Administrative law and its contribution in the fight against corruption*

O direito administrativo e sua contribuição no enfrentamento à corrupção

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* Article received on June 17, 2019 and approved on August 25, 2019. DOI: http://dx.doi.org/10.12660/rda.v279.2020.81387

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ABSTRACT

This text intends to ascertain how Administrative Law can contribute to reduce the corruption levels in Brazil. In addition to Criminal Law, Administrative Law can also play a valuable role in the fight against illegal conducts that affect Public Administration. For that purpose, there must be some structural changes in the way the Administrative Law deals with the legal relationship between the citizen and the State. Debureaucratization, transparency increase and a greater rationalization of the Sanctioning Administrative Law are effective measures listed in this paper to be followed to improve the way the state fights against dishonest and corrupt practices. The methodology adopted will be the bibliographical one and the research objective is to contribute to the reduction of the corruption problem.

KEYWORDS

Administrative law — corruption — technology — regulation — transparency

RESUMO

Este texto tem como objetivo analisar de que forma o direito administrativo pode contribuir para reduzir os níveis de corrupção no Brasil. Ao lado do direito penal, o direito administrativo pode ocupar um espaço valioso no combate a ilícitos que atingem os cofres públicos. Para tanto, é preciso que ocorram algumas mudanças estruturais na forma como o direito administrativo ainda compreende a relação jurídica entre o cidadão e o Estado. Desburocratização, incremento da transparência e uma maior racionalização do direito administrativo sancionador são medidas eficazes elencadas neste artigo que podem ser adotadas para o aprimoramento do enfrentamento estatal a práticas desonestas e corruptas. A metodologia utilizada será a bibliográfica e o objetivo da pesquisa será o de contribuir para a redução do problema da corrupção.

PALAVRAS-CHAVE

Direito administrativo — corrupção — tecnologia — regulação — transparência

1. Introduction

Corruption is a social phenomenon present in all known societies and its confrontation occurred throughout the history of civilizations with the most diverse intensities and through the most varied tools.[1]

Traditionally, criminal law is primarily remembered as the branch of law responsible for investigating and punishing conduct that deviates from the legal system. This becomes more evident when the severity of infractions involves the subtraction of public resources, corruption and acts of similar magnitude. The image that glimpses in our minds is that of the imprisonment of evildoers and the handcuffs on their wrists. Corruption is still a matter narrated by society and by the newspaper pages as punishable primarily through deprivation of liberty. Actually, these criminal repression measures are unable to eliminate it, and preventive measures are insufficient to prevent corruption.[2] Criminal law by itself has not being able to reduce corruption, which opens space for alternative solutions within the law.

However, it is recent the theoretical and normative effort to face corruption by means other than criminal sanctions. In this context, administrative law has broadened its borders and demonstrated a unique role in presenting tools capable of preventing and suppressing dishonest practices involving the government. The fight against corruption cannot limit its foundation to the institutes of criminal law and criminalization of objectionable behaviors. On the other hand, it must be inspired by several other branches of law, especially administrative law.[3]

The prospective and dissuasive function of sanctioning administrative law can greatly contribute to the reduction of unlawful behavior. It is the administrative law coming out of its timid — and myopic — look essentially focused on the study of the legal relations between the citizen and the State to honor the function of regulation, which is already its own, with its inherent systemic character and preventive sanction. Thus, tackling corruption requires

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1 FERREIRA FILHO, Manoel Gonçalves. A corrupção como fenômeno social e político. *Administrative Law Review*, Rio de Janeiro, v. 185, p. 1-18, July/Sept., 1991. p. 6; GARCIA, Emerson. A corrupção. Uma visão jurídico-sociológica. Revista de Direito Administrativo, Rio de Janeiro, v. 233, p. 103-139, July/Sept. 2003. p. 103-104.

2 Ibid., p. 2.

3 HOFMANN, Domenica. Korruptionsbekämpfung. In: VOIGT, Rüdiger (Org.). *Handbuch Staat*. Wiesbaden: Springer VS, 2018. p. 1507.

the State and society to observe new paradigms and new instruments. In the words of Sabino Cassese:

> The new paradigms of the State put into question all the notions, themes and classic problems of public law [...] And they also require change in scientific behavior related to law, because legal doctrine cannot keep the reference codes themselves immutable with such a radical change of its object.[4]

In fact, Brazil needs to change the way that faces corruption. Transparency International, a German non-governmental organization created in 1993, studies the level of corruption in countries and classifies it according to an corruption index perception since 1995.[5] This index makes a classification of the countries considering the probability of public agents being involved in acts of corruption. In 2018, Brazil ranked 105th out of 180 countries surveyed. With 35 points, the country is far below the global average of 43 points.[6] This position reveals how Brazil still needs to advance — and it is not little — in the fight against corruption, which imposes the search for solutions and tools that go beyond the limits of criminal law.

