Administrative sanctions law: a pragmatic approach considering findings from law and economics*

Direito administrativo sancionador: um olhar pragmático a partir das contribuições da análise econômica do direito

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ABSTRACT

The ongoing transformations in the Brazilian Administrative Law must also affect its sanctioning approach in terms of developing more effective and efficient auditing and penalization mechanisms. In this article we propose that a pragmatic approach that takes actual consequences and empirical aspects in account, can present valuable contributions to that matters. Thus, the studies developed by authors in the field of Law and Economics provide important tools, specially regarding the logic of

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economic incentives adopted by the School of Chicago and the theory of public choice connected to the School of Virginia. These theoretical models provide elements that allow the development of analytical reasoning that are more creative and also more sensible to complexities. They can also help to define adequate factual assumptions, establish correct research lines and achieve more precise diagnostics about the real (d)efficiencies of sanctioning models and practices.

KEYWORDS

administrative sanctions law — efficiency — effectiveness — pragmatism — law and economics — School of Chicago — School of Virginia — public choice theory

RESUMO

As transformações que têm impulsionado o direito administrativo brasileiro devem repercutir também sobre sua vertente sancionatória, com vista à construção de arranjos fiscalizatórios e punitivos mais efetivos e eficientes. A proposta do artigo é de que a adoção de um olhar pragmático, atento às consequências práticas e a aspectos empíricos, pode contribuir nesse sentido. Para tanto, os estudos desenvolvidos por autores da análise econômica do direito apresentam-se como um importante ferramental, com destaque para a lógica de incentivos econômicos adotada pela Escola de Chicago e para a teoria da escolha pública, atribuída à Escola de Virgínia. Elementos extraídos desses modelos teóricos permitem a construção de raciocínios analíticos mais criativos e sensíveis a elementos de complexidade, aptos a auxiliar na delimitação de premissas fáticas adequadas, na fixação de linhas de investigação corretas e no alcance de diagnósticos mais precisos em torno das reais (d)eficiências dos modelos e práticas sancionatórios.

PALAVRAS-CHAVE

Direito administrativo sancionador — eficiência — efetividade — pragmatismo — análise econômica do direito — Escola de Chicago — Escola de Virgínia — teoria da escolha pública

1. Sanctioning administrative law in Brazil: rapid expansion and the challenges faced

Omnipresent. On the road, in health surveillance, in the electricity sector, in the environment, in private healthcare. In these and many other fields,[1] administrative law has expanded its reach. It has filled gaps. And a significant part of this phenomenon of the "administrationing" of life is felt precisely in the area of sanctions. This is the case in situations where a private citizen disobeys regulations of an administrative nature and is subject to a coercive state measure with negative effects — and sometimes to more than one. Warnings, fines, suspensions of rights, confiscation of goods, closure of establishments and compulsory publication of information are just a few examples. The range of these tools is truly varied and dynamic.

They are instruments used by the public administration according to a logic of command and control,[2] which started to become more widespread in the second half of the twentieth century. Chilean jurist Cristián Román Cordero talks about a sort of *"elephantiasis"* of the sanctioning powers of the public administration,[3] arising both from the exponential growth in the number of administrative agencies and entities vested with the power to sanction and from the degree of damage that the sanctions they impose can do.

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1 Such as telecommunications, oil, natural gas and biofuels, public transport, cinematographic and videophonographic activities, competition, ordering of urban areas, tax inspection, disciplinary relations (relative to public servants, as provided for in the legislation of each federal entity, and to those condemned to imprisonment or restriction of rights, or in provisional detention, according to arts. 44 et seq. of the Law of Criminal Execution — Law No. 7.210/1984), tenders and public contracts in general, the financial market, administrative misconduct and acts covered by the Anticorruption Law - Federal Law No. 12.846/2013, protection of children and adolescents (see the list of crimes in the Statute of the Child and the Adolescent — Federal Law No. 8.069/1990), consumer, etc.

2 "In general terms, regulation by norms of command and control exists when the normative structure applicable to the conduct regulated makes use of the duality *statute of limitation-sanction.* Control of private conduct is ensured by the provision of state sanctions in the case of infraction. [...]." BINENBOJM, Gustavo. *Poder de polícia, ordenação, regulação:* transformações político-jurídicas, econômicas e institucionais do direito administrativo ordenador. 2nd ed. Belo Horizonte: Fórum, 2017. pg. 153. Original italics. It should be noted that, strictly, administrative measures of a diverse nature can produce negative legal effects for the citizen, such as the revocation of a permit or the precautionary interdiction of an establishment for questions of safety. In this article, *administrative sanction* will be taken to be an administrative act preceded by an *administrative infraction, i.e.,* by violation of a cogent order (a command to do something or not to do something) carried in a regulation characterized as being of administrative law.

3 ROMAN CORDERO, Cristián. El derecho administrativo sancionador en Chile. *Revista de Derecho de la Universidad de Montevideo,* yr. 8, No. 16, pg. 89-101, 2009.

In Brazil, this rapid expansion can be attributed to a combination of factors. First of all, the phenomenon is intimately related to the profile of state action of a social and economic nature, above all since the 1990s. This is because the program of reform of the bureaucratic apparatus and the various privatizations and denationalizations, whereby the state withdrew from its role as direct economic agent, have been counterbalanced by the prevalence of strategies for economic and social regulation.[4] A wide range of bodies and entities belonging directly and indirectly to the public administration were vested with broad regulatory powers, in particular the players created specifically for this purpose: the regulatory agencies.

In line with this trend, there has been a proliferation of rules of compliance for private activities and regulations for public services delegated to private concessionaires. The government, by means of laws and infralegal normative acts, has introduced benchmarks for socially and economically important activities. And, as a logical consequence, we find that the sanctioning apparatus of the public administration has grown in size, in order to ensure the compliance of these agents by means of supervision and punishment.

In second place we have the nature of society today, which is more dynamic and subject to risks.[5] Nowadays the State is expected to respond to people's fears about a wide range of factors such as new technology, global warming, genetic engineering and nuclear energy.[6] There is global demand for a quick, efficient response, and in the end this makes it impractical for

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[4] In Brazil, the model of the regulating state came into force in the 1990s, at the time of the privatizations and denationalizations. Before then, the prevailing model was of direct intervention by the state in the economy, either to provide public services or to carry on economic activities in the strict sense, either as a monopoly or in competition. It was as the public administration withdrew from the position of direct supplier of goods and services, delegating or devolving this function to private initiative, that strategies of indirect intervention in the economy came to the fore, such as regulation and promotion. Economic-social development consists of "[...] a set of legislative, administrative and conventional measures, abstract or concrete, by which the State, either restricting private liberty or simply through incentives, determines, controls or influences the behavior of economic agents, preventing them from harming the social interests defined in the framework of the Constitution and guiding them in socially desirable directions". ARAGÃO, Alexandre Santos de. *Agências reguladoras e a evolução do direito administrativo econômico.* Rio de Janeiro: Forense, 2003. pg. 37.

[5] See BECK, Ulrich. *Sociedade de risco:* rumo a uma outra modernidade. Translated by Sebastião Nascimento. São Paulo: Editora 34, 2010; and TORRES, Ricardo Lobo. A segurança jurídica e as limitações constitucionais ao poder de tributar. *Revista Eletrônica de Direito do Estado* (Rede), Salvador, No. 4, 2005. Available at: <https://goo.gl/fdXsyD>. Accessed on: Jan. 10, 2018.

[6] About the activity of regulation in the society of risks, see SUNSTEIN, Cass R. *Laws of fear:* beyond the precautionary principle. New York: Cambridge University Press, 2005. Specifically on the relationship between regulation and technology, see MOSES, Lyria Bennett. How to think about law, regulation and technology: problems with 'technology' as a regulatory

repression to operate only (or preponderantly) in the penal field, where in the past the restrictions imposed on the state's power of punishment have been more strict.

