Civil procedure in a constitutional state and its reflexes in administrative misconduct actions*

O processo civil no estado constitucional e seus reflexos nas ações de improbidade administrativa

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* Article received on February 10, 2018 and approved on April 16, 2018. DOI: http://dx.doi.org/10.12660/rda.v278.2019.79031.

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ABSTRACT

The aim of this paper is to analyze the logical-rational structure established in the Administrative Misconduct Law, with emphasis on its procedural model of evidence and the legislative reflexes irradiated. The Act of Administrative Misconduct (No. 8.429/1992), among other legislative mechanisms, established a normative system that aims to punish the practice of misconduct conduct by public agents and third parties. For this purpose, the systematization created the action of administrative misconduct with civil nature (understanding adopted in the present paper). Consequently, the changes promoted in civil procedural law, mainly due to its new methodological phase (civil process in the Constitutional State), which is based on a cooperative model, brought several reflexes in the actions of administrative misconduct, both in its model of verification for the judicial conviction, and in some procedural aspects of equal importance. The method used is the deductive and the procedure is the bibliographical and documentary, legislative and judicial decision investigation.

KEYWORDS

Act of Administrative Misconduct — civil procedure in the constitutional state — cooperative model

RESUMO

O objeto da pesquisa é analisar a estrutura lógica-racional estabelecida na Lei de Improbidade Administrativa, com ênfase na avaliação dos impactos de normas fundamentais, consagradas no novo CPC, na ação de improbidade administrativa, além da aplicabilidade do regime de revelia à ação de improbidade administrativa, o princípio da congruência e a ciência e a manifestação prévia das partes a fim de se evitar decisão surpresa. A Lei de Improbidade Administrativa (Lei nº 8.429/1992), entre outros mecanismos legislativos, instituiu um sistema normativo que visa sancionar a prática de condutas ímprobas pelos agentes públicos e terceiros a eles aderentes. Com tal finalidade, essa sistematização criou a ação de improbidade administrativa de natureza cível (entendimento adotado no presente trabalho). Consequentemente, as alterações promovidas no direito processual civil, principalmente em virtude de sua nova fase metodológica (processo civil no Estado Constitucional), que se

baseia num modelo cooperativo, trouxeram diversos reflexos nas ações de improbidade administrativa, tanto em seu modelo de constatação para a formação da convicção judicial quanto em alguns aspectos processuais de igual relevância. O método utilizado é o dedutivo e o procedimento é a investigação bibliográfica e documental, legislativa e jurisprudencial.

PALAVRAS-CHAVE

Lei de Improbidade Administrativa — processo civil no estado constitucional — modelo cooperativo

1. Introduction

Unlike the monarchical regimes that moved toward the absolute absence of personal responsibility of the king or the emperor,[1] in a constitutional system of limited powers, the responsibility of state agents is characterized as one of the essential clauses in the configuration of the primacy of the republican concept.

Thus, the imposition of legal consequences on the public agents due to the practice of misconducts is inherent to the republican regime, being one of the most relevant fundamental political decisions made by the original constituent, which gave existence to the principle of responsibility.

As an inescapable consequence of the foregoing, the liability of state agents and their adhering third parties for any misconducts is a correlated effect on the Republic, which is why "the Brazilian legal system relies, indeed, on various mechanisms laid down in the principles and rules, which structure their own framework for the protection of administrative proper conduct",[2] among them, Law No. 8.429/1992.

In this scenario, it is necessary to comply with the due legal process provided for in the constitutional framework (1988 Constitution of the Federative Republic of Brazil, article 5, LIV) and in the Administrative Misconduct Law (article 17) for the proper use of the resulting sanctions.

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1 BUENO, José Antonio Pimenta. *Direito publico brasileiro e analyse da Constituição do Imperio.* Rio de Janeiro: Typographia Imp. e Const. de J. villeneuve & C., 1857. pg. 206, item 267.

2 MARTINS JÚNIOR, Wallace Paiva. *Probidade administrativa.* 4th. ed. São Paulo: Saraiva, 2009. pg. 11.

Backed by the understanding that the legal nature of the administrative misconduct action is civil — despite the existence of dissonant voices in this regard — its epistemological view rests on the civil process in the constitutional state — the current methodological phase of procedural science in focus –, whose effects will radiate throughout the procedural model inherent to the misconduct, notably with respect to the resulting proper conduct field.

In this respect, the legal consequences imposed as a result of the recognition of the practice of a misconduct are as or even more serious than those defined by criminal law, either in the social field or in the strictly legal sphere, such as the suspension of political rights or the loss of public office in situations that, depending on the seriousness of the conduct, would not be applied in the criminal aspect.

With such focus, it is pertinent to assess, in the strictly procedural and constitutional field, the model that should be adopted for the application of the sanctioning law in the sphere inherent to the action of administrative misconduct, in view of the serious implications that are its own.

The work, using the inductive method, which aims to reach broader conclusions than the content set by the premises on which it is based, based on descriptive research and as a procedural instrument of the bibliographical and documentary, legislative and case law investigation of the Brazilian Federal Supreme Court (STF) and the Superior Court of Justice (STJ), analyzes the logical and rational structure established in the Administrative Misconduct Law, with emphasis on its evidentiary procedural model and the legislative consequences that were spread to it.

2. The legal nature of the administrative misconduct legal proceeding

Pursuant to the provisions of article 37, paragraph 4, of the 1988 Constitution of the Federative Republic of Brazil, came the edition of Law No. 8.429/1992 which, among other regulations inherent to the subject, governs in its articles 9 to 11, the modalities of acts of administrative misconduct, while article 12 provides for sanctions applicable as a result of the recognition of the practice of misconduct.

