Courts of accounts - nature, scope and effects of their functions

Oswaldo Aranha Bandeira de Mello Pontifical Catholic University of São Paulo (São Paulo, São Paulo, Brazil)

DOI: https://doi.org/10.48143/rdai/16.bandeirademello
Keyword: Courts of auditors, nature, scope, effects, functions

resume

1. The budget is the legal act in which the revenue forecast is made, authorizing its collection, and the fixing of the expense, also authorizing its execution, related to a certain financial year.

Although the content of the budget concerns the matter of Financial Law, pertinent to the discipline of revenue and expenditure, the legal nature of monitoring the execution of the budget remains in the field of Administrative Law, despite the use of public accounting and accounting standards. economic-financial technique to carry it out. Thus, in Administrative Law, the study of the State's control bodies regarding the activity of expenditure originators and account payers remains, and the legal acts for effecting this control.

This control of the execution of the budget is done through the Executive Power, by an organ of the Ministry of Finance or Finance, which accompanies the financial management of the different organs of the State, and is called *internal inspection* ; and, through the Legislative Power, drawing on the opinions of its Finance Commissions or Accountability, and, especially, of an administrative, autonomous body, with a collegiate or individual leadership, its delegate, and assist, or rather, collaborator, verification of the accounts of the organs of the State, independent of the Executive Power, and this control is called *external inspection* .

It is up to the Legislature not only to approve the budget but also to inspect it faithfully. It aims to guarantee the effective fulfillment of the budget, in terms of revenue and expenses. Without proper accountability, budgets would be useless formalities and it would be impossible to determine the responsibility of the ordering and paying agents for the expense.

1. As an auxiliary body of the Legislative in this task of controlling the Executive's accounts, in the Latin European countries of the Court of Auditors, also known as the Council of Accounts or Court of Accounts, whose members, called Ministers or Counselors, enjoy immunities that ensure their independence. This body, despite exercising an administrative function, is repeated, effective on an autonomous basis, and without any connection with the Chief Executive.

Já na Inglaterra e nos Estados Unidos da América do Norte, dito controle se faz através de Auditoria, *General Accounting Office* superintendida por Auditor-Geral, *General Comptroller and Auditor*, com garantias equivalentes às que se atribuem à magistratura, e, outrossim, em posição de absoluta independência dos órgãos governamentais controlados, inclusive do Chefe do Executivo.

O exame das contas pode ser feito através de três processos diferentes que originaram os sistemas de exame prévio absoluto ou relativo, e do exame posterior.

O exame prévio absoluto é aquele em que o veto do órgão fiscalizador externo impede os órgãos executivos e ativos a efetuarem a despesa em negando o seu registro, e, então, não pode ser feita. Esse veto absoluto é utilizado nos casos de falta de verba para essa despesa ou ter sido cogitada por verba imprópria. É o sistema acolhido pelo Tribunal de Contas da Itália, e, por isso, denominado de tipo italiano.

The relative prior examination is one in which the veto of the external supervisory body, when the expense is considered illegal, denies the registration, and returns the documentation to the active executive bodies with the reasons for the veto. If the higher executive bodies do not comply with the veto, they ask the external supervisory body to register under protest. After this formality, he notifies the Legislative of what happened, so that he can determine the responsibility of the active executive bodies, which carried out the expense. It was the system chosen by the Belgian Court of Auditors, and therefore called the Belgian type.

The subsequent examination is what the expense check is done after it has been carried out. They are not avoided by the external supervisory body, which is ultimately responsible for punishing the guilty. It was the system chosen by the Court of Auditors in France, and therefore called the French type.

The system of the absolute prior examination adopted is reconcilable with the other two, according to the legislation, with reference to an act of the Public Administration that results in an obligation to pay by the National Treasury or on its behalf. This occurs when the refusal to register is based on any other reason than the lack of funds or concerns improper funds, and, then, the expense may be made subject to or by the protest of the external controlling body, as determined by the Executive to carry it out.

Furthermore, subsequent control occurs when, under the terms of the legislation, the external controlling body is charged with examining the budget, after its execution, in the assessment of the Executive's accounts, through a report to be offered to the Legislative.

In turn, the system of relative veto adopted is reconcilable with that of *a posteriori* examination of the acts of Public Administration, that is, using the same example above, when it is up to the external controlling body to present the report of the Executive's accounts, in appreciating the execution by him of the budget, to be, after the financial year, forwarded to the Legislative.

1. The National Congress has the function of supervising the acts of the Executive Power, as well as of the indirect administration, and with the prerogatives that recognize and give it the law, as provided in art. 45, of the Magna Carta of 69, and, thus, the Chamber of Deputies and the Senate or the National Congress itself can create commissions of inquiry for the due inspection in this respect.
2. The Court of Auditors was actually born in the national legal order, only with Decree 966-A, dated 9.7.1890, which adopted the Belgian model. This was soon after the proclamation of the Republic, by an act of the Provisional Government. The Court had been assigned not only the inspection of expenses and other acts that concern the finances of the Republic, but the judgment of the accounts of all those responsible for public money of any Ministry to which they belonged, giving them discharge, or ordering them to pay due and when they did not comply, he ordered to proceed in the form of law.

The 1891 Constitution simply provided, at its disposal, in art. 89, on the establishment of a Court of Auditors, to settle the revenue and expenditure accounts and verify their legality, before being rendered to Congress. However, it relegated its entire organization to ordinary legislation. Subsequently, all Republican Constitutions inserted it among their devices. The others established the fundamental lines of this government agency.