Indeed, on the question of risks there is more concern about public safety and new forms of criminality.[7] Terrorism, organized crime and the black market challenge traditional methods of repression and encourage the more frequent use of the "weapons" of administrative law, as an alternative to or reinforcement of criminal punishment. For example, there is a requirement for more urgent coercive measures, such as the administrative sanction of forfeiture of goods that enter the country illegally, provided for in Federal Law No. 10.833/2003 and enforced by the customs authority. In other cases a more strategic and effective supervisory regime is required, such as that introduced by Federal Law No. 9.613/1998, which applied a series of duties to provide information and reports to the authorities in combating the crime of money laundering, failing which individuals are subject to administrative penalties. And there are also calls for a sufficiently energetic state response to deal with the so-called "war on terror", like the USA Patriot Act,[8] a statute that broadened the powers of the North American public administration to restrict rights and sanction private individuals, in a sort of permanent state of exception.[9]

But there is perhaps an even more particular reason for this accelerated expansion of the public administration's sanctioning powers. These days we are experiencing a sort of general frustration with the efficacy of the criminal law, encouraging the adoption of alternative responses in other spheres,

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target. *Law, Innovation and Technology*, v. 5, No. 1, p. 1-20, 2013. Available at: <https://goo.gl/SGVxWN>. Accessed on: Jan. 10, 2018.

7 As Paulo Otero remarks: "The events of September 11, 2001, inverting the conviction that the progress of consciousness of freedom was the final meaning of universal history, making safety a nuclear value, brought Hobbes back to the status of champion of History: [...] (ii) In a scenario of global society of 'diffuse risk', where risks for the safety of people, property and the State itself are omnipresent and unforeseeable, the principle of prevention, through precaution, gives the policing and preventive actions of the Public Administration a central role in combating terrorism and organized crime, in a sort of 'permanent state of emergency'". OTERO, Paulo. *Manual de direito administrativo.* Coimbra: Almedina, 2013. v. 1, pg. 133-134.

8 Normative act issued by the US Congress in October 2001, at the request of the then president, George W. Bush, in response to the terrorist action of September 11, 2001. USA Patriot Act of 2001.

9 In the field of philosophical studies, the topic is highlighted in the works of Professor Giorgio Agamben: AGAMBEN, Giorgio. *Estado de exceção.* Translated by Iraci D. Poleti. 2nd ed. São Paulo: Boitempo, 2004. For a reflection on administrative law in situations of emergency, see VERMEULE, Adrian. Our Schmittian administrative law. *Harvard Law Review*, v. 122, pg. 1095-1149, 2009.

such as the civil and the administrative, which frequently appear extremely onerous. After all, these are measures which are thought up precisely to give the impression that impunity is being combated.[10] An example is the Brazilian Anticorruption Law (Federal Law No. 12.846/2013), which was enacted precisely for these reasons.[11] The law provides that companies are to be held liable both administratively and under civil law for the practice of acts against the domestic or foreign public administration. The types of crime are very broad and the sanctions involve substantial fines, that can range from 0.1% to 20% of the company's gross turnover, under Article 6 of the law.

In fact this tendency — which is guided by a search for more effective solutions — is part of an even wider development. I am talking about a sort of crisis of identity of punitive state law as a whole, which leverages non-linear and contradictory flows, now of "administrationing" behavior that was previously subject to penal law, now of criminalizing activities which so far had been treated as administrative infractions. And it is also increasingly common for the two punitive strategies to overlap.

This is two-way traffic which it seems is unavoidable, because of its association with the dynamic character of the organization of society and its legal framework. It is natural and to be expected that strategies of state repression will vary over time, according to changes in priorities and social values. The challenges that arise are not those of slowing down or speeding up these trends, but of elucidating the dogmatic and interpretative confusion to which they give rise.

There is effectively a sort of pernicious (or poorly thought out) "approximation" between the two branches of the law, which has led to lack of definition of the role and the function of sanctioning administrative law and its instruments. In general terms, there is a lack of theoretical support

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[10] "A deep mistrust of the criminal system, concretely directed to the judges in this specialist area, reinforces the reforms that tend to broaden the spectrum of incidence of regulations sanctioning improbity, providing openings for other similar rules in a variety of sectors". OSÓRIO, Fábio Medina. *Direito administrativo sancionador*. 5th ed. São Paulo: Revista dos Tribunais, 2015. pg. 296. [Free translation]

[11] "We can see that this project opted for holding legal entities liable in the administrative and civil sphere, because Criminal Law does not offer effective or speedy mechanisms to punish companies, which are frequently the real beneficiaries of acts of corruption. Civil liability, because it is closest to the aims of sanctioning legal entities, such as by reimbursing financial loss caused to the treasury; and the administrative process, because it has shown itself to be quicker and more effective in limiting misappropriation in administrative contracts and tender procedures, showing greater capacity for providing society with a quick response". Available at: <https://goo.gl/j66x5K>. Accessed on: Jan. 10, 2018. [Free translation]

to provide guidance on *when, how* and *to what extent* specific principles and guarantees of criminal law should be applied to the administrative field. This leads to an uncertain and unclear state of affairs which creates a risk of arbitrary and inefficient solutions.

For example: there are theoretical and case law constructions aimed at extending many of the criminal guarantees provided for in Article 5 of the Constitution to administrative sanctions. This argument is based on the idea that the state has only one *ius puniendi*,[12] and that therefore, for the purposes of safeguards, it makes no sense to distinguish between criminal and administrative punishment. In either case, the exercise of coercive power by the State would require the observance of a list of maximum safeguards, such as a requirement for strict legality in creating administrative infractions and punishments, in allocating guilt and in observing the presumption of innocence. The problem is that there are no parameters or any minimum consensus to serve as a guide in transferring rules from one side to the other. The question is: what can and should be extended to the administrative sphere from the list in article 5 of the 1988 Constitution of the Federative Republic of Brazil? What criteria should we apply to this transposition? Are the safeguards transposed expressed in the same way and with the same force in the different fields of punitive action of the public administration?

In short, the scenario is one of doubt and legal uncertainty, and we do not know whether or not there is a specific legal regime applicable to the exercise of punitive power by the public administration; there is no certainty about the safeguards actually applying to private individuals in administrative proceedings; or about the objectives which guide sanctioning administrative law and the function which it can (and should) perform. There are no easy answers to this, but we must look for them. And this requires reflections that are sensitive both to the peculiarities of sanctioning administrative law and to the challenges of today's world.

This is the purpose of this essay. I am proposing to look at sanctioning administrative law from the standpoint of an economic analysis of the law. As we shall see, the theoretical contributions of two important schools of thought — Chicago and Virginia — offer important critical insights into both

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[12] The doctrine of a single state *ius puniendi* finds broad resonance in Spain. In the words of García de Enterría and Tomás-Ramón Fernández, "[the] same *ius puniendi* of the State can manifest itself both in the courts and administratively". GARCÍA DE ENTERRÍA, Eduardo; FERNÁNDEZ, Tomás-Ramón. *Curso de derecho administrativo*. 9th ed. Madrid: Civitas, 2004. v. 2, pg. 163 [Free translation].

the theoretical arguments and the practices and institutional arrangements in this field.[13] In any case, before presenting the key arguments of each of these schools, a brief discussion is in order about the relationship between the law and economics, and its undeniable importance for contemporary administrative law — including, specifically, how it affects the exercise of punitive power by the public administration.

2. An economic analysis of the law, pragmatism and sanctioning administrative law

The so-called economic analysis of the law is a field of study that seeks to understand the law by means of theoretical parameters of economics — in particular, of microeconomics. "Law and economics" developed in the United States in the 1960s and 1970s[14] and spread out from there. Since then, its initial proposals have been the target of various criticisms and discussions, leading to the creation of schools of thought with their own agenda.[15] In any event, underlying all of them is a pragmatic attempt to explain and conform to reality by means of non-legal elements with a marked empirical component.

The pragmatic approach is one of the tendencies affecting modern administrative law. In his study of the subject, José Vicente Santos de Mendonça explains that philosophical pragmatism can be defined on the basis of three major pillars, which are highlighted by Professor Thamy Pogrebinschi. They are: (i) anti-foundationalism, (ii) consequentialism and (iii) contextualism. In her words:

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[13] The option for an analysis based on the Chicago and Virginia Schools is for methodological reasons. It does not signify, therefore, that other schools of economic analysis of the law are not important for reflections about administrative sanctions law.