It is through the action of administrative misconduct set forth in article 17 of Administrative Misconduct Law that the responsibility of the perpetrators

of the misconduct that harmed the entities outlined in article 1 of the law is sought, subjecting them to their respective sanctions, as previously outlined.

For the purpose of this work, it is essential to delimit the legal nature of the administrative misconduct action, since then it will be possible to direct the applicable procedural model.

In the majority sense, the legal scholar understands that it has a strictly civil nature, since its effects have a clearly administrative and property character and, consequently, the penalties are of civil and political character, without any relation to the criminal law.[3]

Another legal scholar aspect, — minority — in turn defends the criminal nature of the action of administrative misconduct, because the suspension of political rights and the loss of public function would be sanctions proper to the criminal area.[4]

A third current — intermediate bias — states that the loss of civil service and the suspension of political rights are criminal in nature, but the civil court would have jurisdiction to prosecute the misconduct, as the other penalties are of an eminently civil nature.[5]

The understanding of the Superior Court of Justice (STJ) is that "the action of administrative misconduct is of a civil and administrative nature, the possibility of loss of office does not turn it into criminal action".[6]

Notwithstanding the laudable arguments to the contrary, we understand that, *ipso facto*, the legal nature is extra-penal in nature, because the constitutional text itself in its article 37, paragraph 4, establishes that acts of administrative misconduct shall result in the suspension of political rights, the loss of public service, the unavailability of assets and compensation to the treasury, without prejudice to the appropriate criminal action.

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3 FERRAZ, Sergio. Aspectos processuais na lei sobre improbidade administrativa. In: BUENO, Cassio Scarpinella; PORTO FILHO, Pedro Paulo de Resende (Org.). *Improbidade administrativa:* questões polêmicas e atuais. São Paulo: Sociedade Brasileira de Direito Público, 2001. pg. 364-386.

4 TOJAL, Sebastião Botto de Barros; CAETANO, Flávio Crocce. Competência e prerrogativa de foro em ação civil de improbidade administrativa. In: Cassio Scarpinella Bueno e Pedro Paulo de Resende Porto Filho (Org.), *Improbidade administrativa,* op. cit., pg. 350-363.

5 ALVARENGA, Aristides Junqueira. Reflexões sobre improbidade administrativa no direito brasileiro. In: Cassio Scarpinella Bueno e Pedro Paulo de Resende Porto Filho (Org.), *Improbidade administrativa,* op. cit., pg. 86-92.

6 SUPERIOR COURT OF JUSTICE. Special Court, Internal Interlocutory Panel to the Full Panel in Claim 10.037 Matto Grosso, reporting judge Luis Felipe Salomão, *electronic Judicial Gazette DJe* November 25, 2015. Available at: <ww2.stj.jus.br/processo/revista/documento/ mediado/?componente=ATC&sequencial=54894933&num_registro=201202010299&data=20151125&tipo=5&formato=PDF>. Accessed on: October 5, 2017.

However, if the legal nature were criminal, there would be no meaning in the expression "without prejudice to the appropriate criminal action" included at the end of the cited constitutional provision.

In the same position, the Brazilian Federal Supreme Court (STF) settled the matter and, in turn, adopted the majority legal scholar position, considering that the political agents, excluding the President of the Republic, fully submit them to the regime of accountability resulting from administrative misconduct, rejecting the special court for the prerogative function exactly in view of the civil nature of misconduct[7].

3. The civil procedure in the constitutional state

It is clear that the civil legal nature of the administrative misconduct action certainly applies to civil procedural law in the resulting legal and procedural relations. Consequently, it is imperative to tread through that rich vertex of the law.

In Miguel Reale's words,[8] the law is the result of a cultural aspect that is axiologically correlated with each historical moment experienced by man, that is, the legal bond would be linked to the process of choosing, among the various possible paths, carried out by society resulting from the values of coexistence adopted in each period.

The author also describes "society as a condition of Law, Justice as the ultimate purpose, attributing bilaterality as a specific ordinatory form, and Power as a guarantee of its updating".[9]

Thus, the civil procedure, as an autonomous branch of law, although it is eminently technical, has its meaning derived from the cultural factors accepted in each era, emerging what procedural literature calls the methodological phases of civil procedural law.

For this reason, the historical evolution of procedural law is usually segmented into three methodological phases: a) *praxism* or *syncretism* (period when procedural law and material were not distinct); b) *proceduralism*

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7 BRAZILIAN FEDERAL SUPREME COURT. Plenary Session, Petition No. 3240 Interlocutory Appeal to the Panel AgR/DF, reporting justice Roberto Barroso. Available at: <www.stf.jus.br>. Accessed on: March 26, 2019.

8 REALE, Miguel. *Filosofia do direito.* 20th ed. São Paulo: Saraiva, 2012. pg. 702-703.

9 Ibid., pg. 703.

(epoch marked by the scientificity of the procedure and, therefore, with clear differences in relation to material law); and c) *instrumentalism* (intermediate historical moment between the autonomous character of procedural law and its need for material effectiveness).[10]

Currently, however, the existence of a fourth methodological phase of procedural law is already being announced which, going through the concept adopted by Daniel Mitidiero, we call civil procedure in the constitutional state,[11] notwithstanding the existence of other denominations like neoprocessualism[12] which refers the scholar to neoconstitutionalism.

The methodological premises of the new model regarding civil procedural law were largely capitalized on by the new Code of Civil Procedure, notably because of its collaborative view.

Among several other modifications, the new legislation imposed the mandatory observance to the constitutional principles (Code of Civil Procedure (CPC), article 1), the right to obtain the merit solution in a reasonable time (Code of Civil Procedure (CPC), article 4), the objective good faith as a standard of conduct of all procedural subjects (Code of Civil Procedure (CPC), article 5), the right to render a fair and pressed decision of broad collaboration and participation of the parties (Code of Civil Procedure (CPC) article 6), equal treatment granted to all procedural subjects (Code of Civil Procedure (CPC), article 7), as well as the impediment to the rendering of a decision by which the parties did not have the previous opportunity to express their grounds (Code of Civil Procedure (CPC), articles 9 and 10).

