

**THE ACCOUNTABILITY OF SPENDING AUTHORIZERS BEFORE THE
COURTS OF AUDITORS – AN ANALYSIS OF THE JURISPRUDENCE OF THE
FEDERAL COURT OF AUDITORS**

**A RESPONSABILIZAÇÃO DOS ORDENADORES DE DESPESAS PERANTE OS
TRIBUNAIS DE CONTAS – UMA ANÁLISE DA JURISPRUDÊNCIA DO
TRIBUNAL DE CONTAS DA UNIÃO**

**LA RENDICIÓN DE CUENTAS DE LAS ENTIDADES AUTORIZADORAS DE
GASTOS ANTE LOS TRIBUNALES DE CUENTAS: UN ANÁLISIS DE LA
JURISPRUDENCIA DEL TRIBUNAL FEDERAL DE CUENTAS**



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ABSTRACT

This article aims, in turn, to analyze the responsibility of the controllers of expenditure with a view to analyzing the jurisprudence of the Federal Audit Courts. In addition to correlating the role of the authorizing officer with the courts of accounts, identifying the responsibilities assigned to the authorizing officer and describing the importance of the authorizing officer's performance for the public service. To carry out this research, the methodology of bibliographic research, literature survey, applied, descriptive, explanatory and qualitative research was used. In order to judge the originator of expenses, it is first necessary to understand what objective or subjective responsibility is, in order to define their responsibility. The agent has a highly relevant role for the public power, it is the fundamental piece for the management of public money to be used responsibly, guided by interests that will benefit the common good.

Keywords: Expense Organizer. Accountability. Court Union Accounts. Jurisprudence.

RESUMO

Este artigo visa, por sua vez, analisar a responsabilização dos ordenadores de despesas com vista à análise da jurisprudência do Tribunal de Contas da União. Além de correlacionar o papel do ordenador com os tribunais de contas, identificar quais são as responsabilidades atribuídas ao ordenador e descrever a importância da atuação do ordenador para o serviço público. Para a realização dessa pesquisa foi utilizado a metodologia de pesquisa bibliográfica, levantamento de literatura, pesquisa aplicada, descritiva, explicativa e qualitativa. Para julgar o ordenador de despesa, precisa-se prioritariamente entender o que é a responsabilidade objetiva ou subjetiva para assim definir a sua responsabilização. O agente possui um papel de alta relevância para o poder público, é a peça fundamental para que a gestão do dinheiro público seja utilizado de forma responsável, se guiando por interesses que beneficiarão o bem comum.

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Palavras-chave: Ordenador de Despesa. Responsabilização. Tribunal de Contas da União. Jurisprudência.

RESUMEN

Este artículo analiza la rendición de cuentas de los funcionarios autorizadores de gastos a la luz de la jurisprudencia del Tribunal Federal de Cuentas (TCU) de Brasil. Además de correlacionar el rol del funcionario autorizador con los tribunales de cuentas, identifica las responsabilidades que se le atribuyen y describe la importancia de sus acciones para el servicio público. Esta investigación empleó una metodología bibliográfica, revisión de literatura, investigación aplicada y enfoques descriptivos, explicativos y cualitativos. Para evaluar al funcionario autorizador de gastos, es esencial comprender qué constituye la responsabilidad objetiva o subjetiva a fin de definir su rendición de cuentas. El agente desempeña un papel fundamental en el sector público; es esencial para garantizar que los fondos públicos se administren de manera responsable, guiados por intereses que beneficien al bien común.

Palabras clave: Funcionario Autorizador de Gastos. Rendición de Cuentas. Tribunal Federal de Cuentas de Brasil. Jurisprudencia.

1 INTRODUCTION

This topic addresses the issue of the accountability of the authorizers of expenses before the Courts of Auditors, according to Article 80 of Decree-Law No. 200, the authorizing officer of expenditure is characterized by the authority that issues commitments, authorization of payment, supplies, expenditure of resources and must also answer for the losses he causes as a public manager.

According to the National Council of the Public Prosecutor's Office – CNMP (2017) these responsibilities require multiple knowledge in the areas of contracts, finance, works, bidding, human resources, assets, transparency, among others.