[14] In fact, analyses of the law influenced by economic thinking could already be observed in the United States before 1960, in fields such as competition and monopolies. It was in the 1960s, and, in particular, after the milestone represented by the publication by Ronald Coase of *The problem of social cost* (COASE, Ronald H. The problem of social cost. *Journal of Law and Economics,* v. 3, pg. 1-44, 1961) that, in the words of Richard Posner, an economic theory of the law could be observed, to the extent, perhaps, that no field of law can be exempt from an approach that explains it through the eyes of an economist. See POSNER, Richard. Values and consequences: an introduction to economic analysis of law. *Program in Law and Economics Working Paper,* No. 53, University of Chicago Law School. Available at: <https://goo.gl/Zbf7sS>. Accessed on: May 29, 2017.

[15] In this respect, see MERCURO, Nicholas; MEDEMA, Steven G. *Economics and the law:* from Posner to postmodernism and beyond. 2nd ed. Princeton: Princeton University Press, 2006.

> (i) *anti-foundationalism* is the 'idea that truths are created, not discovered; situated, not objective; changing, not eternal; partial, not absolute'. It is the systematic and constant rejection of a priori truths, dogmas, metaphysical abstractions. [...].
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> As for (ii) *consequentialism*, [...] this is a characteristic of philosophic pragmatism that prioritizes the consequences of an act, theory or concept. [...] For now, let us remember the pragmatist's maxim: the meaning and the truth of theories must be sought by analyzing the difference they make to reality. In other words, by a mental process of advancing and assessing their consequences. [...].
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> (iii) *Contextualism* is quite straightforward. It is highlighting context — social, political, historical, cultural — in philosophical and scientific investigation. [...].[16]

These ideas have invaded the law in recent times to demand of jurists and judges a posture that takes the sphere of results into consideration. In the field of administrative law, this *pragmatic twist*, as Gustavo Binenbojm calls it,[17] is usually translated into a call for efficiency and connection with reality (i.e., rationality). There is no room now for administrative action that is procrastinatory, capricious, ill conceived and excessively costly. There should be no allowance for waste or for models that do not work properly. The public manager is expected to select the most appropriate and economical means to serve the public interest, which, furthermore, is not now understood as an abstract concept as it was before, but as something concrete. That is, as an expression of purpose backed by legal ordinance, informed by the prevalence and protection of fundamental rights, and concretely defined in terms of context and the facts currently existing in society.

This is a focus that guides administrative law in general and is particularly pertinent in the field of sanctions. It is enough to realize that the task of typifying behavior requires legislators and administrators to be permanently

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[16] MENDONÇA, José Vicente Santos de. *Direito constitucional econômico:* a intervenção do estado na economia à luz da razão pública e do pragmatismo. Belo Horizonte: Fórum, 2014. pg. 36-38. In brief: "And this is how the pragmatic matrix is completed: if there are no arguments to justify or validate concepts and theories, they must be viewed in terms of their consequences, which only become meaningful in context" (pg. 38). [Free translation]

[17] Gustavo Binenbojm, *Poder de polícia, ordenação, regulação,* op. cit., pg. 32-35 and 37-66.

in touch with reality, both to define what should be considered irregular and to identify rules that are obsolete, unreasonable or out of proportion. Similarly, once conduct has been typified, the model of punishment should be enough to curb it, without going to extremes. And for this it has to show that it is efficient, which presupposes empirical checks, an analysis of practical consequences and the mapping of results.

It is precisely in the light of this tendency — of the pragmatic understanding of administrative law — that studies of an economic analysis of the law emerge as an important tool for thinking about discipline. In the words of Gustavo Binenbojm, economics,

> [a]s a science based on empirical investigations and on the concrete effects of incentives on the behavior of economic agents and consumers, [...] will supply valuable input for the pragmatic use of administrative law, with a view to maximizing the results sought by the political-legal order.[18]

As Guido Calabresi argues, the relationship between law and economics can be explained from more than one perspective.[19] The first of them, which originated with Jeremy Bentham, consists of an economic analysis of the law *per se*, in the shape of an attempt to analyze the legal system from the viewpoint of economic theory and then suggest changes to make it more efficient. At its limit, if the laws analyzed do not fit the economic models, the champions of this theory — or at last the more radical ones — conclude that the norms are irrational and have no prescriptive potential.

The second approach, associated with the thinking of John Stuart Mill and profiled by Guido Calabresi (who calls it *law and economics),* starts with an acceptance of reality as it appears to us and then asks whether economic theory can explain it. If the answer is no, instead of rejecting that world and calling it irrational, Calabresi explains that the reasoning should be guided by the following questions: (i) did the description of reality take into account the world as it really is? Or, in other words, (ii) could some distraction of the gaze of the person who described this reality have led to an error? The idea is to

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[18] Ibid., pg. 68.

[19] CALABRESI, Guido. *The future of law and economics:* essays in reform and recollection. New Haven; London: Yale University Press, 2016.

search for a more comprehensive and accurate view of reality before rejecting it for alleged economic irrationality.

In any case, the writer continues, if there are still legal rules that cannot be explained in terms of economics, we must ask a different question, as follows: is it possible to expand *not* the description of the facts, but the economic theory itself, maintaining its elements of systemic coherence, but seeking to make it more flexible to the point where it does explain social and legal reality? If the answer is yes, *law and economics* argues that this "expanded" (or "nuanced") perspective should be incorporated into general economic theory. That is to say: the theoretical adaptation conceived to explain a certain specific reality should now be included in a broader theoretical-economical framework.[20]

The idea of this second school of thought, therefore, is of constant communication and interaction between law and economics, unlike the traditional version of economical analysis of the law, in which economics, unilaterally, determines the condition of legal reality (classifying it as rational or irrational). In any case, both theories are based on an observation of legal-social reality to seek to explain it from a viewpoint other than that of the law — that of economic theory. Initially, this involves a pragmatic effort[21] of description and prognosis, which revolves around, for instance, the delimitation of the factors and forces that determine economic wellbeing in a particular society, of the impact of new measures and institutions, and of their *modus operandi*. Only then will there be a basis for debating possible methods and choosing which to adopt.[22]

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[20] To illustrate the view he holds, Calabresi cites the example of behavioral economics. He explains that, when describing reality, observers (especially psychologists) point to behavior that cannot be explained by traditional economic theory, from the standpoint of *homo economicus*. From this it follows that, instead of simply taking this data to be irrational and rejecting it, the behavioral economists started to use it to make changes in the theoretical-economic reference. Since then, "nuanced" (or "expanded") economic theory has been used successfully to examine and explain other areas (such as in the field of the relationship of the law to other disciplines) previously not included in an economic analysis of the law. Ibid., chap. I, part A. An example of this is the *framing effect*, i.e. finding that a choice is not totally rational, but is influenced by the way in which the problem is presented, even though it is the same.

[21] Diego Werneck and Fernando Leal, indeed, recognize that studies grouped under the label of economic analysis of the law and legal pragmatism are effectively related, since both take into account arguments structured in a consequentialistic manner. See ARGUELHES, Diego Werneck; LEAL, Fernando. Pragmatismo como [meta]teoria normativa da decisão judicial: caracterização, estratégias e implicações. In: SARMENTO, Daniel (Ed.). *Filosofia e teoria constitucional contemporânea.* Rio de Janeiro: Lumen Juris, 2009. pg. 171-211.

[22] So we can see that studies of an economic analysis of the law can have two dimensions: one descriptive (or positive) and/or one normative (or propositive). So this can be an effort

The truth is that an economic analysis of the law, whether in its traditional version or as argued by Calabresi, can serve as an important tool for reflections that are both urgent and essential in the specific field of sanctioning administrative law. For example: which are the factors that account for the greater or lesser success of the sanctioning models? Do administrative sanctions function as an efficient incentive for citizens to obey the law? If not, what does serve as an incentive? Are the incentives the same in the different fields of application of sanctioning administrative law? And what is it that influences a public agent when defining types of sanctions? Does more, stricter punishment lead to more compliance with the law? What is the most appropriate model of institutional function for the exercise of the powers of supervision and punishment?

In short, these and other questions may find in the studies of economic analysis elements to be examined. And it is precisely this line that I shall be taking in this essay, with an analysis of the contributions of two important schools: the Chicago school, regarded as a pioneer, and the Virginia school, responsible for developing the theory of public choice.