This "cooperative model starts from the idea that the State has as its primary duty to provide conditions for the organization of a free, fair and solidary society (article 3, I, of 1988 Constitution of the Federative Republic of Brazil), founded on the dignity of the human person (article 1, III, of the 1988 Constitution of the Federative Republic of Brazil)".[13] And, to this end, the judge must be equal in dialogue and asymmetrical when making the decision, which must necessarily be just and effective.

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[10] DIDIER JUNIOR, Fredie. *Curso de direito processual civil:* introdução ao direito processual civil, parte geral e processo de conhecimento. 20th ed. Salvador: Jus Podivm, 2018. v. 1, pg. 45

[11] MITIDIERO, Daniel. *Colaboração no processo civil:* pressupostos sociais, lógicos e éticos. 3rd ed. São Paulo: Revista dos Tribunais, 2015. pg. 48.

[12] CAMBI, Eduardo. *Neoconstitucionalismo e neoprocessualismo* — direitos fundamentais, políticas públicas e protagonismo Judiciário. São Paulo: Almedina, 2016. pg. 125; Fredie Didier Junior, *Curso de direito processual civil,* op. cit., pg. 45-46.

[13] Daniel Mitidiero, *Colaboração no Processo Civil,* op. cit., pg. 98.

Concluding the idea of the previously exposed about the new conception of procedural law, Daniel Mitidiero states:

> The conduct of civil proceedings thereafter is recorded by *cooperative duties -clarification, dialogue, prevention and assistance.* The *subjective* and *objective* good faith shall be observed by all its participants (article 5 of Code of Civil Procedure (CPC)/2015). The *likely truth* is an objective whose scope allows for the rendering of fair decisions (articles 300 and 369 of Code of Civil Procedure (CPC)/2015), and is therefore a joint task of the judge and the parties (articles 369 and 370 of Code of Civil Procedure (CPC)/2015), as far as their interests pursue it.[14]

This new *standard* has undeniable consequences for the entire universe of claims brought before the Judiciary, with particular emphasis on administrative misconduct, as reflected below.

4. The procedural model in the constitutional state and its reflection in administrative misconduct actions

As pointed out above, as law is the result of a cultural process, the 1988 Constitution of the Federative Republic of Brazil — which is the apex of the pyramidal system of rules — establishes full compliance with the democratic principle by virtue of the adoption of popular sovereignty (1988 Constitution of the Federative Republic of Brazil Article 1 head provision, and its sole paragraph) as the pillar that unites the rule of law and a democratic state that abides by the rule of law. Thus, the procedural model radiates to misconduct legal actions, requiring the application of the guarantees established in the Federal Constitution.

In this sense, José Joaquim Gomes Canotilho explains well:

> Only the principle of *popular sovereignty* according to which "all power emanates from the people" ensures and guarantees the right to equal participation in the democratic formation of the popular will. Thus, the principle of popular sovereignty embodied in legally regulated

[14] Ibid.

> procedures serves as a "hinge" between the "rule of law" and the "democratic state" enabling the modern formula. *Democratic state that abides by the rule of law*.[15]

It is not for any other reason that the construction of a free, just and solidarity society (1988 Constitution of the Federative Republic of Brazil, article 3, section I) as the foundation of the Republic makes it an unmistakable consequence that the legal proceeding is intended for the true construction of the facts, the scope of which, in this respect, is derived from the performance of the state judge.

In this regard, the Italian legal scholar Michele Taruffo teaches:

> The administration of justice is a very important sector of social life and state activity; therefore one should find the very values of truth which form the constitutive criteria for the correct functioning of the social and political system. It would be rather paradoxical, as it were, to be a democratic system, inspired by the value of truth, in which, however, the administration of justice was not inspired by such value, or even based systematically on error, lies or distortion of truth.[16]

Inspired by this paradigm, one must not lose sight of the need for procedural characteristics that meet the democratic intent derived from the social values currently established by the Federal Constitution, especially when the consequential potentiality resulting from it may result in sanctions suitable for serious suppression of rights, such as those well documented by Néviton Guedes:

> When the State carries out its functions, the broadest guarantee and protection of the individual interests of individuals that may be affected by its action is also in the true public interest, precisely because of the special place that the Constitution has devoted to fundamental rights and guarantees. Obviously, the concern of the State with the rights and guarantees of the citizen is of particular relevance when it comes to

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[15] CANOTILHO, José Joaquim Gomes. *Direito constitucional e teoria da constituição.* 6th ed. Coimbra: Almedina, 2002, pg. 100.

[16] TARUFFO, Michele. *Uma simples verdade:* o juiz e a construção dos fatos. Translation by Vitor de Paula Ramos. São Paulo: Marcial Pons, 2016. pg. 120-121.

> processes in which some sort of imposition of sanction may result in sacrificing their rights of liberty and property, as it is in particular to the extent of the public civil action of misconduct.[17]

It is undeniable, therefore, that the Administrative Misconduct Law is an important milestone in the fight against the practice of corruption and misappropriation of public assets. Such normativity is an important mechanism that aims to protect also the health of the democratic system. At this point, it is worth mentioning the work of Carlos Alberto Alvaro de Oliveira, concerning the formalism in the civil procedure.[18]

The legitimacy of the democratic state that abides by the rule of law is necessarily linked to the lawful and moral functioning of the institutions, and a merely formal democracy is not enough, because the people have the right to an honest, efficient and zealous government, which is why effective democracy presupposes administrative probity, as an essential element.[19]

However, although the probable conduct of public agents is essential for the shaping of an effective democracy, the latter also requires the full observance of all the principles that govern it, including due process and broad defense, especially in sanctioning fields, because state imperativity must also be subservient to the legal system, at least in a democratic state that abides by the rule of law.