For Pamplona and Silva (2020), in recent years there has been a phenomenon called the "cascade effect" of accountability of the authorizing officer of expenditure, thus causing the need for an investigation with regard to the legal consequences and administrative responsibility required in public accounts before the Court of Auditors.

In view of the above, this theme seeks to study and transform into scientific research the role of expenditure authorizers within the scope of public administration, as well as to ascertain possible damages to the treasury.

1.1 OBJECTIVES

1.1.1 General Objective

To analyse the responsibilities of the authorising officers of expenditure before the courts of auditors, based on case law.

1.1.2 Specific Objectives

- a) to correlate the role of the authorizing officer with the courts of accounts;
- b) identify the responsibilities assigned to the authorizing officer;
- c) describe the importance of the authorizing officer's performance for the public service.

2 THEORETICAL FRAMEWORK

2.1 EXPENSE AUTHORIZER

For the National Council of the Public Prosecutor's Office - CNMP (2017), the authorizing officer of expenditure is responsible for authorizing payments, issuance of commitments, expenditure or supplies, as provided for in paragraph 1 of Article 80 of Decree-Law No. 200/67. For the CNMP (2017) the responsibilities of an authorizing officer are very comprehensive, ranging from knowledge in several areas such as: finance, bidding,

contracts, works, transparency, human resources, patrimonial assets and etc., to decision making.

In addition to having the profile of a leader, it is necessary to have a good interpersonal relationship, self-motivation, communication and technical knowledge of management.

Paraphrasing Almeida (2021), the authorizing officer is a public agent with the competence to carry out expenditures on behalf of the Public Administration, it is he who was entrusted with the responsibility for the management of public resources. By exercising its activity of fundamental importance, it enables the Administration to carry out its expenses funded with public resources, in which it will account for its acts, for the delivery of public goods and services to society.

2.2 FEDERAL COURT OF ACCOUNTS - TCU

The Federal Court of Accounts (TCU) was established by Decree No. 966 of November 7, 1890, in which it was charged with examining, reviewing and judging all operations concerning the revenue and expenditure of the Republic (Planalto, 1890).

According to the Organic Law of the TCU, it is incumbent on:

Article 1 The Federal Court of Accounts, an external control body, is responsible for, under the terms of the Federal Constitution and in the manner established in this Law: I - Judging the accounts of the administrators and other persons responsible for public money, assets and values of the units of the powers of the Union and of the entities of indirect administration, including the foundations and societies established and maintained by the federal government, and the accounts of those who cause the loss, misplacement or other irregularity resulting in damage to the Treasury (PLANALTO, 1992);

It is concluded that the Court of Auditors judges and guides the expense manager/authorizer in relation to its administration, thus being its main institutional activity.

Currently, the Court has nine ministers, two-thirds of whom were chosen through nomination by the National Congress and one-third were chosen by the President of the Republic, one of them can be freely appointed by the chief executive and the others can be chosen by the agents of the Public Prosecutor's Office at the court and other auditors (CABRAL, 2021).

In order to be appointed to the vacancy of minister, it is necessary to have some requirements, such as being between thirty-five and less than sixty-five years of age, in addition to having more than ten years of professional career mentioned in item III, paragraph 1 of article 73 of the CF/88 (CABRAL, 2021).

2.3 ACCOUNTABILITY OF THE AUTHORIZING OFFICER OF EXPENDITURE BY JURISPRUDENCE

For the TCU (2013) it is common to ask at certain times, who was the person responsible? Or going further, wondering who will be held responsible for my loss?

This term originates from the Latin "responderere" which means the idea of someone answering for something, or in other words it means the accountability of someone for their actions (TCU, 2013).

In order to live socially in harmony, a set of duties and rights imposed by the State was constituted, whose non-compliance makes its offenders subject to the consequences that are provided for by law. As a rule, liability arises from the commission of an unlawful act, that is, an act that was done in disagreement with what is said in the legal system, it is an act offensive to the laws and legal principles that were established in society (TCU, 2013).