The concern nowadays with the effective fight against corruption justifies the use of administrative law institutes and finds inspiration in the harmful effects that corruption causes in a society and in the existing business environment in a country.[7] High levels of corruption impacts competition, hinder investments, especially in infrastructure, and drastically affect trade costs and companies behavior.[8] From the point of view of social rights, corruption causes irreparable damage, reducing the number of beds in public hospitals and the number of places in schools. Accompanied by an inadequate

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4 CASSESE, Sabino. *A crise do Estado*. Translated by Ilse Paschoal Moreira and Fernanda Landucci Ortale into Portuguese. Campinas: Saberes, 2010. p. 145

5 Emerson Garcia, A corrupção, op. cit., p. 110.

6 Available at: <https://ipc2018.transparenciainternacional.org.br/?gclid=CjwKCAjw0ZfoBRB4EiwASUMdYf3 W1K7jHGB 29gEWmMzHVe6kjD02CCWcnKmqMu5H780Vtq-CdyiyRoCE_kQAvD_BwE # ipc-2018>. Accessed on: 16 June 2019.

7 ARAUJO, Valter Shuenquener de. Uma contribuição do direito administrativo para o aprimoramento do ambiente de negócios no Brasil. In: FERRARI, Sérgio; MENDONÇA, José Vicente (Org.). *Direito em público* (. A tribute to Professor Paulo Braga Galvão. Rio de Janeiro: Lumen Juris, 2016. p. 463-479.

8 SEQUEIRA, Sandra. Corruption and trade costs. In: ROSE-ACKERMAN, Susan; LUCE, Henry R.; LAGUNES, Paul (Org.). *Greed, corruption, and the modern state*. Essays in political economy. Massachusetts: Edward Elgar Publishing, 2015. p. 220.

vulgarization of the theory of the possible reserve, annihilates any desire for improvement in terms of sanitation, public safety, social security, foresight, and other sectors in which there is a need for public spending. In the words of Emerson Garcia, "the higher the corruption rates, the lower the public policies for the implementation of social rights".[9]

Therefore, it is not difficult to see that, because of its seriousness, the problem of corruption is no longer limited to national borders. And, whether in Brazil or abroad, its confrontation is a fundamental measure for a fair wealth distribution and sustainable economic development. According to Diogo de Figueiredo Moreira Neto:

> Undesirable legacy of historical patrimonialism, the plague of corruption thrives and expands in our country, increasingly damaging its economic development, but, even worse than that, its ethical-social progress, without which nothing will be sustained in the future of the nation […] the fight against corruption installed in the country and which even extends beyond borders, already demands an articulated set of strict public policies, which will range from school education to the worsening of criminal, civil and administrative sanctions, by repressive processes in charge of the State's neutral bodies.[10]

Particularly on the international stage, there is a strong stimulus to the use of sanctioning administrative law institutes to fight corruption. The most recent legal norms of administrative law in the field of fighting corruption stem from a fruitful and intense influence of foreign institutes that are already known to be successful. As an example, the Anticorruption Law, Law No. 12.846 of 2013, appears in Brazil as a valuable instrument to prevent corruption under the influence of the *North American Foreign Corrupt Practices Act of 1977*. This law allows the legal entity to be held accountable regardless of intent or guilt and provides for the signing of the leniency agreement to assist in the disclosure of criminal schemes of high complexity and repercussion.

In the words of Domenica Hofmann, even though corruption is a practice as old as the existence of human beings on Earth, "tackling corruption as a SOE

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[9] Emerson Garcia, A corrupção (Corruption, op. cit., p. 117-118.

[10] MOREIRA NETO, Diogo de Figueiredo. Corrupção, democracia e aparelhamento partidário do Estado. *Administrative Law Review*, Rio de Janeiro, v. 273, p. 485-490, Sept./Dec. 2016. p. 485.

practice (Praxisfeld) is part of a relatively young area of political activity".[11] Although the SOE's concern is recent, it is clear that anti-corruption acts can no longer be reduced to an episodic political manifestation of a simplistic tone addressed to punish those who had benefits from its practice.

Corruption produces harmful and serious systemic effects. By being spread as a consolidated practice, destroys institutions and life projects, generates wealth concentrations, sows poverty, abhors meritocracy and frustrates any possibility of sustainable economic development. Although it is not responsible for all the evils of humanity, corruption must be a serious concern of law and, in particular, administrative law.