On the subject, Fernando Capez quite aptly describes the following:

> It cannot, however, become, under the canopy of social defense, a repressive warlike apparatus that demeans the dignity of the accused, destroying his image and honor, subverting his heritage, without any concern to analyze the ontological content, the subjective requirements, or the material typicality of the unreasonable act of misconduct. Regardless of its legal nature, which is of minor importance, the severity of its sanctions means that the Administrative Misconduct Law must comply with the same constitutional principles that guarantee

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[17] GUEDES, Néviton. *Improbidade administrativa:* temas atuais e controvertidos. Coordinated by Justice Mauro Campbell Marques. Rio de Janeiro: Forense, 2017. pg. 287-288.

[18] OLIVEIRA, Carlos Alberto Alvaro de. *Do formalismo no processo civil:* proposta de um formalismo-valorativo. 4th revised and expanded edition. São Paulo: Saraiva, 2010. pg. 35.

[19] ZAVASCKI, Teori Albino. *Processo coletivo:* tutela de direitos coletivos e tutela coletiva de direitos. 7th ed. São Paulo: Revista dos Tribunais, 2017. pg. 100.

> the dignity of the human person as the facts pertaining to the criminal sphere.[20]

The unwaivable issues involved in administrative misconduct acts has a twofold feature. The first involving the unwaivable substantive law itself discussed (proper conduct) and the second, equally, concerning the identical impossibility of disposing of the use of adequate legal proceeding and, consequently, necessarily aimed at the rendering of a just and effective decision of merit with full effective participation of the parties (Code of Civil Procedure (CPC), article 6).

In a truly democratic state, the full exercise of the right to a defense is as relevant as the imposition of a non-derogatory sanction on the public agent that harms administrative probity in any of its facets. In other words, the punishing State must be the same as ensuring a fair and effective process, within constitutional and legal parameters. Broad defense is also an unavailable right of society, as is the zeal for public affairs.

The Superior Court of Justice has already decided in a similar way to that previously evidenced. Let's take a closer look:

> This circumstance is extremely relevant in actions such as those under examination, in which the practice of administrative misconduct is discussed. This is because, although it has an eminently civil character, the sanctioning nature of the action is undeniable, in view of the applicable sanctions — which even imply the transitory suspension of political rights — and also the possible spreading of their effects to others, such as administrative and criminal matters. Thus, not only because these are rights that cannot be transacted, but — and more importantly — in view of the nature of the interests involved, it further outweighs the importance of guaranteeing the defendant's exercise of the right of defense so that justice system can produce a response to society that effectively protects the public interests involved.[21]

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[20] CAPEZ, Fernando. *Improbidade administrativa:* limites constitucionais. 2nd ed. São Paulo: Saraiva, 2015. pg. 340.

[21] SUPERIOR COURT OF JUSTICE. Second Panel, Appeal to the Superior Court of Justice REsp 1.330.058-PR, reporting justice Mauro Campbell Marques, *electronic Judicial Gazette* of June 28, 2013. Available at: <ww2.stj.jus.br/processo/revista/ documento/mediado/?componente=ATC&sequencial=29607567&num_registro=20 1201286385&data=20130628&tipo=5&formato=PDF>. Accessed on: August 31, 2017.

The democratic principle, enshrined in the Federal Constitution, was based, among other branches, on the procedural guidelines and, as a consequence of these consequences, the proceeding was no longer an available right of the parties inserted in it and became part of an unwaivable individual-citizen, especially in a social context in which state imperativity, notably in the jurisdictional approach, observes the collaboration of all involved in the subsequent taking of a just decision (civil procedure in the Constitutional State).

Thus, as a corollary of the right to a fair trial (1988 Constitution of the Federative Republic of Brazil, article 5, LIV), the full participation of the parties during the proceedings with unambiguous possibility of influence over the awards of the judge — overseeing the rationality of the jurisdiction — is exercised by both the plaintiff and the defendant, in compliance with the adversarial system (1988 Constitution of the Federative Republic of Brazil, article 5, LV), imposing, with certain limits, broad right to produce evidence and use of resources in general,[22] mainly in administrative misconduct actions due to the severe penalties inherent in it.

It is not for any other reason that the proceeding has gained an epistemic dimension, as advocated by Michele Taruffo:

> The proceeding, in fact, is also a "place" in which rules are applied, values are enforced, guarantees are secured, rights are recognized, interests are protected, economic choices are made, social problems are faced, resources are allocated, the fate of the people is determined, the freedom of the individuals is protected, the authority of the state is manifested... and controversies are resolved through supposedly just decisions.[23]

Within this social context that has resulted in the formation of a civil procedure of a Constitutional nature, as discussed above, very similar to what should be followed in the criminal sphere, the administrative misconduct action must be rigorously pursued in order to render a fair and effective decision on the merits.

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[22] MITIDIERO, Daniel; MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz Arenhart. *Novo curso de processo civil.* Teoria do processo civil. v. 1. São Paulo: Revista dos Tribunais, 2015. pg. 310-311.

[23] Ibid., pg. 160.

This is because, among other reasons, the state agent, as a rule, carefully chosen by society — which even undertakes large investments in its formation — should not be sanctioned for misconduct without the result being based on an epistemic procedure.

With this perception, it is appropriate to consider the argumentative reinforcement in relation to the latent necessity of the search for the truth of the facts with a wide production of evidence (Code of Civil Procedure (CPC), article 369), including the evidence on the initiative of the court itself (Code of Civil Procedure (CPC), article 370) in the facts that they point to administrative misconduct, in order to avoid, more robustly, the rendering of a decision based on procedural presumptions — as the chosen ideological model — that show a condition more conducive to an unfair outcome.