3. A view of sanctioning administrative law based on the contributions of the Chicago School

3.1 The importance of the theory of economic incentives. In the end, what is it that influences the citizen?

The studies attributed to the so-called Chicago School were the first to bring elements of law and of economics closer together. Since then, its initial proposals have been the target of various criticisms and discussions, leading to the creation of schools of thought with their own agenda.[23] This does not

concentrating only on the description of reality and the possible consequences, or an effort accompanied by an assessment of what should or should not prevail, based on a criterion that expresses some preference.

[23] As André Rodrigues Cyrino explains: "Economic analysis of the law can be understood, generically, as the introduction of elements of economics to legal science. This is a way of viewing the law (its structures, formation and consequences), based on arguments coming from different theoretical trends of economic thinking. So there are various economic studies of the law, in which contrasting paradigms, political views and philosophical concepts are interrelated". CYRINO, André Rodrigues. *Direito constitucional regulatório:* elementos para

mean, it needs to be said, that they are no longer important. On the contrary, the contributions of writers such as Ronald H. Coase,[24] Guido Calabresi,[25] Gary Becker[26] and Richard A. Posner[27] shone a light on many fields of the law, and continue to do so.[28] In matters of sanctions, the potential for clarification is enormous.

The writers belonging to this school work on the basis that individuals are rational beings[29] that make choices to maximize their preferences, both in the market and outside it. It is assumed that they are fully capable of having and understanding the necessary information about the options open to them and that, in this situation, they are able to assess the anticipated results of each of them in the light of what they desire.[30]

From this it follows that human behavior is guided by an analysis of costs and benefits. People project the benefits and additional costs of their actions and only take action if the former outweigh (or at least equal) the latter. This type of calculation, it is argued, also applies in the realm of illegal behavior. The idea is that individuals are led to default on contracts or break the law

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uma interpretação institucionalmente adequada da Constituição econômica brasileira. Rio de Janeiro: Renovar, 2010. pg. 140-141. [Free translation]

24 See Ronald H. Coase, The problem of social cost, op. cit., pg. 1-44.

25 See CALABRESI, Guido. Some thoughts on risk distribution and the law of torts. *Yale Law Journal,* v. 70, n. 4, pg. 499-553, Mar. 1961.

26 See BECKER, Gary S. *Crime and Punishment:* an economic approach. Available at: <https://goo.gl/QJPRbG>. Accessed on: Dec. 16, 2016. pg. 169-217.

27 For a description of the so-called Chicago School, see Nicholas Mercuro and Steven G. Medema, *Economics and the law,* op. cit., pg. 96-156.

28 As Thiago Cardoso Araújo explains: "The emphasis on the thinking coming out of Chicago, directed by Richard Posner and his colleagues, is justified for a number of reasons. First, because it has pioneered the consolidation of a common nucleus, derived, as we shall see, from a combination of the works of Gary Becker, Ronald Coase and Richard Posner, in addition to the efforts in its defense presented by Aaron Director. That is to say: the history of the creation of the field is inseparable from the approximation with an Economic Study of the Law referred to above. Secondly, because it is the most influential version of an Economic Study of the Law, being the most widely published and also the most criticized". ARAÚJO, Thiago Cardoso. *Uma proposta modesta:* uma visão da análise econômica do direito à luz da teoria dos sistemas e possibilidades de sua aplicação. Thesis (PhD in law) — Faculdade de Direito, Universidade do Estado do Rio de Janeiro, Rio de Janeiro, 2015. [Free translation]

29 As Posner warns, the term "rational" must be understood as a comparison of means and ends, and not in the sense of *"a meditation about things".* POSNER, Richard. *Problemas de filosofia do direito.* São Paulo: Martins Fontes, 2007. pg. 473-474.

30 This reasoning is linked to the idea of perfect rationality. See PINHEIRO, Armando Castelar; SADDI, Jairo. *Direito, economia e mercado.* Rio de Janeiro: Elsevier, 2005. pg. 198: "Refers to the mastering, by the players, of details of the game. Rationality is focusing on objectives and finding a more efficient way of achieving them. Irrationality is acting in such as way that one's action cannot be anticipated or foreseen".

whenever it is worth while to do so. Thus infractions must be seen as the result of a rational choice.[31]

And this choice, according to the Chicago School, derives from the response of each agent to incentives of a directly or indirectly economic nature, such as a price rise in a certain product or the publication of a law, respectively. It is clear that this type of reasoning is fully applicable to sanctions law. It can be argued that the likelihood of an individual getting involved in a particular illegal activity diminishes in proportion to the increase in the cost[32] of such involvement. So the more strictly a sanction is applied, and the more efficient prosecution by the state is seen to be, the more "expensive" will be the individual's decision to behave illegally. These variables function as "prices" in the rational equation defined by each agent when deciding whether or not to pay them.

In the economic analysis of the law, it was Gary Becker, one of the key thinkers of the Chicago School, who developed a focus directed at the field of punishment. According to him, crime should be regarded as an economically important activity. A type of "industry". So it is up to legislators and public administrators to calculate, in objective terms, the measure of resources to be spent and punishments to be introduced in order to ensure the ideal level of compliance with the law in a specific location. This requires, among other things, an assessment of the costs related to criminal prosecution and the conviction of wrongdoers, as well as a definition of the nature of the penalty to be imposed — e.g. whether it should be a prison term or a fine. In addition, thought must be given to the theory of incentive as the engine that drives human behavior.[33] In the words of Becker:

> [...] a person commits a crime if the gain he anticipates is greater than he could obtain using his time and other resources in different

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[31] As Ragazzo explains, for the theorists of the Chicago School, the basic function of the law is to change an incentive, by taking the legal rules, in this case, as prices. *In verbis:* "The rules set the costs of human actions (and this is clearer when there are explicit sanctions such as fines, alternative penalties and imprisonment). Thus individuals make their choices about legal or illegal behavior on the base of the duality sanction (degree of penalty) and supervision (the likelihood of getting caught and punished)". RAGAZZO, Carlos Emmanuel Joppert. *Regulação jurídica, racionalidade econômica e saneamento básico.* Rio de Janeiro: Renovar, 2011. pg. 102. [Free translation]

[32] Costs are referred to here in the broad sense, as a set of negative consequences for the individual — monetary or otherwise.

[33] Gary S. Becker, *Crime and punishment,* op. cit., pg. 170.

> activities. Some people become criminals, therefore, not because their basic motivation is different from other people's, but because what they perceive as benefits and costs are different [...].[34]

In other words, the writer rejects explanations based on psychological or cultural factors and proposes an analysis of criminal law from the more comprehensive viewpoint of an economic analysis of the law, based on the premise that there is a rational relationship between the number of infractions committed and the factors of maximization and minimization of costs. From this perspective, elements such as the likelihood of the individual getting caught and punished, and the income that he will cease to obtain when opting for illegal action, will be decisive for his choice — always a rational one.[35] When it comes down to it, it is an analysis of whether crime pays, in the light of the risks and potential benefits in play.

It is clear that this approach has a consequentialist bearing. It proposes that legal rules be thought of as factors that affect the decisions taken by individuals, considering that they, as rational beings, will choose whatever can maximize their satisfaction — irrespective of any moral judgment of right and wrong. So the operator of the law must consider not only the purpose of each measure for adoption but, above all, the manner in which it will effectively influence reality. As Posner warns:

> The role played by economics in the moral and political debate is calling attention to the consequences or implications that people not attuned to economics commonly forget. How one deals with these consequences is the key point of one's business. The basic job of the economist is to remind us of the consequences, which are often though not always adverse, or at least onerous, of acts or practices which otherwise we could think about more clearly.[36-37]

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[34] Ibid., pg. 176. Free translation.

[35] Ibid., pg. 9.

[36] Richard Posner, *Problemas de filosofia do direito,* op. cit., pg. 10-11. Free translation.

[37] It should be noted that another characteristic of the Chicago School approach relates to the characterization of economic efficiency as a criterion for drafting and assessing legal rules. Efficiency is taken to be as defined by Pareto and Kaldor-Hicks, with the latter being considered the more appropriate. In Pareto's view, efficiency is attained when no individual can improve his position without worsening someone else's. Kaldor-Hicks, on the other hand, thinks that a measure is efficient if the gains for its beneficiaries outweigh the losses imposed on those that bear them, as in a trade-off. Here, Ragazzo argues, "[...] it is impossible to adopt

How can the ideas described above contribute to a critical reflection about the exercise of sanctioning powers by the public administration? The following section will try to answer this question.

