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External public administration control deficits: theoretical notes and guidelines based in the Rio Grande do Sul Court of Accounts Actuation*

Déficits no controle externo da administração pública brasileira: apontamentos teóricos e diretrizes a partir da atuação do Tribunal de Contas do Estado do Rio Grande do Sul

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Abstract

The present research has as an objective to delimit which postures can be adopted to solve the deficits in external public administration control. With this, in face of doctrine considerations and jurisprudential analysis about the Brazilian external public administration control, it intends to answer the following problem: which measures can be adopted to heal the deficits of external public administration control? For that, it used the approach deductive method, procedure bibliographic method and the research techniques based in books, magazines, periodicals, news, thesis, dissertations, as well as decisions of Rio Grande do Sul Court of Accounts. The specific objectives are conceptualizing public administration control and its forms; analyzing the external public administration control based on the actuation of Rio Grande do Sul Court of Accounts about irregularities in administrative contracts and; proposing measures that can be used to solve these deficits. Thus, the conclusion is in the sense of the necessity to improve the instruments of public administration control, especially about the inter-institutional collaboration of controlling agents, as well as the adoption of public policies.

Keywords: Public administration. Control. Democracy. Public policies. Court of Accounts.

Resumo

O presente trabalho tem como objetivo delimitar quais posturas podem ser adotadas para sanar os déficits no controle externo da administração pública. Com isso, diante das considerações doutrinárias e análise de jurisprudência quanto ao controle externo da administração pública brasileira, tem-se o seguinte problema de pesquisa: quais medidas podem ser adotadas para sanar os déficits encontrados no controle externo da administração pública? Para tanto se utilizou o método de abordagem dedutivo, método de procedimento monográfico e técnicas de pesquisa que se resumem à pesquisa bibliográfica em livros, revistas, periódicos,

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notícias, teses, dissertações, bem como decisões do Tribunal de Contas do Estado do Rio Grande do Sul. Os objetivos específicos são conceituar o controle da administração pública e suas formas; analisar o controle externo da administração pública a partir da atuação do Tribunal de Contas do Estado do Rio Grande do Sul no que se refere a irregularidades em contratos administrativos e; propor medidas que possam ser utilizadas para sanar os déficits encontrados. Desse modo, a conclusão é no sentido da necessidade de serem aprimorados os instrumentos de controle da administração pública, sobretudo no que tange a colaboração interinstitucional dos agentes colaboradores, bem como da adoção de políticas públicas.
Palavras-chave: Administração pública. Controle. Democracia. Políticas públicas. Tribunal de Contas.

1 Introduction

The present work has the general objective of delimiting which postures can be adopted to remedy the deficits in the external control of public administration. The theme is related to the deficits in the external control of the Brazilian public administration and its forms of confrontation, delimiting the analysis of the jurisprudence of the Court of Auditors of the State of Rio Grande do Sul with regard to irregularities in administrative contracts, using a doctrinal and jurisprudential study. Thus, in view of the doctrinal considerations and analysis of jurisprudence regarding the external control of the Brazilian public administration, the following research problem arises: what measures can be adopted to remedy the deficits found in the external control of the public administration?

To this end, the deductive approach method was used, considering that from the general conceptions about the control of the public administration, it is now specifically analyzed the measures that can be adopted to remedy the deficits found in the external control of the Brazilian public administration from the performance of the Court of Auditors of the State of Rio Grande do Sul. As for the monographic procedure method and as for the research techniques, these are summarized in bibliographic research in books, magazines, periodicals, news, theses, dissertations, as well as decisions of the Court of Auditors of the State of Rio Grande do Sul, among other means. Regarding the decisions, the analysis is restricted to the time period from 2017 to 2019, refining the search field of the institutional website of the Court of Auditors of the State of Rio Grande do Sul between the time period from 01/01/2017 to 01/01/2019.

"Irregularities" and "administrative contracts" – written in quotation marks and with the character "e" in capital letters – were the terms used for the joint search. Subsequently, the filter was applied to the "management accounts" process type, which resulted in 38 results. Among which those that deal with the analyzed theme were selected, to the extent that even after using the aforementioned filters, the search engine presented decisions that did not deal with irregularities in administrative contracts (which were discarded). With this, therefore, a total of 27 decisions remained for analysis.

The initial hypothesis is presented about the performance of the Court of Auditors of the State of Rio Grande do Sul as a deficit, that is, from a distance between the verification of the facts during the audits and the establishment of the respective investigation procedures and application of sanctions to those responsible, thus having a gap between the performance of the Court of Auditors, of the Judiciary and other control bodies, demanding the investigation proposed in this work. From the outset, it is highlighted that it is not a problem related to the performance of the Court of Auditors of the State of Rio Grande do Sul, but rather to external control as a whole, which requires the joint action of other forms of control with the collaboration of all controlling agents and also of society.

The justification is centered, in theoretical terms, on the need to verify what are the deficits in the external control of the public administration, more specifically in the performance of the Court of Auditors of the State of Rio Grande do Sul, so that it is possible to propose mechanisms to remedy these deficits, so that the controlling activity achieves its purposes. Considering that the article was written based on the research carried out throughout the dissertation, the deficits verified in the analysis of the decisions, as well as the results, will be presented succinctly due to the space for approach.

