be bid out can have total knowledge of all the customer's needs while still in the planning stage. This belief reveals the gaps in the legislature's knowledge of the information technology area. According to Frederich Brooks in No Silver Bullet: Essence and Accidents of Software Engineering, the idea that projects contain the total software specifications prior to the start of implementation is impossible (Brooks 10-19).

3.2 ADAPTATION OF THE LAW

Data from the Standish Group in 1995 which used a database of 8,380 software projects showed that only 16% of these projects were delivered within the agreed-upon timeframe and cost, and with all the specified functionalities; 32% were canceled prior to completion, and 52% were delivered with higher costs and longer timeframes or with a lack of the functionalities specified at the time of project initiation. According to the same study, in cases where projects respected the time and cost limits, aspects of low development quality were observed, resulting in high numbers for corrective maintenance. As a result of this analysis, the study identified that the main reason for the faults discovered was the use of the Classic Model of development. In its final conclusions, the study recommended that software be developed in an incremental manner (Standish Group, 1995).

In attempting to regulate Brazilian legislation related to bidding for information and automation services, the President of the Republic, through the Office of the Chief of Staff, published Decree 7174 of May 12, 2010, which regulated contracting procedures for information technology by Brazilian government agencies, despite the fact that this decree seeks to regulate the provisions of Law 8248 of October 23, 1991, revokes Decree 1070 of March 2, 1994 and alters Decree 3555 of August 8, 2000. Upon first analysis, one observes that this decree contains greater detailing of themes dealing with hardware acquisition in detriment to software acquisition, as well as requiring the cascade approach to development, and requires a survey of all project characteristics while still in the planning phase; these remained obligatory under this decree as can be seen in the following article:

> Art. 2º Acquisition of goods and services for information technology and automation must be preceded by contract planning, including the basic project or terms of reference containing the specifications for the object to be contracted [...] (Decree 7174, Brazil, 2010).

The Brazilian legislature's distance from the realities of software development can be observed, because since 2001 with the advent of the Agile Manifesto, there has been a veritable revolution in the way software solutions are created, using the following methodological pillars: individuals and interactions over processes and tools; working software over comprehensive documentation; customer collaboration over contract negotiation, and responding to change over following a plan.

4. UNITED STATES LAW

The legislature's main justification at the time it required that complete planning for services be accomplished prior to their start up was to assure

transparency in public entities' bidding processes. But, wouldn't it be possible to have guarantees of frankness and transparency for government agencies and state-owned companies simultaneous with the application of good practices in software creation? The U.S. Government signaled this concern by publishing the Clinger-Cohen Act proposed by Representative William Clinger and Senator William Cohen in February 1996. It revoked the 1965 Brooks Act, which had amended the Federal Property and Administrative Services Act of 1949.

In February of 1996, the United States Congress approved the Clinger-Cohen Act with the objective of reforming and improving the manner in which federal agencies acquire and manage IT resources. The central point for implementation of these reforms was the need to establish IT leadership inside each government agency. This law decentralized authority and responsibility for acquiring information technology resources; it unified the laws for information technology management reform and the Federal Acquisition Reform Act. The Clinger-Cohen Act of 1996 created the position of Chief Information Officer (CIO) in an attempt to give more attention to results that might be achieved by IT investment, at a time when the idea of making large-scale IT investments was relatively new. The Clinger-Cohen Act emphasized rigor and structure in the way some agencies should select and manage IT projects. Under this law, the CIO became responsible for establishing the visibility and management needed to fulfill the law's specific provisions; the position had the following basic attributions: help to control risks in developing systems, better administer technology expenditures, and achieve real and measurable improvements in agency performance.

Through the Clinger-Cohen Act, the U.S. Government presented the guidelines for software development, e.g. planning, control of investments to maximize value, risk assessment/management in information technology procurement, and contracting large information technology systems in a modular manner as prescribed in the law:

> [...] Use modular contracting to the extent possible when acquiring larger systems for information technology [...] (Clinger-Cohen Act, USA, 1996).

Section 4.1 as follows, explains the temporal context of the American law; while Section 4.2 takes up the issue of modularization again.

4.1 CONTEXT OF THE CLINGER-COHEN ACT

Before analyzing the content of the Clinger-Cohen Act of 1996, the context at the time of its enactment must be understood: Marc Andreessen in his article Why Software is Eating the World (Andreessen, 2011), says that in 2013 software would begin to eat the U.S. federal agency contracts, and that federal budget reductions would provoke significant cuts in work positions. According to Rockwell Collins, budget pressures and the capacity of resources directly affect contracting by the U.S. Government, and sums up the present day budget pressures as, "uncertainty without precedent for all the companies that support the Department of Defense". Budget pressures obliged companies to seek cost reductions through firing workers or by using intelligent software solutions, causing the consumption described by Marc Andreessen to be considered in all government contracting, especially for information technology.

Despite the fact that Collins' article alleges the non-existence in earlier years of budget pressure on companies that work for the U.S. Department of Defense, budgetary discipline and expenditures on information technology are not new to other companies around the world. As Augustine says, the reality is that for a long time project managers have had to deal with budget reductions for their projects, as well as reduction in their teams (Augustine 70-74). In turn, Earl claims that outsourcing of information technology was born of the need to cut costs and to reduce personnel due to growing expenditures on the information technology sector (Earl, 1998), while Wang also lists among the motives that lead organizations to outsource their information technology area is lower production costs (Wang 24-50).

4.2 ADAPTATION OF THE LAW AND MODULARIZATION

To aid government and state-owned companies in complying with the Clinger-Cohen Act, the White House published Contracting Guidance to Support Modular Development which

sought to orient CIOs in applying this law, seeking greater benefits for government and warning of the risks existing at the time of contracting software. As can be seen, there is a concern on the part of the U.S. Government to assure that resources applied to solutions can effectively return value to taxpayers.

> ...responsible development needs complete detailing of requirements prior to the commencement of work. While this is an apparently reasonable hypothesis, practice and experience in the private sector have shown that large, complex implementations of IT frequently stumble over costs and delays in their timetables, since a meticulous process of collecting requirements often takes year to conclude. [...] Government increases its investment risks in these situations because: (1) IT solutions might no longer be necessary or seen as priorities after requirements are surveyed; (2) elevated resources are allocated for outdated solutions without any return on investment, or (3) government-owned companies can experience budget cuts before the final delivery of software (CGSMD, 2012).

In a deeper analysis of the guidance, we identified characteristics recognized as agile in the area of information technology:

> Assuring customer satisfaction though early and continuous delivery of valuable software: deliver working software frequently (weeks instead of months); use working software as the main measure of project progress; even late changes to the project scope are welcome; constant cooperation between the business people and the developers; projects arise though motivated individuals, and there must be a relationship of trust; software design should value technical excellence; simplicity; rapid adaptation to change; individual changes, and interaction over processes and tools; working software over extensive documentation; collaboration with customers over negotiating contracts; responding to changes over following a plan (Agile Manifesto, 2001).

The stance the U. S. Government takes is adherent to the market according to Charette who in his article compares agile methods with the traditional weighty methodologies and demonstrates that projects using the agile model achieve better results in terms of timeframe, cost and quality (Charette, 2001).

5. COMPARISON OF THE LAWS

Upon first analysis of the U.S. Clinger-Cohen Act of 1996 and the Brazilian law for Public Bids and Contracts No. 8666 of 1993, we find in both the need for budgetary discipline and fulfillment of the federal government's strategic plans in both countries, which are little different from existing budgetary guidelines in all governments. However, the major difference found is in the concern of the U.S. Congress in determining that large information technology projects should be delivered in the modular manner, believing that this practice allows for fewer project risks and makes possible a greater, more immediate return on investments made in the solution. According to Contracting Guidance to Support Modular Development:

> small, quick deliveries by the information technology area allow taxpayers to receive a working product before the end of the project, and if needs changes, these can be made without loss of time or resources in developing

> new solutions, moreover, this approach permits, "the IT area always to be included in new market solutions." (CGSMD, 2012)

Returning to Law 8666/1993 one finds no reference to prohibit modular development by Brazilian companies. Nevertheless, the need for a complete survey of the solution before the start of creation, and the obligation to begin one stage only after having terminated the prior stage, make contracting solutions by modules very difficult. Moreover there is a lack of regulation to encourage this practice inside the Brazilian government.

Can we then conclude that the U.S. Congress better adheres to modern software development practices recognized worldwide, allowing American government agencies to take better advantage of resources invested in developing software solutions? Did the Clinger-Cohen Act manage to meet the need for good management of government resources, i.e., that the thing being purchased is right for the right reasons? How does one know?

In 2006, Tom Davis, President of the Committee on Oversight and Government Reform, said, "Since the passage of the Clinger-Cohen Act the government has begun to take a holistic approach toward information technology, using it to resolve business problems and achieve performance improvements. We have a long route to travel, but the giant that is the federal government is well on the road to the twenty-first century."

According to Andrues, "The Clinger-Cohen Act and the laws and regulations that succeeded it are all part of an elementary impulse to impose limits, to demand organizational results and establish a basis to account for expenditures." The imposition of structure, nonetheless, is only one part of what will be necessary to make the Clinger-Cohen Act the change agent that it was projected to be. What is even more necessary is good news, and the story tellers should be the federal CIOs. They should cultivate an environment in which results can be proven, exalted and put on display. They should create conditions for achieving definitive improvements through information technology.

6. CONCLUSION

> The law must be honest, just and created for the common good of citizens and not for the benefit of private parties,compatible to the nature and the customs of the time; necessary, usable, and clear, without obfuscation that raises questions" (Santo Isidoro de Sevilha).

The law is the result of social reality. It emanates from society through its instruments and institutions destined to formulate the law, reflecting society's objectives, as well as its beliefs and values, the complex of its ethical and final concepts (Herkenhoff, 1993).

Thus, one cannot analyze laws without delving deeper into the social environment, including family, school, clubs, churches, work, and others. It should be understood that laws, usage, traditions and customs must be understood as flexible and dependent upon the time, beliefs or locations which differ among states, countries and continents. Something could be considered absurd in a given epoch or place, while in another it might be right or accepted. A law cannot be analyzed without understanding beforehand the time or location in which it was promulgated, or the truths in which it is based. A law is related to the context of its creation, taking into consideration social structures such as family, society, culture and belief systems.

In proposing to analyze the differences between the laws ruling software bidding in Brazil and the United States, we come across this reality and once can identify the evolution of the software creation process in public agencies in these two countries. One observes that laws evolve to meet the different ways of creating solution in information technology. They experience regulations that are more concerned with hardware, others more up-to-date and focused on software. Presently one can observe greater concern by the legislatures, especially the U.S. Congress, to assure that the software delivered meet the needs required and that it also provide a greater return for society.

During the work, it was perceived that the pillars of success for a software creation project – timeframe, cost and quality – are improved when agile methodology is applied, lacking only the fourth pillar, scope, which as defined by this methodology, should be flexible and seek to meet the customers' needs. Despite agile methodology still being in its early phase in 2001, it had already demonstrated consistent results as described by Charette when he compared agile

and traditional methodologies and showed that projects using this methodology obtained better results in meeting deadlines, cost and quality standards. This same study shows that the number of projects and teams using agile methodology grew in the IT environment (Charette, 2001). The major characteristics of agile methodologies are acceptance of change to requirements during the software creation process. He believes that in this way it is really possible to deliver to customers the products they need, without sacrificing the process and tools, documentation, contract negotiation or planning. Simply put, the agile methods consider the importance of these to be secondary compared to the individuals and interaction with working software, with customer collaboration and with rapid response to changes and alterations (Agile Manifesto, 2001).

Thus, contrary to the determinations of Brazilian law, the software project scope must be flexible in order to guarantee that the other pillars can be in place within the customers' expectations, assuring defined costs, timeframe and quality. But for this to happen it will be necessary to revise Law 8666 of 1993 in which the concept of the basic project needs to become more flexible. Moreover, following the example of the U.S. Congress, it is suggested that the Ministry of Science and Technology publish a guide for software contracting guide for the Brazilian government's public and state-owned companies, that software be created in modular form and adhere to agile development methodologies, since it is currently believed that the agile approach could be the big tool that will enable the Brazilian government to attain its objectives.

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A research of the program evaluation systems of the direct federal administration in Brazil

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ABSTRACT

This article presents the results of research on systems for monitoring and evaluating government programs of the federal public administration. The theoretical framework was based on the criteria adopted in Leeuw and Furubo (2008) to characterize an evaluation system. Data from the Monitoring and Evaluation System of the Federal Government's Multiyear Plan-(PPA (SIGPlan), from 2005 to 2009 were used, and 31 Monitoring and Evaluation Units (UMA) of the Ministries of the Executive Branch were surveyed. The results indicate the spread of computerized systems for monitoring physical targets of programs that meet the objectives of performance measurement, although not integrated to sector and central monitoring and evaluation systems. Sector monitoring systems were identified in various ministries and in some bodies that appear as more appropriate alternatives to the management needs of sector policies than the management model of PPA programs. It was further observed that although there is a significant number of program evaluations, one cannot say that the development of evaluation capacity in sector bodies has evolved in the same proportion. Finally, it is observed that although the PPA Monitoring and Evaluation System has not been able to fulfill the functions it was intended to, 49% of sectoral bodies had not yet deployed their own evaluation systems.

Keywords: Direct federal administration. Evaluation of government programs. Programs monitoring and evaluation systems.

1. INTRODUCTION

This article aims to apply a conceptual model to identify and characterize systems for assessing governmental programs of the federal public administration in Brazil. Therefore, from literature review, there were established criteria for the research of evaluation practices adopted in the direct administration of the executive power, with the potential to be characterized as an evaluation system. This is an exploratory research, conducted through analysis of documents and administrative records, interviews and surveys with federal government bodies. This work was conducted by Audit Survey as per TC-032.287/2010-0, reviewed in the Plenary Session of October 19, 2011, where Judgment No. 2781/2011 was rendered, reported by Minister Valmir Campelo.

It is observed that although the evaluation practices have been disseminated in government bodies, few studies have been devoted to investigate to what extent these practices constitute evaluation systems. Indeed, this is what Leeuw and Furubo (2008) observe. They suggest a set of criteria to characterize the assessment systems and, based on work done by other authors, identify a typology of systems, pointing out some issues that should be further investigated to better understand the role these systems play in modern societies.

The institutionalization of these instruments should facilitate the integration of governmental decision-making processes, through the systematization of mechanisms of interaction of various practices associated with planning functions, control and accountability. In this sense, there are budgetary systems, audit systems and evaluation systems. Budget and audit systems are traditionally better developed and structured than the systems for evaluating programs and policies, even though, in the last three decades, assessment practices have been increasingly widespread and disseminated in public administration.

According to Grau and Bozzi (2008), the increasing use in Latin America of systems for monitoring and evaluation of results in the public sector is a way to advance in the search for greater transparency and effectiveness of government action and, therefore, increase the capacity to exercise collective control, resulting in the increasing of State legitimacy, the fight against corruption, the best use of public money and the creation of policies and services that promote social welfare, reducing poverty and tackling inequality.

2. THEORETICAL FRAMEWORK

To develop this work and in order to form the concepts to be used in the analysis, it is important to define institutions.

Institutions are understood as the 'rules of the game' (NORTH, 1990), formal and informal, that guide and limit the relationships between people and/or organizations; expressing, based on a set of shared values, both the mechanisms for implementation of rules, such as the behavior expected from individuals and organizations on a reality, a real world phenomenon (NORTH et al., 2009, p. 15), in order to impose some order and reduce uncertainty in the interactions among the actors involved (MARCH; OLSEN, 1984).

Therefore, it can be inferred that the institutionalization of evaluation systems concerns the definition of formal and informal rules that guide and constrain the evaluation practices and the relationship between the actors involved, in order to reduce the risks, so the expected results can be achieved.

For Williams and Imam (2007), when one thinks in terms of [evaluation] systems, one must understand its limits, what characterizes them, what is part of what is being investigated and what is not, this also helps to understand that systems can exist only in relation to other systems and their limits.

Based on these assumptions, Leeuw and Furubo (2008) defined four criteria to characterize an evaluation system. The first criterion concerns the existence of a distinct epistemological perspective, the second deals with the arrangements, i.e., for the assessment activities to be considered a system, they must be performed by evaluators within organizational structures and institutions, and not just (or largely) by independent evaluators, external to the organization. The third criterion is the continuity, indicating the permanence of these activities over time, and finally, the fourth criterion refers to planning the use of evaluation results.

Thus, for evaluation activities to be characterized as a system, they must be acknowledged as such, based on the shared understanding of the peculiarities, rules and procedures that differentiate them from other activities. According to March (1994), the activities within organizations are defined from a set of skills, responsibilities and rules (formal and informal) that give them identity and allow them to be coordinated and controlled.

When individuals and organizations share the same identity, they follow rules or procedures that they perceive as appropriate to the situations in which they are involved (MARCH, 1994). Thus, the identity of an evaluation system is intrinsically related to the activities and the type of knowledge that are developed and produced within those systems.

To Jannuzzi (2012), monitoring and evaluation systems are part of more general systems of policies and programs management, which are articulated, getting from them demands of data needed to the process and feeding then back with 'customized' information and knowledge, from the diagnosis to the evaluation of a more summative nature. According to the same author,

> these systems have no independent life, as the main reason for their existence is to provide structure and improve management, even though it can also help to ensure greater transparency of government action, merit evaluation and continuity of policies and programs.

Hence, one can infer that the institutionalization of evaluation systems depends on the existence of demands of information for the improvement of policies and programs management, to whose care it produces knowledge through systematic practices of information management, with the purpose of using it in political and administrative decision-making processes.