3.2 The exercise of sanctioning powers in the light of the contributions of the Chicago School: some reflections

In the field of administrative sanctions, the theory of incentives preached by the Chicago School may play an important part in the creation and application of sanctions. Let us take as a reference the area of economic-social regulation. This is a type of indirect intervention by the State in the economy, which can be defined as a means (consisting of the definition of normative pillars and other administrative measures) to achieve certain ends in the public interest, linked to socially important objectives. To be considered legitimate, in the light of the principle of proportionality,[38] regulatory measures must be first and foremost adequate. From this point of view, they must be effectively able to influence and shape (or incentivize) the action of the regulated agents, in a certain direction. For this it is important to consider the weight (or price, in the economic sense) of each measure in the equation of costs and benefits of the economic agents monitored.

It should be noted that this reasoning can be applied to other fields of sanctioning administrative law in addition to economic-social regulation. In truth, when one thinks about punitive schemes (i.e., a definition of infractions and sanctions), one can imagine that those to whom a rule applies can be led to analyze the cost/benefit ratio in a wide selection of cases. Put in another way, this reasoning can be applied both *(a)* to the businessman who calculates whether it is worth ignoring some regulatory requirement, balancing the "gains" of acting illegally against the cost of punishment by the regulatory agency and possible court action which might ensue, and *(b)* to a public servant subject to disciplinary measures, who in his routine work seeks to

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Pareto's theory of efficiency to guide decision-making involving public policies. Kaldor-Hicks' definition is more appropriate in these cases, since every public policy decision involves winners and losers". Carlos Emmanuel Joppert Ragazzo, *Regulação jurídica, racionalidade econômica e saneamento básico,* op. cit., pg. 91-92.

[38] For more details about this principle, see ÁVILA, Humberto. *Teoria dos princípios:* da definição à aplicação dos princípios jurídicos. 17th ed. revised and updated São Paulo: Malheiros, 2016. pg. 204-219.

compare the "advantages" of carrying out his functions poorly (e.g., more time to spend with his family) with the costs associated with the risk of being found out and disciplined.

In spite of this, there are reasons for the theory of incentives to be particularly applicable to the field of regulatory sanctions. Here the persons to whom the rules apply are mainly companies which compete in the market in order to make profits, rather than individuals who, although they compete, are guided by emotions. So the application to these cases of the central premise of the Chicago School, associated with *homo economicus,* tends to be more obvious and more appropriate.[39]

In this context, the theory of incentives can (and should) be taken into account when defining the regulatory instruments to be used. In either case, one must assess which model is more efficient for shaping the behavior of regulated agents so as to attain the public objective pursued — whether by defining types and infractions (i.e., resorting to the conventional instrument for sanctions, known as command and control), or whether by means of alternative, more flexible designs, such as defining performance targets.[40]

J. B. Wiener,[41] for example, explains that in the 1970s in the United States, it was precisely this concern that led to the adoption of a more pragmatic (and less moralistic) outlook on regulation, with a tendency to value the use of incentive-based instruments rather than those subject to the definition of strict technical standards. According to this writer, after the experience obtained from the first regulatory designs, which were based on the model of command and control, it was found that defining strict standards and rigorous penalties

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[39] This is not to overlook the fact that this type of fiction has been severely criticized. Writers on *behavioral law and economics,* for example, point out that there is a limit to human rationality and that individuals allow themselves to be carried away by emotions and cultural standards when making a decision. This, according to these thinkers, is why more or less repetition of certain administrative infractions, such as failing to comply with the traffic code, can be related to changes in the mood of the driver. But in the field of economic-social regulation, we are dealing mainly with companies. So the influence of subjective elements may up to a point be minimized. For studies focusing on behavioral law, see SUNSTEIN, Cass R.; THALER, Richard H. *Nudge:* improving decisions about health, wealth, and happiness. New Haven, CT: Yale University Press, 2008. pg. 293.

[40] See MORENO, Natália de Almeida. Tecnologias regulatórias piramidais: responsive regulation e smart regulation. *Revista de Direito Público da Economia — RDPE,* Belo Horizonte, v. 13, No. 49, pg. 125-158, Jan./Mar. 2015.

[41] WIENER, Jonathan B. The regulation of technology, and the technology of regulation. *Technology in Society,* v. 26, 2004. Available at: <https://goo.gl/DVHWfy>. Accessed on: Dec. 16, 2016.

was often less effective in stimulating the development of new technology than models based on the definition of standards of performance, or those conceived out of the "commerce" of allowances.[42]

The example illustrates how the response of the legal framework to an infraction should be regarded in itself as a factor for the creation of incentives, and not as a mere reaction to someone who breaks the law. This creates an additional onus on the public authorities, who have to justify opting for the command and control model rather than other regulatory instruments that exist, in the light of the incentives generated by it in the specific context in which they are considered.

But this argument is even more important. Having adopted the path of sanctions, both the stipulation in theory of the types and penalties and the concrete application of the sanctions must take account of insights such as those taught by the Chicago School. This includes investigating the efficient degree of densification of the types and applicable penalties.

In fact, the definition of excessively generic types may create unnecessary costs for the regulated agents, which, in an environment of uncertainty about the correctness of their conduct, may result in over-cautious behavior — like failing to make investments or not assuming certain risks. But highly generic provisions may also cause excessively risky (even negligent) behavior by the regulated agents, if they are confident of being able to challenge possible sanctions in the courts. On the other hand, the provision of excessively specific types may cause problems of under-inclusion, with the creation of unjustified competitive advantages for agents not covered by the rules — but which, in the light of the regulatory purposes, should have been covered.

It is not possible to find solutions in advance for these matters. But the perception that the law and, in particular, sanctioning law, can lead to strategic behavior by the regulated agents must always be taken into account by the institutions charged with economic-social regulations.

These comments also apply to the stage of applying sanctions by the regulator. In fact, if excessive rigor is adopted, preferring formal legality to analyses that are sensitive to the principles of proportionality and of reasonableness, the regulated agents may regard this as an incentive, either

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[42] For example, the carbon credits market. On the subject: "The Kyoto Protocol introduced the Clean Development Mechanism (CDM), which provided for a certified reduction of emissions. Once a certificate has been obtained, any company reducing its emissions of polluting gases is entitled to carbon credits and can sell them to countries that have targets to meet". Available at: <https://goo.gl/IGKLd>. Accessed on: Nov. 25, 2017.

to reduce investments, or to adopt a strategy of mass litigation. Moreover, proceedings that take too long to settle can be a perverse encouragement to people to break the rules rather than observe them, on the basis of a cost-benefit analysis that indicates that this is the most advantageous course of action.

In short, the contributions of the Chicago School show how important it is to see administrative sanctions — in particular regulatory sanctions — as instruments *par excellence* for creating incentives, aimed at rational agents who make choices based on the satisfaction of their interests. Choices which, strategically, include the option of obeying or breaking the law. This approach, as we have seen, can confer more rationality and efficiency both on the choice of particular sanctioning models and the definition and application of types and penalties.

4. A view of sanctioning administrative law based on the contributions of the Virginia School

4.1. The public choice theory. In the end, what is it that influences a public agent?

While the Chicago School offers a basis for reflection on the behavior of private agents subject to rules and sanctions, the Virginia School provides a contribution to analyzing the *modus operandi* of the bureaucracy and of those who define the rules and apply the sanctions, in accordance with the public choice theory.