It is in such an ideological-legislative direction that the whole judicial proceeding shall go, notably those involving administrative proper conduct, in view of the strong sanctioning consequences advocated by the legal system for such, even because such penalizing effects result in a legitimate suspension of fundamental and equity rights of those responsible.

Also in this context, although the legislative option for the purpose of typicality of acts of administrative misconduct was, as a rule, the use of open types based on indeterminate legal concepts (articles 9, 10 and 11), except in relation to the new article 10-A of the Administrative Misconduct Law, precisely to enable cyclical fairness, this integration into a broader context carries an enormous evaluative responsibility of the interpreter.[24]

This meaning, as alluded to by Justice Dias Toffoli in Appeal do the Supreme Court No. 656.558-SP, was well summarized as follows:

> What cannot be admitted, from the constitutional point of view, is that open types, instituted after the promulgation of the 1988 Constitution of the Federative Republic of Brazil, originally envisaged to prevent the encroachment of Law No. 8.429/92, remove from public life or improperly punish those who act in good faith.[25]

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[24] GARCIA, Emerson; ALVES, Rogério Pacheco. *Improbidade administrativa.* 9th ed. São Paulo: Saraiva, 2017. pg. 364-370.

[25] BRAZILIAN FEDERAL SUPREME COURT. Second Panel, Appeal to the Supreme Court 656.558-SP, reporting justice Dias Toffoli. Available at: <www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/RE656558DT.pdf>. Accessed on: August 31, 2017.

However, in a republican environment based on the democratic principle that radiates effects intended for the adoption of a legal proceeding that leads to a fair and effective (epistemic) outcome, the valuation of any state agent based on valuations is not authorized as an interpretative logical principle that departs from the constitutional normative sense of the Administrative Misconduct Law.

In addition to the presumption of good faith inherent in all administrative acts, especially when legitimate and duly founded on factual reasons that may justify the chosen option, the conclusion by the practice of a misconduct presupposes the concurrence of presence of intent or fault — the latter only for article 10 of the Administrative Misconduct Law — and non-compliance with the standards of conduct prohibited by Law No. 8.429/1992.

It is worth asserting that democracy requires public agents to elect daily choices of directive for the state function exercised. However, not always adopting a good faith-based direction that was later found to be the most appropriate may — necessarily — result in breach of administrative probity, otherwise the administrative function would be rendered impracticable. Obviously, mere incompetence or illegality is not sanctioned when bad faith does not exist.

In this regard, the position of the Superior Court of Justice has been:

> Thus, for the correct reasoning of the conviction for administrative misconduct, it is essential, in addition to the integration of the fact into the rule, to characterize the presence of the subjective element. The reason for this is that the Administrative Misconduct Law is not intended to punish the unskilled, but the dishonest, the corrupt, the one devoid of loyalty and good faith.[26]

Thus, despite the civil nature regarding the administrative misconduct legal action and their respective sanctions, as well stated by Emerson Garcia and Rogério Pacheco Alves, there will be daily application of the principles of criminal law, given its deepest rigor in the extension concerning grant of

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[26] SUPERIOR COURT OF JUSTICE. Second Appeal, Appeal to the Superior Court of Justice (REsp) No. 1.660.398-PE, reporting justice Herman Benjamin, *electronic Judicial Gazette (Dje)* June 30, 2017. Available at: <ww2.stj.jus.br/processo/revista/documento/ mediado/?componente=ATC&sequencial=72535497&num_registro=201700202678 &data=20170630&tipo=5&formato=PDF>. Accessed on: August 31, 2017.

fundamental guarantees to the processed citizen.[27] Thus, the civil nature of this legal action is defended, however, it is inevitable that the procedural guarantees to be used.

Since, undeniably, every court decision has degrees of truth reach, although, as stated earlier, that — the real truth — must be the main north of the civil proceeding in the constitutional state, it will not always be possible to reach it, becoming sometimes an unattainable goal.

In this trail, it is possible to highlight the existence of three models of verification with the purpose of guiding criteria on the analysis of the facts by the state judge, observed, of course, by the previous adversarial system, which were very well reverberated by Danilo Kunijnik:

> In general, there are two models of extreme fundamental findings, from which we can start and to which a third, intermediate nature is added, forming a structure of three models, namely, the judgment actually formed from a *preponderance of evidence,* of a *clear and convincing evidence* (intermediate) and *evidence beyond a reasonable doubt*.
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> In decreasing order of probabilistic degree, the first consists of the so-called *"proof beyond a reasonable doubt"*. And what is in force in criminal proceedings. At another extreme is the *"preponderance of evidence"*, employed as a rule in civil proceedings.[28]

For this reason, the model of finding the judicial acts related to administrative misconduct (probative procedure) should not follow the proper *standard* from the civil viewpoint and not necessarily that inherent in the criminal aspect, but a mixed model in which, "although they are surpassing those necessary for the formation of the convictions for civil finding of liability, they fall short of those sufficient to determine the criminal conviction".[29]

It should be noted at this point that, although traditionally the use of the so-called "preponderance of evidence" model has been permitted for the

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[27] Emerson Garcia and Rogério Pacheco Alves, *Improbidade administrativa,* op. cit., pg. 624.

[28] KNIJNIK, Danilo. *A prova nos juízos cível, penal e tributário.* Rio de Janeiro: Forense, 2012. pg. 37.

[29] CARPES, Artur. O direito fundamental ao processo justo: notas sobre o modelo de constatação nos processos envolvendo as Ações de Improbidade Administrativa. In: LUCON, Paulo Henrique dos Santos; COSTA, Eduardo José da Fonseca; COSTA, Guilherme Recena (Coord.). *Improbidade administrativa:* aspectos processuais da Lei nº 8.429/92. São Paulo: Atlas, 2004. pg. 56-57.

sphere of civil proceedings, such a course can only be preached when the controversy revolves around disputes concerning only the assets.