Valendo-se de autorização que lhe dera o Congresso Nacional pela Lei 23, de 30.10.1891, para organizar os serviços dos Ministérios, e pela Lei 26, de 30.12.1891, para organizar as repartições da Fazenda, o Poder Executivo promulgou o Dec. 1.166, de 17.12.1892, em que cogitou o Tribunal de Contas previsto pelo texto constitucional citado. Deu-lhe a competência de exame prévio das contas do Executivo e poder de veto absoluto, quanto às despesas, e, outrossim, conferiu-lhe a atribuição de julgar as contas dos responsáveis por dinheiros ou valores públicos, emprestando às suas decisões força de sentença, uma vez lhe reconhecia nessa função atuava como Tribunal de Justiça.

E essa situação não se alterou na legislação posterior, até a promulgação da Constituição de 1934.

Porém, essa última competência, qual seja, de julgar as contas dos responsáveis por dinheiros ou valores públicos, consoante demonstração do Prof. Mário Masagão (cf. “Em face da Constituição Federal, não existe, no Brasil, o Contencioso Administrativo”, pp. 137 a 175, Seção de Obras do *Estado de S. Paulo*, S. Paulo, 1927), em completo estudo sobre o contencioso administrativo no Brasil, devia ser havida como inconstitucional, isso porque a Constituição de 1891 revogara, diretamente, esse instituto estabelecendo a jurisdição una, afeta, em exclusividade, ao Poder Judiciário, *ex vi* do seu art. 60, “b” e “c”. Aliás, nesse sentido, já haviam se manifestado Ruy Barbosa (cf. *Comentários à Constituição*, coligidos por Homero Pires, vol. IV, pp. 429 e ss) e Pedro Lessa (cf. *Do Poder Judiciário*, p. 149).

Como órgão de função administrativa, preposto do Poder Legislativo, como seu auxiliar, na verificação da gestão financeira do Estado, na verdade, pela sua própria natureza, não podia ter funções jurisdicionais. Aliás, o art. 89, citado, da Constituição de

1891, só lhe confiara aquela atribuição administrativa. Inconstitucional seria, portanto, através de lei ordinária, não só diminuí-la, como, e, principalmente, aumentá-la, dando-lhe função jurisdicional.

1. As Constituições que se seguiram à Constituição de 1891, como salientado, mantêm o Tribunal de Contas por esta instituído e lhe dão as linhas mestras da sua organização, especificam o sistema de controle das contas adotado, e definem as suas competências.

As Constituições de 1934 (cf. §§ 1.º e 2.º do art. 101) e de 1946 (cf. §§2.º e 3.º do art. 77) adotaram o sistema italiano de controle da conta, ou melhor, do veto prévio absoluto, proibitivo, com referência às despesas pretendidas em que houvesse falta de saldo no crédito ou que tivessem sido imputadas a crédito impróprio, e do veto prévio relativo, quando diverso fosse o fundamento da recusa, quanto à despesa em causa, e, ainda, o controle *a posteriori* relativamente a outras obrigações de pagamento. No caso de veto prévio relativo a despesa poderia efetuar-se após despacho do Presidente da República, feito, então, o registro sob reserva, com recurso de ofício à Câmara dos Deputados, segundo a Constituição de 1934, e ao Congresso Nacional, conforme a Constituição de 1946.

1. Já as Constituições de 1937, 1967 e 1969 silenciam a respeito. Mencionam apenas as atribuições do Tribunal de Contas sem cogitar do regime de controle. Contudo, dos termos das Constituição de 1967 (art. 71, e parágrafos, e §4.º do art. 73) e Magna Carta de 1969 (art. 70 e parágrafos, e §4º do art. 72) se conclui que optaram, em princípio, pelo sistema francês, do controle *a posteriori*, com ligeiras restrições, ao admitirem a faculdade de o Tribunal, de ofício, ou mediante provocação do Ministério Público, ou das autoridades financeiras e orçamentárias, e demais órgãos auxiliares, verificar a ilegalidade de qualquer despesa, inclusive as decorrentes de contratos.

A auditoria financeira e orçamentária será exercida sobre as contas das unidades administrativas dos três Poderes da União, que, para esse fim, deverão remeter demonstrações contábeis ao Tribunal de Contas, a que caberá realizar as inspeções que considerar necessárias (art. 79, §3.º de 69). Esses são os elementos necessários para as inspeções levadas a efeito pelo Tribunal de Contas, através dos seus órgãos de auditoria, e compreendem perícias, apuração de pagamento e de sua pontualidade, verificação do cumprimento das leis pertinentes à atividade orçamentária e financeira.

Todas essas normas de fiscalização aplicam-se às autarquias, que consistem em pessoas jurídicas criadas pelo Estado, com capacidade específica de direito público na realização de objetivo administrativo (§5.º do art. 70 de 69). Por isso, como seus órgãos indiretos se acham enquadrados no todo estatal, embora seres distintos do Estado, ante a sua personalidade. Formam com ele uma unidade composta. Têm atributos de império, obrigação de agir, são criados por processo de direito público, sem objetivo de lucro e se sujeitam à fiscalização estatal. Distinguem-se em autarquias associativas e fundacionais (cf. *Princípios Geral de Direito Administrativo*, vol. II, p. 233).

Deverá o Tribunal de Contas, em face da Constituição e no caso de concluir tenha havido qualquer irregularidade a respeito: a) assinar prazo razoável para que o órgão da administração pública adote as providências necessárias ao exato cumprimento da lei; b) sustar, se não atendido, a execução do ato impugnado, exceto em relação a contratos; c) solicitar ao Congresso Nacional, em caso de contrato, que determine a medida prevista na alínea anterior ou outras necessárias ao resguardo dos objetivos legais.

