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The Incrimination Of The Brazilian Public Manager Under The Administrative Improbity Law (Brazilian Law Nº 8.429/92)

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Abstract: *This Scientific Article Studies The Liability Of Public Managers In Brazil For Acts Of Administrative Improbity, Regardless Of The Existence Of Damage To The Treasury. It Aims To Analyze The Difficulty Of The Public Manager To Administer And Meet The Public Interest Within The Limits Of Administrative Probity, Given The Breadth Of The Provisions Of The Administrative Improbity Law (Law No. 8.429/92), Parallel To The Various Discussions And Controversies Of The Superior Court Rulings, Under The View Of Renowned Authors Such As Hely Lopes Meirelles, José Afonso Da Silva, José Antonio Lisboa Neiva, And Mateus Bertoncini. The Conclusion Points To The Real Existence Of A Challenge For The Public Manager To Understand The Limits Of Administrative Probity In Brazilian Public Management In The Face Of The Abstraction Of The Administrative Improbity Law, Which Implies The Need To Relativize The Extent Of The Provisions In Order To Provide Greater Legal Security To The Manager And, Consequently, Ensure Greater Freedom And Efficiency Of Public Management In Brazil.*
Key Word: *Brazilian Law; Administrative Improbity; Public Management; Liability.*

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I. INTRODUCTION

The Brazilian legislation governs, through Law No. 8,429 of 1992, the categorization of acts of administrative improbity, as a way to penalize any public agent responsible for the practice of conduct that fits within the provisions of the said legal statute. The provision of the Administrative Improbity Law that seeks the reprimand of the person responsible for the conduct along with the repair of any potential damage caused to the treasury is of utmost importance, ensuring that the individual suffers the penalties of the law, while also preventing society from bearing any potential losses resulting from the aforementioned criminal conduct.

Articles 9, 10, 10-A, and 11 of Brazilian Law No. 8,429/92 define the standards of conduct that result in the accountability of the public agent. Specifically, in Article 11, there is the presumption of occurrence of damages to the treasury by the simple fact of the agent having acted, and even without the need for the individual to have acted with the real intention of causing damage, thus dispensing with the element of intent.

The breadth of the Brazilian legislator in defining conduct characterized as administrative improbity provides security to the administered, who finds tools to hold the corrupt agent accountable and to guarantee potential repair of damages to the treasury caused by the same. However, it raises concern for the public manager as the passive agent of the Administrative Improbity Law, given that the individual, faced with the dynamics of Public Administration, can act improperly, with the simple intention of ensuring the fulfillment of the general aspirations of their constituents.

The dynamism of the Brazilian Public Administration stems from the vast amount of social aspirations that the manager needs to address, having to concern themselves with all social needs, such as health, education, security, social assistance, among others, and meet them instantly without, however, incurring non-observance of legal and regulatory norms pertaining to bidding procedures, the execution of expenses, fiscal responsibility norms, among others.

Faced with this situation, public managers often find themselves legally challenged to act without committing an act of improbity in contrast with their intention to administer and meet social needs. Given that even without causing measurable damage to the treasury, they may suffer legal sanctions, due to a simple non-observance of a legal deadline, even if their conduct was aimed at the public interest.

The challenge to which the Brazilian public manager is subjected makes it imperative to promote the study of administrative improbity in order to limit the accountability of the agent who has committed a mere administrative oversight, when such an act does not result in damage to the public treasury. The manager who,

even with the mere intention of meeting social aspirations or fulfilling their executive function of administering, exceeds administrative probity, may suffer the sanctions of the Administrative Improbity Law.

The imminent risk of the public manager suffering legal penalties, even in the absence of the intention to commit the dishonest act, even when there is no effective damage to the treasury, and even if they have not gained any benefit from the act, can imply compromising the efficiency of administrative management, consequently harming the provision of essential services, such as health, education, assistance, among others, which in essence demand active and swift actions from management to ensure their full functioning.

Given this scenario, the research poses the following problem: what are the difficulties of the Brazilian public manager to administer and meet the public interest in confrontation with the normative limits of administrative probity, in the light of legislation and literature?

This work aims, based on bibliographic survey, to analyze the difficulty of the public manager to administer and meet the public interest within the limits of administrative probity, as well as to address the irrelevance of damage measurement in the breadth of the administrative improbity law, in addition to demonstrating the supremacy of public interest as an element capable of justifying the practice of an act typified as administrative improbity, and finally to understand the limits of administrative probity and its relationship with administrative morality.