As it presents itself as a varied and complex phenomenon, the measures for effectively tackling corruption also need to be diversified and broad.[12] Regarding this topic, Susan Rose-Ackerman comments that: "Given the diverse ways in which corruption can affect state functioning, it is no surprise that its control is difficult and contested. As a legal, economic, political and cultural or sociological phenomenon, its causes and consequences are varied and complex".[13]

As for the government regime adopted and its correlation with dishonest practices, corruption is not an evil that affects only non-democratic countries. Regardless of the regime adopted, it will be present on a greater or lesser scale. There are, as noted by Matthew Stephenson, cases in which democratization has not reduced corruption and situations in which it has aggravated its levels.[14] However, the characteristics of a democratic regime can stimulate its confrontation, especially when the tools available to administrative law are well used.[15] In this perspective, Matthew Stephenson presents five factors, which he calls mechanisms, present in a democracy that are capable of affect the fight against corruption. Are they:

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[11] Domenica Hofmann, Korruptionsbekämpfung, op. cit., p. 1501. In the original: *"Korruptionsbekämpfung als Praxisfeld staatlichen Handelns ist ein relativ junges Politikfeld"*.

[12] Ibid.

[13] ROSE-ACKERMAN, Susan; LAGUNES, Paul. Introduction. In: ROSE-ACKERMAN, Susan; LUCE, Henry R.; LAGUNES, Paul (Org.). *Greed, corruption, and the modern state*. Essays in political economy. Massachusetts: Edward Elgar Publishing, 2015. p. 5.

[14] STEPHENSON, Matthew C. Corruption and democratic institutions: a review and synthesis. In: ROSEACKERMAN, Susan; LUCE, Henry R.; LAGUNES, Paul (Org.). *Greed, corruption, and the modern state*. Essays in political economy. Massachusetts: Edward Elgar Publishing, 2015. p. 95.

[15] Emerson Garcia, A corrupção, op. cit., p. 106.

> 1. Holding politicians accountable for corrupt acts; 2. Holding politicians accountable for the consequences of corruption; 3. Democratic accountability for anticorruption enforcement efforts; 4. Corruption to achieve or maintain power. 5. Democracy, corruption and political time horizons.[16]

As for these mechanisms, it is possible to highlight that, in a democracy, politicians are held responsible for corrupt acts during the electoral process. If well informed, voters can reject the corrupt and reward those who are not involved in dishonest practices with votes. Furthermore, the democratic environment also allows politicians to be held accountable for the consequences of the illicit acts. A poor performance of the economy and public services caused by corruption frustrates the corrupt politician's claims in an upcoming election. The democratic environment also values efforts to fight corruption and encourages the politician to demonstrate not only that he is not corrupt, but that he fights third-party corruption. On the other hand, the high level of competition for obtaining political power in a democracy is a factor capable of encouraging the involvement of the public administrator in corruption. It is corruption to reach or stay in power. As Matthew Stephenson says:

> democratization does create pressures for certain kinds of corruption that might not be as pronounced in non-democratic systems, and this can create at least the appearance, and perhaps the reality, of an increase in certain forms of corruption following a democratic transition [...] long-established, fully —institutionalized democracies have lower levels of perceived corruption than other countries, but new democracies and partial democracies do not seem to have lower perceived corruption than do non— democracies.[17]

Finally, the "horizon of power" is a factor that can also influence corruption in a democracy. The existence of very long and very short terms can encourage politicians to practice corruption. The former for providing greater certainty that the elected will not be punished, the latter for the certainty that they will probably never exercise power again. In the words of

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[16] Mathew Stephenson, Corruption and democratic institutions, op. cit., p. 94, 98, 99, 102, 103.
[17] Ibid., p. 103 and 107.

Manoel Gonçalves Ferreira Filho, corruption is "in contemporary democracy, […] a threat perhaps more serious than in other regimes".[18]

Under these circumstances, the reduction of corruption levels does not depend exclusively on the adoption of a democratic regime. As we have seen, democracy contributes to its confrontation, but it also offers stimulus for its growth. Thus, in a democratic regime, it is essential that administrative law contribute with its tools so that institutional relations involving the government are not permeated by dishonest practices.

In this context, the Brazilian the government needs to adapt to the new requirements and profoundly change its way of acting, under penalty of, according to Fernando Pessoa's verses, being left out of itself. Throughout this article, we will highlight three structural changes that can be carried out by the government in order to make the fight against corruption through administrative law more effective. Are they: **i)** simplifying procedures, **ii)** increasing transparency and encouraging smart disclosure and **iii)** rationalizing administrative sanctioning law.

2. Fundamental structural changes

2.1 The necessary simplification of administrative procedures

Bureaucracy is fundamental for the impersonal exercise of power and for its rationalization. The subjectivism inherent to a patrimonialism model of the State is neutralized by the Weberian bureaucratic logic, according to which the rules of procedure legitimize the formation of the SOE will. A government that bets on bureaucracy thus has some virtue. However, what characterizes an enormous mistake is the abandonment, by the bureaucratic State, of a critical vision focused on the result. The State exists to satisfy the needs of the community and, in this perspective, it cannot create procedures that hinder its reason for existing.