Observe-se, a sustação do ato que refere a alínea "b" poderá ficar sem efeito se o Presidente da República determinar a execução, *ad referendum* do Congresso Nacional, sujeitando, portanto, essa ordenação apenas a controle *a posteriori* do Congresso Nacional (cf. Constituição de 1967, §8.º, do art. 73; de 1969, §8.º do art. 72). O Congresso Nacional deliberará sobre a solicitação de que cogita a alínea "c", no prazo de 30 dias, findo o qual, sem pronunciamento do Poder Legislativo, será considerada insubsistente a impugnação (cf. Constituição de 1967, §5.º, "a", "b" e "c", e §6.º do art. 73; de 1969, §5.º, "a", "b" e "c", e §6.º do art. 72).

Merece crítica as disposições que têm como insubsistente a falta de pronunciamento legislativo no prazo legal a ele cominado. A solução devia ser exatamente a outra, isto é, tornando a sustação definitiva, adotada, aliás, pela Constituição Paulista no seu art. 91, III. Igualmente, a orientação adotada em admitindo a possibilidade do Presidente da República de ordenar a execução do ato considerado pelo Tribunal de Contas ilegal, submetendo-o ao *referendum* do Congresso, mas só depois de perpetrada a ilegalidade, outrossim, merece crítica. Envolve, sem dúvida, completa falência do controle do Tribunal de Contas.

On the other hand, they regulate the 1967 Constitution and the Magna Carta of 69 of the internal control of the execution of the budget. Actually, they provide that the Executive Branch will maintain an internal control system, in order to: I - create indispensable conditions to ensure the effectiveness of external control and regularity in the realization of income and expenditure; II - monitor the execution of work programs and the budget; and III - evaluate the results achieved by the administrators and verify the execution of the contracts (1967, art. 72; of 1969, art. 71). However, the aforementioned censures show that these intended cautions are of no effect, since indirectly with the texts previously criticized, they nullify, as noted, the actual control of the Court of Auditors' practical results.

Regarding the criticized texts, the 1934 Constitution provided that contracts that, in any way, immediately interested in income or expenditure, would only be considered perfect and finished, when registered by the Court of Auditors, and that the refusal of registration suspended the execution until the Legislative Power pronounces (art. 100). The same precept was stated in the 1946 Constitution (art. 77, § 1). A similar text was necessary if it had been accepted by the Constitution of the Federative Republic of Brazil and the Constitutions of States. Thus, they would be freed from the criticisms previously made in this regard.

1. Since the 1937 Charter left the complete organization of the Court of Auditors to the ordinary law (sole paragraph of art. 114), it only provided that it would be up to it, as already provided for in 1934, either directly or by organized delegations, in accordance with the law. , budget execution; judge the accounts of those responsible for public money or goods; and the legality of contracts concluded by the Union.

This triple competence was repeated by the Constitutions that succeeded it in 1946 (art. 77, I, II and III), 1967 (§ 1 of art. 72, §§ 5 and 8 of art. 73), and 1969 (§1 of article 71, §§5 and 8 of article 73), and 1969 (§1 of article 71, §§5 and 8 . Of article 73). And to them was added that of judging the legality of pensions, retirements and pensions.

Except for the Magna Carta of 37, all of them consider the prior opinion of the Court of Auditors, within 30 days, according to the 1934 Constitution (art. 102) and 60 days according to the others (from 1946, §4, 77, 1967, paragraph 2 of article 71, 1969, paragraph 2 of article 70) on the accounts that the President of the Republic must render annually to the National Congress. And, if they are not sent to you within the term of the law, you will communicate the fact to the National Congress, for the purposes of law, presenting you in both cases with a detailed report of the financial year ended.

1. Undoubtedly, the 1967 Constitution and the 1969 Magna Carta through their texts retrograded the most important oversight that should be the responsibility of the Court of Auditors, namely that of financial administration inspector, as representative of the Legislative. Without the absolute veto in cases of lack of credit balance and in cases of imputation to improper credit, the performance of the Court of Auditors no longer has its raison d'être.

The opinion of some who declare that the powers of the Court of Auditors has been increased by the texts of the Constitution of 67 and the Magna Carta of 69, seems to be meaningless, given the possibility it has today to monitor the development of the budget, through special inspections. , accounting surveys, and representation, which is incumbent upon the Executive Branch and the National Congress, on irregularities and abuses, including those arising from contracts, as they lack the possibility to prevent, coercively and absolutely, irregular expenses.

Ruy Barbosa rightly said: it is not enough to judge the administration, to denounce the excess committed, to reap the exorbitance or the permission to punish. Circumscribed to these limits, this tutelary function of public funds will often be useless due to omission, delay or powerlessness.

It is no different to feel Dídimo da Veiga when he affirmed: “The *a posteriori* or successive examination allows the expense to be consummated and then to inspect the legality of the same, being the responsibility of the originator, which is never effective, and that of the payer, whenever the expense paid is so high that it exceeds the value of the security deposit and the assets of the person responsible; the public farm is damaged, it is uncovered of any guarantee, which, in *itself* , is enough to coordinate the *ex post facto* contrast regime ”. (*Report of the Court of Auditors, 1899* , p. 13).

This restriction on the powers of the Court of Auditors is regrettable, much to the taste of dictatorships and de facto governments. It is even more regrettable that the state Constitutions followed this same direction.

It is worth remembering that when it was desired to extinguish prior inspection, with absolute veto, in the Floriano Peixoto Government, its Minister of Finance, Seserdelo Correia, asked for his resignation from office, and had the opportunity to say in a letter to the President about the veto impeditive. "Far from considering him an embarrassment to the administration, I considered him to be the greatest inspector of good budget execution". And he proceeded correctly: “If the expenditure is within the budget, if there is money or if it has funds, the Court cannot fail to record it. If it does not exist or is exhausted, it is the case of extraordinary or supplementary credits ”.