Accordingly, evaluation systems have characteristics and purposes that distinguish them from other systems that integrate the cycle of government policies and programs management.

Thus, the institutionalization of evaluation systems can be characterized from the mechanisms that define a steady and continuous stream of demands that drive a set of, formalized, structured and coordinated evaluation practices to produce knowledge, with the aim of supporting the decision making and learning processes to improve the management and implementation of programs and public policies (SERPA; CALMON, 2012).

Leeuw and Furubo (2008), based on the International Atlas of Evaluation (FURUBO et al., 2002) and Roots of Evaluation (ALKIN, 2004), identified - mainly in western countries - the following types of evaluation systems:

i. Monitoring and Evaluation Systems (SM&A),
ii. System of Performance Monitoring,

iii. System of Performance, Inspection and Monitoring Audit,
iv. Quasi-experimental Evaluation System and evidence-based policy;
v. System of evaluation and accreditation.

One can infer that evaluation systems with different purposes meet different needs. Therefore, their respective structures and features are developed and shaped to meet the purposes for which they were created, based on the epistemological assumptions that guide the form and development of systematic processes for the production of knowledge, as well as the relationships between the actors involved.

On the other hand, Grau and Bozzi (2008) in their work on survey of monitoring and evaluation systems in Latin America, given the lack of conceptual delimitation and consensus on what is generically called national system of monitoring and evaluation, established the criteria listed in Table 1 to identify these systems, or the set of instruments that could be converted into system. These criteria are closely correlated with those suggested by Leeuw and Furubo (2008), as shown in Table 1.

Thus, based on the theoretical foundations presented, the model proposed to identify and characterize the evaluation systems includes the following dimensions of analysis:

i. external and internal contexts in which demands for evaluation are formulated - in this dimension the variables to be identified relate to the external and internal organizational context (political and administrative), where the demands for evaluation arise, are structured and delimit the purposes of the evaluation system, through the definition of what should be evaluated (object), why it should be evaluated (objectives) and to whom (those interested in evaluations),
ii. arrangements - structuring of process and organization of means to perform the evaluation activities, which can be deduced as evaluation capacity. In this dimension, the variables to be investigated concern the definition and dissemination within the organization, evaluation practices established, the organizational support in terms of education and training for professionals responsible for implementing evaluation activities; formalization of evaluation practices, by defining responsibilities, routines and tools, as well as the allocation of resources needed to implement the activities,
iii. organizational learning capacity - attributes and conditions to support organizational learning and relate to clarity of purpose and vision of organizations, leadership, an organizational culture that fosters learning, knowledge transfer, cooperation and teamwork,
iv. use - it concerns the investigation of the mechanisms that promote the use of information produced by evaluation activities, so that the knowledge needed is effectively generated and decisions are taken to improve management, programs and public policies.

3. METHODOLOGY

Whereas the criteria defined by Leeuw and Furubo (2008) summarize those established by Grau and Bozzi (2008), and based on them, evaluation practices existing in bodies responsible for finalistic programs of the federal government, in particular of

Table 1:
Comparison of the criteria established by Leeuw and Furubo (2008) and Grau and Bozzi (2008) to characterize the evaluation systems.

Leeuw and Furubo (2008) - Criteria	Grau and Bozzi (2008) - Criteria
Distinct epistemological perspective	formal institutionalization, with coordinating unit and name
Arrangements	operation of the system by an entity with role and authority over all public administration, but with specialized roles
	conducting monitoring and evaluation activities;
	global coverage intention
	explicit articulation of users and system functions
	location of the system in the executive branch
	regulation of the system within the public administration
	minimum instrumental density
Continuity	regularity of activities
Use	use of resulting information and monitoring and evaluation activities

Source: the authors

program evaluations and monitoring mechanisms, were initially identified from the data contained in the Monitoring and Evaluation System of Multi-Year Plan - SMA, considering that it is a system established by law (Law 11.653/2008), nationwide and under the coordination and responsibility of the central executive branch planning body.

It should be noted that such a strategy is supported by the work coordinated by Grau and Bozzi (2008), whose orientation to identify monitoring and evaluation systems was to locate a coordinating unit clearly defined and institutionalized, with the authority to establish procedures for collecting data to conduct monitoring and evaluation - M&A and send processed information to potential users. From the identification of the activities of this unit, it would be possible to delimit the scope of the system, the components and tools used, as well as its relationship to other M&A practices within the government, which would help to build the map of other existing systems.

Based on the analysis of the database of programs annual evaluations carried out through the Monitoring and Evaluation System of the PPA (SIGPlan), for the period of 2005 to 2009, the number of programs evaluations carried out under sectoral bodies was quantified. These were responsible for implementing programs and policies (Table 2), as well as for evaluation practices related to the monitoring of physical targets of the programs (Graph 1).

This information allowed us to identify clusters of evaluation practices with the potential to be characterized as an evaluation system. Such evaluation practices were examined by means of documentary analysis and interviews with relevant bodies and experts, based on the theoretical framework mentioned.

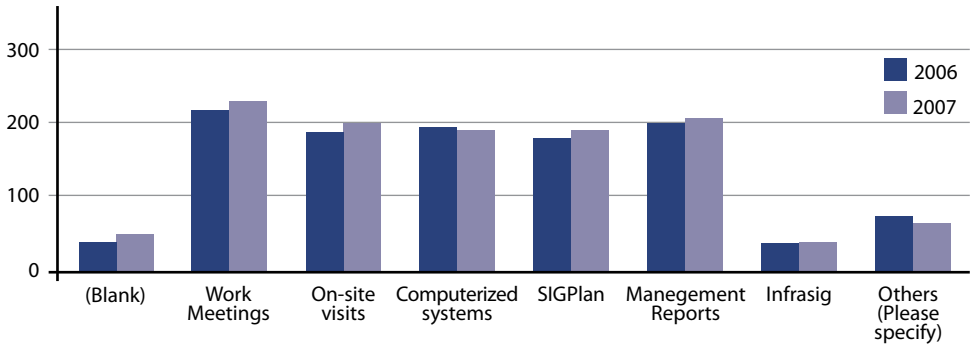
With this information and based on normative rules established by the legislation then in force, a survey of 31 Monitoring and Evaluation Units (UMA) took place, all linked to the Ministries of the Executive

Table 2:
Number of Program Evaluations Total/ Year and Body

MINISTRIES	YEAR					EVALUATIONS TOTAL
	2005	2006	2007	2008	2009	
Health	11	12	12	5	4	44
MMA (Ministry of Environment)	15	7	8	3	9	42
Agriculture	12	7	9	4	9	41
Justice	8	4	9	3	7	31
MME (Ministry of Mines and Energy)	3	4	3	8	13	31
MDS (Ministry of Social Development)	9	4	4	4	5	26
Defense	6	5	5	6	4	26
Work	6	3	4	5	7	25
MDIC (Ministry of Development, Industry and Foreign Trade)	5	3	3	6	5	22
MCT (Ministry of Science and Technology)	5	6	1	1	7	20
MPOG (Ministry of Planning, Budget and Management)	5	2	7	2	3	19
Culture	6	2	2	3	5	18
Education	3	2	4	3	3	15
Sports	3	4	3	2	3	15
SEDH (Special Secretariat for Human Rights)	3	2	2	0	8	15
Transport	2	3	5	0	5	15
Cities	2	1	1	4	6	14
Finance	3	2	4	3	1	13
Integration	3	1	4	0	5	13
MRE (Ministry of Foreign Affairs)	3	0	3	4	2	12
MDA (Ministry of Agriculture Development)	2	2	2	1	4	11
Communications	3	2	1	2	2	10
PR	1	2	1	1	2	7
Tourism	2	1	0	1	2	6
Social Security	0	0	0	3	3	6
SEAP (Department of Public Administration)	1	0	1	1	1	4
SEPPIR (Department of Policies to Promote Racial Equality)	1	1	0	1	1	4
Women	0	0	0	0	2	2
GabPR	0	0	1	0	0	1
MPU (Brazilian Federal Attorney General's Office)	0	0	0	0	1	1
TOTAL	123	82	99	76	129	509

Note. Source: Adapted from BRASIL, 2011.

Graph 1:
Monitoring mechanisms in relation to the quantitative of government programs (years 2006 and 2007)



Source: PPA Annual Evaluation Questionnaire 2006 and 2007 - SIGPlan, BRASIL (2011).

Branch, and the collection of data in eight of these units (Ministries Health, Education, Social Development and Fight Against Hunger, Agriculture, Labor, Tourism, National Integration and Cities) was through a structured interview and in the other by electronic submission of questionnaire. The percentage of response obtained was 81% (25 bodies). The research aimed to identify the extent to which these units fulfilled the role of articulating evaluation systems of sectors with the central monitoring and evaluation system in order to enable the construction of the map of the evaluation systems for the public federal administration.

4. RESULTS

Preliminarily, it is worth noting that at the time of preparation of this paper, the PPA Monitoring and Evaluation System, , was undergoing a restructuring process, in face of the new premises of the PPA 2012- 2015. The data used in this study were extracted from the system in force in the period from 2005-2010 (BRASIL, 2011).

The Monitoring and Evaluation System of the Multi-Year Plan, for the period of 2004-2011, corresponding to the Multi-Year Plan 2004-2007 and 2008-2011, does not have characteristics that allow us to classify it in this category, according to the classification defined by Leeuw and Furubo (2008). Analysis from the data collected indicate that the central monitoring and evaluation system of the federal administration is similar to a system of performance monitoring of normative character, considering that its main purpose is to comply with the legal provisions established in laws that approved the respective multi-year plans. The knowledge produced through the System does not properly subsidize the decision making and learning processes to improve sector management, nor is able to contribute to improving the implementation of programs and public policies.

5. MONITORING

From the analysis of the questionnaire for annual evaluation of the PPA programs, answered by managers of sectoral programs, for the years 2006 and 2007 it was found that monitoring of physical targets is performed in 96% of programs, as shown in Table 3:

It was found that the mechanisms for monitoring the performance of physical targets are consistent with the sources of information used for the monitoring of sectoral goals, i.e., in addition to data from SIGPlan, Management Reports and Work Meetings, the use of other computerized systems by program managers also stood out, as shown in Graph 2.

Despite the widespread use of computerized systems by sectoral bodies to monitor the programs, it was observed that these systems are not integrated into sectoral systems and monitoring and evaluation center, as shown by the evidence presented below.

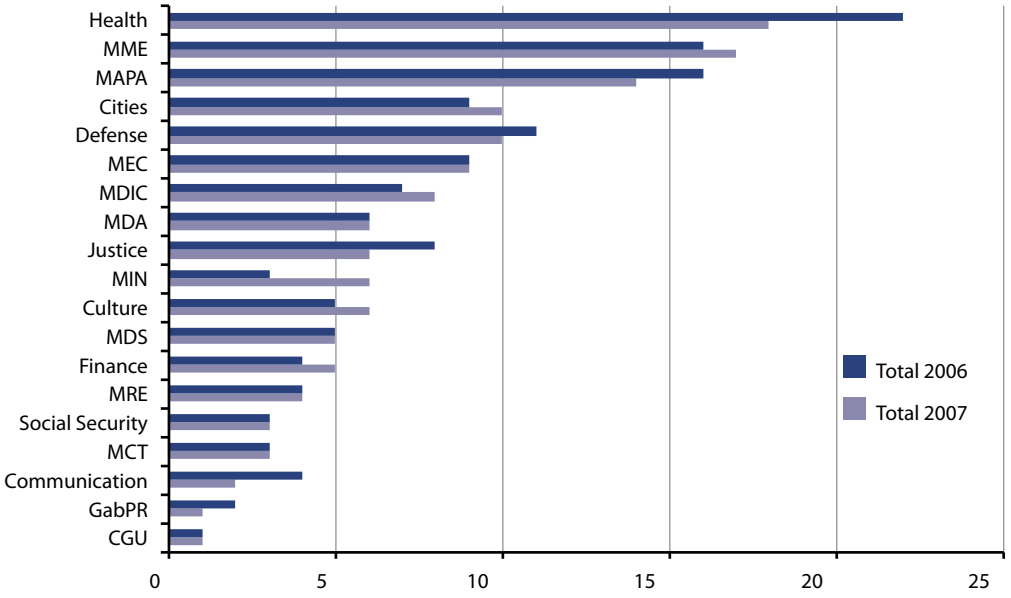
According to the survey, 49% of bodies do not use other result indicators, besides those of the PPA, to monitor their programs and or actions (Graph 3). This evidence is relevant considering the flaws shown in other studies that have been dedicated to evaluate

Table 3:
Quantitative of Programs that have monitoring mechanisms

Physical targets monitoring?	2006	%	2007	%
No	14	4	15	4
Yes	325	96	329	96
Total	339	100	344	100

Source: BRASIL, 2011.

Graph 2:
Quantitative of Computerized Systems used by sectoral bodies for monitoring programs.



Source: BRASIL, 2011.

the consistency and adequacy of the PPA indicators to measure the achievement of program objectives (BRAZIL, 2009).

6. SECTORAL MONITORING SYSTEMS

With regard to monitoring systems, taking into account those formally established, with the structure and tools to ensure its continuity and its use, initiatives that meet these criteria were identified, especially in the interviews conducted in the units responsible for UMAs. MEC, for example, has a system for monitoring the actions of the Ministry called Painel de Controle (Control Panel), and the module for the monitoring and evaluation of the PPA, both available through SIMEC.

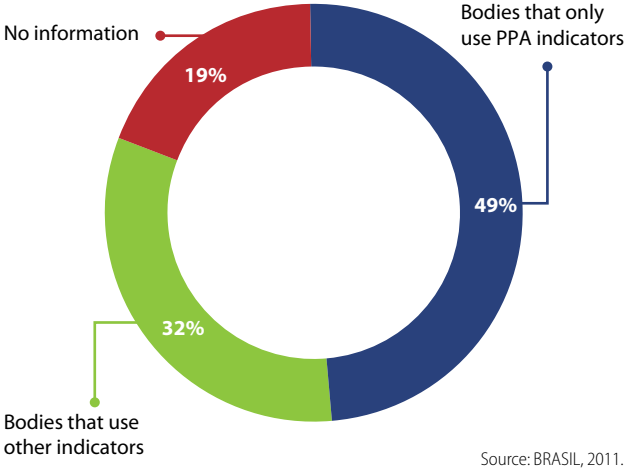
In the Ministry of Health, the *Sala de Situação em Saúde* (Health Conditions Room) was identified, which provides a range of information on programs run by the Ministry, and the Strategic Agenda called *Mais Saúde* (More Health), which is a strategic plan of the Ministry, organized into 4 pillars, 8 axes of intervention and 21 strategic objectives, monitored by 244 indicators.

On the other hand, the Ministry of Social Development and Fight Against Hunger, has a specific department for the development of monitoring and evaluation actions, SAGI, Department of Evaluation and Information Management, which has in its structure a Monitoring Board, responsible for the creation and measurement of indicators for the strategic programs of the Ministry.

The Ministries of Agriculture and Tourism also have strategic plans, respectively, MAPA Strategic Management and National Tourism Plan, with targets and indicators set, in addition to those established for the PPA and their own monitoring systems, SIPLAN and SIGTur, respectively.

In UMAs survey responses, it was found that in addition to these Ministries, other bodies also use indicators correlated to their respective strategic plans, such as AGU (Federal Attorney's Office), CGU (Office of the Comptroller General), MCT (Ministry of Science

Graph 3:
Nature of the indicators used for monitoring programs.



Source: BRASIL, 2011.

and Technology), Justice and Transportation. The Ministry of Foreign Affairs also uses other indicators to monitor activities performed by their units.

As monitoring is an associated activity, which requires prior definition of results to be obtained and, considering that the management model of the PPA programs was not adequate to the needs of sectoral bodies, the existence of other planning initiatives, such as national plans and strategic plans, demonstrate alternatives tailored to sectoral policies management, as well as the identification of the goals to be achieved, the means necessary for its implementation and the mechanisms and instruments for measuring results.

Thus, the monitoring systematic outlined within these planning tools are more efficient, effective and useful for performance measurement.

7. PROGRAMS EVALUATIONS

Based on the data from the questionnaire of programs annual evaluation, specifically regarding the inquiry about the existence of another assessment, besides the PPA evaluation, it was observed that bodies associated to the executive branch, in the period between 2005 and 2009 were informed by their managers of the existence of 509 evaluations, as already shown in Table 2.

Analyzing the answers to this question, it was found that not all records regarded evaluation. In 112 of them (22%) there was no information to indicate the purpose of the evaluation, the evaluated aspects of the program, the evaluating institution or any other information that would allow inferring the nature of the evaluation practice. On the other hand, 161 records (32%) evidenced other evaluation practices, which, by analysis of the content of the comments, were not characterized as program evaluations, in the sense of examining a given aspect of the program or policy, based on criteria and according to a methodology. Thus, only 236 records (46%) were considered for analysis in this research.