In broad terms, the *public choice theory* can be defined as the study of democracy (in the form of collective processes of political decision-making) from an economic perspective.[43] This is an interdisciplinary effort combining political science and instruments of economics to analyze how collective decision-making processes work in democratic systems. It involves the study of government and its players: political agents, interest groups, bureaucrats

[43] GUNNING, J. Patrick. *Understanding democracy:* an introduction to public choice. Available at: <https://goo.gl/xYPY7t>. Accessed on: May 29, 2017. Compare the definition of James M. Buchanan: "Public choice is a perspective on politics that arises from an extension-application of the economist's tools and methods to take collective or non-commercial decisions". BUCHANAN, James M. The public choice perspective. In: _____. *Politics as public choice.* Carmel, Indiana; Liberty Fund, Inc., 2000. pg. 15. (The collected works of James M. Buchanan, v. 13). Free translation.

and electors, as well as the way in which they interact and the motivations that lead them to do so in the institutional sphere.[44]

Mercuro and Medema[45] explain that the development of this theory of economic analysis of the law, which took place in the 1960s, was caused, in part, by the dissatisfaction of economists and political scientists with the focus of the studies undertaken during the first half of the twentieth century. Prior to that, studies were centered on the market and how it functioned, and this permitted coherent and systematic models of the private sector to be constructed. This was the basis for sensible theories about the relationship between competitive markets and economic efficiency, and the market failures answerable for inefficiency. And in the light of these discoveries, it was stipulated that the State should intervene when and where flaws were detected. But how could the success of state intervention be guaranteed?

This was the cue for interest to shift from flaws in the *market* to an investigation of the so-called shortcomings of *government.* It was necessary to study the logic underlying decision-making processes in the public sector in the same way as hitherto the mechanism of functioning of the private sector had been analyzed. In the market, it was realized that individuals reveal their preferences and satisfy them by means of the pricing mechanism. In the public sector, for its part, this happens by means of the collective decision-making processes that take place in political and bureaucratic arenas. Similarly, the perception shared by the writers pioneering the public choice theory was that it would be possible to establish a parallel between the private and public sectors, even if on a more general level.[46] It was precisely this scenario that opened up fronts for systematic and coherent studies to be undertaken on the successes and failures of state intervention, as had been done in the case of the private sector.

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[44] "The perspective of the public choice theory is that government's political and economic decisions are subject to a set of powers divided among different agents with different functions in the political system. President, executive, legislative, judicial system, public administration, political parties, interest groups, all of them interfere in the possibility and capacity of implementation of these policies. On the other hand, governments have limited time horizons and are periodically subject to the popular vote, which is also an essential feature of representative democracies and has an influence on the decisions taken". PEREIRA, Paulo Trigo. A teoria da escolha pública (public choice): uma abordagem neoliberal? *Análise Social,* v. 32, No. 141, pg. 419-442, 1997.

[45] Nicholas Mercuro and Steven G. Medema, *Economics and the law,* op. cit., pg. 156-157.

[46] Ibid., pg. 157-158.

As a departure point, the *public choice* theorists also chose methodological individualism.[47] Starting with the idea that individuals are the base reference for an analysis of politics (i.e., the primary units), government is taken to be a complex of institutions through which individuals interact in order to take collective decisions. Politics, in turn, is simply the activity of people in the context of these institutions.[48]

In second place, the public choice theory is based on the assumption that the behavior of individuals in politics is exactly the same as they exhibit in the marketplace. In other words, just as in their personal relationships, politicians, regulators and bureaucrats are motivated by self-interest and egotistical objectives. They seek to maximize their utilities, preferences and satisfaction through strategic, rational behavior, just like *homo economicus,* which here too is used as a theoretical reference. As Robert D. Tollison explains, government agents are not seen in an idealized way, as players committed to a vague notion of public interest. On the contrary, he believes in the fidelity with which they pursue their own interests in the context of government.[49]

And it is with this realistic outlook that Gordon Tullock compares state agents to private businessmen, asserting that:

> For the analyst of public choice, the government is not interested in systematically maximizing the public interest. This analyst believes that government employees are always seeking to maximize their own

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[47] According to Carla Vanessa Sales, the principle of methodological individualism "[...] establishes that all social phenomena can and should be explained in terms of the actions of individuals and their interactions with each other [...]". SALES, Carla Vanessa. *Entre instituições e racionalidade:* o federalismo na ciência política contemporânea. Dissertation (Master's degree in political science) - Universidade Federal de Pernambuco, Recife, 2006.

[48] James M. Buchanan, The public choice perspective, op. cit., p. 4. As the author explains: "[...] How does the approach of an economist to politics and government differ from the political scientist's usual analysis? As I have tried to show, the difference in thinking is simple. It involves only a change in analysis, from the organizational entity to the way an individual acts as part of an organization. Instead of trying to examine political institutions as organizations, the entire approach involves trying to examine interactions between individuals to the extent that they perform certain functions attributed in these institutions" (p. 13). Free translation.

[49] TOLLISON, Robert D. *Politics as public choice.* Carmel, Indiana; Liberty Fund, Inc., 2000. (The collected works of James M. Buchanan, v. 13). Or, as Buchanan asserts: "In the perspective of public choice theory, properly understood, there simply are no elements such as 'social objectives', 'national targets' or 'functions of social welfare'". James M. Buchanan, The public choice perspective, op. cit., pg. 71. Free translation.

> interests. In doing their jobs they act like, for example, the managers of United States Steel.[50]

The public choice theory thus breaks away from the view of the economists of the theory of social welfare trusting in the government as a sort of "benevolent despot". As Gunning explains,[51] the government structure was no longer seen as an "entity" motivated by public interest and always prepared to design public policies aimed at correcting market shortcomings (such as natural monopolies and adverse external forces). Instead of this, a realistic view of political processes came into being, where the search for efficiency in realizing social objectives is relegated to the level of secondary objective.

The list of topics studied to explain the collective decision-making process is a very long one. The writers get involved in an analysis of the Constitution, the Legislative Branch, state bureaucracy, political parties, interest groups, election campaigns, and the rules and dynamics of voting.[52] And it is from these studies that a phrase like rent-seeking is coined, to describe the different ways in which individuals use the political process to redistribute other people's wealth to themselves.[53]-[54] This would be the case, for example, of a car manufacturer who, in order to reduce competition, contributes to the political campaign of a candidate known to be in favour of stricter controls on vehicle imports.

The fact is that, irrespective of the focus, these studies are clearly pessimistic about democracy. On the one hand, political agents in office and candidates want to be re-elected or elected, as the case may be, and so they act in such a way that they will gain votes and power. On the other hand, the

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[50] TULLOCK, Gordon; SELDON, Arthur; BRADY, Gordon L. *Falhas de governo:* uma introdução à teoria da escolha. Translated by Roberto Fendt. Rio de Janeiro: Instituto Liberal, 2005. pg. 28.

[51] J. Patrick Gunning, *Understanding democracy,* op. cit.

[52] We observe, therefore, that the studies are aimed at politicians, legislators, bureaucrats, electors and lobbyists, seeking to analyze the interactions between these players in typically political arenas. These interactions, it must be stressed, being motivated by a logic of supply and demand. Consequently, with these concerns, the authors of *public choice* cease to focus on the functioning of the Judiciary.

[53] Nicholas Mercuro and Steven G. Medema, *Economics and the* law, op. cit., pg. 166.

[54] J. Patrick Gunning, *Understanding democracy,* op. cit., pg. 9. In the author's definition: *"Rent seeking consists of legitimate, non-voting actions that are intended to change laws or administration of laws such that one individual and/or group gains at the same or greater expense to another individual or group"* (p. 348). See also Gordon Tullock, Arthur Seldon and Gordon L. Brady, *Falhas de governo,* op. cit., p. 55: "[...] this is using real resources in order to generate income for people, with the income itself arising from an activity that has negative social value".

voters in general, subjected to the rule of the majority, have little incentive to invest time, money and energy in exercising an informed vote. However great an effort is made, the overall perception of the electorate is that an individual vote has a negligible chance of being decisive. And this is why, when it comes down to it, not voting or not getting information to decide how to vote ends up as being a rational decision.[55]

And the bureaucrats? For them, maximizing utilities revolves around salary increases, bonuses, reputation, and gaining power and influence. This leads to a dispute between agencies and government departments for inflated budgets, and this serves as an incentive to create artificial costs. After all, higher costs mean bigger budgets. As a consequence, there is less incentive for bureaucrats to save money.