Conversely, as stated, when civil proceedings revolve around matters whose effects may go beyond the assets sphere, the criterion used should be, at a minimum, the intermediary ("clear and convincing proof"), as in the case of the actions of administrative misconduct.[30]

In this view, Artur Carpes argues:

> It can be stated that the justice to be sought in proceedings involving administrative misconduct will depend on the conformity of the procedure so that, as regards the convincing of the judicial body regarding the facts, its finding is based on the intermediate model of "clear evidence and convincing" rather than mere "preponderance of evidence", a *standard* characteristic of civil cases, or "evidence beyond a reasonable doubt", a characteristic model of criminal proceedings.[31]

Although the subject has not yet been the subject of great appeal in the case law context, it is possible to observe that the Superior Court of Justice (STJ), obliquely, has already moved towards the adoption of the intermediate model of verification ("clear and convincing proof"); otherwise note the following:

> 3. In this case, there is no **unequivocal evidence of damage to the Treasury,** reason why there is no way to support the conviction of the appellants based on article 10, VIII, of the Administrative Misconduct Law. 4. There was, however, an act of misconduct that undermines the principles of Public Administration, as, according to the factual framework outlined by the lower courts, **it was clearly evidenced the intent, at least generic, of the appellants in improperly** directing the contracting of the preparation of preliminary technical studies for the implementation of a high speed train (bullet train) between Brasília/DF and Goiânia/GO.[32] [emphasis added]

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[30] Danilo Knijnik, *A prova nos juízos cível, penal e tributário,* op. cit., pg. 38-39.

[31] Artur Carpes, O direito fundamental ao processo justo, op. cit., pg. 57.

[32] SUPERIOR COURT OF JUSTICE. First Panel, Appeal to the Superior Court of Justice No. 1.470.675/DF, reporting justice for Appellate Decision Sérgio Kukina, *electronic Judicial Gazette (DJe)* February 9, 2017. Available at: <ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ATC&sequencial=68022110&num_registro=20130398084 2&data=20170209&tipo=5&formato=PDF>. Accessed on: October 16, 2017.

In any case, even if there is an inclination to use at least the intermediate standard of verification in the context of administrative misconduct actions, based on the cooperative model currently in force for civil procedural law, it is expected that the "judicial decision sets forth, fundamentally, the model of realization that makes use of forming the judgment of fact [...] enabling this criteria to be known, justified and obviously submitted to the adversarial system as an essential chapter of the judgment".[33]

5. Other milestones regarding the investigation of acts of administrative misconduct of civil proceedings in the constitutional state

Despite the impossibility of portraying, in this study, all the procedural particularities inherent in administrative misconduct, it is possible to notice some significant procedural differences when compared to the common procedure advocated in Title I of Book I of the special part of the new Code of Civil Procedure.

Such particularities, in fact, only corroborate the statements raised in the previous topic of this paper, given the umbilical differences that involve actions of misconduct and others of civil nature whose controversy revolves around purely property issues and interests.

Article 17, paragraph 7, of Law No. 8.429/1992 provides that "If the complaint is in due form, the judge shall issue and serve notice on the defendant, to offer a written statement, which may be supported by documents and justifications within fifteen days".[34]

Even though "the *ratio essendi* of paragraph 7 of art. 17 of Law 8.429/1992 is to prevent the birth of an action of reckless misconduct, without reasonable basis, in favor of the honorability of the administration and the public agent accused of the practice of misconduct",[35] It is undeniable that such a

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[33] Danilo Knijnik, *A prova nos juízos cível, penal e tributário,* op. cit., pg. 45.

[34] BRAZIL. *Law No. 8.429 of June 2, 1992*. Available at: <www.planalto.gov.br/ccivil_03/leis/L8429.htm>. Accessed on: October 9, 2017.

[35] SUPERIOR COURT OF JUSTICE. Second Appeal, Appeal to the Superior Court of Justice (REsp) No. 1.124.919 — SP, reporting Justice Humberto Martins, *electronic Judicial Gazette* October 5, 2009. Available at: <ww2.stj.jus.br/processo/revista/ documento/mediado/?componente=ATC&sequencial=6277616&num_registro=200 900333870&data=20091005&tipo=5&formato=PDF>. Accessed on: August 31, 2017.

normative command stems from the democratic principle of constitutional nature, especially when considering the enormous negative impacts that such a proceeding causes to any citizen, notably to a public agent who may subsequently be acquitted.

Thus, despite the existence of dissonant voices,[36] even prevailing within the scope of the Superior Court of Justice, in the sense of the need for this preliminary phase as it is merely relative nullity,[37] "to violate this singular procedural regime is to violate the guarantee of broad defense (article 5, LV, CF)"[38] and, therefore, it is an insatiable vice conforming to a circumstance of absolute nullity.

Therefore, it is a characteristic of the proceeding provided for in the Administrative Misconduct Law that there is prior control for the purpose of receiving the complaint, as a way to avoid reckless disputes. Such *modus operandi* is not a mere detail, but an unwavering guarantee of civil procedure based on the constitutional state, whose non-compliance cannot be characterized as a relative nullity and, consequently, as a remedy.

Another sensitive point concerning the model of investigation inherent to administrative misconduct actions is the possibility or not of incidence of the effects of default, whose concept is transcribed below:

> Default Judgment. Absence of a defense. It is characterized when the defendant: a) leaves the deadline for the answer to go without a response; b) untimely answer; c) formally challenges but does not challenge the facts narrated by the plaintiff in the complaint. The default judgment may be total or partial, formal or substantial. There is partial default judgment when the defendant fails to challenge any or some of the facts articulated by the plaintiff in the complaint. There is formal default judgment when there is no formal part of the defense or when

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[36] NEVES, Daniel Amorim Assunção; OLIVEIRA, Rafael Carvalho Rezende. *Manual de improbidade administrativa.* 5th revised and expanded edition. Rio de Janeiro: Forense; São Paulo: Método, 2017. pg. 210-212.