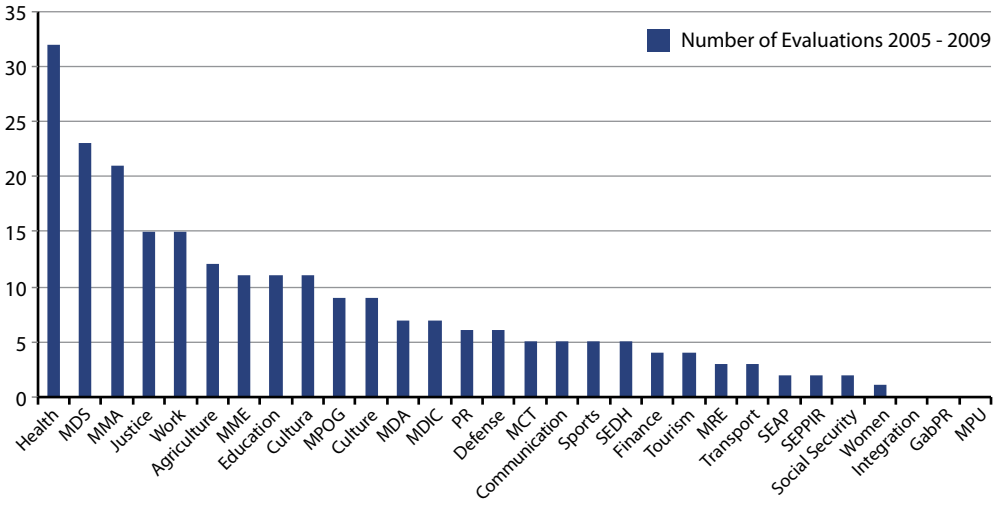
To clarify the details of the questionnaire and try to confirm them, UMAs were asked to relate program evaluations conducted over the past three years, indicating the evaluating institution, evaluated aspects of the program, the dates of beginning and end of the work and the amounts paid, if applicable.

As a result, it was found that UMAs have little knowledge on the monitoring and evaluation initiatives undertaken within the sectoral bodies, and 11 bodies reported that no further evaluations were made in addition to PPA, despite having been registered in the questionnaire. 8 other bodies did not answer this question and mentioned that it was not applicable, and only 3 identified the work done.

From the analysis of information on evaluations concluded, it was found that those that present commonly accepted criteria for defining evaluation may be considered as program evaluations, i.e., object, goal, method and evaluating institution. Figure 5 shows the final result of this analysis, indicating, by body, the number of evaluations carried out during 2005-2009. Thus, although there is no regular production under the bodies of program evaluations direct administration, some ministries have significant volume of evaluation, which may prove to set up an evaluation system.

It is also important to notice that although there is a significant volume of program evaluations, as stated,

Graph 4:
Total number of program evaluations conducted by body from 2005-2009.



Source: BRASIL, 2011.

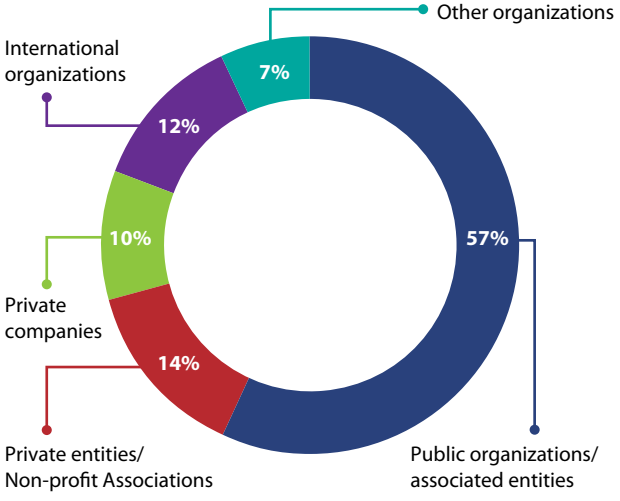
one cannot infer, based on the collected data that the development of evaluation capacity in sectoral bodies existed to the same extent. This finding can be deduced from the nature of the institutions listed as performers of evaluations, which although they are mostly associated to the public sector (57%), they are not part of the court structure of claiming sectoral bodies (Figure 6).

In order to draw a profile of evaluating institutions, based on information contained in the annual self-assessment questionnaires of PPA programs, it appears that the evaluations carried out under the government programs are mainly implemented by higher education institutions and entities associated to them, with IPEA (Brazilian Institute of Applied Economic Research), CGU and TCU (Federal Court of Accounts) standing out, in addition to internal evaluations of such bodies and those conducted by MPOG (Ministry of Planning, Budget and Management) (Graph 5).

8. CONCLUSION

Based on the analysis of data and information collected, it can be said that a significant part of the sectoral bodies, 49%, has not yet implemented their own evaluation systems, being dependant on planning and management instruments provided by the planning and budgeting central body, as well as methodologies and information system (SIGPlan) for the monitoring and evaluation of their programs.

Graph 5:
Profile of assessment institutions.



Source: BRASIL, 2011.

This finding is relevant to the extent that several works about the consistency, effectiveness and efficiency of the government planning model, as well as the management and evaluation model demonstrate numerous weak points that may compromise the results of the programs and goals to be achieved (MATSUDA et al. 2006; BRASIL, 2009).

The PPA Monitoring and Evaluation System was not able to comply with the duties assigned to it, despite its standardization and structuring at all levels.

In relation to other evaluations carried out under sectoral bodies, except for the MDS (Ministry of Social Development), it was found that they occur in a piecemeal fashion, without properly monitoring the nature of services: what was performed, how it was performed, with what purpose and how their results were used. On the other hand, UMAs have little knowledge on these initiatives, unless they are informed of the PPA annual evaluation when program managers fill in the self-evaluation questionnaire.

MDS is the only body in direct federal administration that has a formal monitoring and evaluation policy and a department prepared to carry out these activities, even though the strategy adopted by the body to perform such evaluations is hiring these services.

Other initiatives implemented in some bodies of the Direct Administration are also noteworthy, particularly regarding the implementation of monitoring systems organized in the framework of models for planning and management of the relevant ministries, such as InfraSigs (MEC, MS, MAP, and MTur MCT) and monitoring systems Painel de Controle (Control Panel) (MEC), *Sala de Situação em Saúde* (Health Conditions Room) and *Mais Saúde* (More Health) (MS).

In short, it can be concluded that the systems for monitoring and evaluation of programs under the Direct Administration of the Federal Executive Branch, are not yet fully established, structured and implemented. This finding cannot be generalized, whereas in some bodies, such as MDS, MEC and MS at different levels and formats, their systems were organized in order to monitor and/or evaluate government actions, in addition to the single model established by the MPOG for all public bodies.

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The principle of separation of functions and its application to public expenditure management: An analytical approach in the context of public bidding and contract administration

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ABSTRACT

This paper addresses the principle of separation of functions and its application to public expenditure management. It is evident that when functions are separated in the public bidding and contract administration processes, there is a reduction in the occurrence of conflicts of interest, errors, fraud and corruption. At the same time, one notices improved administrative streamlining, work productivity and public administration. Thus, the separation of functions significantly reduces ethical misconduct.

Key words: Administrative control. Public expenditures. Separation of functions.

1. CONTEXT

In the hustle-bustle of everyday life in the realm of public administration, one can imagine, in a purely intellectual exercise, a situation in which, although somewhat extreme and unusual but nonetheless possible, a public official of a certain government agency is responsible for identifying an item for procurement, for requisitioning the item, researching (and estimating) the market price, preparing the bidding notice, publishing the bidding announcement, conducting the bidding process, responding to questions and grievances (if they occur), publishing

the results, consummating the purchase, validating the expenditure (verification) and receiving the item. In order for this example to be plausible, issuance of a legal opinion regarding the draft bidding notice, approval of the bidding process, payment of the expense and conformation of management records have been intentionally excluded from the public official's list of responsibilities.

In short, based on the above scenario, one can see that identifying an item, selecting the supplier, receiving the item and verification (validation of the expenditure) are all in the hands of just one public employee. In other words, one public employee controls various steps in the process of the public expenditure of funds.

Let us now imagine a different scenario, where distinct sections or divisions of a certain government agency, each with their own public officials, have to, independently, identify and requisition an item, estimate the market price, prepare the bidding notice, conduct the bidding process, consummate the purchase and validate the expenditure. In other words, in contrast with the first scenario, public officials from different sections or divisions have different functions during the public expenditure process. That situation is neither extreme nor strange. It is perfectly rational, logical and feasible.

Responding quickly and spontaneously, which of these two scenarios is more likely to produce conflicts of interest[1], errors, omissions, fraud and corruption? Expanding upon this way of thinking, one might ask how the principle of separating functions can restrict or lessen the occurrence of conflicts of interest, errors, omissions, fraud and corruption in public expenditures?

This paper takes an analytical approach to the principle of administrative control of the separation of functions and its application to public expenditure management through the example of public bidding and contracts administration, with the aim of answering the following questions: What really is the principle of separation of functions? How is it implemented? What is its importance or relevance in the process of managing public expenditures?

2. CONCEPTUAL-THEORETICAL REFERENCE

Beginning with the basic tenets that should determine administrative procedures for public expenditure management, the separation of functions is one of the fundamental principles of internal control. As explained by Aragão (2010, p. 224):

> "The principles of internal control that must be followed by public entities and monitored by internal govenment auditors are: cost-benefit analysis, proper qualification and rotation of employees, delegation of authority and

> identification of responsibilities, the existence of procedural manuals, separation of functions and compliance with guidelines and legal standards."

According to the Manual of Internal Control of Federal Executive Power (2001, p. 67-68), in applying separation of functions:

> "the structure of the unit/entity should separate the functions of authorization/approval of operations, execution, control and accounting, in such a way that no person has powers and responsibilities that contravene this principle."

This means, for example, that all the stages, or at least the most critical stages, in the public expenditure process cannot be concentrated in the hands of a single public official or agent.

Therefore, as part of the above-stated intent, and in seeking improved management and to impede the concentration of power, Resolution CGPAR No. 3/10, which addresses practices of corporate governance in state-owned companies, requires:

> "Art. 1 [...] the adoption, by state-owned companies, of the following guidelines, with the aim of improving corporate governance practices related to the Board of Directors: a) the separation of management functions, by not bestowing the duties of Chairman of the Board of Directors, or similar position, and those of Chief Executive Officer on the same person, even temporarily, in order to prevent a concentration of power."

For purposes of clarifying the separation of functions, the macro function of SIAFI No. 020315 (accounting standard) is cited below, emphasizing that:

> "8.1.1 The separation of functions is a basic principle of internal administrative control that separates, by distinct employees, the functions of authorization, approval, execution, control and accounting."[2]

In accord with the discussion above, Decision No. 5615/2008-TCU-2ª Câmara (Federal Court of Accounts), emphasizes that the principle of the separation of functions

"1.7.1. [...] consists of separating the functions of authorization, approval, execution, control and accounting, and avoiding the accumulation of functions in a single employee."

In agreement with this thinking, Decision No. 3031/2008-TCU-1ª Câmara, highlights the impossibility of

> "1.6 [...] allowing one employee to carry out all the stages of expenditure, namely, the functions of authorization, approval of operations, execution, control and accounting."

According to the Guidelines for Internal Control Standards for the Public Sector (2007, p. 45-46), by the International Organization of Supreme Audit Institutions (INTOSAI), the purpose of the separation of functions is to "reduce the risk of errors, waste and improper procedures and the risk of not discovering such problems." Furthermore, according to INTOSAI (2007, p. 46):

> There should not be just one individual or team in control of the key stages of a transaction or event [or process of public expenditure]. All duties and responsibilities should be systematically divided among a certain number of individuals in order to assure effective review and evaluations. Key functions include authorization and recording of transactions, execution and review or auditing[3] of transactions.

It should be noted that from INTOSAI's perspective, the separation of functions aims, above all, to reduce the risk of errors, reduce the risks of not discovering improper procedures, avoid waste, enable effective reviews and evaluations of conduct, prevent collusion and increase the efficiency of internal controls. INTOSAI (2007, p. 51) further elaborated on its view of the separation of functions, asserting that

> "policies, procedures and organizational structure [should be] established so as to prevent a single individual from controlling all important aspects of computerized operations, which could thereby enable that individual to engage in unauthorized actions and obtain access to assets and records."

Following the above-outlined reasoning, the System Auditing Manual CFC/CRC (2007, p. 109), affirms that the separation of functions is a

> "basic principle of internal control that consists of separating functions, namely, authorization, approval, execution, control and accounting operations."

Summarizing what is stated in the CFC/CRC Manual, the Apostille of Internal Control and Government Auditing of the State of Minas Gerais (2012, p. 5), notes that

> "no person should be responsible for all phases of an operation [which] should be executed by persons and sections independent of one another."

In this same context, the CGU (Federal Comptroller General) Manual of Internal Control (2007, p. 50), instructs preventing that "physical control and accounting for transactions [are done] by the same person."

From a broader perspective, the application of the principle of separation of functions to public expenditure management is clearly stated in Decision No. 2507/2007-TCU-Plenário, in which it highlights that

> "5.2 [...] those persons in charge of requests for acquisitions of goods and services should not be the same persons responsible for approving and contracting expenditures."

3. SEPARATION OF FUNCTIONS IN BIDDING AND CONTRACT ADMINISTRATION

With regard to public bidding, Law No. 8666/93, which implements Article 37, subsection XXI of the Federal Constitution of 1988 (CF/88), separating functions, does not permit the creator of a preliminary or detailed project, a public employee or the head of a contracting agency to participate in bids under the following circumstances:

> "Art. 9 – The following are prohibited from participating, directly or indirectly, in bidding on or performing a job or service and from supplying goods that they themselves require: I – the creator of a preliminary or detailed project, whether an individual or an entity; II – the company, alone or jointly, responsible for preparing the preliminary or detailed project or of which the project creator is an officer, a manager, a shareholder, or owner of more than five percent (5%) of the voting shares or controlling shareholder, the expert responsible or subcontracted; III – an employee or officer of the contracting agency or who is responsible for the bidding process. § 1 – Participation is permitted by the creator of the project or by a company referred to in subsection II of this Article, in bidding on a job or service, or in its execution, as a consultant or expert in the functions of inspection, supervision or management, solely to assist the interested Agency. § 2 – The foregoing provisions of this Article do not prevent the bidding on or contracting of a job or service that includes the preparation of a detailed project by the contracted party or for the price previously set by the Agency. § 3 – For purposes of this Article, indirect participation shall mean the existence of any technical, commercial, economic, financial or employment ties between the project creator, whether an individual or entity, and the bidder or party responsible for the services, supplies and jobs, including the supply of goods and services to the bidder or such party. § 4 – The provisions of the preceding paragraph apply to members of the bidding committee.[4]

Addressing the above issue, Justen Filho (2008, p. 151-152) surmises that the limitations imposed by the above-referenced law derive from the morality and equality that should permeate the process of public contracting, as well as from the competition that should be part of the process:

> "The prohibitions of Article 9 derive from the principles of public morality and equality. The law creates a type of impediment, similar in meaning to the laws of Civil Procedure, to participation by certain people in the bidding process. The existence of a personal relationship between those that choose the bidder and those that bid is considered risky. This relationship can, in theory, produce distortions that are inconsistent with equal treatment under the law. The mere possibility of harm is enough for the law to take precautions. Instead of relying on a future investigation, which will show the agent's improper conduct, the law requires this prohibition in advance. This prohibition consists

> of proactively removing from the situation any person who, by virtue of personal ties with the actual situation, could stand to benefit in a way that is contrary to the ideal of equal treatment under the law. The prohibition includes those who, due to the specific situation in which they find themselves, have the means (theoretically) to interfere with competition and produce undeserved and unacceptable benefits for themselves and third parties.[5]"

Thus, consistent with current standards and doctrines in assessing actual cases, the Federal Court of Accounts, in Decision No. 3360/2007-TCU-2ª Câmara, recommends,

> "16.1.4 in following the principle of separation of functions, [the adoption of] measures so that a job is not supervised by the same company contracted to perform the job."

Following the same thinking, Decision No. 3067/2005-TCU-1ª Câmara points out that one

> "1.7 observes the accounting and administrative principle of Separation of Functions by adopting controls that prevent the possibility of a single employee from acting as both supervisor and performer under the same contract."

Elaborating further on the meaning of Article 9 of Law No. 8666/93, in light of the possibility of fraudulent and anti-competition actions due to the absence of a separation of functions, Altounian (2012, p.195), concludes:

> "Even worse is the possibility of fraudulent changes to the specifications and amounts in the bidder's preliminary project, intended to prejudice proposals by competitors, making them less competitive and, consequently, preventing the Agency from contracting the most beneficial proposal."

The principle of separation of functions should be the overriding factor in the public expenditure ritual.[6] Thus, for example, in bidding that involves obtaining goods or contracting information technology services, there should be distinct individuals with well-defined, separate duties in the planning, supervisory and management functions, as provided in Regulation SLTI/MP No. 04/10, which deals with contracting information technology services for agencies that are members of the Information and Technology Resource Management System ("SISP") of the federal government:

> "Art. 2 – For purposes of this Regulation, the following meanings shall apply [...] III – Contract Planning Team: the team involved in planning, comprised of: a) a Technical member: an employee from the Information Technology area, referred by a proper authority in that area; b) an Administrative member: an employee from the Administrative area, referred by a proper authority in that area; c) Requisitioning member: employee from the Requisitioning area, referred by a proper authority in that area; IV – Contract Administrator: employee charged with managerial, technical and operational duties related to contract administration, referred by a proper authority; V – Contract Technical Supervisor: employee from Information Technology, referred by a proper authority in that area to supervise the technical aspects of the contract; VI – Contract Administrative Supervisor: employee from the Administrative area, referred by a proper authority in that area to supervise the administrative aspects of the contract; VII – Contract Requisitioning Supervisor: employee from the Requisitioning area, referred by a proper authority in that area to supervise the contract from the point of view of implementing an Information Technology solution.[7]"

The existence of so many players, namely, the contract administrator, the requisitioning member, the technical member and the administrative member, and the respective requisitioning supervisors, indicates the importance of separating functions in contract planning and supervision, as well as in contract administration, which especially requires expertise in each separate function.