The specific objectives, in accordance with the division into topics, are: to conceptualize the control of public administration and its forms; to analyze the external control of the public administration based on the performance of the Court of Auditors of the State of Rio Grande do Sul with regard to irregularities in administrative contracts and; propose measures that can be used to remedy the deficits found.

2 Forms of control of public administration: concepts and normative provision

In this first topic, the objective is to conceptualize the control of public administration and its forms, focusing on the Brazilian context and using a conceptual and normative analysis. Initially, regarding the definition of the word "control", as with other phenomena in the social sciences, its definition is complex and involves a series of factors. However, Viana (2019) states that regardless of the definition used, the understanding that the denial of control is inherent in human nature, even in the refractory (unsubmissive) character to the instruments of control, both in personal and work life.

As for the origin of the need to control public acts, according to Lima (2018, p. 04), since the period in which the Declaration of the Rights of Man and of the Citizen was promulgated,

in France in 1789, in the context of the French Revolution, there was already a provision in its Article 15 that "society has the right to demand accountability from every public agent in its administration". In other words, the idea that the acts of the public administration need to be controlled is not recent, as well as the author, this is one of the logical consequences of democracy, along with equality before the law, the existence of an administrative and judicial procedural system that respects individual rights and guarantees, in addition to a list of constitutionally expressed fundamental rights and freedoms and popular participation.

Regarding the modalities of control of public administration, the possibility of social control, internal control and external control is highlighted, the latter being the focus of this research. In relation to such modes of exercising control, what can be observed is that they can also be adopted jointly, that is, at the same time that individuals exercise social control of public acts, the public administration can adopt internal control of its acts in addition to external control.

It is also necessary to observe the distinction brought by Perez (2016) in relation to the modalities of internal and external control of the public administration, so that the former, also called power of self-control, is understood as the duty of the public administration to annul its acts if they are not practiced in accordance with the pre-established norms. While external control, in the author's definition, is that comprised both the control of the Legislative Branch over the administration and also the jurisdictional control.

Although they have different concepts and characteristics, the modalities of internal and external control are related to each other. On this point, Malafaia (2011) states that external control should be linked to internal control, having double obligations of mutual support. Thus, even if the internal control is an independent institute, it needs to provide subsidies to the external control through its procedures and information found, while it is up to the external control to support and exchange tools with the internal control, thus having a relationship of mutual cooperation.

With regard to the social control of public administration, according to the website of the Comptroller General of the Union (2012), social control is one of the ways of sharing power between the State and society, through joint actions and inspections, aiming at a common purpose. The document also defines that it is one of the duties of all public entities to inform the population clearly about the way they spend the money, accounting for their actions. The language used must be objective and easy to understand by citizens, and the mere disclosure of data without enabling understanding by those who access it is not enough.

Relating social control to the role played by the Courts of Auditors (TCs), Bittencourt and Reck (2018, p. 57) state that "the TCs will decide by communicating to the manager that the information present in the transparency portals does not generate communication capable of allowing social control of the public administration, opening the opportunity for correction", in order to demonstrate that the instruments of control of the public administration do not act in a totally isolated way, with this there is a connection between the modalities in the search for the effective control of state acts. This is a typical example of when one of the control modalities proves to be insufficient or with problems for its implementation, the joint action between the entities and society is what enables its exercise.

Regarding the internal control of public administration, in a synthetic way, it is noted that it is directly related to the acts performed internally in the organization of public management, such as the homologation, approval, invalidation, revocation of its own procedures. Similar to what occurs in the private sector, in *compliance* codes, for example, internal control within the scope of public activity has, among its objectives, the duty to establish organizational plans and methodologies that aim to guarantee results in accordance with normative and legal provisions.

Internal control, according to Leal (2020), is not a faculty of state powers, but a cogent and inescapable imposition, which is extended to autarchies, foundations, and state-owned companies, as well as extends to all public powers, whether in the scope of the Executive, Legislative, and Judicial Branches. In the author's understanding, internal control should have its performance beyond the formatting and execution of public policies, and should be present in the evaluation of results, especially regarding the efficiency and effectiveness of financial, budgetary and asset management in the public interest.

Complementing these considerations, Lima (2012) considers that among the objectives of the internal control systems of the public administration, in the first place, is the safe execution of administrative action, which must be based on principles and rules of law, aiming above all at the realization of the public interest, falling on all acts and procedures carried out by the controlled administrative entity.

Another concept about the internal control modality is brought by Gonçalves Júnior and Miranda (2019), who states that it is possible to relate the existence of management's internal control instruments with *compliance* programs, to the extent that only by implementing such programs will it be possible to meet the demands for guidance and inspection imposed as public internal control guidelines. In the authors' view, with which we agree, the public as well as the private sector has the obligation to establish systems and routines that encourage the integrity

of managers' actions. In addition, in a democratic context, the creation of verification and control mechanisms – citing as examples internal controls, *compliance,* transparency and *accountability* programs – is essential for both the public sector and citizens.