This unlawful act causes the violation of legal duties, when it causes damage to someone, a new legal duty arises, which consists of repairing the damage. It also generates a legal consequence for the violation of legal rights that must be assumed (TCU, 2013).

For Almeida (2021), the correlation between the two is due to the fact that the authorizing officer of a public body/entity is responsible for authorizing the use of public resources in order to deliver a service or good to society. This authorizing officer will render accounts of his administrative acts and if he has federal public resources, he will be subject to the inspection and judgment of the Court of Auditors and the National Congress. The court and Congress, in turn, are responsible for:

Article 70 - The accounting, financial, budgetary, operational and patrimonial supervision of the Union and of the entities of the direct and indirect administration, as to the legality, legitimacy, economy, application of subsidies and waiver of revenues, shall be exercised by the National Congress, through external control, and by the internal control system of each Power.

Sole Paragraph. Any individual or legal entity, public or private, who uses, collects, keeps, manages or administers public money, assets and values or for which the Union is responsible, or who, on its behalf, assumes obligations of a pecuniary nature, shall be accountable. (Text given by Constitutional Amendment No. 19, of 1998)

Article 71. The external control, under the responsibility of the National Congress, shall be exercised with the assistance of the Federal Court of Accounts, which is responsible for:

- I - to assess the accounts provided annually by the President of the Republic, by means of a prior opinion that must be prepared within sixty days from its receipt;
- II - judging the accounts of the administrators and other persons responsible for public money, assets and values of the direct and indirect administration, including the foundations and societies established and maintained by the Federal Government, and the accounts of those who cause loss, misplacement or other irregularity resulting in damage to the public treasury;

III – to assess, for the purposes of registration, the legality of the acts of admission of personnel, in any capacity, in the direct and indirect administration, including the foundations established and maintained by the Government, except for appointments to positions of provision in commission, as well as the concession of retirements, retirements and pensions, except for subsequent improvements that do not alter the legal basis of the concession act;

IV – to carry out, on its own initiative, the Chamber of Deputies, the Federal Senate, the Technical or Inquiry Commission, inspections and audits of an accounting, financial, budgetary, operational and patrimonial nature, in the administrative units of the Legislative, Executive and Judiciary Branches, and other entities referred to in item II;

V – to inspect the national accounts of supranational companies in whose capital stock the Federal Government participates, directly or indirectly, under the terms of the constitutive treaty;

VI – to supervise the application of any resources transferred by the Federal Government by means of an agreement, agreement, adjustment or other similar instruments, to the State, the Federal District or the Municipality;

VII – to provide the information requested by the National Congress, by any of its Houses, or by any of the respective Committees, on the accounting, financial, budgetary, operational and patrimonial inspection and on the results of audits and inspections carried out;

VIII – to apply to those responsible, in case of illegality of expenditure or irregularity of accounts, the sanctions provided for by law, which shall establish, among other penalties, a fine proportional to the damage caused to the treasury;

IX – to sign a deadline for the body or entity to adopt the necessary measures for the exact compliance with the law, if illegality is verified;

X - to suspend, if not complied with, the execution of the contested act, communicating the decision to the Chamber of Deputies and the Federal Senate;

XI – to represent the competent Power on irregularities or abuses ascertained.

Paragraph 1 - In the case of a contract, the act of suspension shall be adopted directly by the National Congress, which shall immediately request the Executive Branch for the appropriate measures.

Paragraph 2 - If the National Congress or the Executive Branch, within ninety days, does not carry out the measures provided for in the previous paragraph, the Court shall decide on the matter.

Paragraph 3 - The decisions of the Court that result in the imputation of a debt or fine will have the effect of an enforceable title (PLANALTO, 1998).

(...)

3 METHODOLOGY

The methodology used will be that of bibliographic research, for Silva (2017) consists of explanations and discussions of certain subjects that have been published in magazines, annals, periodicals, scientific articles and books. In addition to bibliographic research, another research method used is literature survey, which for Gonçalves (2021) is characterized by locating and obtaining documents that enable the evaluation of the availability of materials that have the function of subdividing the theme of the work to be researched.