Brazil has already undergone countless reforms and transformations aimed to simplify the SOE procedures and requirements, and each new ruler has, for the beginning of his term, a prepared speech of efficiency and

[18] FERREIRA FILHO, Manoel Gonçalves. Corrupção e democracia. *Administrative Law Review*, Rio de Janeiro, v. 226, p. 213-218, Oct./Dec. 2001. p. 214.

debureaucratization. Some changes are more efficient than others, but there is still no solid, uniform and continuous movement in Brazil towards the effective elimination of unnecessary SOE consents and the simplification of procedures. The recent Provisional Measure of Economic Freedom, Provisional Measure No. 881, of April 30, 2019, reveals an important step in this direction.

There is still an irrational SOE logic that the more complex and slow a procedure is, greater the control over it and lower the risk of corrupt practices. The examples taken from Law No 8,666 are perfect. The competition modality established in the bidding law has the largest number of stages. As an illustration, the qualification occurs during the procedure, which leads to endless disputes often involving participants without any chance of winning the competition. This slow and bureaucratic procedure is considered by law as something appropriate/necessary for the government to conclude the significant contracts. However, the grater is the procedure formalism, slower will be SOE conclusion, greater will be the number of obstacles to be overcome and higher the risk of corruption. A higher grade of formalism in competitive bidding modality does not hinder corruption, but legitimates it.

The elimination of what is unnecessary is a measure that closes windows of opportunity for dishonest and corrupt acts, and the clarity and predictability of legal norms are fundamental factors for facing corruption. According to Domenica Hofmann, "a prerequisite for effective prevention and for fighting corruption is the existence of a solid and clear legal basis (*solide, eindeutige rechtliche Basis*)."[19]

Abundant number of laws and administrative acts has never been synonymous of less corruption. On the contrary, it is still current the saying of Tacitus, Roman politician, *corruptissima republica plurimae leges*. The more corrupt the republic, greater the number of laws. In this context, the smart regulation is an institute of administrative law that can contribute to the reduction of corruption rates due to the simplification it causes. The practice of illegal acts can be prevented through clear, predictable and accessible regulation. The obscurity of the normative text that affects people's freedom and property gives the administrator an excess of discretion that can encourage corruption. In the same sense, Nicoletta Rangone, says: "On one hand, where regulation leaves too much room for administrative discretion, it creates a favorable environment

[19] Domenica Hofmann, Korruptionsbekämpfung, op. cit., p. 15011511. In the original *"Voraussetzung für eine effektive Korruptionsbekämpfung und Korruptionsprävention ist eine solide, eindeutige rechtliche Basis"*.

for corruption. [...] Therefore, the 'global tendency' to oversee discretionary power providing more transparent and objective criteria."[20]

When the State demands more than should from the private sector in order to fully exercise economic freedom, there will be an involuntary incentive to offer unfair advantages. For this reason, administrative law must have an incessant obsession by simplifying procedures, real and effective reduction of bureaucracy. Besides, administrative routines can be updated and simplified with technology.

In this perspective, the use of algorithms to improve administrative decisions is a measure that, besides simplifying the decision-making process, it reduces the discretion in situations that it would not be appropriate, discouraging corruption and encouraging economic and social development. According to Hoffmann-Riem: "When algorithms are used, considerable opportunities are created in various fields — almost all — of social development".[21]

With the adoption of a decision-making methodology through algorithms some problems can arrise, especially the risk of behavior manipulation (*Manipulation von Verhalten*).[22] Despite this, the consequent reduction of subjectivism reveals an environment favorable to reduce corruption. And the government will be able to improve its algorithms through the critical use of "*big data*". The collection of a significant volume of data by the government must be considered as a fundamental measure for improving the fairness of its decisions and reducing corruption. Another area in which administrative law can contribute. Depending on the decisional architecture (*Entscheidungsarchitektur*) adopted by the government, corruption may be stimulated or discouraged.[23]

Indeed, the use of technological resources by the government is capable of reducing subjectivism, patrimonialism and the space for obscure decisions can revolutionize the anti-corruption acts. The positive impact can be higher than the usual concern about the political discourse of raising penalties and popularizing criminalization.

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[20] RANGONE, Nicoletta. *A behavioral approach to administrative corruption prevention*. 2016. p. 4. Available at: <www.researchgate.net/publication/311468410_A_behavioural_approach_ to_ administrative_corruption_preventiont>. Accessed on: 4 June 2019.

[21] HOFFMANNRIEM, Wolfgang. *Verhaltenssteuerung durch* Algorithmen — Eine Herausforderung für das Recht. Archiv des öffentlichen Rechts, Band 142, Heft 1. Mohr Siebeck: Tübingen, 2017. p. 5. In the original: *"Beim Einsatz von Algorithmen werden erhebliche Chancen in diversen — fast allen — Feldern der gesellschaftlichen Entwicklung eröffnet"*.

[22] Ibid.