Regarding external control and the current constitutional provision, it is important to emphasize that the concern with the control of public acts gained normative strength with the advent of the Federal Constitution of 1988, standing out in the words of Avritzer and Filgueiras (2011) with the notion of democratization of the Brazilian State and the strengthening of external control of public administration. We agree with the authors' understanding of the need to strengthen the role of state powers together with civil society, guaranteeing the basic principles of public administration. Relating to the phenomenon of corruption, the authors conclude that from 1988 onwards there was a centralized concern with issues related to the administrative machinery of the State, which ended up producing a hypertrophy of the control mechanisms at the same time that corruptive scandals continue to occur, which is why such mechanisms must be increasingly improved.

Specifically regarding the external control of the public administration, the constitutional provision is explicit in Article 70 et seq., and the aforementioned provision provides that the accounting, financial, budgetary, operational and patrimonial inspections of the Union, as well as of the entities of the public administration, whether direct or indirect, must occur in compliance with the principles of legality, legitimacy and economy. being exercised by the National Congress, through external control, and by the internal control system of each of the branches. As for Article 71 of the Federal Constitution of 1988, it provides that the external control of the public administration will be exercised by the National Congress with the assistance of the Court of Auditors, and its attributions are listed in items I to XI.

External control, as exposed, is exercised by bodies outside the administrative structure of the State, which according to Coelho (2009) constitutes an important aspect in the maintenance of the system of checks and balances, one of the pillars of the theory of the tripartition of powers, a theory developed by Montesquieu in the work *The Spirit of the Laws*, in which the author established the existence of three distinct powers with their own functions and distributed the competences to different state bodies.

Although Brazilian legislation has these and other instruments for the exercise of control of public administration, in addition to public and private policies, some communication deficits are observed between the controlling agents, which can have harmful consequences for obtaining the desired results. At this point, as an example, it can be seen that the Court of Auditors of the State of Rio Grande do Sul, as well as the Federal Court of Auditors (TCU) and

other state Courts of Auditors, have a normative provision on the possibility of collaboration, guidance and prevention in the detection of irregularities. In addition, it also presents controlled managers, providing for the formulation of consultations by public administrators on how to proceed legally and legitimately in their bodies; the awareness of the internal control of the Court of Auditors about irregularities or illegalities found by it in the scope of public management; among other regulations.

This situation was also verified in research carried out by Leal (2020), which concluded that among the causes that would justify this deficient horizontal relationship between the controlling entities of the public administration, the following could be cited: the absence of an institutional and personal culture of cooperation; conflicts and tensions in the spaces of power and search for protagonism; insufficiency in operational and logistical mechanisms in collaboration; the use of techniques and methodologies outdated work with regard to preventive and curative actions related to the confrontation of irregularities in public administration, especially with regard to practices of corruption and administrative improbity.

Given the importance of analyzing in practice the role played by the Courts of Auditors, the research carried out by Guerra and Hartmann (2020) on the profile of the type and time of processing of cases in the TCU is verified, which in the last 25 years it was noticed, firstly, that the workload carried out by the TCU, measured by the number of new cases, quadrupled in two decades, while this did not result in any impact on the duration of these procedures. This finding is one more evidence about the effectiveness of the services performed by the institution and, at the same time, relating to the research carried out in this study, the need for cooperation between the controlling agents of the public administration is evidenced. The second trend pointed out by the authors is about the significant improvement in the management of processes in the TCU, largely improved with the implementation of electronic processes.

In turn, on the subject of audits and the fight against corruption in the Court of Auditors of the State of Rio Grande do Sul, Pase *et. al*. (2018) concluded that the effectiveness of the inspection system is one of the factors that contributes to adherence to the norms, both formal and informal, of democracy, and is thus one of the essential requirements for the long-term socioeconomic development of countries.

Having exposed the introductory considerations on the theme of public administration control, its conceptualization, modalities and legal provision, it is now possible to verify in a specific way how the Court of Auditors of the State of Rio Grande do Sul acts with a focus on

its institutional identity and external control procedures, especially with regard to irregularities in administrative contracts.

3 The performance of the Court of Auditors of the State of Rio Grande do Sul: institutional identity and external control procedures

This second topic aims to analyze the external control of the public administration from the performance of the Court of Auditors of the State of Rio Grande do Sul, with regard to irregularities in administrative contracts. The focus is to explain the institutional identity of the Court of Auditors, as well as to analyze and investigate its performance, with regard to irregularities in administrative contracts based on the twenty-seven decisions analyzed, succinctly bringing the main conclusions.

Initially, it is noted that in 1935, through Decree No. 6,004, five judges were appointed, which constituted the first plenary session of the Court. In 1939, the Court of Auditors of the State of Rio Grande do Sul was extinguished due to the implementation of the Estado Novo, being reactivated only in 1945, with the full function of overseeing the public administration, a function assigned by Decree Law No. 947, of October 24, 1945, which established the Court. As for the competences of the Court of Auditors, these are expressly provided for in Article 71 of the Federal Constitution of 1988, as exposed in the previous topic, and also, specifically with regard to the Court of Auditors of the State of Rio Grande do Sul, in the State Constitution. In addition, Law No. 11,424 of 2000, regarding the Organic Law of the Court of Auditors and the Internal Regulations of the Body, through Resolution No. 1028, of 03-27-2015, also define the areas of activity of the Court of Auditors.