The registration under protest, that is, of the relative veto, is not enough for these retroactive hypotheses, to contain the abuses of the government and to avoid financial disagreements . Of course, when the refusal of registration has any other basis it is explained, and then the registration is made under reservation. The subsequent control has been applied as a complementary element, in the assessment of the behavior of the originators and expense payers for the purpose of giving an opinion on the accounts to Congress, and consequent determination of responsibility.

1. In spite of opinions to the contrary, if it seems perfectly possible, without occurring the unconstitutionality, adopt the federal and municipal states, the absolute and the relative veto, according to the hypotheses, in the organization of their Courts of Accounts, in the exercise respective autonomies, ensured by arts. 13 and 15, respectively, of Amendment 1/1969.

The matters pertaining to the Courts of Accounts focus on two legal branches: Financial Law and Administrative Law.

The matters of Financial Law, in fact, are the prevailing competence of the Union, *ex vi* of art. 8, XVIII, “c”, of the Magna Carta of 69, that is, to establish, through legislative texts, general rules on budget, expenditure and patrimonial and financial management of a public nature, and, since the States are only responsible for legislating , alternatively, about them, according to the sole paragraph of the aforementioned art. 8th, 17th, “c”.

Já as matérias de Direito Administrativo, em especial sobre a organização dos seus órgãos, cabem aos Estados pois assistem-lhes todos os *poderes que não lhes foram vedados*, por texto constitucional. Incumbe-lhes, então, e tão-somente, *respeitar os princípios constitucionais*, na Magna Carta de 69. Por conseguinte, afora as competências que lhes foram proibidas, hão de obedecer apenas as limitações que defluem dos princípios estruturais do regime pátrio, constantes da Constituição Federal. Portanto, cumpre aos Estados federados, ao organizarem o respectivo Tribunal de Contas, a observância do princípio de prestação de contas da administração, segundo art. 10, VII, “f” e mais elaboração do orçamento, bem como a fiscalização orçamentária, conforme o art. 13, IV.

A conjugação desses dois princípios faz com que para efetivá-los devam instituir Tribunais de Contas, com as restrições expressas de que os seus membros não poderão exercer, ainda que em disponibilidade, qualquer outra função pública, salvo um cargo de magistério e nos casos previstos nesta Constituição; receber, a qualquer título e sob qualquer pretexto, percentagens nos processos sujeitos a seu despacho e julgamento, e não deverão exceder de sete, em consonância com o art. 13, IX da CF.

Afora essas delimitações aos poderes dos Estados Federados, constantes dos textos suprarreferidos, nenhuma outra foi prevista, e como a eles são conferidos todos os *poderes* que, explícita ou implicitamente, não lhes tenham sido vedados pela Constituição Federal, como dispõe o §1.º do art. 13, é indiscutível, a nosso ver, ao organizarem os seus Tribunais de Contas, podem fazê-lo com liberdade, em escolhendo para efeito do controle financeiro o sistema que mais lhes convenha. Assim o de veto prévio absoluto quanto as despesas em que inexista verba ou esta seja imprópria.

Certo, o art. 188 da Constituição de 67, reproduzido no art. 200 da Carta de 69, invocado pelos que negam essa possibilidade, não configura o referido impedimento. Realmente, os artigos em apreço dispõem que as disposições nela constantes ficam incorporadas, *no que couber*, ao direito constitucional legislado pelos Estados. Com isso se pretendeu, na melhor das hipóteses, que os Estados devem adotar, *no mínimo*, o modelo imposto pela Carta Federal, com referência ao controle financeiro, os princípios básicos constantes dessas Constituições em referência. Eles constituem o paradigma *mínimo* a serem obedecidos pelos Estados, tendo em atenção o modelo federal. Mas, nada impedem melhorem o sistema federal de controle das contas estaduais e o torne mais severo. Não lhe impuseram completa simetria de organização, o que seria absurdo em um Estado federal, de grande extensão territorial, e em que as unidades federativas são de áreas díspares e com diversidade de população, e de civilização e cultura distintas.

Assim sendo, deverá o Tribunal de Contas do Estado, como mínimo tão-somente:

I – exercer o controle externo da administração financeira do Poder Executivo e entes autárquicos, como colaborador da Assembleia Legislativo neste mister;

II - to appraise, in an opinion, the annual accounts of the Public Administration, and to prepare a report on the financial year, with the help of an audit, to take the accounts of the administrators and others responsible for public money, *and to verify the legality of pensions, reforms and pensions* ;

III - enjoy *internal* autonomy *corporis* of the Judicial Courts and enjoy their members in a situation comparable to the magistrates of the Courts of Justice;

IV - satisfy the nomination of its members the requirements foreseen for the appointment of magistrates;

V - represent the Executive Branch and the Legislative Assembly giving notice of irregular acts or abuses verified regarding financial and budgetary administration;

VI - stop the acts of the financial administration when the term signed for its regularization has expired, as well as request the Legislative Assembly, in cases of contracts signed by the administration, the measures to safeguard the regularity of the legal objectives, if not respected.

In fact, if the State Audit Courts were really denied to expand and improve the system adopted by the Union, in order to make them more apt, in order to carry out their function, as to the organization of the organ itself and its fiscal action, it would be practically annulled the autonomy of States, guaranteed by art. 13 of the Magna Carta of 69, and, consequently, to have the Federation revoked, established in art. 1 of it, and whose abolition, through constitutional reform, cannot even be the object of deliberation proposed in this sense, before art. 47, §1. Consequently, they are free to organize the body and its action as long as they respect, *at least*, regarding the organization, the rules provided by the Union and regarding its action to the minimum aspect pertinent to the fiscal control established by the Union. It seems absurd to maintain that the State is, by the Letter of 69, prevented from improving the organization of its Court and of make its financial supervision more effective.