Thus, it becomes pertinent to research the accountability of the Brazilian public manager under the Administrative Improbity Law, in order to clarify relevant points on the subject. Above all, it is important to demonstrate the need to analyze the extent of the acts of improbity provided for in Article 11 of Law No. 8,429/93, making it applicable only when the act of the public manager has caused some notable loss or damage to the treasury, allowing to understand the importance of relativizing the interpretation of the Administrative Improbity Law to provide the public manager with greater freedom in the act of administering. With this in mind, it corroborates the question of whether it is fair to hold the public manager accountable for an act of administrative improbity simply for not observing a formal regulatory norm without his conduct causing any injury to the treasury.

The work was developed and organized didactically, starting with a general contextualization about the discipline of Administrative Improbity, followed by a generic explanation of the subjects, principles, and sanctions provided for in the Administrative Improbity Law. It then proceeded to a detailed study of the challenges faced by the public manager to exercise the role of administering under the constant risk of his conduct being considered improper. A thorough examination of the studies related to the challenges of public management was developed, in addition to judgments of Superior Courts pertinent to the matter. Brazilian authors such as Hely Lopes Meirelles (2006) and José Afonso da Silva (2005), authors of great relevance in the study of administrative matter, were approached, as well as the authors José Antônio Lisboa Neiva (2009) and Mateus Bertoncini (2018), who are renowned authors with works developed specifically for the study of Administrative Improbity.

Administrative probity in Brazil has its main references established in the Administrative Improbity Law, which disciplines all matters concerning the dishonest act, analyzing the elements, the subjects, the conducts, and the sanctions provided for in the Law that can lead to the accountability of the manager. The following section demonstrates the corpus of the theme, presenting aspects of the responsibility of the public manager, the discipline of the administrative act, and the risk of accountability of the public manager for carelessness.

II. RESPONSIBILITY OF THE BRAZILIAN PUBLIC MANAGER UNDER LAW Nº 8.429/92

The Brazilian Federal Constitution of 1988 provides, in its article 37, fourth paragraph, that acts of administrative dishonesty will result in the suspension of political rights, loss of public function, unavailability of assets, and restitution to the treasury, in the form and gradation provided by law, without prejudice to the applicable criminal action. Such sanctions represent the possible reprimands that can be applied to the agent responsible for the act of administrative dishonesty. The delimitation of the act of dishonesty is embodied in Law 8.429/92, dated June 2, 1992, which lists sets of behaviors deemed dishonest, in some of which the agent responds even if the act does not result in concrete damage to the treasury. The Administrative Dishonesty Law has a strong relationship with administrative morality, despite the independence between them.

In dealing with dishonesty, Porto Neto and Porto Filho (2003), establish the idea that the dishonest act does not represent just an illegality, an affront to legal rules, but also an affront to morality, which leads, in the Federal Constitution, to the establishment of severe penalties for such act, given its harmfulness to society. For the authors, there is a direct relationship between administrative dishonesty and the issue of administrative morality.

In this same context, José Afonso da Silva (2005), emphasizes that administrative immorality is a genus of which administrative dishonesty is a species: Administrative probity is a form of administrative morality that deserved special consideration from the Constitution, which punishes the dishonest with the

suspension of political rights (Art. 37, § 4º)[1]. Administrative probity consists in the duty of the public servant to serve the Administration with honesty, performing in the exercise of their functions, without taking advantage of the powers or facilities resulting from it for personal benefit or of others to whom they wish to favor. Disrespect for this duty is what characterizes administrative dishonesty. It is a matter of qualified administrative immorality (SILVA, 2005). Administrative dishonesty is an immorality qualified by damage to the treasury and corresponding advantage to the dishonest or to others.

The definition of administrative dishonesty depends on the understanding of the relationship between administrative probity and morality, in order to understand that the latter is a foundational element of the legal system, guiding the legislator in the formulation of the administrative legal system, while the former results from the agent's observance of the legal system, that is, for an act to be deemed probity, it must be carried out in accordance with the systemic norm set in compliance with administrative morality.

Legal morality underpins administrative probity, which is characterized as the integrity of intentions and behavior that must be present when public managers enact official acts (RONZANI, 2007). Thus, it is observed that the principle of objective morality guides the administrative system, while the duty of probity aims to keep the concrete attitudes of its agents within systemic norms.