Among the provisions of Law No. 11,424/2000, some provisions stand out, Article 3 provides that the organization of the Court of Auditors includes: I – the Full Court; II – the Chambers; III – the Counselors; IV – the Presidency; V – the Vice-Presidencies; VI – the General Internal Affairs Office; VII – the Ombudsman's Office; VIII – the Substitute Auditors of the Board Member; IX – the Technical Staff and the Auxiliary Services; and X – the Francisco Juruena School of Management and Control. Article 4 defines that the Councilors will be appointed by the Governor of the State. In turn, Article 10 provides that the Substitute Auditors of the Board of Directors, in number of 7 (seven), shall be appointed by the Governor of the State, among Bachelors in legal and social sciences, by means of a public examination of tests and titles, held before the Court of Auditors. While civil servants of the technical staff and the auxiliary services of the Court of Auditors will be part of their own staff, with the

structure and attributions that are established by law, by the Internal Regulations or committed by the Full Court under the terms of Article 17 of said law.

Specifically with regard to competence, the Organic Law establishes, in its Article 33, that the Court of Auditors, an external control body, in the exercise of accounting, financial, budgetary, operational and patrimonial inspection, is competent, under the terms of the provisions of Articles 70 to 72 of the Constitution of the State and also in the form of this provision. Among the attributions, it is possible to highlight: the issuance of a prior opinion on the accounts that the Governor of the State must provide annually; the issuance of a prior opinion on the accounts of the municipal Mayors; judging the accounts of administrators and other persons responsible for public money, assets and values, of the direct and indirect administration, including foundations and societies established and/or maintained by the state and municipal public authorities, and the accounts of those who cause loss, misplacement or other irregularity resulting in damage to the treasury.

Also with regard to competences, it is the responsibility of the State Court of Auditors to assess, for the purpose of registering the legality of acts of admission of personnel, in any capacity, in direct and indirect administration, including foundations established and/or maintained by state and municipal public authorities, except for appointments to positions in commissions, as well as the concessions of retirements, retirements and pensions, except for subsequent improvements that do not alter the legal basis of the concession act; carry out inspections and audits of an accounting, financial, budgetary, operational and patrimonial nature, monitoring the execution of work programs and evaluating the efficiency and effectiveness of the internal control systems of the bodies and entities inspected; supervise the application of any resources belonging to the State, transferred by it to the municipalities through an agreement, agreement, adjustment or other similar instruments.

Also on the list of competencies are: to apply fines and determine reimbursements to the treasury, in case of irregularities or illegalities; sign a deadline for the person responsible for the body or entity to adopt the necessary measures for the exact compliance with the law, if illegality is verified; suspend, if not complied with, the execution of the contested act, communicating the decision to the Legislative Assembly or the respective City Council; request, in the case of contracts, the suspension of the same to the Legislative Assembly or the respective Municipal Council, deciding on whether the corresponding Legislative or Executive Branches; to represent the competent authority on irregularities or abuses investigated; to decide on denunciation, in accordance with the provisions of Articles 60 and 61 of this Law; to decide

on the scientification, which is dealt with in Articles 57 to 59 of this Law, under the terms defined therein; and finally, to assess consultations that are formulated to it, in accordance with the provisions of the Internal Regulations.

Under the terms of the first paragraph of the same provision, there is an important provision on the investigative power of the Court of Auditors, which is responsible for requesting and examining, directly or through its technical staff, at any time, all the elements necessary for the exercise of its attributions, and no process, document or information may be withheld. under any pretext. In addition, under the terms of the second paragraph, the Court of Auditors, in the exercise of its powers, may determine that the bodies and entities subject to its jurisdiction send it data and/or information through computerized, magnetic or electronic means, as defined in the Internal Regulations or in Resolution.

As for the jurisdiction of the Court of Auditors of the State of Rio Grande do Sul, among the hypotheses of Article 34, the following stand out: all persons responsible, individuals or legal entities, public or private, who use, collect, store, manage or administer money, assets and public values for which the State or any of the municipalities that compose it are responsible, or who assume obligations on behalf of the State or municipality; those that cause loss, misplacement or other irregularity that results in damage to the treasury; all those who must be accountable to it or whose acts are subject to its supervision and; those responsible for the application of any resources transferred by the State to the municipality, through an agreement, agreement, adjustment or other similar instruments.

Article 67 of the Organic Law of the Court of Auditors of the State of Rio Grande do Sul, mentioned in most of the decisions analyzed in the following topic, in turn, provides that violations of laws and regulations related to accounting, financial, budgetary, operational and patrimonial administration will subject their authors to a fine of no more than 1,500 reference fiscal units. this amount being independent of the applicable disciplinary sanctions. The Organic Law brings other equally important provisions, however, considering that it is not the focus of this research, the other provisions will be described in due course and if necessary.