But the vicious circle goes further still. Why, in the end, is there no crackdown on the excess spending of the bureaucracy or its poor performance? As Mercuro and Medema explain, there is a chain of perverse interests behind the maintenance of a framework of chronic inefficiency. In fact, as politicians and legislators want votes, they seek to satisfy interest groups that are avid to maximize their own gains and which promise them political loyalty — or even financial support. These groups, in turn, frequently depend for their business on regulations issued by a particular body or entity, and so either they do not want to change "the rules of the game", or they want to influence any changes there may be. So the "sponsored" politicians are led to support these bureaucratic units, by increasing their budgets or weakening their supervision. At the same time, they lose the incentive and the ability to conceive strategies that eliminate inefficiency.[56]

As can be seen, *public choice* bets on a realistic description of the way the public machine works, and its verdict is a decidedly pessimistic one. To this extent the theory can be the target of criticism, because it ignores the fact that reality is plural, and that there are also well-intentioned individuals. That is, citizens, politicians and bureaucrats whose actions are motivated by a genuine civic commitment and sense of social responsibility.[57] In any case, this dose

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[55] Nicholas Mercuro and Steven G. Medema, *Economics and the law,* op. cit., pg. 184-185.

[56] Nicholas Mercuro and Steven G. Medema, *Economics and the law,* op. cit., pg. 189.

[57] A man "of flesh and blood" is not always motivated in his actions only by calculations of costs and benefits, and it is possible that he may not even be able to do these calculations on the majority of occasions, because of the different cognitive biases to which he is subject (such as a mistaken perception of reality). Questions of this type are emphasized in *Behavioral Law and Economics,* an area of economic analysis of the law which arose precisely as a reaction to

of reality has a contribution to make to the challenge of thinking about and updating administrative law in general, and, specifically, its sanctioning role. In the following section I shall include some reflections on this topic.

4.2 Public choice *and the exercise of punitive power by the administration: some reflections*

The set of ideas developed by the authors of the public choice theory leads to profound reflections on politics and bureaucracy in general, especially in countries like Brazil which suffer from endemic levels of corruption. But this critical look is particularly appropriate in the field of sanctioning powers exercised by the state authority.

In reality, the public choice theory preaches that politics and bureaucracy should be understood without romanticism,[58] on the assumption that the public agent uses (or is constantly tempted to use) the state machinery to his own advantage or to that of the department where he works. If this is so, the field of sanctions is particularly propitious for realizing this egotistic and reprehensible objective. It can provide a space for maneuvers such as:

(i) The *typification* of unwarranted infractions or misuse intended to benefit interest groups or to work as a bargaining counter for a public agent in exchange for illicit favors;
(ii) The *application* of unjustified sanctions or their misuse intended to benefit interest groups or to work as a bargaining counter for a public agent in exchange for illicit favors;

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the rationalist constructions of the Chicago and Virginia Schools. These studies are sensitive to the psychological, sociological, cultural, emotional, moral and ethical values that guide human behavior. In general terms, the authors of this school have brought to the field of law the contributions of the so-called behavioral economics, so as to stress the (empirically undeniable) fact that human rationality is limited. In real life, it is expected than an individual may be carried away by emotions and cultural standards when making a decision. In addition, individuals do not always behave egotistically, but may assume a studied and truly altruistic conduct. These thinkers, therefore, resort to empirical studies to conclude and prove that human behavior is systematically irrational. Normally decisions are taken not consciously or voluntarily, but influenced by factors of a different order, such as cultural values or psychological aspects. Similarly, it is natural that decisions may be taken based on errors of diagnosis caused precisely by factors of this sort. After all, there are many factors with the potential to interfere in people's cognitive and decision-making dimensions.

[58] See James M. Buchanan, The public choice perspective, op. cit., pg. 45-59.

(iii) The disproportional and excessive *application* of penalties, especially fines, inflating the importance of the supervisory entity and boosting the size of its budget. Incidentally, this type of misuse is referred to by Alexandre Santos de Aragão as "a certain spectacularization" of the sanctioning activity of the regulatory agencies, consisting in the application of sanctions "[...] with criteria that always tend to appear as strict as possible, potentially jeopardizing the financial health of the companies and, at its height, in the event of repeat fines, even their continuing in business".[59]

Clearly, the idea is not to assert that all sanctioning activity is contaminated by shady interests to the point that they need reformulating. In truth, the tools developed by the authors of public choice can contribute to *(i)* a diagnosis of problems with the functioning of the public machinery and their causes, as well as to *(ii)* the prevention of future collapses, by conceiving institutional models that can actually deal with the (pessimistic) reality revealed by the public choice theory.

For example: in the regulated sectors, there are frequent questions about the rationality of the supervisory and sanctioning schemes adopted by the regulatory agencies, which are usually based on the application of severe fines on the companies they regulate. In addition to the criticism mentioned above of the "spectacularization" of this activity, Floriano de Azevedo Marques questions the effectiveness of fines as an instrument to ensure that the regulated agents — specifically the concessionaires — provide quality services. According to the writer, on top of the large number of appeals available to postpone payment of these sanctions, there is no guarantee that the money paid in fines is actually used to improve the services. So more effective penalties would be those that get to the source of the companies' revenues, such as prohibiting them from contracting more customers. And he adds: "When the regulator does not take preventive action but only reacts to breakdowns in service, applying inopportune fines, it generally errs in the calculation of the fine and in the basis for the sanction. And the result is that these decisions can be challenged in the future".[60]

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[59] Preface written by Alexandre Santos de Aragão to the following work: LELLIS, Mauro M.; BERNARDES, Gabriel F. *Da base de cálculo das penalidades aplicadas pela Aneel.* Rio de Janeiro: Synergia, 2006.

[60] MARQUES, Floriano Azevedo. Estatais não quitam 78% das multas aplicadas por agências reguladoras. *O Globo.* Available at: <https://goo.gl/v8TEZE>. Accessed on: Apr. 28, 2016.

One might well ask: why do regulators insist on coercive action (after the fact) instead of acting preventively? Why insist on an inefficient practice instead of trying alternative solutions, such as converting fines into action to benefit the service provided to the users?

It is to answer questions such as these and to help construct solutions that the public choice theory can contribute. It may be that the reason for repeating an outdated and inefficient practice is that the public servants in question are poorly qualified and thus lacking in the technical ability to address change. But it could also be that other types of interest exist, in isolation or additionally. The repeated application of strict sanctions can be seen by the state agents as an opportunity to obtain illicit benefits, such as a quid pro quo in negotiations with interest groups, or as a strategy to inflate the importance — and the budget — of their bureaucratic unit.

In this context, the critical, pessimistic diagnosis made by the authors of public choice may help to understand the dysfunctions that affect the exercise of sanctioning power by the administration. In any case, this potential depends on the effective completion of empirical studies, and this by itself would account to a large extent for an increase in rationality in the discussions about the subject.

5. Final considerations

The rapid expansion experienced by sanctioning administrative law has made urgent reflection necessary about the role, the function and the legal regime to which this area of the law and its tools are subject. As I have shown in this article, analysis of this type is especially important in view of the transformations the world is going through, and of the way that the State has intervened in Brazil's economy and its legal reality, above all since the Constitution of 1988. It is necessary to think about ways and means of making administrative infractions and sanctions more rational and efficient. This is without doubt a complex task, but this does not invalidate the effort to correct the course and to define trends[61] that can throw critical light both on

[61] In this line of thought, Fernando Menezes defines a trend as "[...] the dynamic element connecting past, present and future". It is presented under the form: [...] of the major problems and challenges to be faced by the theory, in its function of understanding the legal reality of administrative law and, at the same time, precisely because it supplies elements for better

theoretical reasoning and on the challenges of a practical nature faced by all those that militate in this field.

In this article I have argued that a pragmatic outlook, sensitive to a study of the consequences and to empirical observation, can contribute to the task. And for this purpose the contributions of writers of economic studies of the law are also of great importance. On the one hand, the theory of economic incentives revealed by the Chicago School enables us to understand better the behavior of private agents and their possible reactions to legislation. This makes it possible to construct more conscious and efficient sanctioning models. On the other hand, the studies contained in the so-called public choice theory, the product of thinkers of the Virginia School, help us understand the dysfunctions and perplexities in the functioning of the state apparatus. The tough, unromantic outlook of these writers is intended to reveal the intricate web of interests that motivate public agents, and this is of the greatest relevance. This can be an important guide to explain, for instance, why excessive and inefficient sanctioning practices persist in the regulatory agencies.