In turn, Cruz, Platt Netto, and Petri (2002) analyze the challenges faced by the public manager to meet the social needs submitted to him by his administrators without neglecting the normative precepts contained in the legislation, exemplarily, in the Fiscal Responsibility Law (FRL) or Complementary Law nº 101 de 04/05/2000. The authors found the real existence of a challenge to be faced by the public manager, who is constantly subjected to social and individual pressure from the administered to promptly address social interests and present solutions to existing problems. Thus, the public administrator is limited to acting in accordance with legal, normative, and regulatory precepts, especially those contained in the FRL that guide his actions, thus needing to reconcile his political action with the observance of legal provisions, in attending to the demand submitted to him without incurring in an act of dishonesty.

III. REGULATION OF THE ACT OF ADMINISTRATIVE IMPROBITY IN BRAZILIAN PUBLIC MANAGEMENT ACCORDING TO LAW Nº 8.429/92

Subject to the sanctions of the Administrative Misconduct Law, under the terms of art. 2 of Law nº 8.429/92, is any agent, thus considered as anyone who exercises, even temporarily or without remuneration, through election, appointment, designation, contract, or any other form of investiture or bond, a mandate, position, employment or function. It is a broad concept that encompasses any agent active in Public Administration, regardless of remuneration or means of investiture. It should also be clarified the provision in the same law that extends its effects to those who do not even play a role in Public Administration, but merely have directly or indirectly benefited from conduct deemed as administrative misconduct, thus being subject to the penalties of the Law.

The Administrative Misconduct Law grants a significant margin of freedom to the active subject of the Administrative Misconduct Action, who, as a rule, is the Public Prosecutor's Office, allowing them to file lawsuits seeking the accountability of the public manager even when they act within the boundaries of the public interest and in accordance with applicable legislation, should the subject understand that there has been an affront to administrative morality. Such freedom creates insecurity for the public manager who, when practicing the administrative act, begins to operate within a dark legal world susceptible to interpretation with a high degree of subjectivity.

Thus, we observe the manager's concern with the discipline of administrative misconduct, when analyzing, for example, the responsibility of those who fail to render accounts when they are obliged to do so, as provided in article 11of the Administrative Misconduct Law. For such, it is not necessary to demonstrate actual damage or even the agent's intention not to render accounts, it suffices to demonstrate the existence of delay and the responsibility of those who are accountable, even if they have adequately applied the financial resources in observance of the public interest. [019] They will thus be held accountable for mere negligence in observing the legal deadline for account rendering.

In a free translation, Article 11[2] of the Law nº 8.429/92 could be written as follows:

[1] In a free translation, section 4 could be written as: "§4 The acts of administrative misconduct will result in the suspension of political rights, the loss of public office, the unavailability of assets, and reimbursement to the treasury, in the manner and gradation provided for by law, without prejudice to the applicable criminal action".

[2] Art. 11. Constitui ato de improbidade administrativa que atenta contra os princípios da administração pública qualquer ação ou omissão que viole os deveres de honestidade, imparcialidade, legalidade, e lealdade às instituições, e notadamente: I - praticar ato visando fim proibido em lei ou regulamento ou diverso daquele previsto, na regra de competência; II - retardar ou deixar de praticar, indevidamente, ato de ofício; III - revelar fato ou circunstância de que tem ciência em razão das atribuições e que deva permanecer em segredo; IV - negar publicidade aos atos oficiais; V - frustrar a licitude de concurso público; VI- deixar de prestar contas quando esteja obrigado a fazê-lo; VII - revelar ou permitir que chegue ao conhecimento de terceiro, antes da respectiva divulgação oficial, teor de medida política ou econômica capaz de afetar o preço de mercadoria, bem ou serviço; VIII - descumprir as normas relativas à celebração, fiscalização e aprovação de

Art. 11. Any action or omission that violates the duties of honesty, impartiality, legality, and loyalty to institutions constitutes an act of administrative improbity that offends the principles of public administration, notably:
I - Performing an act aimed at a purpose prohibited by law or regulation, or different from that foreseen in the rule of competence;
II - Unnecessarily delaying or failing to perform an official act;
III - Disclosing a fact or circumstance that, because of the responsibilities, should remain secret;
IV - Denying publicity to official acts;
V - Frustrating the legality of a public competition;
VI - Failing to render accounts when obliged to do so;
VII - Disclosing or allowing to come to the knowledge of a third party, before its official disclosure, the content of a political or economic measure capable of affecting the price of a commodity, good, or service;
VIII - Failing to comply with the rules relating to the establishment, supervision, and approval of accounts for partnerships entered into by the public administration with private entities;
IX - Failing to comply with the requirement of accessibility requirements provided for in the legislation;
X - Transferring resources to a private entity, due to the provision of services in the health area without prior conclusion of a contract, agreement, or similar instrument, under the terms of the sole paragraph of art. 24 of Law No. 8,080, dated September 19, 1990. (BRAZIL, 1992).