As for the competences, it is worth mentioning the fact that it is the responsibility of the State Court of Accounts to assess, for the purposes of registering the legality of the acts of admission of personnel, in any capacity, in the direct and indirect administration, including the foundations established and/or maintained by the state and municipal public authorities, except for appointments to positions in commissions. as well as the concessions of retirements, retirements and pensions, except for subsequent improvements that do not alter the legal basis of the concession act; carry out inspections and audits of an accounting, financial, budgetary,

operational and patrimonial nature, monitoring the execution of work programs and evaluating the efficiency and effectiveness of the internal control systems of the bodies and entities inspected; supervise the application of any resources belonging to the State, transferred by it to the municipalities through an agreement, agreement, adjustment or other similar instruments.

Regarding the Internal Regulations of the Court of Auditors of the State of Rio Grande do Sul, it is necessary to highlight some provisions in relation to the text approved by Resolution No. 1028/2015 and updated until Resolution No. 1090/2018. Considering that part of the text of the Internal Regulations repeats the provisions already exposed in the Organic Law, it will not be analyzed in total, but rather, as necessary throughout the development of the research. With this, the important provision of Article 5, XIV, which is related to the theme of this dissertation, is highlighted. This provision provides that it is incumbent on the Court of Auditors "to determine, at any time, the remittance of documents to the Public Prosecutor's Office and other competent authorities, when there are well-founded indications of criminal offense and acts of administrative improbity", that is, joint action between the control bodies of the public administration is more than a necessity, rather, a legally imposed duty.

It is interesting to note that, according to Viana (2019), Article 16, paragraph 3, of the Organic Law of the Federal Court of Accounts imposes that whenever the occurrence of an irregular act is verified, a copy of the relevant documentation must be immediately sent to the Federal Public Prosecutor's Office, for the filing of the appropriate civil and criminal actions. This demonstrates that the supervisory function of the Court of Auditors does not end with the performance of the sanctioning or even jurisdictional function, which is also seen in relation to the Court of Auditors of the State of Rio Grande do Sul. In other words, the provisions of the Internal Regulations are in accordance with the entire Brazilian legal system in the sense of seeking joint action between the control bodies of the public administration, aiming at the inspection and application of the respective sanctions in the event of the occurrence of the illegalities provided for in the legislation.

Specifically regarding the decisions analyzed, the position of the Court of Auditors was evident with regard to the search for the achievement of the public interest and respect for legislative and constitutional norms, which serve as a guideline for the position adopted not only in the decisions analyzed, but also for the institutional identity and history of the Court of Auditors of the State of Rio Grande do Sul as a whole. This is an intrinsic characteristic of its existence and organizational form. What was verified in almost all of the decisions analyzed is that in addition to the applicable sanctions, in the form of fines or debt fixation, the need to

warn the current management about the need to avoid the occurrence of illegalities verified in the procedure in question was highlighted, as well as to communicate future management about the decision.

With regard to the application of fines, this sanction was verified in almost all decisions, ranging from R$ 500.00 (five hundred reais) to R$ 1,500.00 (one thousand five hundred reais). The setting of debit was also applied, although in smaller numbers, emphasizing that there are specific situations that justify its applicability, and the correct reasoning was verified in cases in which the debit was fixed during the judgment of the management accounts. However, at the same time that this concern is observed to avoid the recurrence of managers in the irregularities investigated, there are deficits with regard to the communication of possible unlawful acts to the Public Prosecutor's Office, under the terms of Article 5 of the Internal Regulations, which was analyzed in the first topic.

Within the scope of the decisions analyzed, irregularities were found in the bidding procedures, such as: the absence of bidding in cases that were not unenforceable, a situation in which, with the possibility of extending the same contract, the administration chose to carry out a new bidding, with a new contract and substantial change in prices; lack of transparency in procedures involving administrative contracts; direct hiring through dismissal processes in which there was no proof of the emergency situation or public calamity that would justify such hiring; a fact in which there was a violation in the bidding procedure, since there was no demonstration of the simultaneous existence of specific situations; irregularity when signing administrative contracts, with payment via Autonomous Payment Receipt (RPA); among other cases of irregularities, which from reading the opinions, votes and reports, it is inferred the possibility of the occurrence of acts of administrative improbity and other criminal offenses.

Thus, in view of the findings about the institutional and normative identity of the Court of Auditors of the State of Rio Grande do Sul, measures are proposed to remedy the deficits found in the performance related to the external control of the public administration with regard to the decisions analyzed on irregularities in administrative contracts.

4 Guidelines and proposals for the remediation of deficits in the external control of public administration

This topic aims to propose measures that can be used to remedy the deficits found, highlighting that the guidelines presented here are based on the readings and analyses carried out, without highlighting, so far, other possibilities. Initially, it is understood, in general, that

external control, such as that exercised by the Courts of Auditors, does not have enough time and personnel to be able to verify all situations, and in addition to the formation of interinstitutional cooperation networks, mentioned throughout this topic, there is also social control as a complement to this action to the extent that external control requires time, which is scarce due to the speed and need to bid for goods and services, or even the execution of other administrative contracts. Thus, social control must be improved precisely to avoid excesses and irregularities at a critical moment that Brazilian and global society is facing.