[23] Ibid.

In research done on the incidence of corruption in the port region of Maputo (Mozambique) and Durban (South Africa), Sandra Sequeira demonstrates how corruption appears more frequently in places where the technology is less sophisticated. And this also occurs where there is an unnecessary proximity between the public and private agent, which increases administrative discretion and the opportunities for committing illegal acts, which reads as follows:

> Bribes were higher and more prevalent in the port with public oversight of officials with the most bureaucratic discretion to extract bribes, and with the least sophisticated technology to limit interactions between bribers and bribes [...] bureaucratic and organizational structures can affect the magnitude and type of corruption observed, by creating different sets of opportunities for frontline public officials to extract bribes.[24]

The simplification of regulation must coexist with the necessary analysis of its regulatory impact. Public authorities must measure and justify their demands, especially when they create considerable burdens on individuals. The Article 15 of Law 13,575/2017 was created in a good moment established the National Mining Agency (ANM), requiring the analysis of the regulatory impact prior to the edition of the amendment of normative acts by ANM.[25]

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[24] Sandra Sequeira, Corruption and trade costs, op. cit., p. 212 e 220.

[25] Article 15. The adoption of proposals to amend normative acts in the general interest of economic agents will be, under the terms of the regulation, preceded by a Regulatory Impact Analysis (RIA), which will contain information and data on the possible effects of the normative act.

Item 1 Regulation will provide for the content and methodology of the regulatory impact analysis, the minimum requirements to be examined, the cases in which it will be mandatory and those in which it may be waived.

Item 2 ANM's Collegiate Board of Directors will express itself, in relation to the regulatory impact analysis report, on the adequacy of the proposed normative act to the intended objectives, and will indicate whether the estimated impacts recommend its adoption and, when appropriate, the necessary complements.

Item 3 The statement referred to in Item 2 of this article will include, together with the regulatory impact analysis report, the documentation to be made available to interested parties for conducting consultation or public hearing, when the Board of Directors decides to continue the administrative procedure.

Item 4 ANM's internal regulations will provide for the operationalization of the regulatory impact analysis.

Item 5 In cases which the regulatory impact analysis is not carried out, at least a technical note or equivalent document supporting the proposed decision must be made available.

Likewise, Article 5 of Provisional Measure No. 881/2019 also requires this assessment.[26]

However, simplification cannot be confused with an absence of minimum and safe parameters for effective control and prevention of dishonest practices. The Law of State-owned No. 13,303/2016, for example, bet on the creation of compliance and governance rules for this purpose, which is praised by the doctrine.[27] To a certain extent the rules bureaucratize the functioning of the SOE, but at the same time are fundamental to avoid corruption stimulating the internal structures of the company to inspect these acts.

In this case, it is possible to conclude that not only excessive formalism in administrative procedures does not reduce the levels of corruption, but also that the absence of minimum, intelligent and efficient rules of control will also not produce positive effects dealing with these unhealthy practices. It is difficult to find the balance and universal characteristics for a good regulation.[28] At that point, it is important to recall the Montesquieu important lessons in his classic work *The spirit of the laws*, when he points out that "business needs to work, and they must be carried on with a certain motion, neither too quick nor too slow".[29]

2.2 Increasing transparency and encouraging smart disclosure

Corruption can't resist to a transparent performance by the government. It does not spread in sunlight. Illicit acts feeds on darkness and ignorance. The

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[26] Article 5 Proposals for editing and altering normative acts of general interest to economic agents or users of the services provided, edited by a Government body or entity, including autarchies and public foundations, shall be preceded by a regulatory impact analysis, which will contain information and data on the possible effects of the regulatory act to verify the reasonableness of its economic impact.

Paragraph. Regulation will provide for the start date of the requirement referred to in the caput and on the content, the methodology of the regulatory impact analysis, on the minimum items to be examined, on the hypotheses in which it will be mandatory and on the hypotheses in which it can be excused.

[27] PINHO, Clóvis Alberto Bertolini de; RIBEIRO, Marcia Carla Pereira. Corrupção e compliance nas empresas públicas e sociedades de economia mista: racionalidade das disposições da Lei de Empresas Estatais (Law No 13.303/2016). *Administrative Law Review*, Rio de Janeiro, v. 277, n. 1, p. 241-272, Jan./April 2018. p. 255.

[28] BALDWIN, Robert; CAVE, Martin; LODGE, Martin. *Understanding regulation*. Theory, strategy and practice. Oxford: Oxford University Press, 2012. p. 37.

[29] MONTESQUIEU, Charles de Secondat, Baron de. *O espírito das leis*. São Paulo: Martins Fontes, 2000. p. 21.

government models that encourage secret acts and have low publicity rates are fertile fields to sow the practice of corruption.