The morality of the administrative act, along with its legality and purpose, as well as its conformity with other principles, constitute prerequisites of validity without which all public activity will be illegitimate (MEIRELLES, 2006). The activity of administrators, in addition to expressing the will to achieve maximum administrative efficiency, must also correspond to the constant desire to live honestly, not to harm others, and to give each what is theirs.

In light of these ideas, both the administrator who, in order to act, was determined by immoral or dishonest ends, and the one who despised the institutional order and, although driven by professional zeal, invades the sphere reserved for other functions, or seeks to obtain mere advantage for the property entrusted to his or her care (MEIRELLES, 2006) infringe administrative morality. In both cases, their actions are unfaithful to the idea that they had to serve, as they violate the balance that must exist in all functions, or, although maintaining or increasing the managed property, they deviate from the institutional end, which is to strive for the creation of the common good.

Thus, it can be seen that the irrelevance of concrete damage for the typification of the act of administrative misconduct, it is enough that the public manager incurs in the described conduct to be held accountable as José Antônio Lisboa Neiva (2009) clearly explains. It is indispensable, for the conduct to be suited to this legal provision (Article 10 of the Administrative Misconduct Law), that there has been an actual injury to the treasury. It is the responsibility of the plaintiff of the civil action for administrative misconduct to prove the damage and the causal link with an intentional or exceptionally negligent conduct, equivalent to intent because of its severity, in the terms previously highlighted. The absence of an actual injury to the patrimony can eventually characterize misconduct based on art. 9 or 11, depending on the case.

The insecurity of the public manager is due, among other aspects, to the presence of the burden of proof inversion in the administrative misconduct action that investigates the act of misconduct as a result of the agent's illicit enrichment, an act typified in art. 9 of Law nº 8.429/92. Based on the legal provisions embodied in it, some scholars argue that to configure such an act of misconduct, it is enough to demonstrate a disproportion between the agent's remuneration and his or her wealth, it being the manager's duty in this case to prove the legality of his or her wealth.

As concluded by Ricardo Marcondes Martins (2010), the plaintiff must prove illicit enrichment and the disproportion between this and the agent's remuneration. If these two facts are proven and there is no proof of the legality of the enrichment, the action for misconduct should be deemed valid. The system does not require proof of illegality, the burden of proof of the non-existence of the constitutive fact, or rather, of the legality of the enrichment lies with the defendant. It has been asserted in this study that the presumption implies the inversion of the burden of proof.

In the same vein, Suzana Fairbanks Schnitzlein Oliveira (2011) argues that there is a relative presumption that can be overturned by contrary evidence of the legality of enrichment. In this sense, there will only be a presumption that the public agent committed the act of administrative misconduct in kind, illicitly

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contas de parcerias firmadas pela administração pública com entidades privadas; IX - deixar de cumprir a exigência de requisitos de acessibilidade previstos na legislação; X - transferir recurso a entidade privada, em razão da prestação de serviços na área de saúde sem a prévia celebração de contrato, convênio ou instrumento congênere, nos termos do parágrafo único do art. 24 da Lei nº 8.080, de 19 de setembro de 1990. (BRASIL, 1992).

enriching themselves, if they do not succeed in proving the legal origin of their wealth, by documentary evidence or other means of proof admitted in law that are capable of overturning the presumption of illegality.

The public manager who commits an act of administrative misconduct is subject to the sanctions set out in art. 12 of Law nº 8.429/92, namely, full reimbursement of the damage, loss of illicitly added goods or values to the property, loss of public function, suspension of political rights for a specified term, payment of civil fine and prohibition to contract with the Public Power or receive benefits or tax or credit incentives, directly or indirectly, even if through a legal entity of which they are the majority shareholder.