Therefore, in emphasizing the importance of separation of functions for administrative control, TCU's Guide for Good Practices in Contracting Information Technology Solutions (2012, p. 234), states that "the separation of functions is a form of basic control […] that should permeate the structure

of all the agency's job processes, and not just those in the IT area." Based on such reasoning, in separating the bidding and supervisory functions, Decision No. 100/2013-TCU-Plenário is instructive regarding:

> "9.20.1. [t]he necessity of substituting contract supervisors and their assistants that are in the situation of third parties or the equivalent, and ineffective, for staff members […] that have not participated, directly or indirectly, in the bidding of the contract to be supervised, so as to adhere to the principle of control by separation of functions […]."

In addition to separating the requisitioning, technical and administrative functions, Regulation SLTI/MP No. 04/10 urges separating the functions of evaluating, measuring performance and supervising IT contracts:

> "Art. 6. In cases where the evaluation, measurement of performance and supervision of an Information Technology solution are the subject of a contract, the contracted party providing the Information Technology solution should not also evaluate, measure performance and supervise."

Also, with regard to the subject of the contract, as shown in the above-cited regulation, it should be noted that:

> "Art. 5 The following may not be the subject of a contract: I – more than one Information Technology solution in a single contract; and II the management of information technology processes, including managing the security of information. Technical support for planning and evaluating the quality of Information Technology solutions can be the subject of a contract, provided that it is under the exclusive supervision of officials of the contracting agency or entity."

Similarly separating a contract's performance and supervisory functions, Article 3 of Regulation SLTI/MP No. 02/08, which contains rules and guidelines for contracting ongoing services, stresses that:

> "§ 2 The agency shall not contract the same service provider to execute and supervise the subject of the contract, thereby assuring the requisite separation of functions."

With regard to the execution and supervisory functions in public bidding and contract administration, and in accord with the provisions of Article 3, section 2 referenced above, Article 19 of Regulation SLTI/MP No. 02/08, emphasizes that it is necessary to have:

> "II – a specific provision to prohibit the awarding of two or more services to the same company, when, by their very nature, the services bid on require the separation of functions, such as executing and supervising, and thereby ensure the ability of all bidders to participate in all instances and establish the order of awarding bids among them."

In this context, TCU's Guide for Good Practices in Contracting Information Technology Solutions (2012, p. 157) establishes the separation of functions between the contract supervisor and the committee or employee responsible for receiving the services provided:

> "with respect to the receipt of services, in Article 73, subsection I, paragraphs a and b, of Law No. 8666/1993, there is a separation of functions between the contract supervisor, who receives the services provisionally, and the receiving employee or committee, which receives the completed service."

Moreover, according to TCU's Guide for Good Practices in Contracting Information Technology Solutions (2012, p. 39), it is essential that there be a separation of functions between the contracting process and IT management, and finally

> "to guarantee that whomever identifies the object for bidding does not engage in contract management in order to prevent creating ambiguities in the contract that the agent can use to the agent's advantage in administrating the contract, thereby possibly causing loss to the public coffers and further impeding the discovery of such losses."

By way of example, one can envision the presence of the principle of separation of functions

during bidding by auction, provided for under Order No. 5450/05, since, with the aim of minimizing conflicts of interest[8], reducing subjectivity and preserving impartiality in judging challenges to the auctioneer's decisions, the following line of action is adopted:

> "Art. 8 The appropriate official (the official authorized to approve expenditures), pursuant to duties prescribed in the rules or statutes governing the agency or entity, may [...] rule on appeal, challenges to the auctioneer's decisions[9]; V – award the bid when there is an appeal."

With further reference to bidding by auction, the separation of functions is evident in the acts of preparing for auction, approving the auction terms and conducting the event, as provided in Order No. 5450/05:

> "Art. 9 In preparing for the auction electronically, the following shall be observed: I –auction terms prepared by the requisitioning agency, [...]; II –terms of auction approved by the authorized official (authorized to approve expenditures); [...] VI – designation of the auctioneer [responsible for conducting the event] and his team of assistants.

In addition to the above-cited example of separation of functions, as between the requisitioning agent (responsible for preparing the auction terms) and the official responsible for identifying the object and estimating the price (the financial official), Order No. 3555/00, which approves the regulation for acquiring ordinary goods and services through bidding by auction, states that:

> "Art. 8 The preparatory phase of the auction must comply with the following rules: [...] III – the authorized official, or, by delegation of authority, the financial official, or the administration official responsible for purchases, should: a) identify the object for the event and its estimated value as shown on a spreadsheet that is clear, concise and objective, according to the auction terms prepared by the requisitioning party, together with the purchasing department, following specifications used in the marketplace.

Ultimately, Decision No. 38/2013-TCU-Plenário clarifies the idea stated above, recommending, among other things, the separation of functions of the official with expenditure authority, the auctioneer, the contract supervisor and the storage official, under the following terms:

> "9.2.1 establish criteria for selecting employees that receive and certify goods and services, in a manner that avoids them engaging in other, incompatible activities, such as the official that authorizes expenditures, the auctioneer, members of the bidding committee and the official in charge of storage."

Separating the requisitioning individual (or unit) from members of the bidding committee or support staff, Decision No. 747/2013-TCU-Plenário, emphasizes:

> "9.1.5. promoting the separation of functions in the processes of acquiring goods and services, in following good administrative practices and strengthening internal controls, so as to prevent the individual responsible for the request from participating in conducting the bidding process, while integrating bidding committees or support staff in the auctions."

The principle of separation of functions is intended, among other things,

> "to prevent the operations pertaining to an event (public bidding and contract administration) to be done all by a single person or within a single area. In addition, the separation of functions is beneficial because it prevents fraud (and corruption) and the unauthorized use of assets (public resources), as it promotes interaction among different areas and people." (BRASILIANO, 2010, p. 15).

Decision No.. 5840/2012-TCU-2ª Câmara adds to this notion by stating that

> "9.6.7. in respecting the principle of separation of functions, one should avoid designating the same persons to act in the contracting process as the requisitioning party, the auctioneer or member of the bidding committee, contract supervisor and

official responsible for the verification of services or receipt of goods."

With regard to what directly and specifically affects the stages of public expenditure, linked by commitment, validation of expenditure (verification) and payment (extinguishing the obligation)[10], Decision No. 1099/2008-TCU-1ª Câmara instructs that "1.3.3. one follow the principle of separation of functions, adopting measures such that the entity's purchase, payment and receipt of goods and services are performed by different employees," and in the case of the public sector, by distinct officials.

4. SCHEMATIC DIAGRAM OF THE PRINCIPLE OF THE SEPARATION OF FUNCTIONS

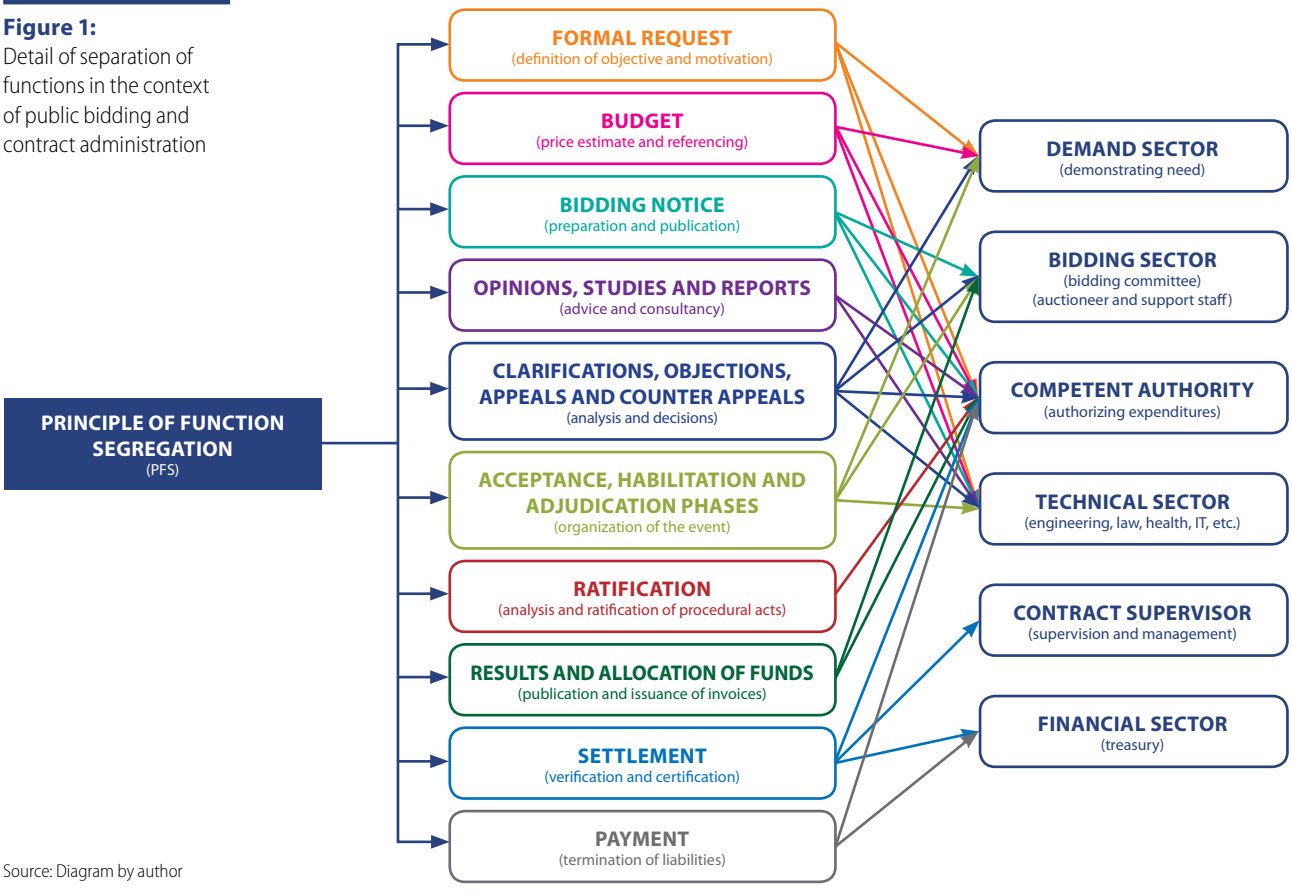
With respect to events and contractual actions, Figure 1 below, which breaks down the separation of functions from the perspective of public bidding and contract administration, brings together the separation of functions under the principle of administrative control, revealing its distinct nuances and different players.

From preparing the formal request, which involves identifying the object and the reason behind the request, to bidding and through to payment (extinguishing the debt), one can see that, with the exception of approval, which is solely up to the official authorized to approve expenditures, no other action should go forward with fewer than two employees or public officials.

Based on Figure 1, one notes that distinct employees participate and act, in different contexts, in concert with the principal of separation of functions. No employee or public agent should be fully responsible for the entire public expenditure process.

One also notes that, in the diagram, a single "player" participates in various acts or "roles" at different times in the expenditure cycle. These actions and procedures bring about numerous benefits that relate to the principle of separation of functions. Among them are increased administrative control of each phase in the process, the division of labor by

Figure 1:
Detail of separation of functions in the context of public bidding and contract administration



Source: Diagram by author

specialization with increased productivity, a reduction in conflicts of interest, errors, fraud and corruption, and greater transparency and efficiency.

5. SUMMARY OUTLINE

Figure 2 below, which is a summary outline of the principle of separation of functions, shows the application of the principle and its effects on the processes involved in public expenditure, in the context of public bidding and contract administration.

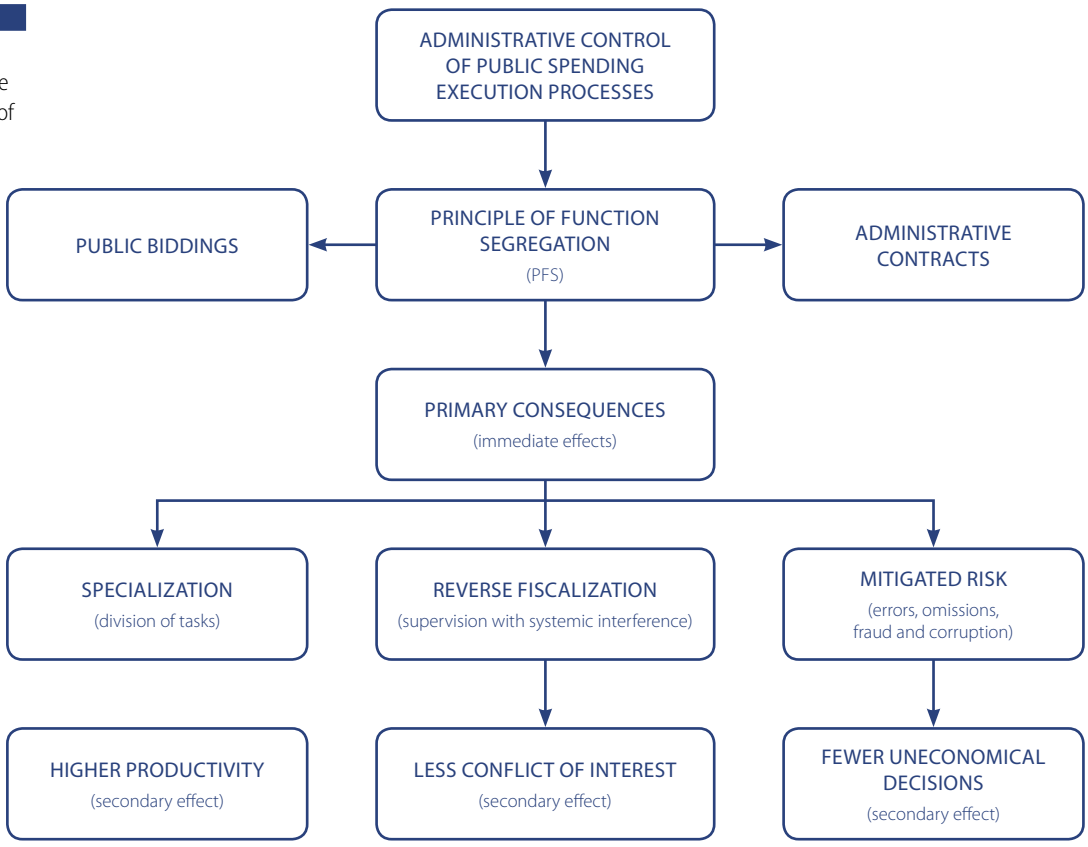
Studying figure 2, which is a summary outline of the effects of the principle of separation of functions, one can understand how that principle has the following immediate and direct effects: a) specialization by dividing up tasks, which leads to increased productivity (as a secondary effect); b) the emergence of reverse supervision with system-wide interventions, which reduces the problem of conflicts of interest; and c) reduced risk of errors, fraud and corruption with constraints on the incidences of uneconomic actions.

In complete agreement with this reasoning, the Guide for the Implementation of the Internal Control System in the Accounting Court of Espírito Santo - TCES (2011, p.18), concurs with such assertions, as follows:

> "the essential tasks and responsibilities [in public expenditures], authorization, management, verification and review of the transactions and facts, should be assigned to different individuals. With the goal of reducing the chance of errors, waste and improper acts, and the likelihood that these kinds of problems will not be discovered, it is essential that all major aspects of a transaction or operation not be concentrated in the hands of a single individual or section."

Thus, the separation of functions allows for each task performed by a public employee to be verified by another employee who is responsible for carrying out the next step in the process. Such a system and procedures lead to a virtual cycle of monitoring, supervision and administrative control, with real improvements in efficiency, transparency and controls over actions taken.

Figure 2:
Summary outline of the effects of the principle of separation of functions



Source: Diagram by author

6. CONCLUSION

Along with other results, when one separates the functions involved in the expenditure of public funds, it allows the action subsequent to the task performed to be verified by a different public employee than the one that performed the task. Such conduct creates a positive result in the realm of administrative control, by generating continuous vigilance and a permanent barrier to possible unethical conduct.

Thus, in the ambit of public bidding and contract administration, Decision No. 415/2013-TCU-Plenário, explains the necessity of

> "9.1.7. regulating the separation of functions in those areas that perform duties that pertain to bidding and contracts, so as to minimize the possibility of misappropriations and fraud."

Aside from deterring biased behavior and conflicts of interest, the separation of functions, through the division of labor, results in specialization with appreciable increases in efficiency and productivity in the performance of procedures related to the expenditure of public funds.

Another positive outcome from the separation of functions, apart from the relief from excess work, at times exhausting, that befalls the official who, alone or with limited resources, carries out all actions that precede the public expenditure process, is the reduction in inefficiency from the cumulative effect of executing tasks, and the restraint on risks of errors, omissions, fraud and corruption.

In separating functions and not allowing a single employee to be responsible for all of the most critical (sensitive) stages of public expenditure, it creates, metaphorically, a healthy environment of deterrent and apparent "policing," in which tasks performed by a public official are followed up and monitored by another, thereby inhibiting unlawful and/or uneconomic activity.

Thus, except for those criminal cases where a gang clandestinely infiltrates the entity, acting together with the top administrative official, the application of the principal of separation of functions produces positive results, both in the public bidding process and in contract administration.

Therefore, the separation of functions stands out as a principle of administrative control that brings greater efficiency, rationality, impartiality, transparency and effectiveness to the processes involved in public expenditure. Without the separation of functions, there surely will be weak management, undue interferences, lax controls, favoritism and every type of disfunction imaginable.