Another guideline that is understood to be necessary in a broader way is the improvement of joint integration systems between public administration bodies, facilitating the exchange of information, especially with regard to criminal practices as a way to better identify agents and apply the respective sanctions in the criminal, civil or administrative sphere. which could occur in a computerized way. Perhaps this is one of the biggest challenges, based on the readings made during the dissertation, because so far, what has been verified is the deficient performance of the information exchange systems. This guideline is seen as an urgent need at a time when almost all of the decisions analyzed were not communicated to the Public Prosecutor's Office, even in the case of facts that, at least in theory, would be characterized as a crime and/or administrative improbity, violating not only the Internal Regulations, but also the constitutional principles related to public administration.

Considering the legislation on the subject, in addition to the existence of these cooperation networks, as well as the terms signed between the Court of Auditors of the State of Rio Grande do Sul and the Public Prosecutor's Office, the institution of a computerized system in which it would be possible to integrate the existing instruments, as is the case of Licitacon, studied in the previous topics; the Court of Auditors' jurisprudence search system; the public procedural consultation of the Court of Justice; the transparency websites of the municipalities, State and Union; among others, it would enable greater exchange of information for the exercise of social control in those data that could be disclosed and also with the existence of internal systems, as already occurs in the scope of work of these bodies.

This alternative would not require greater expenses from the public administration, beyond what is necessary for the establishment and maintenance of the aforementioned systems, and would be a way to overcome these deficits and the gaps between the performance of the external control bodies and the subsequent initiation of civil and/or criminal proceedings, as necessary. In this aspect, in the same way that the Court of Justice of the State of Rio Grande do Sul allows the procedural consultation of procedures that are not in secrecy of justice, it

would be interesting to link those originating from the Court of Auditors as a way of verifying by citizens about those unlawful acts found, if there was accountability, who were the agents and what were the sanctions applied.

This interaction deficit was also verified by Pase *et al.* (2018), who pointed out that the absence of effective interactions with other control organizations, exemplifying the Public Prosecutor's Office and politics, are presented as factors that weaken the technologies for detecting and operationalizing the possibilities promised by the agreements, entered into between the institutions and with the purpose of producing evidence and progressing the investigative processes.

On this point, it is interesting to highlight the role played by the National Strategy to Combat Corruption and Money Laundering, an articulation network, under the terms contained in the Anti-Corruption Guidelines Plan – Action 01/2018 (ENCCLA, 2018), which has the function of discussing anti-corruption policies, and is not responsible for implementing such measures. Being composed of qualified public servants from the various spheres of power, ENCCLA is given the possibility of carrying out a cross-sectional analysis of the theme, enabling the development of medium and long-term guidelines for the fight against corruption. And although certain authors discuss its nature as a public policy, it is understood that ENCCLA can be configured as a public policy to combat corruption and money laundering.

Another important observation is that through Action 02/2016 (ENCCLA, 2016b), defined in a meeting held in 2015, the objective was to create instruments for effective social participation, enabling the promotion of transparency and increasing the possibilities of monitoring by civil society, which resulted in the creation of the mechanism. This demonstrates the closing of the cycle between planning, development of actions and results achieved by public policy. Through this and other initiatives, proposed by the aforementioned public policy, possibilities arise for the formulation of guidelines for the improvement of public administration control networks, as a way to prevent the occurrence of illicit acts related to corruption and also to money laundering.

In addition, the importance of this public policy and other initiatives, which will be mentioned throughout this topic based on the verification of these communication deficits between the controlling entities, is justified in part by the growing complexity of the state apparatus mentioned in the previous topics, in addition to what Leal (2020) also observesin the sense that there is greater technical sophistication of issues related to public administration, with regard to the multiplication of interest categories and the increase of ethical requirements on the part of society.

At this point, the Court of Auditors of the State of Rio Grande do Sul, as well as the Court of Auditors of the Union and other state Courts of Auditors, have the normative provision on the possibility of collaboration, guidance and prevention in the detection of irregularities also with the controlled managers; providing for the formulation of consultations by public administrators on how to proceed legally and legitimately in their bodies, in the awareness of the internal control of the Court of Auditors on irregularities or illegalities found in the scope of public management, among other regulations.

Thus, what is being sought to demonstrate is that this is not a problem involving the performance of the courts of accounts in the exercise of external control, but rather the fact that this is not sufficient to meet the complex demands required by the public administration, thus requiring the improvement of the networks of joint action between the controlling bodies and also of civil society. which plays an important role in social control.

This same understanding is adopted by França (2016) when he states that the State, by constitutional definition, is subject to an effective system of external control, exercised by the Legislative Branch, the Court of Auditors, in the exercise of its institutional independence, the Public Prosecutor's Office, civil society and also the Judiciary, as well as the need to ensure its self-control. It is emphasized that the public administration works in a transparent manner, needing legitimately constituted control bodies that act in harmony to supervise, guide and correct their conduct.