The definition of the sanction to be applied in the concrete case varies according to the typification of the conduct, which will be delimited through the legal provision in which the act is described. It is a settled matter in the Brazilian Superior Court of Justice the possibility of isolated or cumulative application of the mentioned infractions, the Court having understood that it is perfectly possible to accumulate the sanctions. However, such cumulativity is not obligatory, and the magistrate must observe the necessary dosimetry in the application of the sanctions, according to the principles of reasonableness and proportionality, as prescribed by the single paragraph of article 12 of Law 8.429/92.

The device gives the magistrate at the time of setting the penalties a margin of discretion, allowing him to establish the time span of the penalties according to the principle of proportionality and reasonableness, considering the severity, nature and consequences of the act practiced.

IV. THE RISK OF CRIMINALIZING THE PUBLIC MANAGER FOR ADMINISTRATIVE NEGLIGENCE

The need to hold the improper agent accountable and apply the sanctions contained in the Administrative Misconduct Law is unquestionable, however, what is sought to delimit is the breadth of the concept of probity, in order to avoid the imposition of sanctions on the manager for mere administrative oversight resulting from the desire to meet social need, to provide immediate attention to the demands imposed on him, when his conduct does not result in damage to the treasury, and even when the act has not been carried out for his own benefit or that of others.

Such concern comes from the understanding of the Brazilian Superior Court of Justice, embodied in its judgements, that the act of misconduct provided for in art. 11 of Law No. 8.429/92 does not depend on proof of damage to the treasury and illicit enrichment of the agent. In this sense, the public agent, intending to make the administrative machine work, to execute his administrative actions efficiently, is subject to the sanctions of administrative misconduct, even if he has not gained any benefit, as long as the morality of his act is questioned. Thus, if the public agent allocates financial resources to one area of health to the detriment of another, even if properly applied in the public destination conferred on it, he can be subjected to the penalties of the law, if it is understood that the priority was mistakenly recognized by the manager.

The judgment of Special Appeal No. 1091420/SP, reported by Justice Sérgio Kukina of the Brazilian Superior Court of Justice, makes clear the irrelevance of proving actual damage to the treasury and the illicit enrichment of the agent for his or her accountability. As the magistrate pointed out, the contested decision does not deviate from the jurisprudence, in the sense that the wrongdoing referred to in Art. 11 of Law No. 8,429/92 dispenses with the proof of damage to the treasury and of illicit enrichment of the agent.

The breadth of the provisions of the Administrative Misconduct Law creates a universe of conducts that subject the public manager to administrative liability even when he has not caused the act. This occurs, for example, when the public manager is held responsible for delay in accounting, regardless of the proper application of the financial resources subject to accounting. That is, for his liability in the case in question, only the non-observance of the legal duty to account within the conferred deadline matters, even if the delay occurs for reasons beyond the agent's will.

Given this scenario, it is necessary to analyze the effects of subjecting the public manager to administrative probity on his efficiency in the exercise of the duty to administer and meet social needs, since the agent's excessive caution when practicing the administrative act can cause serious harm to citizens who depend on the services provided by the Public Power. Therefore, it is not a matter of dismissing the applicability of the Administrative Misconduct Law, but simply of relativizing the punishment of the public manager for mere administrative oversight, when there is no actual damage to the treasury.

V. FINAL CONSIDERATIONS

The Administrative Misconduct Law establishes with great breadth a universe of situations that may characterize the absence of probity in the public manager in the exercise of administrative activity. This research confirms that this breadth indeed poses a challenge for the public manager, creating for him a constant risk of incurring administrative misconduct with the mere intention of efficiently performing his administrative role, routinely facing administrative urgency that prompts him to practice certain administrative acts, however, the manager is hindered by the legal rule that establishes requirements and obligations prior to the act.

The accountability of the public manager should be relativized in certain situations where he has acted with the sole intention of serving the public interest, of ensuring the functioning of the administrative machine, without the manager causing any damage to the public treasury, nor even having gained enrichment or advantage of any kind. This is therefore a situation in which the operator of the standard must pay attention to the supremacy of the public interest, allowing the administrator to act within legal limits, but always with the main focus on meeting collective aspirations.

Therefore, such relativization is necessary to allow greater efficiency to the Brazilian public manager, who is urged to act and ensure the functioning of public management intermittently, and cannot excuse himself from acting for the mere fear of not observing administrative probity.

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