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NOTES

1 The conflict of interest occurs when psychological or environmental forces, or specific circumstances, influence, condition and channel attitudes and decisions. According to Freire and Teixeira (2009, p. 7), a conflict of interest could be characterized as […] a [situation] whereby someone has a personal or private interest in a particular matter, and influences, or tries to influence, the actions of another, in such a way that the latter acts in a biased way, and the former's objective is achieved. Personal or private interest refers to any potential advantage for the person, for members of their family, relatives or circle of friends. According to D'Agosto (2011, s/d), "When a professional, by performing his or her activities, has a personal interest in the result of a negotiation that is different to the other party's, there is a conflict of interest. Depending on how their professional activity is performed and remunerated, the conflicts can be minimized or exacerbated."; According to Law No. 12813/13, which deals with conflict of interest in exercising professional functions in the Federal Executive Branch, and subsequent impediments to exercising professional functions.", *in verbis*: "art. 3 For the purposes of this Law, conflict of interest is defined thus: a situation generated by the confrontation between public and private interests, which can compromise the collective interest, or influence, in an inappropriate manner, the exercising of the public office". With the intent of avoiding a conflict of interest in activities related to planning and the federal budget, the federal financial administration, accounting and internal monitoring of the Federal Executive Branch, Law No. 10180/01 clarifies *in verbis*: "Art 25. Subject to the provisions of Art. 117 of Law No. 8112, from December 11th, 1990, it is forbidden for the leaders of the organs and units in the Systems referred to in Art. 1 to exercise: I – leadership of political parties; II – liberal profession; III – other activities that are incompatible with the interests of the Federal Public Administration, in the manner outlined in the regulation".

2 For example, the separation of duties can also be clearly perceived in the Normative Instrument No. 06/07, which governs the procedures pertaining to the accounting compliance records and management records, *in verbis*: "art. 8 – the record of the Management Compliance Records is the responsibility of the public servant formally designated by the Holder of the Execution Unit Manager, which features in the Role of Responsibilities, together with the respective substitute, who cannot have the function of emitting documents. Single paragraph. Exceptions to those compliance records which are the principle idea of this article are permitted when the Execution Unit Manager finds themselves justifiably impeded from designating different public servants to perform these functions, and seeing as, in this case, the compliance will be registered by the same person who is authorized to organize expenditure." A particularly interesting case of separation of functions that "exceeds" the scope of this text, but is still worth mentioning, is that of the Injection of Funds. According to Article 45 of Decree No. 93872/86, which deals with the unification of the resources of the National Treasure, and which updates and consolidates the relevant legislation, "§ 3. an injection of funds shall not be granted: a) to the person responsible for two subsidies; b) to the public servant whose job it is to store or use the material to be acquired, unless there is no other public servant to delegate to; c) to the person responsible for the injection of funds, who, when their term has expired, has not reported on his application of said funds." Symmetrically, Judgment No. 3412/2006-TCU-1st Chamber relates that there must be no "1.1.2. […] granting of injection of funds to the same

person as he/she who is responsible for the financial sector". In this same line of jurisprudence, Judgment No. 2373/2009-TCU-2nd Chamber stresses that "1.5.1.1. avoids that the person responsible for granting the Injection of Funds also be the beneficiary".

3 Despite not being part of this analytical approach, the activities of the internal audit, given their importance for the monitoring process of public funds, deserve attention and consideration when it comes to the separation of functions. As such, when analyzing the principle of the separation of functions, from the perspective of the job of the internal audit, Nascimento (1997, p.18) claims that "the internal audit, as an eminently evaluative organ, should not participate in any operational activity that is the object of its evaluation because an impartial attitude cannot be expected from somebody evaluating their own behavior". From this point of view, Judgment No. 3096/2006-TCU-1st Chamber offers the following jurisprudence, *in verbis*: "1.3.4 abstain from granting Internal Monitoring activities which are not specific to the sector, in the interests of guaranteeing the separation of functions". In a similar vein, Judgment No. 578/2010-TCU-Plenary Assembly recommends that the following be adopted "9.6. [...] measures with a view to avoiding that internal auditors participate in activities that compromise the principle of the separation of functions between the former and the managers". Elucidating the aforementioned ideas in a complementary manner, that is, the use of the principle of the separation of funds as an effective mechanism for inhibiting conflicts of interest in, amongst others, the operation of internal audits, the Manual for the Audit of the Supreme Electoral Tribunal, TSE, (2008, p.35-36) highlights, *ipsis litteris*: "in the scope of the audit, the basic principle of the separation of functions must be observed, which consists of separating potentially conflicting attributions, such as authorization, approval, execution, monitoring and accounting of the operations. In light of the separation of functions, the auditor cannot express an opinion in the audit report on administrative tasks they themselves have performed. The auditors cannot assume extra-auditory operational responsibilities, so there is no weakening of objectivity, to the extent that what would be audited would be the activity for which those same professionals had authority and responsibility". It can thus be perceived that the auditing activities that refer to public spending, should not interfere with the execution or management activities of such expenditure so that the principle of administrative monitoring of the separation of funds is not infringed upon, which would create a conflict of interest.

4 Law No. 12462/11, which institutes the Public Hiring Law (RDC), also addresses the issue of the separation of functions with the with the intent of inhibiting, amongst other things, the conflict of interest, as specified in Articles 36 e 37.

5 According to Mendes (2011, p.152), the restriction mentioned "is presented as an assumption of smoothness of the event". As such, the same author, Mendes (2011, p.151), states the following: "the person who defines the solution or describes the object has the ability to impose, in a purposeful way, certain restrictions or even establish a direction capable of benefitting him".

6 According to Melo (2004, p.121), the observance of the principle of the separation of funds establishes, in sum, the following: "the person who buys should not receive the merchandise, and the person who pays should not maintain any link to or dependence on the person who buys, or the person who stores the purchased product".

7 For information and clarification, as per the provision of the Normative Instruction/SLTI/MP No. 04/10, *ipsis litteris*: "art. 24. The phase of Selection of the Supplier will conclude with the signature of the contract and with the designation of: I – the Contract Manager; II – the Fiscal Technician of the Contract; III – the Fiscal Applicant of the Contract; and IV – the Fiscal Administrator of the Contract. § 1. The appointments described in this article will be conducted by the competent authority of the Administrative Area, in accordance with numbers IV, V, VI and VII of Art. 2; § 2. The Fiscal Technician, Applicant and Administrator of the Contract will be, preferably, members of the Hiring Planning Team; § 3. The Hiring Planning Team will be automatically void upon signature of the contract".

8 In a broader context, extending beyond the sphere of execution of public expenditure, Law No. 9784/99, which governs the administrative process in the sphere of federal public administration, seeking to restrict the conflict of interest in the following way, *ipsis litteris*: "art. 18. It is prohibited for public servants or authorities to participate in an administrative process in the following instances: I – they have direct or indirect interest in the subject matter; II – they have participated or have come to participate as an expert, witness or representative, or if such situations occur involving their spouse, partner or relative to the third degree; III – if they are legally or administratively involved in a dispute with the person or their respective spouse or partner.

9 In accordance with provisions contained in Articles 58 to 70 of Law No. 4320/64, the phases of public spending are the commitment, the settlement (certified) and the payment (termination of the obligation).

10 In accordance with provisions contained in Articles 58 to 70 of Law No. 4320/64, the phases of public spending are the commitment, the settlement (certified) and the payment (termination of the obligation).

Notes about the integration of the RDC (Differentiated System of Contracts) with the constitutional macro system and to the general system of the public bidding process by means of the principles

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ABSTRACT

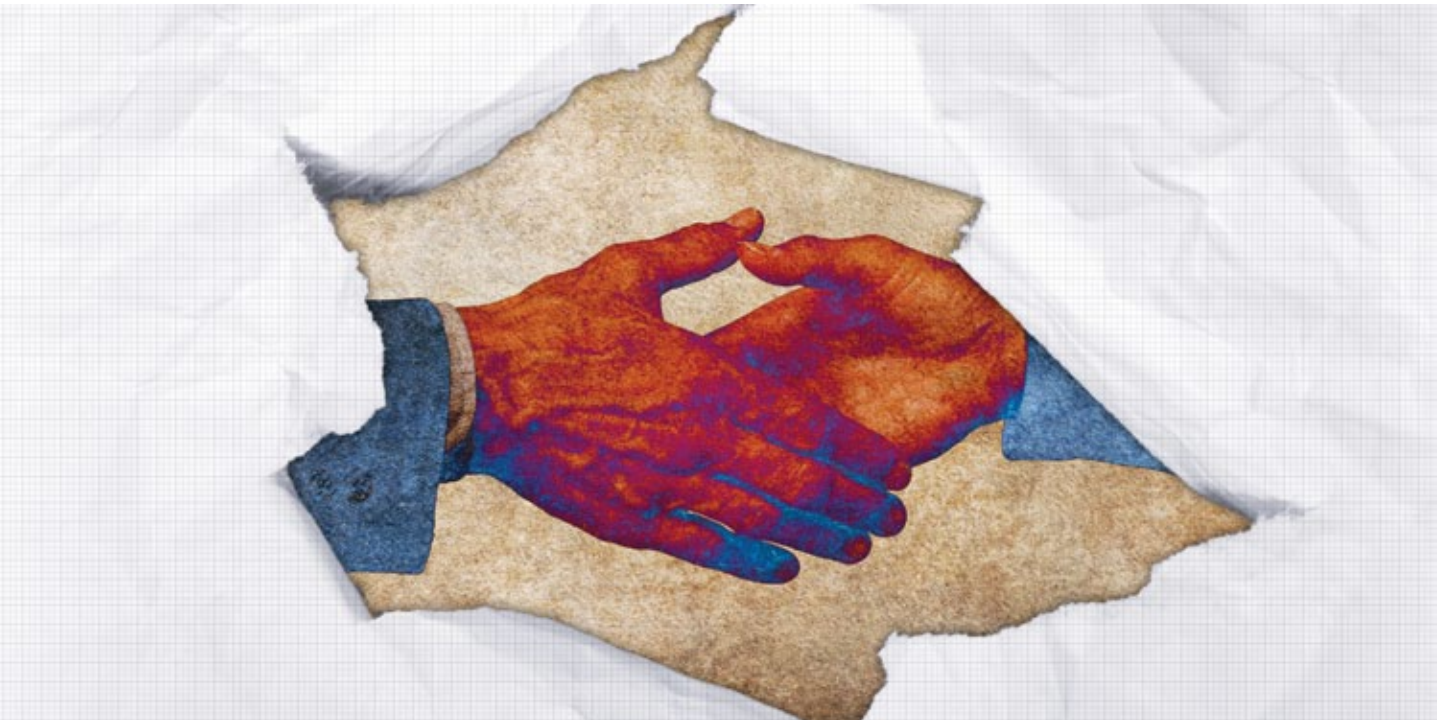
Law No. 12462/11, as a subsystem for administrative contracts for the acquisition of certain objects, enunciates the principles that guide its implementation. All Brazilian Public Administration is subject to this law. When analyzing these principles in order to clarify them, this paper proposes to integrate the principles with the legal administrative constitutional macro system of public contracts and public bid processes, as well as with the system of the federal legislation that deals with the issue (Law No. 8666 of 1993).

Key words: Differentiated system. Principles. Public Contracts.

1. INTRODUCTION

Article 3 of Law No. 12462/11 states:

> Art. 3 - The bids and contracts carried out in accordance with the RDC (Differentiated System of Contracts) shall follow the principles of legality, impersonality, morality, equality, publicity, efficiency, administrative probity, economy, and sustainable national development. They shall also be binding to the bid public notice and follow the principle of objective judgment.



The heading of article of the Federal Constitution states that the direct and the indirect Public Administration of every Branch of the Federal Government, of the States, of the Federal District and of the Cities shall follow the principles of legality, impersonality, morality, publicity and efficiency. Thus, we observe that the 3rd article transcribed above reproduces the principles listed in the constitutional text and adds the principles of equality, administrative probity, economy, sustainable national development, the binding nature of the bid public notice and the principle objective judgment, which, in turn, are also listed in article 3 of Law No. 8666/93.

Rafael Carvalho Rezende Oliveira teaches that "The legal principles combine the core values of the legal order. Due to the fact that they are fundamental and linguistically open, the principles affect all of the legal system, thus providing it with harmony and coherence" (*Princípios do Direito Administrativo*. Rio de Janeiro, Método, 2nd ed., p. 45, 2013).

The RDC (Differentiated System of Contracts) Law, when it refers, in its 3rd article, to the general principles that apply to all the Brazilian Public Administration and when it adds sectoral or special principles to them, proposes to integrate the RDC system (Differentiated System of Contracts) with the legal administrative constitutional macro system of public contracts and public bids - despite its temporal and special limited scope, as it was conceived to govern bids and contracts aimed at acquiring objects related to specific or transitional purposes. The RDC Law also proposes to integrate the differentiated system with the federal legislation system that deals with this issue, which is mandatory nationally, according to the exclusive mandate of the Federal Government established in article 22, item XXVII of the Constitution. Whether the intent is self-sufficient or whether the harmony and coherence between the RDC (Differentiated System of Contracts) subsystem, the system of Law No. 8666/93 (the general terms law) and the constitutional macro system will depend on interpretation, is what will be discussed in these brief notes.

2. INTEGRATIVE PRINCIPLES OF THE DIFFERENTIATED SYSTEM OF PUBLIC CONTRACTS

This topic refers to the principles that are likely to promote the integration of the RDC (Differentiated System of Contracts) with the constitutional macro system and with the system of Law No. 8666/93. This is why the principles expressed in the Constitution and those contained in the General Law of the Bids and Contracts are republished.

2.1 LEGALITY

The agents participating in bids or in any other processes that may result in a direct contract cannot grant or remove any rights, nor create any obligations or impose any prohibitions that are incompatible with the law. In contemporary administrative law we are moving from strict legality towards juridicity, which is understood as something that binds the Administration not only to the formal law, "but to an entire block of legality that incorporates the greater values, principles and legal objectives of society. In this scenario, several Constitutions (for example, the German and the Spanish Constitutions) have clearly begun submitting Public Administration to the legislation and to Law This can also be implicitly inferred from our Constitution and expressly inferred from the Law of the Federal Administrative Process (article 2, sole paragraph, item I). This concept is called the principle of juridicity or principle of legality in a broad sense" (Aragão, Alexandre Santos de. *A concepção pós-positivista do princípio da legalidade*. RDA, Rio de Janeiro: Renovar, No. 236, p. 63, apr.-jun. 2004).

The broad normative framework of juridicity, in which the principles are also mandatory legal norms and whose lack of enforcement subjects the violator to sanctions, aims to prepare the public agents to realize what they must or what they can do (discretion), in view of the effects and consequences imputable to their actions under the law that include both principles and valid rules. This framework provides management that is technical and that has high level of predictability, subject to evaluation by internal and external control systems, as defined in article 75 of the Federal Constitution.

2.2 IMPARTIALITY

This principle obligates all agents to consider public interest objectively. Concerning the public bids, it means that all bidders will receive equal treatment, disregarding the irrelevant differences.

Rafael Carvalho Rezende Oliveira highlights the two sides of the principle isonomy and the ban on personal promotion. The first meaning refers to "the relationship between the Administration and the ones administered… and it is the implementation itself of the principle of equality in the Administrative Law. This is why we say that the impartiality principle merges with the idea of public purpose… the State shall attempt to make material equality real, instead of being content with mere formal equality… equality shall be interpreted and understood according to the concept of proportionality: equality requires isonomic treatment to all the people that find themselves in the same legal situation, and differential treatment to all the people that find themselves in a evident situation of inequality. Equality therefore means equal treatment of equal people and unequal but proportional treatment of unequal people. The criteria for discrimination among people ("obscure criteria") will only be legitimate if they are proportional" (*op. cit*, p. 98). In the second meaning, the author considers that the "public achievements are not personal results of their respective agents, but, on the contrary, a result of the administrative entities themselves… The action of the agent shall be guided by the realization of the public interest and it shall be imputed to the State" (p. 99).

Application of the RDC (Differentiated System of Contracts) when acquiring by contract relevant objects for major international sporting events that have a considerable media impact, or when implementing health, education and transport programs that are likely to cause intense social mobilization, once can imagine how difficult it can be to control the agent, especially a politician holding an administrative position, so that he/she stays within the limits of the impartiality, considering its second meaning.

2.3 MORALITY

Bids and direct contracts shall be conducted according to the respected ethical standards. This imposing to both the Administration and the bidders to "act according to the ethical standards of probity, decorum and good faith", as provided for in article 2, sole paragraph, item IV, of Law No. 9784/99 (federal administrative process).

Morality and legality do not necessarily exclude themselves, as if every act in accordance with legality should also be submitted to the concept of morality. Odete Medauar illustrates that the purchase of luxury vehicles to be used by administrative authorities in an environment of economic and social crisis would be immoral, even if all the due legal process had been observed (*Direito administrativo moderno*. São Paulo: RT, 12th ed., p. 126, 2008). And there are two evident reasons for this, as follows: this purchase does not benefit the public interest and represents an outrage to the government priorities considering the crisis and its consequences to the population.

The respect to the principle of morality would authorize, for instance, questioning the costs of public works that are increased considerably in order to meet the requirements of the international organizations that promote the sporting events, and the repercussions about the use of the built facilities after the events, as they should constitute a relevant legacy to the population.