In addition, the importance of effective control in this area, to prevent and combat corruptive practices, is even more relevant given that administrative contracts are directly related to the phenomenon of corruption at a time when the occurrence of irregularities is a field susceptible to corruptive practices ranging from embezzlement of small amounts to millionaire losses to the public coffers. This makes cooperation networks increasingly necessary for the realization of effective control of public administration, which in turn is one of the prerequisites for the existence of democratic states.

Furthermore, the entire control procedure carried out by the controlling bodies must have its performance limited to legislative norms and constitutional principles, especially with regard to those related to public administration, as provided for in Article 37 of the Federal Constitution of 1988, with no room for discretionary acts. While there is no democracy without control, for it to be effective it must be limited to the aspects highlighted. Thus, external control, due to its limitations, both in terms of time and number of personnel for the investigation of

possible irregularities, is not enough, and collaboration between other modalities, whether internal control or social control, is increasingly necessary.

In view of the above, this topic ends by emphasizing that the conclusions brought were elaborated based on the readings and analysis of decisions made so far, and such guidelines were formulated in order to respond to the research problem, bringing possible solutions to the irregularities found. With this, we move on to the conclusion, in which the main aspects of the research will be resumed, as well as answered the problem, which justified the research, informed as to the confirmation or not of the initial hypothesis.

Conclusion

The present work aimed to delimit which postures can be adopted to remedy the deficits in the external control of public administration. For this, at first, the control of public administration and its forms was conceptualized, focusing on the Brazilian context and using a conceptual and normative analysis. On this topic, the conclusion was that the control of public administration is an inherent part of the structuring of democratic regimes, as well as the joint structuring of the modalities of social control, internal and external.

In the second topic, the external control of the public administration was analyzed from the performance of the Court of Auditors of the State of Rio Grande do Sul, with regard to irregularities in administrative contracts. The focus of the explanation was on the institutional identity of the Court of Auditors, in addition to an investigation into its performance with regard to irregularities in administrative contracts, based on the twenty-seven decisions analyzed and succinctly bringing the main conclusions.

The conclusion was that the competencies are broad and the institutional identity reflects the evident position of the Court of Auditors, with regard to the search for the achievement of the public interest and respect for legislative and constitutional norms. This finding serves as a guide for the position that has been adopted not only in the decisions analyzed, but also by the institutional identity and history of the Court of Auditors of the State of Rio Grande do Sul as a whole.

Finally, in the third and last topic, the objective was to propose measures that can be used to remedy the deficits found, highlighting that the guidelines presented here are based on the readings and analyses carried out so far and without discarding other possibilities. Thus, in general, the understanding was established about the need for horizontal cooperation between the controlling agents through joint action in the exercise of control of the public administration.

In addition, control needs to be carried out jointly between the State and civil society, which is another reflection of the complex relationships established between public and private spaces, taking into account that in the same way that corruption occurs in both spheres, measures to prevent and combat it must also be present in both spheres.

Having exposed the main conclusions of each topic, the research problem is answered, which questioned: what measures can be adopted to remedy the deficits found in the external control of public administration? In summary, the answer to the research problem is in the sense that the possibilities of action of the Court of Auditors of the State of Rio Grande do Sul, in the external control of public administration as an instrument of prevention and fight against corruption, are in the sense of acting as an auxiliary body in the exercise of control of public administration.

This finding is justified to the extent that the action of the Court of Auditors alone cannot meet all the needs seen in such activity as a controlling body. This is due to the fact that problems related to public administration, specifically involving corruptive practices, have become increasingly complex, thus requiring a set of legislative measures and also public policies to face them.

With regard to the guidelines for the remediation of the deficits found, it is understood that it is necessary to improve social control precisely to avoid excesses and irregularities, not only in the scope of administrative contracts, but in the performance of the public administration as a whole. Such improvement occurs mainly through the evidence and disclosure of public data in a transparent, objective and accessible way to citizens.

Another guideline that is understood to be necessary in a broader way is the improvement of joint integration systems between public administration bodies as a way to facilitate the exchange of information, especially with regard to criminal practices as a way to better identify agents and apply the respective sanctions – in the criminal sphere, civil or administrative – which could occur in a computerized way. Perhaps this is one of the biggest challenges, based on the readings made during the dissertation, and what has been verified, so far, is the deficient performance of the information exchange systems.

An equally fundamental point was found in the face of the relations established between the State and the private sector, which have become increasingly complex, and involving the most diverse factors, as already observed. In this case, the search for the realization of the public interest, which in this specific situation occurs through the provision of services agreed upon through an administrative contract, must be carried out by public and private actions. Thus, one

of the ways to solve, in addition to the effective control of compliance with contractual obligations, would be the adoption of internal instruments in companies, such as integrity and compliance codes, with the objective of investigating this type of failure and preventing its occurrence. And, if they occur, the agents, employees and managers involved must be held accountable, and even the legal entity under the terms provided for in Brazilian law.

With this, the initial hypothesis was confirmed in the sense that the performance of the Court of Auditors of the State of Rio Grande do Sul is in a way deficient, that is, there would be a distance between the verification of the facts during the audits and the establishment of the respective investigation procedures and application of sanctions to those responsible, thus, there is a gap between the performance of the Court of Auditors and the performance of the Judiciary and other control bodies. As already pointed out, this is not a problem of the Court of Auditors, but of the entire control system of the Brazilian public administration, which led to the elaboration of the guidelines set out above.