In the words of Nicoletta Rangone,

> Legal uncertainty associated with lack of transparency and accessibility, instability and inconsistency of all kinds of regulation may indeed increase bureaucratic discretion, fostering a corruptible social environment and encouraging higher levels of corruption.[30]

The government enforcement for transparency obtained a strong ally in 2012, the year in which Law No. 12,527/2011 came into force. The act provided a positive revolution concerning the type of act the government must disclose, and the effects and duties about the noncompliance mandatory disclosure. In general, the recent enforced transparency was expanded to reach acts formerly known as being exclusively private interests. According to Emerson Garcia:

> the public agent, to the extent that he performs a function of equal nature, must have an absolutely transparent conduct, hence the need to mitigate the rules that reduce the publicity of his patrimonial evolution, especially those concerning banking and fiscal secrecy.[31]

Great part of act transparency by the administration must be followed by greater and sincere motivation of decisions and popular control facilitation. In this context, administrative law must stimulate the creation of mechanisms of popular control providing a simpler form to communicate illicit acts. Whistleblowers duties should be facilitated, admitting the representation of doubtful authenticity documents to start an investigation. Nicoletta Rangone, "evidence from cognitive experiments show that a propensity to report corrupt behavior is the product of complex inter-dependent choices and the anonymity of the complainant plays a crucial role".[32]

Transparency should not be limited to the access to a party interest documents in an administrative process. Even if the citizen does not appears to have an direct interest, has the right to request the disclosure of non-

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30 Nicoletta Rangone, *A behavioural approach to administrative corruption prevention*, op. cit., p. 2.
31 Emerson Garcia, A corrupção, op. cit., p. 119.
32 Nicoletta Rangone, *A behavioral approach to administrative corruption prevention,* op. cit., p. 20.

confidential information due to legal issues to the administration. And ideally, active transparency should have an increase; and the administration should disclose its information regardless any requirement.

On the other hand, the excess of information disclosure and in a non-standardized way, especially when they are not useful for social control, can compromise the transparency efficiency. Human being has a limited capacity to absorb information, and data overload can generate an opposite effect to that desired with transparency. More than quantity, the standardization and quality of the information available are more efficient for controlling the administration and for reducing corruption. Transparency must be, in the words of Hermann Hill, a meaningful transparency or a "productive transparency" (*produktive Transparenz*).[33]

There is also a concern in consumer relations, that the consumer has access to relevant information for his decision making. The excess of data gets confuses, mainly because the consumer does not have enough time and knowledge to digest everything that effectively concerns each product to be potentially consumed. Therefore, the disclosure of information to consumers must be done intelligently. In a memo issued in September 2011 to the heads of departments and entities of the US Federal Government, Cass Sunstein highlighted, as administrator of the Office of Information and Regulatory Affairs, the positive effects of adopting a smart disclosure:

> Smart disclosure makes information not merely available, but also accessible and usable, by structuring disclosed data in standardized, machine readable formats. [...]
> Consumers will frequently be able to make better choices when they have accurate information about the economic consequences of those choices (including their own past choices and those of others). [...]
> In practice, it is often time consuming and difficult for consumers to track and analyze the complex information they need to make these judgments. [...]
> Smart disclosure initiatives can help promote innovation, economic growth, and job creation in the market for consumer tools. Smart disclosure of consumer data yields other benefits, including allowing

[33] HILL, Hermann. Wandel von Verwaltungskultur und Kompetenzen durch Öffnung für gesellschaftliche Innovation. *Die Verwaltung,* v. 47, n. 3, p. 435-448, 2014. p. 447.

> consumers to monitor more easily the accuracy and use of the information that companies hold on them.[34]

The characteristics of simplification and clarity inherent in the product disclosure system for consumers that follow the logic of smart disclosure must also be present in government advertising. Society does not need to know what is unnecessary for administration control. On the other hand, the essential must be disclosed in a simplified and clear way. Thus, the procedure adopted by the government for disclosure of its data can contribute to the reduction of corruption, turning popular control more effective.

From a different perspective, SOE transparency measures must preserve personal data which must not be disclosed, respecting information self-determination. The institute of information self-determination was recognized by the German Constitutional Court as a derivation of the right to personality and can be conceptualized as the right that each individual has to decide how their personal and private data will be used.[35] According to Marion Albers, referring to the understanding of the German Constitutional Court, "just like people can decide about their actions, they also have the right to determine how 'their' personal data will be processed".[36]

On the other hand, corruption is a phenomenon drastically reduced not as a result of the increase in the number of repressive laws, but especially because the way society realizes and starts to reject corruption, resulting in the relevance of transparency and social control become. Daniel Márquez points out: "Corruption is not eliminated by creating 'laws' and 'agencies', but by generating an important impact on the political-social conventions so as to reject this practice".[37]

Simple, clear and precise texts contribute to identify the correct procedure to be adopted by the government and to the improvement of popular control.