2.4 EQUALITY

In the context of public bids and contracts, the principle of equality consists in two obligations imposed to the public agent: the first one is the obligation to not accept, foresee, include or tolerate clauses and the conditions that are likely to frustrate, to restrict or to bias the competitive nature of the bidding process (Law No. 8666/93, article 3, Paragraph 1, item I), as well as excessive, irrelevant or unnecessary specifications (article 5 of Law No. 12462/11 states that "The object of the bid shall be clearly and precisely defined in the public bid notice and excessive, irrelevant or unnecessary specifications are hereby prohibited"); the second one is the obligation to treat equally all bid participants. In cases of direct contracts, there could also occur an eventual illegal bias if the choice of the contractors, despite its discretionary content, would contradict the requirements expressed in article 26, sole paragraph, of the Law No. 8666/93, which are: price justification, reason for choosing the contractor and, if applicable, characterization of an emergency situation. In any case, isonomic treatment is the conduct imposed directly and explicitly to the Administration by article 37, item XXI, of the Federal Constitution.

2.5 PUBLICITY

This principle is the right any interested party has to information regarding the acts carried out in bids (as of the publication of the bid invitation) and direct contracts, as per article 5, item XXXIII, of the Federal Constitution/88 ("everyone is entitled to receive from public agencies information that is of private, collective or general interest and such information shall be provided within the legal deadlines, subject to liability, except in cases where secrecy of the information is essential to the security of the State and society ") and item LX ("the law may only restrict the publicity of the procedural acts when the protection of privacy or social interest requires this").

In the bids and in direct contracts, publicity plays two roles: it increases access of the interested parties to the competition, which raises the level of competitiveness considerably, and it ensures control of the juridicity of the acts performed. Publicity is not a requirement to validate the administrative act, but it constitutes an efficacy measure. It should be noted that contract rights and obligations will only be mandatory upon publication of the contract summary (Law No. 8666/93, article 61, sole paragraph). However, irregular acts are not validated upon publication and the regular acts depend on it in order to be enforced (when the act or the statute requires it).

According to the insightful synthesis of Rafael Carvalho Rezende Oliveira, the "visibility (transparency) of the administrative acts is closely related to the democratic principle (article 1 of the Brazilian Federative Republic Constitution): the people, sole and true holder of power, shall be aware of the acts of their representatives. The greater public transparency is, the greater the social control of the acts by the Public Administration and by private entities that exercise delegated or public relevance activities will be. Obscure and secretive administrative acts are typical of authoritarian states. In a Democratic State, publicity of the state acts is the rule and their secrecy, the exception" (*op. cit*, p. 102).

It is not noticed that purchases, works or services that are the object bids or contracts under the RDC (Differentiated System of Contracts) could eventually have any margin of secrecy that could, justifiably, exempt them from publicity.

2.6 EFFICIENCY

The principle that was included in the heading of article 37 of the Constitution/88, by means of the Constitutional Amendment No. 19/98, requires that the Public Administration follow some parameters that were previously outlined and that assure an appropriate cost-benefit relationship, as well as a great probability of achieving the planned public interest results. In the RDC (Differentiated System of Contracts), efficiency is the object of the contract that is defined in a specific rule in order to encourage the economic performance by the contractor, matching with those procedures and objectives:

> Article 23. When judging by the criterion of greater economic return, which is used

> exclusively for efficiency contracts, the proposals will be considered so as to select the one that will provide the greatest savings for the public administration as a result of contract execution.
>
> Paragraph 1. The object of the efficiency contract is the provision of services, which may include the execution of works and the supply of goods, aiming to provide savings to the contracting party in the form of reduced current expenses, while the contractor will be paid based on a percentage of the savings generated.

The notion of result is introduced in contemporary public management by means of the efficiency principle that Juarez Freitas translates as "a fundamental right to good administration", observing that "efficient and effective public administration, in addition to being economic and theleologically responsible, reduces intertemporal conflicts that only increase transaction costs" (*Discricionariedade administrativa e direito fundamental à boa administração*. São Paulo: Malheiros, p. 21, 2007). The state administrative reform that was introduced by Constitutional Amendment No. 19/98 and that emphasized the premise that "While the bureaucratic Public Administration cares about the processes, the managerial Public Administration is geared to achieving results (efficiency), being characterized by the decentralization of activities, specialization of functions and performance evaluation" (Pereira, Luiz Carlos Bresser. *Gestão do setor público: estratégia e estrutura para um novo Estado. Reforma do Estado e Administração Pública gerencial*. Rio de Janeiro, FGV, 7th Ed., p. 29, 2008).

2.7 ADMINISTRATIVE PROBITY

This principle requires loyalty and good faith of the public agents when dealing with bidders and third parties that are participating in the contract processes, whether they are preceded or not by bids. Law No. 8429/92, in its chapter II, classifies administrative improbity acts as the ones that result in illicit enrichment of the agent, that cause loss to the public treasury or attack the principles of Public Administration (articles 9, 10, and 11). The tendency of precedents has been to consider existence of improbity only when there is proof of guilt of the agent in the cases of losses to the public treasury and of noncompliance with principles, and proof of intent the cases of illicit enrichment. Therefore, it distinguishes improbity from irregularity or illegality resulting from ignorance or arbitrariness.

In this regard, please check out the precedent of the Superior Court of Justice:

> IMPROBITY SUIT. LAW 8429/92. SUBJECTIVE ELEMENT OF CONDUCT. INDISPENSABILITY.
>
> 1. The administrative improbity case, of a constitutional nature, (article 37, paragraph, regulated by Law 8429/92) has a very special nature and is qualified by the singularity of its objet which is to impose penalties to dishonest administrators and to any other people – individuals or legal entities – that join them as accomplices in order to act against the Administration or to benefit from the improbity act. Therefore, it is a case that has a repressive character, similar to criminal cases and different from other cases of a constitutional nature, such as: the Popular Action, whose typical object (Federal Constitution, article 5, item LXXIII, regulated by Law No. 4717/65) has essentially a nature of cancellation and the Public Civil Action (annulment of illegitimate administrative acts) for the protection of public property, whose typical object has a preventive, cancellation or remedial nature. (Federal Constitution, article 129, item III and Law No. 7347/85).
>
> 2. We cannot confuse illegality up with improbity. Improbity is illegality that is typified and qualified by the subjective element of the agent's conduct. This is why the dominant precedent of the Superior Court of Justice considers it imperative that the agent's conduct be intentional in order to characterize improbity, to typify the conducts described in articles 9, and 11 of Law 8429/92 or, at least culpable to typify the conducts described in article 10 (v.g.: Special Appeal 734,984/SP, 1 T., Minister Luiz Fux, Electronic Justice Gazette of 06.16.2008 Regimental Appeal in the Special Appeal 479.812/SP, 2nd Chamber, Minister Humberto Martins, Justice Gazette of 08.14.2007; Special Appeal 842,428/ES, 2nd Chamber, Minister Eliana Calmon, Justice Gazette of 08.03.2006; Special Appeal 626.034/RS, 2nd Chamber Minister João Otávio de Noronha, Justice Gazette of 06.05.2006; Special

Appeal 604.151/RS, Minister Teori Albino Zavascki, Justice Gazette of 06.08.2006).

3. It's reasonable to presume the vice of conduct of the public agent that commits an act that is contrary to what was recommended by the technical agencies, by legal opinions or by the Brazilian Federal Court of Accounts. But it's not reasonable to recognize or to presume this vice precisely in the opposite conduct: to have acted according to those manifestations, or of not having promoted the revision of acts that were performed as recommended in those manifestations, especially if there is no doubt about the integrity of the legal opinions or the good standing of those who issued them. In these cases, if there isn't any conduct motivated by recklessness, malpractice or negligence, there is no guilt and much less improbity. The illegality of the act, if any, will be subject to sanction, a sanctions of a differentnature, outside the scope of the case of improbity.

4. Partially granted Special Appeal of the Public Ministry. (Special Appeal 827,445 – SP).

SPECIAL APPEAL. ADMINISTRATIVE. IMPROBITY CASE. LAW No. 8429/92. ABSENCE OF INTENTION. UNFOUNDED CASE.

1. In order to characterize an act of improbity, as usual, the existence of the subjective element of intention is required, in light of the sanctioning nature of the Administrative Improbity Law.

2. The legitimacy of the legal object and the objective absence of a formal contract that is recognized by the local instance constitute the improbity.

3. So "the objective of the Improbity Law is to punish the dishonest public agent, not the incompetent one. Or, in other words, in order to judge the public agent according to the Improbity Law, it is necessary to find intention, culpability and loss to the public entity, characterized by the action or the omission of the public agent". (Mauro Roberto Gomes de Mattos, in "*O Limite da Improbidade Administrativa*", Edit. América Jurídica, 2nd ed. pp. 7 and 8). "The purpose of the administrative improbity law is to punish dishonest administrators" (Alexandre de Moraes, in "*Constituição do Brasil interpretada e legislação constitucional*", Atlas, 2002, p. 2,611). "In fact, the law reaches the dishonest administrator, not the unprepared, incompetent and clumsy one" (Special Appeal 213,994-0/MG, First Chamber, Rapporteur Minister Garcia Vieira, Official Gazette of Brazil of 09.27.1999)." (Special Appeal 758,639/PB, Rapporteur Minister José Delgado, First Chamber, Justice Gazette 5.15.2006)

4. The scope of Law No. 8429/92 of the Administrative Improbity Action, provided for in article 37, paragraph 4 of the Federal Constitution, was to impose sanctions to the public agents that were involved in improbity actions, when such acts resulted in: a) illicit enrichment (article 9); b) loss to the public treasury (article 10); c) attack against the Public Administration (article 11.), including moral injury to the administration.

5. Special Appeal Granted. (Special Appeal 734984/SP).

2.8 ECONOMY

This principle found in Decree-law No. 200 of 1967 the first signs of its configuration.

Article 14 of the decree-law stated that: "The administrative work will be streamlined by simplifying processes and suppressing controls that are purely formal or whose cost is clearly higher than the risk". It acquired constitutional status when it was included among the elements that shall be object of the external control by public management which is assigned, in the heading of article 70 of the Federal Constitution of 1988, to the Brazilian Congress with the support of the Brazilian Federal Court of Accounts, in face of the duty of accountability imposed to every individual or legal entity, public or private, that uses, collects, keeps or manages monies, properties or securities that are public or for which the Federal Government is responsible or, any individual or legal entity who, on behalf of the Federal Government, assumes obligations of a financial nature (sole paragraph).

Economy is evident both in the strictly administrative sphere – when it promotes streamlining and simplification – as in the financial sphere, as a product of cost reduction in the administrative contracts,

resulting from effective planning, prior extensive and serious research of the market value of the bidding object, and from searching for the proposal that is most advantageous to the Administration, which is not necessarily the one with the lowest price, if the lowest-priced proposal clearly does not meet the requirements justifiably established in the specifications of the material to be purchased and in the basic projects of public works and services, during the internal preparatory stage of the bid and contracts processes (Law No. 8666/93, articles 7 and 14). In this regard, the RDC (Differentiated System of Contracts) introduced a substantial innovation by allowing the bidders themselves to prepare the basic and executive projects, according to the profile generically determined by the Administration in the bid process and it as long as they take full and exclusive responsibility for possible imperfections.

2.9 SUSTAINABLE NATIONAL DEVELOPMENT

This principle is inserted in the article 3 of Law No. 8666/93. It is the instrument for promoting the domestic market, supported by the purchasing power of the public sector, in all powers of the three branches of the federation (around 16% of the GDP, in other words, approximately 300 billion Brazilian reais/year) and its effect on the generation of employment and income. But that is not all. This principle intends to commit the bids and contracts with environmental protection principles and rules, according to the content of the article 225, paragraph 1, item V, of the Federal Constitution/88 ("In order to assure the effectiveness of this right [ecologically balanced environment, common good of the people and essential to a healthy quality of life], it is the responsibility of the Public Power to: V – control production, commercialization and use of techniques, methods and substances that may present risks to life, to the quality of life and to the environment").

There is a huge and challenging task to be accomplished in order to comply with this new general clause in everyday bids and contracts which is to explicit the requirements of sustainability – the social, economic and environmental – in in the public bid invitations and contracts and correlate the specifications of the object with the norms issued by the authorized entities (vg., INMETRO – Brazilian Institute of Metrology, Quality and Technology, ABNT – Brazilian Association of Technical Rules, CONAMA – Brazilian Environmental Board). At the moment, this is the only way to avoid the adoption of specifications and criteria that may go against the principles of isonomy and objective judgment.

2.10 BINDING NATURE OF THE BID INVITATION

This principle forces the Administration to respect the rules stipulated to organize the bidding process. The profile of postmodern public law does not confer absolute force to the principle of the binding nature of the bid invitation. The fact is that the requirements of a merely instrumental or formal is that nature, and which do not harm the essence of the competition, can be interpreted in favor of the public interest purpose to be achieved. What cannot be accepted is the vice that might compromise the result of public interest or that might be harmful to the legal security of the bid, to its competitiveness and isonomy. This is why one should be careful in order to avoid including useless, irrelevant, unnecessary or ambiguous requirements in the bid invitation.

Decree No. 7581/11 that regulates the RDC (Differentiated System of Contracts), specially in its article 7, paragraph 2, confers to the bidding committee, at any stage of the bidding process - and provided the substance of the proposal is not modified - the faculty to adopt sanitation measures to clarify information, to correct improprieties in the qualification documents or to complement the process, keeping in mind the rule provided for in article 43, paragraph 3, of the Law No. 8666/93. Therefore, flexibility regarding the interpretation of provisions that can be met otherwise is allowed, provided there is no diversion of purpose and without affecting the substance of the proposal and competition.

Sanitation of vices in the proposals is also admitted, as long as the principles of objective judgment and equality of the bidders are honored. That's what can be understood, on the other hand, based on the reasons for the disqualification of the proposal that listed in article 24 of the RDC (Differentiated System of Contracts): "The following proposals will be disqualified: I – those that have irremediable vices; […] V – those that show any kind of inconsistency with any requirements of the bid invitation, if they are irremediable". So, the vices that, due to their nature, can be solved by the Administration without hurting the principles of isonomy and objective judgment, will not be considered as disqualifying vices of the proposal.

2.11 OBJECTIVE JUDGMENT

This principle aims to avoid that decisions regarding the bidding process be made based on subjective ideas, in other words, feelings, impressions or personal interests of the members of the judging committee. It is true that judgment is closer to maximum objectivity when it is based solely on price. But, aware that price can hide some deviations – such as miscalculation of the market value of the object for instance, inducing the committee to believe that there is compatibility between the quoted price and the market price -, either will it suffice to consider quality, technique and performance that are usually taken into account in when examining the proposals. When the object of the bid is based on these attributes, the primacy of one or another proposal will depend on evaluations that have a certain level of subjectivity, which shall be minimized as much as possible but will never disappear. In order to fulfill the principle of objective judgment, in these cases, the bidding committee shall take into account the reports or the technical opinions that will help it make a well-founded decision, explaining its reasons in the respective minutes. In any case, the evaluation parameters shall be included in the bid invitation in order to allow, upon its publication, requests for clarifications and objections (Law No. 8666/93, articles 40 and 41, item VIII, and its paragraphs). The RDC (Differentiated System of Contracts) dealt with this subject in two provisions:

> Article 20. When judging the best combination of technique and price, the technical proposals and prices that were submitted by bidders shall be evaluated and weighted, according to objective parameters that are mandatorily inserted in the bid invitation.
>
> Article 21. When judging according to the best technique or artistic content will only consider the technical or artistic proposals that were presented by the bidders, according to the objective criteria that were previously established in the bid invitation. The prize or the remuneration that will be awarded to the winners will be defined in the invitation.

3. OTHER PRINCIPLES THAT ARE APPLICABLE TO THE RDC (DIFFERENTIATED SYSTEM OF CONTRACTS)

Other general or sectoral principles bind the Public Administration performance in the bidding processes and contracts that are governed by the RDC (Differentiated System of Contracts): motivation, reasonability, competitiveness and security of contracts.

3.1 MOTIVATION

It consists in the duty every agent has, while performing his/her functions, of justifying the administrative acts that arise from each stage of the contract process as well as during the execution of the contract, whether or not there was a bidding process (preparation and instruction, elaboration and approval of drafts of bid invitations and other instruments, judgment of documents and proposals, decision about accepting and evaluating administrative appeals, awarding of the object and confirmation of the procedure).

Motive is understood as the set of assumptions de facto or de jure that determine the decision, as well as the correlation between events and pre-existing situations and the choice made. It is not enough to indicate the legal text on which the decision is based. The public agent shall strictly and clearly enunciate the grounds for his/her actions, being aware that article 113 of the Law No. 8666/93 obligates him/her to demonstrate the legality and the regularity of the expenses and its execution, a rule that is applicable to the RDC (Differentiated System of Contracts) by force of its article 46 ("The provisions of article 113 of Law No. 8666 of June 21st 1993 applies to the RDC - Differentiated System of Contracts ").

In the Democratic Rule of Law, society has the right to know the reasons why the decisions of the public agents in general are made, except if the information is related to their own security and to the security of the State (article 5, item XXXIII, of the Federal Constitution).

Besides violating one of the most cherished principles of administrative law and compromising the validity of the performed act, that may be annulled due to vice of motive the absence of motivation regarding administrative acts raises doubts regarding the exemption of the agent and his/her commitment to the public interest. According to the article 11 of

Law No. 8429/92, subverting the principles of public administration or violating the duties of honesty, impartiality, legality and loyalty to institutions constitutes an administrative improbity act.