In view of the above, therefore, and having answered the research problem, exposed the guidelines and findings, as well as confirmed the initial hypothesis, the present study is closed.

References

AVRITZER, Leonardo; FILGUEIRAS, Fernando. **Corruption and democratic controls in Brazil.** Brasília: Office in Brazil/IPEA, 2011.

BITTENCOURT, Caroline Muller; RECK, Janriê Rodrigues. Competence of the courts of accounts and transparency portals: possibilities of control in public services. *In*: LEAL, Rogério Gesta; SILVEIRA, Alessandra Aparecida de Souza; CANO, Carlos Aymerich (ed.). **IV Hispano-Luso-Brazilian International Seminar on Fundamental Rights and Public Policies**. Bubok Editorial: Madrid, 2018, p. 45-60.

BRAZIL. [Constitution (1988)]. **Constitution of the Federative Republic of Brazil of 1988.** Brasília, DF: Presidency of the Republic, [2021]. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm. Accessed on: 04 Feb. 2021.

BRAZIL. Office of the Comptroller General of the Union. Social Control. **Government of Brazil**, Brasilia. Available at: https://www.gov.br/cgu/pt-br/assuntos/controle-social. Accessed on: 04 Feb. 2021.

FRANCE, Phillip Gil. **Control of public administration:** fight against corruption, administrative discretion and economic regulation. 4. ed. São Paulo: Editora Saraiva, 2016.

GONÇALVES JÚNIOR, Edson; MIRANDA, Maurício Fernando Oliveira de. Compliance in the public sector and the reality of programs for small municipalities. **Journal of Reflection and Criticism of Law**, Ribeirão Preto, v. 7, n. 1, p. 45-57, jan./jun. 2019.

GUERRA, Sérgio; HARTMANN, Ivar A. Federal Court of Accounts: an analysis Quantitative. **Attn: Journal of Administrative & Constitutional Law**, Belo Horizonte, year 20, n. 80, p. 153-171, Apr./June 2020.

LEAL, Rogério Gesta. **Democratic deficits in the society of risks and (mis)paths of institutional protagonisms in Brazil.** São Paulo: Tirant lo Blanch, 2020.

LIMA, Liliana Chaves Murta de. **Internal control in public administration:** internal control in public administration as an accountability instrument. 2012. Monograph (Specialization in Public Budgeting) - Serzedello Corrêa Institute of the Federal Court of Accounts, Brasília, 2012. Available at: https://portal.tcu.gov.br/lumis/portal/file/fileDownload.jsp?fileId=8A8182A24F0A728E014F0B2415387225. Accessed on: 18 nov. 2021.

LIMA, Guilherme Corona Rodrigues. **The prior control of the bidding documents by the Courts of Auditors**. Lumen Juris: Rio de Janeiro, 2018.

MALAFAIA, Fernando César Benevenuto. **Can social control and external control interact?** Evaluation of the TCE-TO's practices in stimulating citizen participation. 2011. Dissertation (Master's Degree in Public Administration) - Brazilian School of Public and Business Administration, Fundação Getúlio Vargas, Rio de Janeiro, 2011. Available at: http://bibliotecadigital.fgv.br/dspace;/handle/10438/10184. Accessed on: 18 nov. 2021.

PASE, Luiz Hemerson *et al*. External control, auditing and combat to corruption in the Court of Auditors of the State of Rio Grande do Sul: an analysis of the municipal scope. **JURIS**, Rio Grande, RS, v. 28, n. 1, p. 111-136, 2018.

PEREZ, Marcos Augusto. Control of public administration in Brazil: a brief summary on the subject. **Forum**, Belo Horizonte, 17 Jul. 2018. Available at: https://www.editoraforum.com.br/noticias/controle-da-administracao-publica-no-brasil-um-breve-resumo-do-tema/. Accessed on: 03 Feb. 2021.

RIO GRANDE DO SUL. **Law 11.424, of January 6, 2000**. Provides for the Organic Law of the State Court of Accounts. Porto Alegre: Legislative Assembly, [2021]. Available at: http://www.al.rs.gov.br/FileRepository/repLegisComp/Lei%20n%C2%BA%2011.424.pdf. Accessed on: 01 Feb. 2021.

RIO GRANDE DO SUL. State Court of Accounts. **Resolution No. 1028/2015, of March 4, 2015.** Approves the Internal Regulations of the State Court of Accounts. Porto Alegre: TCE, [2021]. Available at: https://atosoficiais.com.br/tcers/resolucao-n-1028-2015-dispoe-sobre-a-politica-de-gestao-documental-do-tribunal-de-contas-do-rio-grande-do-sul-e-da-outras-providencias. Accessed on: 03 Feb. 2021.

RIO GRANDE DO SUL. State Court of Accounts. **Licitacon** – Bidding and Contracts System. 2020. Available at: http://dados.tce.rs.gov.br/group/licitacoes. Accessed on: 02 Feb. 2021.

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