1. As already noted, the Magna Carta of 69 ensured in art. 15 the autonomy of Municipalities. It admitted the intervention of the State in its business when they no longer respect the principles inserted in §3 of that article. And among them, is the provision of accounts due under the law, as already provided for in inc. II of the aforementioned art. 15. Consequently, in art. 16 established that financial and budgetary supervision will be exercised through external control by the City Council and internal control by the municipal Executive, established by law. And in § 1 stipulates: "The external control of the City Council will be exercised with the assistance of the State Audit Court or the state agency to which this task is assigned". Thus,

Although in collaboration with the City Council, the prior opinion of these state agencies will only cease to prevail, according to §2 of this article, by decision of 2/3 of that. In this way, they were able to target the abuses of City Councils under the pressure of political pressure. Greater restrictions would compromise the autonomy of the Municipality. In order to avoid these abuses by municipal governments, without hindering autonomy, it is in the adoption by the States of the absolute and relative prior veto, with reference to the Municipalities in terms that should be recommended to the Court of Auditors of the State itself, with reference to its financial control. .

Discute-se sobre a possibilidade de, em existindo Tribunal de Contas nos Estados, haver possibilidade de ser por ele criado órgão estadual com o encargo de proceder a fiscalização financeira dos Municípios, como auxiliar do controle externo das Câmaras Municipais. Entendem uns a dejuntiva *ou* do texto constitucional faz com que só se possa admitir a criação desse órgão em inexistindo Tribunal de Contas do Estado. Já outros sustentam a permissibilidade da criação desse órgão para efeito de descongestionar os Tribunais estaduais. Estes restringiram o seu controle contábil financeiro às contas do

Estado federado, e o outro órgão se destinaria a igual controle dos Municípios. Aliás, só desse sentido se pode compreender a palavra *"ou"* intercalada entre as duas hipóteses, isto é, *one "or"* another.

It seems to us more in line with the truth the thesis of the last current, although there was a pronouncement by the Supreme Federal Court in favor of the other. In fact, there is also a decision by this Court in another sense. Inspection will be carried out by one *or* another relevant body.

Adopted the first guideline, the constitutional provision of another body, in addition to the Court of Auditors, for that control must still be considered meaningless, since all States must have Courts of Auditors, *ex vi* of art. 13, IX, of the CF, completed by art. 200 that determines the incorporation, *as appropriate* , of the provisions contained in the Federal Charter, into the constitutional law of States. Furthermore, the work that is the responsibility of the State Audit Courts, regarding the fiscal control of their performance, may disturb the service of this Court to actually effect the financial control of the Municipalities, and then the creation of this body is explained. distinct from the Courts of Accounts, at the discretion of the state legislature.

This state autonomous body, however, should enjoy perks that ensure its independence from the force of political pressure, in order to be able to exercise, with absolute exemption, its audit activity, be it collegiate or under the singular guidance of a chief auditor.

However, the municipalities, before §3, of art. 16, of the Magna Carta of 69, with a population of more than two million inhabitants and tax income of more than five hundred million new cruzeiros, may themselves institute Courts of Accounts. And these must respect, in their organization and action, the minimum principles adopted by the Federal Constitution in arts. 72 and paragraphs and other norms perfecting them, such as the absolute veto in cases of lack of funds or improper funds, and the relative veto regarding other expenses.

The Municipality of São Paulo, by virtue of art. 191, it was assured, and only him, the continuity of his Court of Auditors, unless otherwise decided by the respective Chamber, while the other Municipal Audit Courts were declared, by that same term, extinct.

The Court of Accounts of the Municipality of São Paulo can be reorganized, and as for its action, like the new Courts of Accounts in other States, of the respective Municipalities in which they will be created, satisfying the requirements of §3 of art. 16.

In addition to obeying the federal model, in its minimal outlines, the Municipal Courts are required to obey the minimum texts laid down in the State Constitution and the Organic Law of Municipalities. But they can establish more extensive control over them over the budget, as noted.

After all, consider yourself: it is incredible that the Constitution of São Paulo exists, in art. 75, provided that no expenditure will be ordered or incurred without a budgetary resource or credit voted by the Assembly, and has expressly failed to provide for the

absolute veto of the Court of Auditors, both of the State and of the Municipality of the Capital, when providing for the their competencies in this regard.

1. The expression judging the accounts of those responsible for public money and assets, as well as the legality of contracts and initial concessions for pensions, reforms and pensions, gave rise to doubts in the doctrine and jurisprudence, that is, if, when using the expression "judge" the constituents considered whether to assign jurisdictional functions to the Court of Auditors or not.

As for the latter, to judge the legality of the contracts, guidance was signed that it was an administrative function, improperly used the word “judge” in the text, as the decision of the Court of Auditors only had the effect of suspending its execution until to pronounce on the National Congress. Thus, it functioned as an auxiliary organ of the Legislative Power, without jurisdictional character, but only administrative. As for the first, to judge the accounts, the prevailing orientation was that it was a judicial function, attributed to the Court of Auditors.

We tried to distinguish the expression "judging from legality" from "judging the accounts", by employee the verb in different rules by the constituents.

Now, "judging" in the sense of drawing up or pronouncing a sentence does not ask for a direct object, it is said "to judge someone's right". "Judging" in the sense of evaluating, understanding, asks for a direct object, says "I believe" that you are right (cf. Cândido de Figueiredo, entry "judging", in *New Dictionary of the Portuguese Language*, 3rd ed., Vol. II, Portugal-Brazil, s / d). Consequently, the change in the regency proves against the thesis of those who intend the expression “to judge the accounts” corresponds to that of sentencing, that is, of exercising the judicial function. In fact, this regency of the verb, in contrast to the other one of “judging from legality”, authorizes the conclusion that the expression “judging the accounts” refers to the meaning of evaluating, understanding, reputing them good or bad provided, never in the sense of sentencing, of deciding about them.