3.2 REASONABILITY

The fact that the law, in some situations, bestows discretion to the public agent means that the law transferred to the public agent the responsibility of adopting the measures that are appropriate to each circumstance and to the means at hand, in face of the diversity of situations to be faced, in harmony with the priorities and objectives of public interest. This relationship between appropriateness, necessity and proportionality is what should be understood as reasonability in Brazilian Public Law (both constitutional and administrative), which is advancing in this matter. The decision that violates this tends to infringe other values and principles. So, for instance, excessive requirements in the bid invitation are unreasonable and offend the principles of isonomy and competitiveness. Depending on the scope and purpose of the requirement, it will also violate the principles of morality, impartiality and economy.

Granting of the administrative discretion seeks to identify, in each situation, the measure that better caters to the public interest, according to the determined and weighted circumstances. Reasonability is based on the same precepts that support the principles of legality and finality in the Constitution (article 5, items II and LXIX, and heading of article 37, of the Constitution/88). In the infra-constitutional norms, reasonability is mentioned in the article 2 of Administrative Procedure Law (No. 9784/99.) It ultimately urges the public manager to always ponder the means and the ends in the time-space equation of public interest, and it is also a tool for legal of administrative discretion. There are abundant precedents in our courts, for which management of discretion helps to choose the best solution among the ones available. Any other choice goes against juridicity. This is why the reasonability principle values the activities that support managers in the decision-making process, such as the elaboration of studies, reports and opinions that show, rationally and objectively, which would be the best solution. In summary, the public manager is not bestowed discretion to choose any solution, but to choose always the best solution under the given circumstances.

3.3 COMPETITIVENESS OR EXPANSION OF THE DISPUTE BETWEEN THE INTERESTED PARTIES

Competitiveness is strictly related to the principles of legality, equality and impartiality, thus non inclusion of excessive conditions in the bid invitation, that bias or restrict the competitive nature of the process, enables the expansion of the number of participants in the bidding process which, in turn, promotes competition among those interested in having contracts with the Public Administration and, consequently, favors the pursuit of the most advantageous proposal. That's why Law No. 8666/93 does not require a bidding process when competition is not feasible (heading of article 25); whether the infeasibility results from the absence of competitors to compete with the exclusive producer or supplier or whether it is due to the impossibility of establishing objective evaluation criteria, due to the nature of the object.

3.4 SECURITY OF CONTRACTS

The Law establishes the legal order to promote civil stability, to create an atmosphere of security that, according to the point of view of Celso Antonio Bandeira de Mello, coincides with one of the most profound aspirations of the human being: certainty regarding the phenomenology and the inequalities that surround him/her. The legal security principle cannot be consolidated in a specific constitutional provision. It is the essence of the Law itself, especially in a Democratic State that is founded on human dignity, justice and solidarity of relations (Federal Constitution/88, 1st art.). This is why it models the entire constitutional system (*Curso de Direito Administrativo*. São Paulo: Malheiros, 14th ed., p. 106).

Among the things that ensure the stability of the legal order, including in the bidding processes and administrative contracts, we also find estoppel and statute of limitations.

Article 45 of Law No. 12462/11 establishes that the public administration acts, arising from the application of the RDC (Differentiated System of Contracts), are subject to: (a) requests for clarifications and objections regarding the bid invitation, at least two business days before the opening dates of the proposals, in the case of bidding process for acquisition or disposal of assets, or five business days before the proposals' opening dates, in the case of bids for public works or service contracts; (b) hierarchic appeals,

within 5 working days from the date of the notice or drafting of the minutes, in face of: (i) the act that grants or rejects the request for the pre-qualification of the interested parties; (ii) the act of qualification or disqualification of the bidder; (iii) the bid judgment of the bid proposals; (iv) the cancellation or revocation of the bidding process; (v) the rejection of the request for registration in the registry, its alteration or cancellation; (v) the termination of the contract in accordance with the provisions in item I of the article 79 of Law No. 8666/93; (vi) the application of the penalties such as warning, fine, certificate of good standing, temporary suspension from participating in bidding processes and prohibition of signing contracts with the public administration; and (c) the representations, within five business days from the date of the notice, regarding the acts that are not subject to hierarchic appeal.

Once these deadlines expire and there is no manifestation from the interested parties, or after the appeals, objections and representations presented are decided, the law lies on something recognized as stable, with the preclusion of every inquiry and the exclusion of the right to evoke it in the administrative sphere. In other words, the legal relationships based on these acts and decisions become stable and independent of the supervenience of future events, without preventing those who considered themselves harmed or threatened with harm from exercising the subjective right of invoking judicial protection.

4. CONCLUSION

"A rule does not (only) lack interpretation because it is not 'unambiguous', 'evident', because it is 'devoid of clarity' – but, above all, because it should be applied to a (real or fictitious) case", according to the lesson of Friedrich Muller (*Métodos de trabalho do direito constitucional*. Rio de Janeiro: Renovar, 3rd ed., p. 48, 2005).

This means that interpretation is always needed, whether the writing of the norm is not clear, whether it seems to be unambiguous and evident. The wording of the norm, whether it is clear or obscure, will always need to be interpreted according to the reality. The aphorism "*interpretatio cessat in claris*" was established in Rome and it is followed by many people, however, it is not exact. The wording of norms may seem to be unambiguous and evident and, even so, the best solution for the case to which we will be applying it can be misunderstood. And this solution can even differ from the apparent clarity of the norm. An excellent example to illustrate this can be seen in article 22, paragraph 3, of Law No. 8666/93, whose norm is apparently clear when it establishes, in defining the invitation modality, that the Administration must invite a minimum of three bidders, while the Brazilian Federal Court of Accounts, according to its recent precendent[1], interprets that this minimum number does not refer to bidders but to the number of valid or appropriate proposals for selection, on reasonable grounds that the loss of competitiveness should be compensated if the modality were to accept the direction that states that only three be chosen by the administrative unit and that this would be enough to validate the invitation.

In summary, every "case" is contextualized and shall be identified and understood as such. The literal meaning of the created norm has always been and will always be insufficient to foresee all the possibilities of factual relations and interests that it intends to reach. Hence the importance that the valid norms in the legal system be interpreted according to the standards, called principles, that guide and enrich the system, which will perceive the case, giving direction and discipline to it.

The RDC (Differentiated System of Contracts), as a subsystem of administrative contracts of certain objects, did the right thing when it enunciated its guiding principles. However, it is the responsibility of the interpreter of these principles – the competent public agents - to articulate the RDC (Differentiated System of Contracts) principles with the other principles that constitute the constitutional macro system and the infra-constitutional general system of contracts and bidding processes of Brazilian law. This articulation will, in each case, answer for the achievement or not of the results of public interest that will justify the existence of the subsystem. If this subsystem succeeds, it may replace the current general system and become the general system. Thus, the subsystem would no longer be applicable only to certain objects but would govern all contracts and bids within the national legal system. The social and institutionalized controls of the Public Administration will evaluate it, when appropriate, in order to consecrate it or to reject it according to the results obtained.

NOTE

1 Precedent No. 248: If a minimum of three proposals apt for selection is not obtained, in a bid under the Invitation modality, the process has to be repeated, inviting other possible interested parties, except in the cases listed in paragraph 7, article 22, of Law No 8666/1993.

Autopoiesis applied to Courts of Accounts

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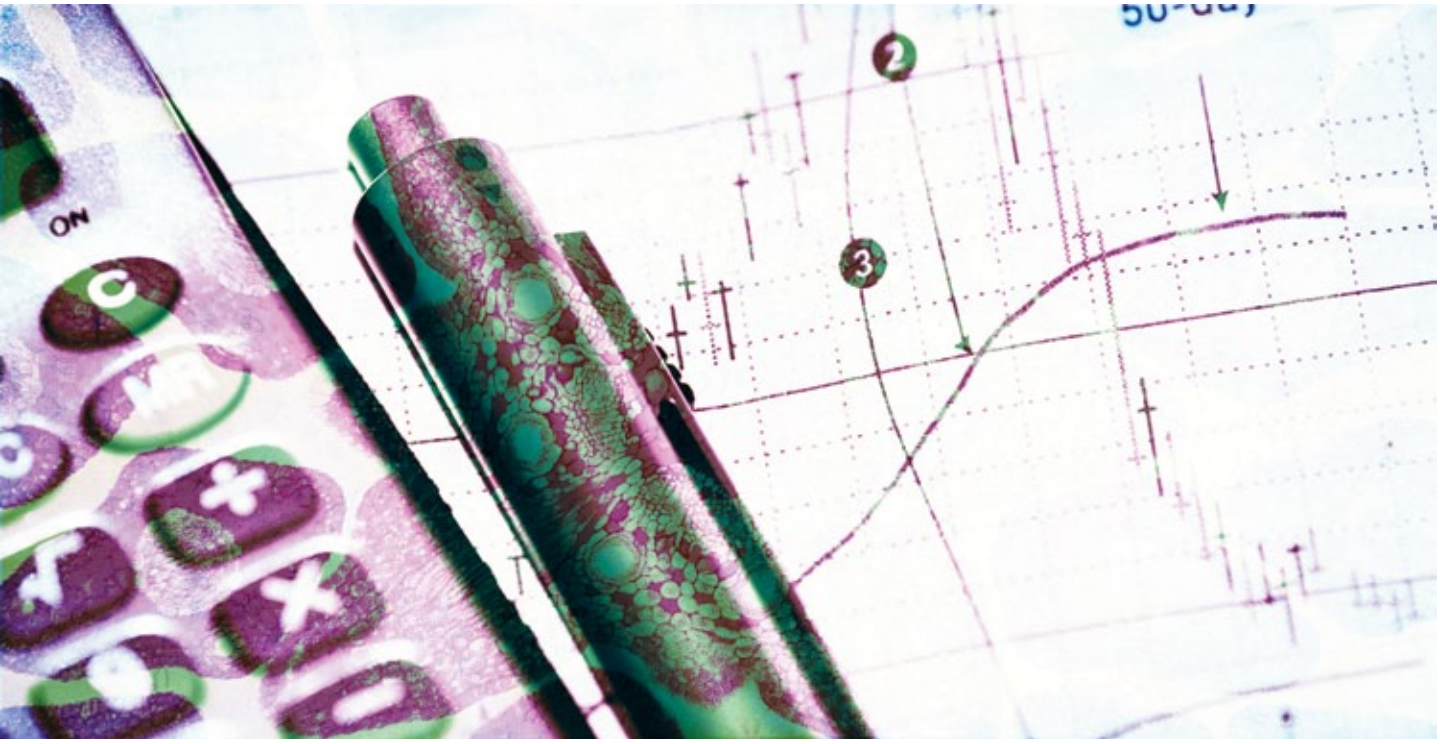
ABSTRACT

The Federal Court of Accounts needs to communicate with the other systems that gravitate around it in order to carry out the external control granted to it by the Constitution. However, in order that there is perfected communication, it is necessary that the sender, when sending a message, uses a code inherent to the system known by the receiver or that the latter may know. Should the receiver not know the code, there will be noise and communication will not be perfected. That is the reason why it is important to acknowledge the System of the Court of Accounts as autopoietic, that is, operationally closed and cognitively open. The operational enclosure will allow the system to have a language of its own and to be autonomous and independent in relation to the other systems. The open cognition causes the system to communicate with the other systems, without any violation of the code used by it. Since/ Because it is operationally closed and cognitively open, the System of the Court of Accounts is complete, independent and prevails over the other systems with which it communicates in its duty of external control.

Keywords: Federal Court of Accounts. Autopoietic system. Autopoiesis. Constitution.



Elements of Communication. Sender. Receiver. Code. Message. Language. Open cognition. Operational closing. Operational enclosure. External control.

1. INTRODUCTION

A matter extremely relevant in the democratic state of law concerns the control instruments that fall upon managing res publica. Several government and private agencies exercise Government control. Among them, there is the Federal Court of Accounts that, although not binding the other Brazilian courts of accounts, serves as inspiration as a summit agency of the System of the Court of Accounts.

The Federal Court of Accounts (TCU) is in charge of performing external control, as an auxiliary agency of the Brazilian Congress.

However, the Federal Court of Accounts is part of a system, which has its own coding and needs to communicate with the other systems that gravitate around it and send communication regarding a certain fact.

Hence the need to analyze the coding of such system, as well as the communication with the other systems, based on the theoretical milestone of the autopoietic systems mentioned in Social Sciences by Niklas Luhmann.

2. CODING THAT IS PROPER TO THE SYSTEM OF THE COURT OF ACCOUNTS

Each system has its own code, under the penalty of not being an autonomous and independent system.

The System of the Court of Accounts has its own coding., It is worth remembering that, although it is named Federal "Court" of Accounts, it is not part of the Judiciary, which is liable, according to the Brazilian constitution, for ending conflicts regarding claims.

The Single Jurisdiction System adopted by the Brazilian legal system determines that "*a lei não excluirá da apreciação do Poder Judiciário, lesão ou ameaça a direito*" (the law does not exclude from the analysis of the Judiciary a violation of or threat to any right) (article 5, item 35, of the Federal Constitution). Such provision consecrates the said System, as opposed to administrative litigation – with larger scope in the French Administrative Law, which inspired the Brazilian one, but that was combined with the influence of the United States system, privileging the Single Jurisdiction System.

In France administrative litigation exists alongside the common jurisdiction. The former truly applies *res judicata*, in the sense of article 467 of the Brazilian Code of Civil Procedure, since common jurisdiction lacks power to revise, as in Brazil, the

court orders rendered in such litigation. The court orders rendered in the administrative litigation, may be appealed before the State Council[1], which is part of the administrative sphere.

The doctrine of *res judicata* is provided for by the Constitution and is an irrevocable clause of the Brazilian system, under article 5, item 36, of the Federal Constitution[2], since, among others, it aims at eternalizing and establishing a legal relationship, that is, a legal certainty is sought in the orders rendered by the Brazilian courts.

According to Liebman, *res judicata* is

> the immutability of the emerging command of the judgment (...) a more intense and deeper quality, surrounding the act also in its contents and, thus, making the effects of the formal act and the act itself immutable.[3]

The Brazilian Civil Code also defines *res judicata*, under article 467, in these exact terms:

> Material *res judicata* is the effectiveness rendering the judgment immutable and not discussible, no longer subject to ordinary or extraordinary appeal.

As seen, the expression "*res judicata*" is a technical term intended for the effects of a judgment, whose jurisdiction is under the Judiciary. However, not disregarding the technical accuracy of the expression, there is *res judicata* also included in the administrative sphere and, therefore, in the Court of Accounts System.

The administrative decisions rendered by the Court become non-appealable, that is, they cannot be reviewed by TCU or any other administrative agency. The definition of administrative *res judicata* may be the one previously mentioned, except that it has effects only in the administrative sphere and not in the Judiciary and refers to the order against which administrative appeals, can no longer be filed that is, to TCU decisions.

In this regard, Diógenes Gasparini[4] teaches:

> When it is not possible, in the administrative sphere, to reverse the court order offered by the Government, we have an administrative *res judicata*.

In the same regard, Hely Lopes Meirelles[5] states as follows:

> The so-called administrative *res judicata*, which is in fact only a preclusion of internal effects, does not have the scope of the judicial *res judicata*, because the jurisdictional act of the Government is just a mere decisive administrative act, without the final force of the jurisdictional act of the Judiciary. The administrative jurisdictional act lacks what the United States experts in public law call "the final enforcing power", meaning the final power of the Courts. Such power, in the constitutional systems that do not adopt the administrative litigation, is exclusive of the judicial orders.

Also, according to Amílcar de Araújo Falcão[6]

> Even those that support the theory of the so-called administrative *res judicata* acknowledge that actually it is not a *res judicata*, either due to its nature or intensity of effects, but an effect similar to that of preclusion, and that, when it occurs, it could be called irrevocability.

The grounds of the administrative *res judicata* under TCU lie in the systematic and teleological interpretation of the Federal Constitution, Act 8,443/1992[7] and its By-laws[8].

Concerning *res judicata*, it means the impossibility to appeal the challenged decision. TCU has jurisdiction to decide on the accounts of the people in charge of moneys, assets and values of the Federal Government, as well as inspecting the accounts, finances, budget, operation and property of the units of the Federal Government Branches or of state, district, local and private entities that manage assets and values of the Federal Government. However, the decisions rendered by TCU may be exhaustively appealed, namely: appeal for reconsideration, motion for clarification, mandatory appeal and interlocutory appeal[9].

The Court of Accounts System has its own coding, with specific proceeding, according to its Organic Law and By-laws. Notwithstanding the existence of doctrines similar to the ones provided for in general jurisdiction, there is no confusion among them, since the procedural aspect, proceedings, doctrines, and terms, for example, are independent on the ones used by the Judiciary to meet the relief relied on it by the Brazilian legal system.

Although the Court of Accounts System has its own coding, in accordance with the autopoietic systems, it has to be analyzed according to a systemic view.

3. SYSTEMIC VIEW

When studying the theory of the autopoietic systems applied to the Court of Accounts System, the purpose is to identify the characteristics of such theory applicable to the interrelation of such system with the others gravitating around it.

The word autopoiesis may be understood by the combination of two radicals: auto (by oneself) + poiesis (organization). Thus, an autopoietic system is a self-organizing and self-reproductive system that communicates with several other systems.

Luhmann was not the first one to discuss the autopoietic systems, although he has been the greatest exponent of this Theory in Social Systems. Initially, such systems arose from biological sciences, by means of scientists Humberto **Maturana** and Francisco **Varela**, in order to verify the applicability of a system to the living organisms or, in other words, to verify the applicability of the social phenomenology to the biological one.