As for its nature, the research applied to the Editora do Senai-SP (2018):

Applied research is the collection of knowledge necessary for use in practical situations employed in real problems, and may even make use of concepts developed in basic research (EDITORIA, 2018, p.24).

From the point of view of its objectives, for Gomes and Gomes (2019) descriptive research is given by the most in-depth level of knowledge on a given subject, the act of describing in a certain way is a fact or phenomenon. On the other hand, the act of observing objects, interesting facts and behaviors are linked to our natural day-to-day capacity and will serve for different interpretations. Also according to the authors, explanatory research tries to explain the observed patterns of facts or phenomena that will be evaluated, refuted, confirmed or refined, to identify the determining factors for their occurrence.

As for the approach to the problem, the research can be said to be qualitative, according to Minayo (2010), it provides the review and construction of new points of view, conceptualizations and categories, taking into account and respecting the existing diversity.

4 DEVELOPMENT

Before delving into the problem of this research, there are some points that should be clarified and taken into consideration as a priority, these aspects will help readers to understand this study clearly and objectively. First, a brief summary of the two types of liability, subjective and objective. For Cavalieri (2001) the feeling of guilt is directly correlated to responsibility, due to this, one cannot blame or make a judgment of disapproval with someone, without having been cautiously absent in their acts.

For the TCU (2013), for the authorizing officer to be guilty by the subjective doctrine, it must be proven that he acted with fault, that is, fault in the strict sense or willful misconduct. In addition, there are four simultaneous elements: action/omission, damage, causal nexus and fault – *lato sensu*. According to TCU Jurisprudence:

Liability is of a subjective nature, as settled in the case law of the TCU: Liability before the Courts of Auditors is of a subjective nature, that is, the presence of the three elements mentioned above is required, action or omission, causal link and fault in a broad sense.

49 - Liability of Agents According to the Jurisprudence of the TCU "49. The liability of the administrators of public resources, supported by the sole paragraph of article 70 of the Federal Constitution (...) follows the general rule of civil liability. That is, it is subjective responsibility. The fact that the burden of proving the correct application of the resources rests with the public administrator does not mean that the responsibility ceases to be subjective and becomes objective. This, it is worth emphasizing, is an exceptional liability, as occurs with the damages caused by the State in its interaction with private individuals - article 37, § 6, of the Federal Constitution.

50. Subjective liability, that is, has as one of its presuppositions the existence of the element of fault. " (Ruling No. 249/2010 - Plenary)"

It should be noted that other deliberations of the Court of Auditors expressly position themselves in this regard, including Rulings No. 46/2001, No. 1,795/2003, No. 33/2005, No. 46/2006, No. 975/2006 and No. 487/2008, all of which were issued by the Plenary.

With regard to the objective doctrine, guilt is left aside, so the most important thing to be analyzed is the causal relationship between the harm suffered and the fact that generated the damage. According to the Civil Code of 2022, strict liability was divided into two hypotheses:

- a. if a specific law so provides;
- b. when the activity normally carried out by the author of the damage implies, by its very nature, a risk to the rights of others.

These authorizers, known as public agents, will be subject to answer for their acts in three ways: civil, criminal and administrative disciplinary. All forms have their own autonomy and competence of a jurisdictional or administrative instance (TCU, 2013). Therefore, only proof of the defendant's action/omission, damage and causal relationship is sufficient (GONÇALVES, 2003).

For the TCU (2013), the autonomy of these forms mentioned above implies the condition of the public agent being held responsible for the same fact/act in any of those fields. In addition to these forms of accountability, due to the fact that they work with public resources, the administrative responsibility of the external controls of the public administration is also highlighted.

The Constitution granted the Court of Auditors the power to attribute accountability along with the necessary sanctions in cases of irregularities or illegality, as the Court evaluates the management of the authorizing officers of expenditures, thus being able to condemn amounts to be paid to the treasury (TCU, 2013).