Note, the Constitutions of 1967 and 1969 separated the two activities into different provisions: judging the legality of contracts; and to judge the legality of the initial concessions for retirement, reforms and pensions, together in the same item of the Constitution of 1945. As for the first, that is, the legality of contracts established the principle of recourse to the National Congress of its deliberation. Regarding the second, that is, the legality of retirement, reforms and pensions, they had nothing to do with regard to their decision. However, in the latter case, too, the Court of Auditors' decision was not final. If left unregistered by the Court of Auditors, this would not prevent its execution, in keeping with the act by the Executive. So, these acts would be registered under protest. It could, without a doubt, in view of the constitutional texts (1946, art. 77, III, §3 and art. 141, §4; 1967, art. 73, §5, “b”, and art. 151, §4; and 1969, art. 72, §§5, “b”, and 8) the interested party lodges an appeal to the Judiciary to defend his individual right, if unknown, if he considered having right to retirement or retirement and your family if you are denied a pension.

1. Supporters of the jurisdiction of the Court of Auditors, in the case of judging the accounts of those responsible for money and public goods, maintain that the fact that the Court of Auditors recognizes the scope must be accepted without discussion by the Judiciary. They agree, however, that the refusal to accept the accounts, involves only the recognition, by the Court of Auditors, of the scope by the payer of the expense or its payer, since the conviction, for crime of embezzlement, depends on a judicial sentence of the Power Judiciary, and the civil condemnation of the debt, for the purpose of indemnity to the Public Power, also depends on a judicial sentence of the Judiciary Power. Thus, the Court of Auditors has *a preliminary ruling on the fact* . However, the *conviction* , for*the practice of criminal or civil wrongdoing* , in fact, it is up to the Judiciary, and more to *enforce the sentence* .
2. *Data venia* , of these masters, it must be understood that, in both cases, the Court of Account only has an administrative function to monitor budget execution and to assess the accounts of those responsible for money or public goods. This does not diminish the relevance of the Court of Auditors, on the contrary, it projects itself in its specific function of implementing public morality, of an administrative nature, in budget oversight. In the legal organization of the State, all bodies are of equal importance in the exercise of their respective functions, each essential to the rule of law. And of such emphasis is that of the Court of Auditors, which is outside the threefold conception of the three powers, and who is responsible for the economic and financial inspection of the activity of all of them.

However, the text in question did not have the objective of investing it in the exercise of a judicial function, when it was stated that it would be up to it to judge those accounts. It only aimed to give you the final competence in the administrative order on the matter. If considered to be well rendered, the work pertinent to its calculation is closed, with the discharge that it would have passed in favor of those who offered them. On the contrary, if it understands the scope of money or public good, in the exercise of this function, it will determine that they pay the amount due, within the fixed term, and, if the determination is not satisfied, *it will be up to them to proceed against them in the form of law* .

It was argued that, in considering the Court of Auditors to be irregular, this issue could not be reopened by the Common Justice, who would be responsible for processing and judging the crime, as a consequence of the verified scope. Therefore, characterized by the Court of Auditors the scope, in the case of embezzlement, this pronouncement would oblige the Common Criminal Justice. Then, this, that is to say, the Common Justice, will have to accept this pronouncement on the defendant's accounts, as an investigation of the fact necessary for the integration of the crime, that is, as a pre-established investigation and a requirement for action, under penalty of a new Judge rejecting what had been judged by another, incurring unjustifiable *bis in idem*, in useless new appreciation, which would result in mere formalism. Equal consideration is given to the Common Justice, in an executive action proposed by the State, for the collection of scope and the corresponding asset replacement.

This is not a matter for re-judgment by the Common Justice, because the Court of Auditors is an administrative and non-judiciary body, and its denomination of Court and the expression to judge both are equivocal. In fact, it is a Council of Accounts and does not judge them, ruling on them, but verifies their veracity to give discharge to the interested party, considering them as well rendered, or to promote the criminal and civil condemnation of the person responsible, verifying the scope. Find out facts. Now, *finding facts is not judging* .

To judge is to say someone's right in the face of facts and legal relationships, in view of the current normative order. If it simply investigates facts, under the improper cognition of judging, it has no jurisdictional function. This determination may be the subject of contrary evidence in court. It should not therefore be harmful to be accepted by the Judiciary *without any examination* . The Common Justice cannot be attached to it, since the Constitution does not expressly attribute the sentence of the Court of Auditors' conclusions on the fact. And whoever has to say someone's right, in principle, it is up to the verification of the fact, ultimately. Therefore, the Common Justice, in saying that, must be able to appreciate this. There is no *bis in idem*, because one thing is the administrative appraisal and another the judicial assessment of a given fact.

Undoubtedly, the verification of the fact of the reach by the Court of Auditors will be a necessary prejudice for the filing of the action, civil or criminal, as presupposition of the civil or criminal illicit. This prior investigation is always necessary. And, *in principle* , it will be accepted by the Judiciary, either in the fiscal executive for asset replacement, or in criminal action against the public agent. This is because it is documented in the procedure carried out by the Court of Auditors. However, if the public agent, a defendant in one of these actions, argues that the defense is being curtailed in this investigation and brings convincing evidence to the record that the civil or criminal offense was not investigated against him, the *Judiciary* , which will *convict him* , cannot and then,*execute its sentence* , fail to examine that allegation and verify its validity, if the case file contains elements to admit the veracity of the alleged against the pronouncement of the Court of Auditors.