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[34] SUNSTEIN, Cass. *Memorandum for the heads of Executive Departments and Agencies. Informing Consumers through Smart Disclosure. Executive Office of the President. Office of Management and Budget*. 8 Sept. 2011. Available at: <www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/foragencies/informingconsumersthroughsmartdisclosure.pdf>. Accessed on: 16 June 2019. p. 2-3

[35] ALBERS, Marion. A complexidade da proteção de dados. *Direitos Fundamentais & Justiça*, Belo Horizonte, yr. 10, no. 35, p. 1945, July/Dec. 2016. p. 2425.

[36] Ibid., p. 26.

[37] MÁRQUEZ, Daniel. Mexican administrative law against corruption: scope and future. *Mexican Law Review*, v. VIII, no. 1, p. 100, 2014. Available at: <https://revistas.juridicas.unam.mx/ index.php/mexicanlawreview/article/view/7819/9794>. Accessed on: 7 June 2019.

The transparency gains relevance insofar as it succeeds in provoking society and making it demand a course correction and a change of behaviour from the government. Simplicity and clarity are also essential to make any institutional compliance program viable. Nicoletta Rangone sustains that: "Regulation clarity and transparency are essential conditions for compliance: when regulation is not clear it is difficult for endusers to understand how to comply and for controllers to check compliance".[38]

In another light, there must not be transparency only in relation to the acts performed in the exercise of public service. Also, transparency must be allow society to identify interests when they enter and leave public positions and functions. John Bell points out a concern in which preventive measures in the matter of corruption must also include the entry and exit of the public sector: "There are three areas in which preventive measures are taken: entry into positions of responsibility, conduct in those positions, and what people are allowed to do immediately on leaving the public sector".[39]

The increase in transparent performance of the government also has another positive effect. It raises the level of society's participation in shaping SOE's intent. Based on the information the citizen receives, it is possible to propose measures, many of them capable of reducing the level of corruption in SOE operation, without implying in a reduction in the power of the government. On the contrary, society's contribution ends up increasing its legitimacy and power to the same extend. According to Hermann Hill: "they do not lose their power of decision when including the contributions of citizens but continue to expand their role in the development of policies and in the coordination of the public interest".[40]

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[38] Nicoletta Rangone, *A behavioural approach to administrative corruption prevention,* op. cit., p. 10.

[39] BELL, John. Legal means for eliminating corruption in the public servisse. *Electronic Journal of Comparative Law*, v. 11, no. 3, p. 13, Dec. 2007. Available at:<www.ejcl.org/113 /article11328.pdf>. Accessed on: 7 June 2019.

[40] Hermann Hill, Wandel von Verwaltungskultur und Kompetenzen durch Öffnung für gesellschaftliche Innovation, op. cit., p. 446. In the original *"Sie verlieren indes durch Einbeziehung von Bürgerbeiträgen nicht ihre Entscheidungsbefugnis, vielmehr erweitern sie ihre Funktionder Politikentwicklung und Gemeinwohlkoordination".*

2.3 The necessary rationalization of the sanctioning administrative law for its predictability and proportionality

If there is not a minimum of rationality in their use, the plurality of punitive norms in administrative law may compromise the choice of this branch to face corruption. In this area, administrative law has a lot to offer, but it still needs to evolve to not allow an unpredictable, illogical and unsafe regulatory environment.

Valter Shuenquener de Araújo defended the following thought in a specific article on the use of administrative sanctioning law as a mechanism for the protection of fundamental rights:

> What the sanction of Administrative Law seeks is not exactly the same as that of Criminal Law. In that, the sanction has a clear regulatory, ordering and incentive purpose for certain behaviors, and not a predominant objective of imposing a punishment. Administrative sanction, therefore, does not have a retributive character as its main objective.
>
> In Brazil, the Sanctioning Administrative Law environment is chaotic, insecure, devoid of rationalization and, above all, founded on generalist and principled notions.
>
> [...] We have a fertile ground for arbitrary and inefficient sanctioning decisions. In the disciplinary field, for example, the legislation is full of indeterminate legal concepts to describe a functional infraction and the invocation of the state of special subjection inherent to this punitive sphere is made as a justification for often validating the unacceptable in light of legal certainty and proportionality. The excess of uncertainties in the Brazilian punitive system is capable of ruining the most diverse fundamental rights of the citizen. Property, freedom, security, dignity and equality are examples of fundamental rights that can be compromised in a Democratic State of Law incapable of adopting a minimum of rationality in its sanctioning system.[41]

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[41] ARAUJO, Valter Shuenquener de. *Direito administrativo sancionador no Brasil:* uma contribuição para a efetividade dos direitos fundamentais. In: ARABI, Abhner Youssif Mota; MALUF, Fernando; MACHADO NETO, Marcello Lavenère (Coord.). *Constituição da República 30 anos depois:* uma análise prática da eficiência dos direitos fundamentais A tribute to the Minister Luiz Fux. Belo Horizonte: Fórum, 2018. p. 436437.