Still for the TCU (2013), looking at the aspect of civil law that sees the unlawful acts practiced by the authorizing officers as the reason to repair damages, being their main act of recomposing the victims' patrimony. From the perspective of criminal law, the illicit act is the reason to punish the agent. We have seen, then, that there is agreement with the action of the courts, whether they are civil or criminal. It can be seen that with regard to the accountability of public agents, the proceedings in the courts of accounts are assimilated to civil law when it comes to repairing damage caused to the treasury, and it is also assimilated to the principles of criminal law when it comes to the application of penalties.

The liability of the authorizing officers of expenditures before the proceedings in the courts of accounts originates in the commissive or omissive action of this agent, culpable or

intentional, whose results are the duties violated by the public law regime applied to those who manage public resources of the State or those who cause damage to the public coffers (TCU, 2013).

Regarding the unlawful acts of the management of public resources, the guidelines of the theory of legal responsibility applied to external control, show that in order for the authorizing officer to be held accountable, it is necessary to present an anti-legal conduct of the private or public agent. In the civil sphere, it is necessary to have a damage or loss due to an unlawful act, without which there would be no liability. For the courts, the damage is not the main element for the accountability of the authorizing officer because some irregularities may occur that do not imply the generation of financial loss to the public coffers, but that the accountability will be carried out with the due application of penalty, taking into account the aspects of seriousness and reprehensibility of their conduct (TCU, 2013).

5 CONCLUSION

This work focused on the accountability of expenditure authorizers from the perspective of the jurisprudence of the Federal Court of Accounts – TCU, in which it was possible to analyze that despite the responsibilities that an expenditure authorizer is subject to face in the function, such a public servant has high relevance for the functioning of the public administration, therefore, indispensable for the achievement of goals and public policies.

From the facts, it can be seen that in many cases the authorizing officer of expenses is held responsible for the lack of planning, which culminates in many other things such as: lack of transparency, due legal procedures, fractionation of expenses and administrative improbity. Many of these cases due to the budget deficit and lack of time for transfer by the competent central body holding the public resource, be it Municipal, State or Federal, thus the ordinance cannot be held responsible for decisions that did not involve its management, since there is no time for any planning. Therefore, it is not possible for all budgetary and financial planning to be his responsibility based on the principle of reasonableness.

Undoubtedly, the Public Administrator must plan his expenses within the financial year. However, even so, sometimes the budget itself requires the Administrator to carry out certain expenses in more than one installment during the year without this meaning lack of planning. Rather, it denotes planning, within the budgetary reality.

Considering that the Brazilian legal system protects legal goods inherent to the existence of the human being. The legal norms corresponding to them are called fundamental rights, which are found in the condition of a stony clause in the Brazilian legal system. It so

happens that the complexity of human coexistence in society enables the emergence of situations that generate an apparent conflict between fundamental rights at the time of applying positive law.

Considering that the dignity of the human person is the mainstay of the Democratic Rule of Law, it means that the Public Power has as one of its main obligations to ensure that everyone has a life with dignity. To this end, the national legal order has institutionalized several fundamental rights and guarantees to human beings.

The eminent Minister of the Supreme Court, Celso de Mello, in the judgment of ADPF No. 45, was extremely happy when he declared "(..) that the realization of economic, social and cultural rights - in addition to being characterized by the gradualness of their process of realization - depends, to a large extent, on an inescapable financial link subordinated to the budgetary possibilities of the State, in such a way that, objectively proven the economic and financial incapacity of the State person, it cannot reasonably be demanded of it, considering the material limitation referred to, the immediate implementation of the command based on the text of the Political Charter. It will not be lawful, however, for the Public Power, in such a hypothesis - through undue manipulation of its financial and/or political-administrative activity - to create an artificial obstacle that reveals the illegitimate, arbitrary purpose of defrauding, frustrating and making unfeasible the establishment and preservation, in favor of the person and citizens, of minimum material conditions of existence".

As this research is limited only to the exploration of the problem and its characteristics and impacts on the lives of expenditure authorizers, the recommendation is that with the evolution of studies on the subject that today is little explored academically, in the future research should be carried out based on the existing literature to suggest public policies adopted by governments to give more transparency to public acts, debureaucratization of the public machine, implementation of the chronological order of payments and better institutional planning.

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