If the constituents had assigned the Court of Auditors a jurisdictional function, they *should have integrated it into the Judiciary* . This they did not do, and, on the contrary, placed him among the cooperation *agencies* in government activities, as an auxiliary to the Legislative Power.

On the other hand, the Constitution of 1991 *had abolished administrative litigation* . Consequently, its reinstatement can only be admitted, even partially, for the judgment of the accounts of those responsible for money and public goods, when this was clearly stated in the text, which would be achieved by declaring that the Court's decision of Accounts in this matter would have the force of sentence.

1. It could be counter-argued that the title of Minister was given to its members, and their appointment is made in the same way as those of the other Ministers of the Supreme Court and enjoy the same guarantees as these, of vitality, of irremovability and irreducibility of salaries. , as well as the organization of the Internal Regulations and the Secretariat, the Court of Auditors has the same powers as the Judicial Courts.

Now, the argument proves too much. This was done to ensure the independence of its members from the Executive in supervising their financial management, never to judge their accounts with the force of sentence, in order to compel, for example, the Judiciary to consider how characterized someone's reach is. , without being able to reconsider this assessment, and must therefore accept the judgment of the Court of Auditors as final. It does not seem reasonable to compel the criminal or civil judge, *reduced to a formal function* to convict someone for evidence that does not convince him or cannot verify his origin, when there are elements in the file that contest them.

As *leis ordinárias*, que, na vigência da Constituição de 91, embora devendo ser havidas como inconstitucionais, quiseram atribuir ao Tribunal de Contas *competência jurisdicional*, o fizeram de forma expressa. Deram às suas decisões *força de sentença*. Isso não fizeram os textos constitucionais. Portanto, os textos em causa, constitucionais, devem ser interpretados como tendo em mira usar a palavra julgar no sentido restrito, atrás sustentado, isto é, dentro da órbita administrativa, pois do contrário atribuiriam a esse julgamento a *força de sentença*.

In fact, it is not understood that the expression “judge of legality” is interpreted as restricted to the administrative orbit and “judge the accounts” extends to the jurisdictional scope. Changing the verb's regency does not change the meaning of the function, passing it from administrative to jurisdictional, and, on the contrary, direct regency is not proper for the use of the word in the sense of sentencing, as we have seen. Both texts must be understood in a strict sense, although when “judging from legality” there is an appreciation of the matter of law, but without definitive character, a mere administrative examination, the judicial function being relegated to the Judiciary.

1. Furthermore, this interpretation conforms to the nature of the Court of Auditors, the Administrative Court, of auditing accounts, and never the Court of Justice, of judging, after all, the public agents for the accounts not rendered or badly rendered.

In fact, the judgment of the accounts is not to be confused with the judgment of those responsible for them.

The *function of judging* , in its true sense, of saying about the law in the face of facts, *concerns someone* , or better, a person of law, natural or legal. In this case, the public agent who ordered or made the expense, natural, related to the scope, of a criminal nature, and the patrimonial reparation, of a civil nature, or better, the person responsible for the accounts.

The expression " *judging the accounts* ", on the other hand, does not contain any jurisdictional function to say someone's right, but *administrative-accounting* to assess the fact of its performance. Judgment is made of the agents responsible for the accounts, never of the accounts. These are appreciated, as has been said, under the administrative-accounting aspect. They are insusceptible to judgment.

The Court of Auditors judges the accounts, or rather, appreciates their performance in view of the administrative-accounting element, and, furthermore, the legality of the contracts made, as well as the retirements and pensions. The Common Justice judges public agents who order expenditure and its payers. And when judging their acts, under the aspect of the criminal or civil offense, one must also appreciate the facts that are intended to generate these offenses. Repeat, the jurisdictional function is to say the right in the face of the facts. Never to appreciate facts simply. Even if it accepted that assessment as definitive, it would not correspond to a function of judging.

The certificate of the Court of Auditors in affirming the reach of the public agent, as a document of instruction of the judicial process, has only the presumption of truth *juris tantum* , before the constitutional text and not *juris et juri* . This is because it does not have the power of a judicial sentence and this cannot be the case, unless it is *empowered to judge the* civil and criminal *offense itself* , attributed to the agents responsible for the expense and their payers, that is, the agents responsible for the accounts.

The successive national Constitutions expressly conferred on the Union Judges (cf. 1934, art. 81, "a", and single paragraph; 1937, arts. 107, 108 and single paragraph; 1946, art. 201 and §§1. And 2, 1967, art. 119, I, and 1969, art. 125, I) competence to prosecute and judge the cases in which the Federal Government is interested as plaintiff or defendant, assistant or opponent, and only exception to that competence the competence of the local Justice in bankruptcy and other processes in which the National Treasury, although interested, does not intervene as the plaintiff, defendant, assistant or opponent, and also emphasized the competence of the Electoral, Military and Labor Justice. They said nothing about the accounts of those responsible for money or public good.

On the contrary, the Constitutions of 34 (art. 81, "i"), 46 (art. 104, II, "a", art. 105, after the AI / 2, art. 6) was promulgated, of 67 (119, I and IV), and 69 (art. 125, I and IV), without any reservations in favor of the Court of Auditors, attributed to the Federal Judges the power to prosecute and judge, in the first instance, the crimes committed to the detriment of goods, services or interests of the Union or of autarchic entities or public companies, except for the competence of the Military, Labor and Electoral Justice.

If they wished to exclude from the jurisdiction of the Federal Judges the judgment of those responsible for money or public goods, giving force to the judgment of the Court of Auditors regarding their accounts, they should have said that, or at least made reference to that article. On the contrary, they were silent. Not having excluded this matter from the jurisdiction of the federal Judges, it should be their responsibility, *ex vi* of the articles of the different national Constitutions, and not only the formal competence to condemn

those whose accounts are rejected and have been found to have committed an offense, or civilly responsible, as appreciate the merit of this criminal and civil offense, which was attributed to him.