[37] SUPERIOR COURT OF JUSTICE. Second Panel, Appeal to the Superior Court of Justice No. 1.319.770-SP, reporting judge Herman Benjamin, *electronic Judicial Gazette* April 10, 2017. Available at: <ww2.stj.jus.br/processo/ revista/documento/mediado/?componente=ATC&sequencial=35971972&num_registro=201200049192&data=20170419&tipo=5&formato=PDF>. Accessed on: August 31, 2017.

[38] PAZZAGLINI FILHO, Marino. Lei de Improbidade Administrativa comentada: aspectos constitucionais, administrativos, civis, criminais, processuais e de responsabilidade fiscal, legislação e jurisprudência. 6th ed. São Paulo: Atlas, 2015. pg. 207.

> it is submitted untimely. There is substantial default judgment when, although the defendant has submitted the petition, there is no answer content, such as when the defendant generally disputes, violating the Code of Civil Procedure (CPC) 336 *head provision.*[39]

As can be seen, one of the substantive effects of default is the presumption of truth of the facts alleged in the complaint (Code of Civil Procedure (CPC), art. 344), which even it allows, depending on the case, that the judge state proceed with summary judgment (Code of Civil Procedure (CPC), art. 355, section II).

There are decisions of the Supreme Court in the sense of being possible by default in the facts concerning the administrative improbity; otherwise let's see:

> 3. There is no nullity for curtailment of the right to a full defense if the defendant falls silent in view of opportunities to speak: notification for the presentation of prior defense (article 17 of the Administrative Misconduct Law), summons to answer and summons for specification of evidence. Operation of the effects of default provided for in article 322 of the Code of Civil Procedure (CPC).[40]

However, there are also contrary precedents set by the same Superior Court of Justice on the subject, under the view that the rights treated in actions of administrative misconduct are unavailable and, therefore, the presumption of truth of the facts alleged in the inapplicable complaint, especially because, despite the civil nature, the severe sanctions provided for by law have spreading effects on other spheres, such as administrative and criminal law.[41]

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[39] NERY JUNIOR, Nelson; ANDRADE NERY, Rosa Maria. *Comentários ao Código de Processo Civil*. São Paulo: Revista dos Tribunais, 2015. pg. 958.

[40] SUPERIOR COURT OF JUSTICE. Second Panel, Motion for Clarification in the Appeal to the Appeal to the Superior Court of Justice (AREsp) No. 57435-RN, reporting justice Eliana Calmon, *electronic Judicial Gazette (DJe)* of October 9, 2013. Available at: <ww2.stj.jus.br/processo/revista/ documento/mediado/?componente=ATC&sequencial=31386412&num_registro=201102260649&data=20131009&tipo=5&formato=PDF>. Accessed on: October 17, 2017.

[41] SUPERIOR COURT OF JUSTICE. Second Appeal, Appeal to the Superior Court of Justice (REsp) No. 1.330.058-PR, reporting justice Mauro Campbell Marques, *electronic Judicial Gazette* of June 28, 2013. Available at: <ww2.stj.jus.br/processo/revista/ documento/mediado/?componente=ATC&sequencial=29607567&num_registro=201201286385&data=20130628&tipo=5&formato=PDF>. Accessed on: October 17, 2017.

José Antonio Remedio, when dealing with the legal nature of the protected property, asserts that "the existing public interest in the protection of administrative conduct is identified as a diffuse interest".[42]

Having outlined the guidelines of the issue, as I said earlier, in a civil case based on the constitutional state, it does not seem credible to admit the solution of a controversy involving the determination of pointedly misconduct based on mere presumptions of a procedural nature.

On the subject, it is worth considering the important lessons of Michele Taruffo:

> That is to say that not contesting the allegation of fact in itself has no binding effect either for the parties or for the judge: it is not a deal between the parties, but a situation in that the value of truth is not eliminated as a condition of justice of the decision; In any event, it is therefore appropriate to minimize the possibility that a decision may be taken without an effective determination of the truth of the relevant facts.[43]

Anyway, by reading article 345, item II, of the Code of Civil Procedure, the material effects of default are not applied to disputes concerning unwaivable rights and, by the content, diffuse dimension of the misconduct action and severity of penalties provided for in the Administrative Misconduct Law, there is no doubt it is unwaivable and, therefore, of departing from the presumption contained in article 344 Code of Civil Procedure (CPC).

On the other hand, it is also possible to conclude that the presumption of truth arising from the absence of administrative misconduct actions is unfeasible by the provisions of "Article 17, Paragraph 1 of Law No. 8.429/92, which prohibits 'the transaction, agreement or conciliation', it should not be overlooked that one of the defining parameters of the concept of 'unwaivable rights' is precisely the impossibility of 'compositions' in this regard".[44]

Finally, another spreading of the modern civil proceeding on administrative misconduct is found in cases where the judge recognizes the applicability of sanctions other than those sought in the preambular piece, in

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42 REMEDIO, José Antonio. *Direito administrativo.* 2nd ed. São Paulo: Verbatim, 2015. pg. 741.
43 Michele Taruffo, *Uma simples verdade,* op. cit., pg. 158.
44 Emerson Garcia and Rogério Pacheco Alves, *Improbidade administrativa,* op. cit., pg. 1059.

view of the principle of the restriction between the request and the judgment (Code of Civil Procedure (CPC), articles 141 and 492).