According to Corsi[10]:

> *Un sistema vivo, según Maturana, se caracteriza por la capacidad de producir y reproducir por sí mismo los elementos que lo constituyen, y así define su propria unidad: cada célula es el producto de um retículo de operaciones internas al sistema del cual ella misma es un elemento; y no de una acción externa.*

Therefore, according to Corsi, there is a synthesis of the autopoietic systems brought by Luhmann to social sciences: a system that is self-reproductive from its own coding of the respective system.

It is noted that we are not talking about a legal system, but a social system, whose applicability may be verified in any and all systems. Therefore, the operational enclosure and cognitive opening are grounds of the autopoietic systems applied to the Court of Accounts System.

The operational enclosure may be understood from the exegesis that every system has its own coding, regulated and governed by the system itself, in other words, the system self-organizes and establishes a specific language. In such context, the language adopted by the economic system differs from the one used by the political, educational or legal system, for example.

The cognitive opening implies acknowledging that the systems must communicate with the other systems that gravitate around them. Such communication must exist with a prerequisite: the message must be translated into the receiving system, under the penalty of failing communication.

Thus, it is of vital importance to define the elements of communication: sender, receiver, code and message.

Synthetically, sender may be understood as the one that sends a message; receiver, as the one to whom the message is intended; code, as the message vehicle; and message, as information to be conveyed to receiver.

For communication to be established between the several systems that gravitate side by side, there must be the elements previously mentioned, under the penalty of there being noise and communication not being perfected. In the absence of one of the elements of communication (sender, receiver, code or message), there is a noise that prevents the communication between the several systems.

The systemic communication is crucial for the longevity of the Court of Accounts System, because the existence of a single system would imply the inexistence of any system. It may only exist if if there are other systems that allow checking the difference among them, with proper and different communications and codes… thus, an autopoietic system.

Luhmann, when referring to the auto-referential system, states the following[11]:

> *En esta comprensión básica se trata de autorreferencialidad. Este concepto deberá entenderse en el contexto de una red que constituye un entramado específico, como condición que hace possible la produción e reprodución de las operaciones del sistema. Un sitema autorreferencial debe definirse, pues, como un tipo de sistema que para la produción de sus propias operaciones se remite a la red de las operaciones propias y, en este sentido, se reproduce a sí mismo. Con una formulación um poco más libre se podría decir: el sistema se presupone a sí mismo para poner en marcha su propia operación en el tiempo.*

The attempt to establish a proper system, considering the organization of Maturana in biological sciences and Luhmann in social sciences, may not be considered innovative.

For exemplification purposes, two authors that somehow searched and managed to obtain, according to the purposes pursued by them, the systematization that Luhmann intended, namely, Kant and Kelsen.

Kant, from the conception of good and right, tried to establish in reason the ground for stability of the relationship among people, in order to establish perpetual peace.

Immanuel Kant, *in Crítica da Razão Pura* (The Critique of Pure Reason)[12], privileges the search for reason as a systematization basis for peace among people.

Well, when dealing with other languages without having reason as ground, as, for example, moral, values… one aims at purifying a system, as solution for the conflicts.

Such purification may be conceived as an autopoietic system, for which reason it is possible to infer the undeveloped exegesis that could later be acknowledged as autopoietic systems, as stated by Kant in the attempt to systematize the duty of being by means of reason, which was perfected in social sciences by Niklas Luhmann.

Kelsen, in his work named The Pure Theory of Law, also defended the purification of the normative production, when disciplining the duty of being.

Such author, when discussing the basic norm[13], teaches that the inferior norm must seek its ground in the superior one until it reaches the basic and hypothetic norm, which consists of the last valid ground, to constitute the unit of such creative interconnection.

Well, there are, thus, several systems that have their own coding, in spite of being acknowledged the communication between them.

Accordingly, there are several systems that gravitate side by side, as, for example, the Politics, Economics, Religion, Health, Education, Law, Judiciary, Executive , Legislative and Court of Accounts sysems, being the reason for analysis of the systemic communication.

4. SYSTEMIC COMMUNICATION

As already mentioned, the existence of a system may be solely assimilated by virtue of the existence of other systems that communicate with it. Hence the importance of establishing communication between the autopoietic systems in order to apply it to the Court of Accounts System.

Ignacio Izuzquiza, when introducing the work "*Sociedad y sistema: la ambición de la teoría*"[14], of Niklas Luhmann, points out the importance of communication between the systems within social sciences, as follows:

> *Luhmann dedica su esfuerzo, como vengo repitiendo, al estudio de los sistemas sociales. Para nuestro autor, la sociedad es un sistema autorreferente y autopoiético que se compone de comunicaciones. A su vez, puede diferenciarse en distintos subsistemas, cada uno de ellos cerrado y autorreferente, que poseen un ámbito determinado de comunicaciones y de operación, que limitan su entorno y reducen la compejidad de un modo especializado. La sociedad se diferencia progresivamente, a lo largo de la evolución temporal y de la historia, en diferentes subsistemas sociales tales como el derecho, la economía, la política, la religión, la educación, etc. Y una sociedad avanzada será siempre uma sociedad altamente diferenciada, en la que existan esos diferentes ámbitos de comunicación que son los diferentes subsistemas sociales.*

Thus, with the existence of several systems, there is less complexity in society, since each system has its own language, coding and communication, that is, a self-reproduction.

The Federal Court of Accounts System, despite the name "court", is not part of the Judiciary Branch. The Federal Court of Accounts is geographically included in the Legislative Branch.

The Constitution sets forth that the Brazilian Congress exercises the Legislature, and is comprised of the Federal Senate and the Chamber of Deputies. In such sense, *stricto sensu*, the Federal Court of Accounts would not be part of the Legislative Branch.

However, still in the chapter intended for the Legislative Branch, it establishes that the Brazilian Congress, by means of external control and the internal control system of each Branch will oversee the accounting, finances, budgets, operations and properties of the Federal Government and of the entities directly or indirectly managed by the Federal Government, concerning the legality, legitimacy, economic aspect, application of subsidies and waiver of revenues.

Although, strictly speaking, the Brazilian Congress is in charge of external control, as defined by

the original constitution-making power, this mandate was allocated to the Federal Court of Accounts, who is characterized as an auxiliary agency of the Federal Congress in this regard[15], but that exercises this mandate autonomously and independently. The Court's decisions[16] are not subject to a potential revision by the Parliament.

Here lies a contradiction in the features of the existing Court of Accounts System.

As seen, *stricto sensu*, TCU is not part of the Legislative Branch, which is, according to the Federal Constitution, comprised of the Chamber of Deputies and the Federal Senate, and it is not part of the Judiciary, whose composition may be verified in articles 92/126 of the Constitution, nor is it part of the Executive Branch.

Well, since it is not objectively part of the Three Branches consecrated in Montesquieu, there is the need to set forth an interrelation between the Court of Accounts System and the other Branches.

Upon reading the Federal Constitution, *prima facie,* since it is not part of the Judiciary, it is possible to conclude that TCU, although named a "court", is an administrative agency. Although it is administrative agency, it is important to analyze the language that qualifies it as an autopoietic system.

The Federal Court of Accounts is comprised of nine judges, is located in the Federal District and has its own personnel and jurisdiction in the entire Brazilian territory, against agencies of the states, Federal District, municipalities and private entities that manage assets and values of the Federal Government.

The Justices that compose the Federal Court of Accounts have the same guarantees, prerogatives, impediments, salaries and advantages of the Appellate Justice of the Superior Court of Justice and must meet the following requirements, in addition to being interviewed and upon approval of the appointment by the Federal Senate, when they are appointed by the President of Brazil:

a. more than thirty-five and less than sixty-five years of age;
b. moral trustworthiness and unharmed reputation;
c. evident legal, accounting, economic and financial knowledge or knowledge on the federal government;
d. more than ten years of exercising the duty or of actual professional activity that requires the knowledge of the areas referred to in the previous item.

The requirements for holding the office of TCU Justice are stricter than the ones to be met for the office of STJ or STF Appellate Justice, since the latter must only meet the requirements of items "a", "b" and first part of "c", that is, more is required from TCU Justices than from Appellate Justices of the Superior Courts.

Notwithstanding such preliminary considerations, it is important to point out that the system, in light of the notion of an autopoietic system introduced in social sciences by Niklas Luhmann, evidences communication. It is by means of communication that the system guarantees its perpetuity, according to the idea of the operationally closed and cognitively open system.

It is possible to see that society is comprised of individuals. However, for purposes of the autopoietic systems, society is not comprised of individuals, but rather of the communications established not between individuals, but between the systems that compose it.

In such sense, it is important to once again analyze the opinion of Lenio Streck, as follows[17]:

> The invasion of philosophy by language, when overcoming the subject-object scheme, places language as a possibility condition, and it is forbidden to use it – under the penalty of a paradigmatic paradox – as an instrument, in other words, as another object that causes discourses to gain real existence (in the said event, of discourses previously supported, nonfactual) and that creates an argumentative proceduralization, which postpones the final objective of the norm: the application (...).

The problem is that, given an "A" fact, there may be a "B" or "C" fact, according to the complexity, contingency and expectation concerning the original fact.

In the systemic communications, there is a yes/no binary code, concerning "A" datum, when elements of communication will be analyzed, in order to verify whether there was communication or not, whether the code was recognized or not, whether the message was received or not. It is partially due to the complexity of the communication that, according to Luhmann, implies "*dizer que sempre existem mais possibilidades do que se pode realizar*" (saying that there always are more

possibilities than the ones that may be achieved). The said author also states: "*Em termos práticos, complexidade significa seleção forçada*"[18] (In practical terms, complexity means forced selection), that is, from more than one option, one must select the one most perfect to "A" fact.

Such complexity arises from the distinction between system and environment, since the latter is if not disorganized, with several other systems that seek communication. In the system, the complexity, that is, the multiplicity of options is structured. The system or environment will only exist opposed to the other, without which, it is not possible distinguish one from the other.

Contingency must be construed as the possibility of disappointment concerning the option selected. Luhmann, when defining contingency, states the following[19]:

> Contingency must be construed as the fact that the possibilities appointed for the other experiences may differ from the ones expected; in other words, that the said indication may be misleading since it refers to something that does not exist, cannot be achieved or that is no longer present after the measures necessary for the concrete experience are taken (for example, going to the determined point). In practical terms, complexity means the forced selection and contingency means disappointment and need for risk assumption.

But in order that there is communication, complexity or contingency, there must be identification of the instrument by means of which communication is perfected. The said identification occurs by means of structural coupling. Corsi, when mentioning Maturana, defines structural coupling as follows[20]:

> *A través de un concepto de Maturana se indica como acoplamiento estructural la relación entre un sistema y los presupuestos del entorno que deben presentarse para que pueda continuar dentro de su propia autopoiesis.*

As already mentioned herein, the existence of a system presupposes a surrounding area with several systems outlined one by the other in the surrounding area itself[21], which always seek communication, all in accordance with the operational enclosure and cognitive opening inherent to the autopoietic systems applied to the Federal Court of Accounts System, since the system will expand by means of such communication, at the time the system acknowledges, decodes to its language (in the scope of operational enclosure) and establishes the communication received by another system (cognitive opening).

The surrounding area may "affect" the system when there is annoyance. For the social systems, as in the Court of Accounts System, there must be a control itinerary in the system itself, in order that the actions conceived or acknowledged by it have their own coding. However, when there is a communication that, *a priori*, does not have a coding proper to the system itself, the latter must confront it with its internal provisions for either assimilating or rejecting it. Such internal and self-referent confront is called annoyance. It arises from the surrounding area to the system, for which reason such annoyance may be construed as a self-annoyance, since the operationally closed and cognitively open system is the one that will cause annoyance to itself, in order to make its expansion possible or not, according to the notion of open cognition inherent to the autopoietic systems.

Thus, it is crucial to set forth that the systemic communication attributed to the Court of Accounts System, which took place with the surrounding area, will only make sense if applied to the facts that implicate the performance of the Court of Accounts in its constitutional duty of controlling the proper management of assets and moneys of the Federal Government under its jurisdiction, with language inherent to the Court of Accounts System.

5. FINAL CONSIDERATIONS

As shown, the Court of Accounts System is in charge of assisting the respective parliaments (federal, state, district and municipal, when applicable) in carrying out external control of the sound use of government moneys and assets under the respective jurisdiction initially fixed by the Federal Constitution.

This System has its own coding, usually fixed by organic laws and by-laws based on the Constitution, the last establishment of validity of the non-constitutional rules. However, it is necessary that there is communication between the other systems

that gravitate around it, as, for example, political, legal, economic and social systems.

Although there are inputs of other systems, the Court of Accounts System must translate the message received into its own language and coding, under the penalty of inexistence of the communication intended by the surrounding area and the Court of Accounts failing to exercise its constitutional duty.

It is based on such attempt to communicate that it is possible to see the Court of Accounts System as an autopoietic system, as originally developed by the Chilean scientists Maturana and Varela and adopted in social sciences by Niklas Luhmann.

Accordingly, the Court of Accounts System is considered operationally closed and cognitively opened, as conceived in the autopoietic systems.

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NOTES

1 Concerning the possibility of administrative matters transcending to the scope of the Judicial Branch, Hely Lopes Meirelles states the following: "*Embora caiba à jurisdição administrativa o julgamento do contencioso administrativo (...), certas demandas de interesse da Administração ficam sujeitas à Justiça Comum desde que se enquadrem numa dessas três ordens: a) litígios decorrentes de atividades públicas com caráter privado; b) litígios que envolvam questões de estado e capacidade das pessoas e de repressão penal; c) litígios que se refiram à propriedade privada.*" (Although the administrative jurisdiction is liable for deciding on the administrative litigation (...), certain demands of interest of the Government are subject to the Courts of General Jurisdiction, provided that they are classified in one of the three following orders: a) disputes arising from government activities with private nature; b) disputes involving matters of state, personal capacity and criminal repression; c) disputes referring to private property. (in MEIRELLES, Hely Lopes. Direito Administrativo Brasileiro. São Paulo: Malheiros Editores Ltda., 34th edition, 2008, page 54)

2 Item 36 of the Federal Constitution sets forth that "*a lei não prejudicará o direito adquirido, o ato jurídico perfeito e a coisa julgada*" (the law cannot affect the vested right, the perfect legal act and the *res judicata*).

3 LIEBMAN, Enrico Tullio. *Eficácia e Autoridade da Sentença*. Rio de Janeiro: Forense, 3rd edition, page 54.

4 GASPARINI, Diogenes. *Direito Administrativo*. São Paulo: Saraiva, 8th edition, 2003, pages 775/776.

5 MEIRELLES, Hely Lopes. *Direito Administrativo Brasileiro*. São Paulo: Malheiros Editores Ltda., 34th edition, 2008, pages 688/689.

6 FALCÃO, Amílcar de Araújo. *Introdução ao Direito Administrativo*. Rio de Janeiro, 1960, page 649.

7 TCU Organic Law.

8 Resolution 246/ TCU, of November 30, 2011.

9 According to articles 31/35, 48, of Act 8,443/1992 and article 289 of RI/TCU.

10 CORSI, Giancarlos; ESPOSITO, Elena; BARALDI, Claudio. *Glosario sobre la teoría social de Niklas Luhmann*. Mexico: Editorial Anthropos, 1996, pages 31/32.

11 LUHMANN, Niklas. *Sistemas sociales*. Barcelona: Universidad Javeiriana. 1998, page 21.

12 KANT, Immanuel. *Crítica da razão pura*. Translation of Lucimar A. Coghi Anselmi. São Paulo: Martin Claret, 2009.

13 KELSEN, Hans. *Teoria Pura do Direito*. São Paulo: Martins Fontes, 6th edition, 1998, page 247.

14 LUHMANN, Niklas. Sociedad y sistema: la ambición de la teoría. Translation of Santiago López Petit and Dorothee Schmitz. Barcelona: Ediciones Paidós Ibérica, 1990, page 25.

15 Articles 70 and 71 of the Federal Constitution set forth the legal nature of TCU, as well as its jurisdiction.

16 Such is the understanding consolidated by STF (ADI 3715 MC/ TO – TOCANTINS. Judge-Rapporteur Gilmar Mendes. Decision: 05.24.2006. Published in DJ of 08.25.2006, page 15).

17 STRECK. Lenio Luiz. *Verdade e consenso: constituição, hermenêutica e teorias discursivas*. Rio de Janeiro: Lumen Juris, 2006, page 35.

18 LUHMANN, Niklas, *Sociologia do direito I*. Translation of Gustavo Bayer. Rio de Janeiro: Edições Tempo Brasileiro, 1983, pages 45/46.

19 Idem.

20 CORSI, Giancarlos; ESPOSITO, Elena; BARALDI, Claudio. *Glosario sobre la teoría social de Niklas Luhmann*. Mexico: Editorial Anthropos, 1996, page 19.

21 Luhmann, when expressing his view on the relation surrounding area/autopoietic system, states the following: "*El entorno contiene una multiplicidad de sistemas más o menos complejos que pueden entablar relaciones con otros sistemas que conforman el entorno de los primeros, ya que para los sistemas que conforman el entorno del sistema, el sistema mismo es parte del entorno y, en este sentido, objeto de posibles operaciones. Por esta razón, en el nivel de la teoría general de sistemas nos vimos obligados a distinguir entre relaciones sistema/entorno y relaciones intersitémicas. Estas últimas presuponen que los sistemas se encuentran recíprocamente en sus respectivos entornos*". (in LUHMANN, Niklas. Sistemas Sociales. Barcelona: Universidad Javeiriana. 1998, page 176.)

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