And this jurisdiction was now conferred in a *level of appeal* to the Supreme Federal Court (Constitution of 34, art. 76, II, “a”, c / c art. 79, sole paragraph, §1, 101, II, 2nd letter “a” and article 109 (sole paragraph), now, to the Federal Courts to judge *privately and definitively* (Constitution of 1946, article 104, II “a”; 67; article 117, II, and paragraph 69, art. 122, II, and sole paragraph), except for bankruptcy matters, and those subject to Electoral, Military and Labor Justice, and no Court deems it private and definitely an issue if it cannot hear it , both in its formal and material aspect.

Note, it is considered as a crime of responsibility of the Ministers of State not only those who practice or order, but also those related to the expenses of their Ministry, which they are responsible for directing, as advisor, coordinator and supervisor of their bodies. , because they are responsible for them and the Finance Department, in addition to these, such as those pertinent to the collection of revenue, as this charge is still affected.

Therefore, how can it be understood that the constitutional expression "will judge the accounts of those responsible for public money or goods" is equivalent to the granting of a judicial function to the Court of Auditors? The same function is left to the Political Justice and then to the Common Justice, in the cases of crimes under the responsibility of the President of the Republic and related to the Ministers of State, and to the Supreme Court, in those under the responsibility of the Ministers, who are responsible not only for acts that they order or practice, such as the expenses of their Ministry, and, that of Finance, in addition, for the collection of revenue? And how would the subsequent liability of these authorities, civil and criminal, take place before the Common Justice, after being convicted of the loss of office?

Now, not a word exists about the Court of Auditors. Considered by this act of the President of the Republic and of the Ministers of State connected to it as having violated administrative probity or the execution of the budget, will the Political Court be bound by the pronouncements of the Court of Auditors? So, will the auxiliary body of Congress, of financial and budgetary oversight, overlap, in its conclusions, with it? The Chamber of Deputies will not have the freedom to assess the existence or not of the alleged attack on administrative probity by the President to present the complaint against him, and the Senate will be obliged to accept this attack, object of the complaint, as proven, without investigating the veracity, forming the Judgment on it in itself?

1. The last consequence to be drawn is the one previously advocated, that is, that the expression "judge" the accounts given to the Court of Auditors, in fact, improperly, is restricted to the administrative orbit, with the objective of being able to give discharge or to have the liability determined accounts of those responsible for money or public goods. And yet, with this same sense, the word judge is given, as corresponding to appreciating the accounts only found when it is attributed in the Constitutions of 1934 (art. 40, "c"), 1946 (art. 65, VIII) , 1967 (art. 47, VIII) and 1969 (art. 44, VIII) to the National Congress with private competence to judge the accounts of the President of the Republic. This is because the President of the Republic must present the accounts for the previous year to the National Congress within 60 days,*ex vi* of art. 81, XX, with the prior opinion of the Court of Auditors, within 60 days of receipt.

As a final consideration, consider that in the face of the national Constitutions, since that of 1946, it has always been ensured, among the individual rights of the citizens, and among them are public agents, expense managers and their payers, that it could not be excluded any injury under individual law, which would be guaranteed by law. Now, in understanding the public agent, whose accounts are no longer accepted by the Court of Auditors, which has resulted in injury to his right of defense and that the evidence of the alleged fact is not true, the Judiciary should be allowed to, always, its examination, under penalty of injury to their individual right, whether in the grounds of civil or criminal offense.

Therefore, the Court of Auditors does not exercise jurisdictional and only administrative accountability. This point of view is also defended by Guimarães Menegale (cf. *Administrative Law and Science of Administration* , pp. 219-226, Borsói, Rio, 1957) and by José Afonso da Silva (cf. *On the Extraordinary Appeal in Brazilian Procedural Law* , pp. 265-268, Book 114, Ed. RT, 1963). Clenício da Silva Duarte (cf. *Proceedings of the VIII Congress of Brazilian Courts of Accounts* , vol. II, pp. 441-477, João Pessoa, 1976).

In conclusion

I - The role of the Court of Auditors par excellence is to control the budget in order to ensure public morality.

II - The Courts of Accounts do not, in fact, have jurisdictional functions, but only assess the accounts, whose activity in this regard is of particular importance.

III - The Court of Auditors in the Constitution of 67 and Charter of 69 had its real powers restricted and thus impaired the exercise of its primary function.

IV - Only the absolute veto against expenses without improper or appropriated funds allows the effective control of the budget, reserving the relative veto for other expenses and the *posterior* control for the final determination of the responsibilities of its originators and payers.

V - The Courts of Accounts of States and Municipalities may adopt, in view of arts. 13 and 15 of the Charter of 69 with art. 1, the absolute and relative veto and *a posteriori* control in the terms stated above, to guarantee compliance with the budget.

VI - States, in Municipalities where there is no Court of Auditors, may exercise control over municipal budgets, through their Courts of Accounts or a body created for that purpose.

Downloads |

There is no statistical data.

Author's biography

Oswaldo Aranha Bandeira de Mello, Pontifical Catholic University of São Paulo (São Paulo, São Paulo, Brazil)

Full Professor of Administrative Law at the Faculty of Law of the Catholic University of São Paulo

References

Conference given at the Court of Accounts of the Municipality of São Paulo, in April 1982. Originally published in Revista de Direito Público, São Paulo, year 18, n. 73, p. 181-192, Jan-Mar. 1985, whose transcription was made by João Paulo Ribeiro Cucatto and Leandro Moraes Leardini.

Published

2021-01-09

Edition

v. 5 n. 16 (2021)
Section

News