The Superior Court of Justice has been admitting this possibility, considering that "the principle of congruence does not infringe the judicial decision that frames the act of misconduct in a device different from that indicated in the complaint, thus the defense must be based on facts and not on legal capitulation",[45] provided, of course, that all the requirements of the different form of administrative misconduct subject to conviction are present.

Similarly, in Appeal to the Superior Court of Justice (REsp) No. 439.280/RS, the then Justice of the Superior Court of Justice (STJ) Luiz Fux understood that "the multifarious administrative actions that are part of the novel law transmutes the request for their adaptation to the facts, as a clear fungible act legal action, with the judge being able to decide to impose a penalty beyond rather than lesser".[46]

On the other hand, Néviton Guedes says that the possibility of altering the legal capitulation by the state judge would be a procedural dogma to be overcome, reason why it argues the inadmissibility of this modification because it understands that the accused shall defend the qualification given to the facts, while the sanction imposed by the Judge on the basis of facts and legal consequences that differ from those pointed out in the preambular piece is antagonistic to the broad defense and adversarial system.[47]

The same understanding was expressed by Justice Napoleão Nunes Maia Filho at the judgment of Appeal to the Superior Court of Justice (REsp) No. 1147564/MG, pointing out that "the framing by the single Judge of the act of misconduct in a provision different from the complaint, in addition to curtailing the defendant's right of defense, characterizes violation of the principle of congruence".[48]

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45 BRAZIL. SUPERIOR COURT OF JUSTICE. Second Panel, Appeal to the Superior Court of Justice (REsp) No. 842428/ES, reporting justice Eliana Calmon, *Judicial Gazette* May 21, 2007. Available at: <ww2.stj.jus.br/processo/revista/ documento/mediado/?componente=ATC&sequencial=3011651&num_registro=200600688561&data=20070521&tipo=5&formato=PDF>. Accessed on: October 19, 2017.

46 BRAZIL. SUPERIOR COURT OF JUSTICE. First Panel, Appeal to the Superior Court of Justice (REsp) No. 439280/RS, reporting justice Luiz Fux, Judicial Gazette June 16, 2003. Available at: <ww2.stj.jus.br/processo/revista/documento/me diado/?componente=ATC&sequencial=536588&num_registro=200200634924&data=20030616&tipo=51&formato=PDF>. Accessed on: October 19, 2017.

47 Néviton Guedes, *Improbidade administrativa,* op. cit., pg. 301-302.

48 BRAZIL. SUPERIOR COURT OF JUSTICE. First Panel, Appeal to the Superior Court of Justice (REsp) No. 1147564/MG, reporting justice Napoleão Nunes Maia Filho, *electronic Judicial*

In any case, although it is still a controversial issue, it is wholly salutary that, should the alteration of the legal capitulation be allowed in the judgment, there is full compliance with the provisions of Articles 9 and 10 of the New Code of Civil Procedure (corollaries of the principle of cooperation of civil procedure in the constitutional state), in order to enable the parties to fully acknowledge and express their views in this regard, in order to avoid surprise, as advocated by Néviton Guedes:

> [...] the effective and concrete possibility of the parties' manifestation about the facts and the legal grounds is an essential requirement to the principle of access to justice, conforming to the right to be heard by the judiciary. This right is, of course, violated when the court, to the surprise of the party, makes a non-congruent decision as formulated by the plaintiff and, in this condition, even more serious, not allowing the accused, considering the surprise, to defend himself against request, on the grounds which supported it.[49]

Thus, it is reinforced that what is debated in the proceeding focuses on the facts brought for discussion.

6. Conclusion

The work considered the existence of a new methodological phase of procedural law, naming it a "civil proceeding in the constitutional state", arising from the existence of contemporary cultural and social factors, thus correlating the radiations of this new model with administrative misconduct actions.

This is because, despite the existence of disagreements from legal scholars, it was followed by the understanding that the administrative misconduct actions would be civil in nature, consequently, in the application of the procedural model in evidence today, coupled, of course, with the special characteristics governed by the Administrative Misconduct Law.

Gazette (DJe) September 2, 2013. Available at: <ww2.stj.jus.br/processo/ revista/documento/mediado/?componente=ATC&sequencial=29763628&num_registro=200901872717&data=20130902&tipo=5&formato=PDF>. Accessed on: May 9, 2017.

[49] Néviton Guedes, *Improbidade administrativa,* op. cit., pg. 309.

Thus, the guidelines inherent to the model of verification that should be used for the appraisal of the facts by the state judge were drafted, especially in the administrative misconduct actions, further delimiting the need to be previously clairvoyant to the procedural subjects the criterion adopted for such, exactly because of the principle of cooperation and adversarial system.

Also, as a consequential factor of the new existing procedural system, beacons to the actions of administrative misconduct were attached for the purpose of safeguarding an epistemic process. With such a focus, moreover, there was the need to establish new paradigms, including in case law scope, about certain traditionally crystallized interpretations.

In this regard, the present study addressed issues specific to administrative misconduct actions and the consequences imposed by the civil procedure based on the resulting constitutional state.

As a corollary of these consequences, it was understood that the non-compliance with the procedure provided for in article 17, paragraph 7, of the Administrative Misconduct Law, contrary to the prevailing case law, generates absolute nullity; the impossibility of applying the material effects of default on administrative misconduct — although there is controversy in this respect — and the need to at least allow prior knowledge and expression of the parties before any judgment recognizing the practice of misconduct changing the legal framework outlined in the complaint.

In conclusion, it is undeniable that the new methodology inherent to contemporary civil procedural law necessarily entails the rereading of several institutes applicable to administrative misconduct, especially in the verification model used in the formation of judicial conviction, of the necessary observance of the principle of collaboration, with all procedural subjects, including in a summary form, under penalty of the characterization of justice based on an epistemic process that aims at the administrative misconduct to interweave state legitimacy in all its aspects (conduct of public administration and ideological legitimacy of the legal proceeding).

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