Finally, exploring approaches of this type is not just advisable but necessary and urgent. A final example will be sufficient to prove the argument. In 2009, in Taking of Accounts No. 022.631/2009-0, the Federal Court of Auditors (TCU) set out to inspect the sanctioning activity of the federal regulatory agencies and of some other administrative bodies and entities.[62] On checking the amount of fines imposed and actually collected during the period 2005 to 2009, the TCU found that, on average, only 3.7% of the fines issued had been paid into the public purse (see Ruling No. 1.817/2010), which was an alarming result for two reasons: both for the significant amount of potential revenue not received by the treasury

comprehension, for influencing the evolution of this reality". ALMEIDA, Fernando Dias Menezes de. *Formação da teoria do direito administrativo no Brasil.* São Paulo: Quartier Latin, 2015. pg. 411.

62 Refers to case TC 022.631/2009-0. The following were inspected: the National Water Transportation Agency (Antaq); National Land Transportation Agency (ANTT); National Civil Aviation Agency (Anac); National Cinema Agency (Ancine); National Telecommunications Agency (Anatel); National Electrical Energy Agency (Aneel); National Oil, Natural Gas and Biofuels Agency (ANP); National Supplementary Healthcare Agency (ANS); and the National Health Surveillance Agency (Anvisa). The TCU did not assess the results for the National Water Agency (ANA). In addition to these agencies, data was collected for the Brazilian Securities Commission, the Superintendence of Private Insurance, the Central Bank of Brazil, the Administrative Economic Defense Council, the Brazilian Institute of the Environment and Renewable Resources, and for the Federal Court of Auditors itself.

(estimated at around R$24.9 billion) and for the impaired efficacy of the state sanctioning operation.[63]

In view of this, the ministers determined that the units inspected should submit a series of reports explaining the poor collection performance and describing the steps they would be taking to correct it. These reports were analyzed in Judgment No. 482/2012. Of the measures described by the units inspected, the following deserve mention: the issue or reissue of internal regulations; the introduction of new data management systems and the establishment of procedures, administrative checks and monitoring of processes; and staff training and an increase in numbers.[64]

Without doubt the initiative of the Court of Auditors has been of value. Collecting data, mapping performance and correcting problems are fundamental for improving the supervision and sanctioning models. But the analytical approach by the TCU, though not wrong, is far from sufficient. The theories developed by the schools of economic analysis of the law call for other more important questions that could have been asked by the Court, such as the following:

(1) From the point of view of economic rationality, does the punitive model based on monetary sanctions constitute a legal-institutional arrangement that can create, in each segment regulated, the incentives necessary for shaping the conduct of private agents, taking into account, for this purpose, the costs associated with the infraction (direct and indirect) and the benefits which the perpetrator was trying to achieve? After all, as the writers of the Chicago School point out, if it is more attractive for the regulated agent to violate the regulations than to comply with them, it will have an incentive to do so.[65] This

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[63] "In other words, situations can arise where the original volume of fines imposed is very high, but these fines are cancelled after administrative appeals have been submitted by the entities inspected. If a large discrepancy is found between the amounts originally applied and those remaining valid for collection after administrative appeals, this will indicate a major flaw in the efficiency of the regulator: either fines will have been applied improperly by the inspectors, whether in terms of procedure or of the amounts stipulated; or the courts that judge the administrative litigation are not prepared to maintain fines correctly imposed by the inspectors. In either case, there is a waste of resources in an inefficient process of issuing and then cancelling fines, and at the same time the efficacy of the regulatory body or entity is reduced, because it cannot satisfactorily penalize the entities it regulates" (Judgment No. 1.817/2010, pg. 13).

[64] Judgment No. 482/2012, pg. 40-41. Note that, in 2014, a new decision was issued pursuant to the monitoring initiated in 2010 and taking into account the rulings delivered in 2012 (Judgment No. 1.665/2014).

[65] In fact, "[o]ne problem with setting fines in accordance with the cost to society of a crime is that it may not have a deterrent effect if the fine is less than the benefit obtained by the criminal. If

will potentially lead to more fines. But the larger number of punishments will not be proof that the sanctions are achieving their aim. On the contrary, it will prove that the arrangement is unable to correct the behavior of those for whom it is intended.[66]

(2) From a pragmatic perspective, have the solutions presented by the bodies and entities to perfect their enforcement activities, such as the alleged enhancement of regulations, introduction of new computer systems and increase and training of staff, proved to be sufficient? Indeed, are they workable? Or are there alternative strategies which cost less and are potentially more effective?[67] In effect an analysis committed to efficiency and economy cannot ignore the scenario of permanent shortages. So solutions requiring significant expenditure often turn out to be unworkable or of limited effect. That is to say, inappropriate to deal with the very poor performance detected by the TCU in respect of collecting money.

(3) And: what other important factors, apart from limited human and financial resources, could — and should — have been taken into account

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you are in a hurry to get to a meeting with a client on time, and the fine for speeding is only thirty Euros, you may consider it a cost worth incurring (especially if there is a chance you may not even be caught). On the other hand, if the fine is three hundred Euros, a rational calculation may lead you to behave differently (which will depend on many factors, such as how much the client is worth to you, how much you charge per hour and what the chances are of being caught)". *"Crime doesn't (always) pay: what determines the level of fines?"*, article adapted from chap. 9 of: NIELS, G.; JENKINS, H.; KAVANAGH, J. *Economics for competition lawyers*. Oxford, United Kingdom: Oxford University Press, 2011. Available at: <https://goo.gl/tfEaaU>. Accessed on: Jan. 10, 2018. Free translation.

66 Still on the problem of incentives associated with the use of monetary sanctions, Daniel Silva Boson observes that the function of making the practice of infractions unprofitable *ex ante* by corporations may be made impossible because of legal or patrimonial restrictions. This is because, for example, "the legal ceiling for a fine may be relatively low, or the available equity of the organization may be insufficient to make the crime unprofitable". BOSON, Daniel Silva. Sanções aplicadas pelo Conselho Administrativo de Defesa Econômica (Cade) a empresas no cartel do cimento: uma visão da análise econômica das penas. *Revista de Direito Administrativo — RDA*, Rio de Janeiro, v. 272, pg. 119-144, May/Aug. 2016. pg. 125.

67 On this line — of looking for mechanisms and incentives for increasing compliance and cooperation by the agent regulated —, Jonathan Wiener explains that, in the United States, since the 1970s, assessments based on the logic of incentives and on the real efficacy of coercive instruments have led to the adoption of a more pragmatic (and less moralistic) outlook regarding regulation. This has led to the increased use of incentive-based instruments and less of those that depend on the definition of strict technical standards. According to this writer, after the experience obtained from the first regulatory designs, which were based on the model of command and control, it was found that defining strict standards and rigorous penalties was often less effective in stimulating the development of new technology than models based on the definition of standards of performance, or those conceived out of the "commerce" of allowances (as in the carbon credits market). See Jonathan B. Wiener, The regulation of technology, and the technology of regulation, op. cit., pg. 485.

when examining the efficacy of the punitive action of each unit inspected? For example, in the light of the contributions of the Virginia School, the controller could ask how (or to what degree) the institutional environment is governed by non-priority interests of the regulatory agency, and how this type of influence can be combated, or at least mitigated, in order to achieve public objectives.

What must be clearly understood, in short, is that the upgrading and the efficacy of sanctioning models require a more in-depth, dynamic and institutionally committed analysis, that goes beyond verifying greater or lesser success in collecting fines. This is because the success of a regulatory strategy tends to be inversely proportional to the indices of punishment. Less punishment can be an indication that the model designed to make people behave properly is successful. In other words, more sanctions are not *a priori* evidence of effectiveness; they are strictly a sign of more disrespect of the rules. Similarly, it is not necessarily correct for the TCU to assume that the agencies are inefficient if they do not collect the full amount of the fines applied. In practice, this could be due to other causes, such as the possible use of alternative measures of correcting misdemeanors, such as substituting fines with investment commitments. The point is that the numerical data, by itself, tells us little.

This is why it is important to construct analytical reasoning that is more creative and sensitive to complex elements, and here economics can be useful. Methods must be found to help outline appropriate factual premises, setting the correct lines of investigation that will obtain a more accurate diagnosis of the real (d)efficiencies of the sanctioning practices. All this is a fundamental part of a more ambitious program — but one that is necessary and urgent — for regulatory improvement.

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