In this context, an efficient punitive system is an interdependent normative arrangement endowed with coherence and organization. A model that turns its attention to the most diverse aspects: social, legal, political, economic, cultural, behavioral etc.

Rationalization of the sanctioning law in Brazil relays on a minimum harmonization between the legal regimes of the different federal entities. Punitive overlap caused by the diversity of existing rules in each federal entity is the characteristic that encourages non-compliance with rules and the practice of illegal activities. When playing by the rules proves to be impracticable, especially from a competitive perspective, individuals opt for the risk of non-compliance. In this context, government punitive system should have as its primary goal to discourage the practice of infractions, not the opposite.

In another light, the sanctioning administrative law deals with indeterminate legal concepts and with a greater flexibility of legality principle. These characteristics should not create a general fear on business activities. Fighting corruption cannot generate a market reaction of total paralysis.

In an article on the subject, Valter Shuenquener de Araujo has already defended the need for the primary punitive rule to be clear enough that the regulation is not excessive:

> The law should establish minimum parameters for conduct and sanctions. In case of delegalization, for example, the legislator must, at a minimum, establish the parameters capable of identifying which are the infractions to be repressed by the administrator and the possible sanctions. [...] Therefore, the theory of implicit powers in relation to the Sanctioning Law has not been admitted to allow the administrator to create the infractions and sanctions without the legislator having expressly foreseen this possibility.[42]

Fight against corruption is a fundamental determination for Brazil, but when it spreads based on empty, generalist, moralistic and terrifying speeches it loses quality with significant expression. This only creates legal uncertainty, flight of private capital, recession and more poverty. A perfect gear for the production of injustice.

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[42] Ibid., p. 442.

The rationality of our administrative punitive system is a necessary condition for an efficient fight against corruption in Brazil, and it can be achieved in several ways. Some specific measures can drastically improve the way the State apply sanctions to the corrupt acts. According to Valter Shuenquener de Araujo, these determinations can be characterized by:

> i) Incentive to specialty over generality; ii) Encouraging collegiality and popular participation in control bodies; iii) Support for the transaction; iv) Greater concern with the ordering/regulatory function of the sanctioning administrative law; v) Greater empowerment of authorities with sanctioning power for the adoption of punitive systems independently.[43]

In relation to the five determinations previously mentioned, the punitive system should, as far as possible, be applied by those who understand the sector, which is the essence of responsive regulation. Punitive decisions should, when feasible, be made by collegiate bodies, in order to achieve greater systematization, uniformity and decision stability.

Furthermore, Brazilian government cannot, in the fight against corruption, disregard the most modern in terms of negotiated rulemaking in administrative law. The sanction law transaction can be a less expensive, more efficient and more advantageous measure for society and the State.

The systematization of administrative sanction law as an instrument to anti-corruption must also be concerned with its regulatory function. The administrative sanction must organize economic activity, harmonize the conflicting interests and radiate values capable of discouraging corruption. Its purpose goes beyond that of just punishing the offender. Hence the high potential of administrative law in this matter, insofar as the fight against corruption can be accompanied by a normative policy for economic development and encouragement of good practices and the observance of superior ethical standards.

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[43] Ibid., p. 442.

3. Conclusion

The fight against corruption in Brazil cannot be exhausted in the creation of criminal types and in the increase of sentences of deprivation of liberty. Criminal law by itself cannot reduce corruption, given the complexity of the causes of this social phenomenon present in all civilizations that the world has known. From this perspective, administrative law is prepared to offer the most diverse tools for preventing and tackling corruption in our country.

The focus of administrative law in combating corruption is fundamental to enable a business environment in Brazil, to stimulate competition, to avoid the flight of private capital and, above all, to improve the quality of public services provided to the population. Many of these services are fundamental to the achievement of human dignity, as in the case of education and basic sanitation.

The democracy has several mechanisms that sometimes discourage and sometimes encourage corruption. Thus, the adoption of a democracy by a country is a circumstance that will not necessarily lead to a greater effort to face corruption. The most common example is corruption aimed to perpetuating power. Democratic and non-democratic countries are hit by corrupt practices. However, its decrease is evident when, in a democracy, we have strong, consolidated and perennial institutions.

One of the most important measures that the government can take to address corruption is the creation of simplified, clear and low complexity procedures. The assumption that the increase in procedural formalism reduces corruption is not real. On the contrary, the excess of bureaucratic and unnecessary rules acts as a fertilizer for the growth of corruption.

From another point of view, the simplification of rules can also reduce the conformation space of the administrator in terms of convenience and opportunity for editing administrative acts. By removing unnecessary subjectivisms, the measure also contributes to the reduction of corruption.

The use of big data and algorithms by the government is also capable of stimulating a more objective, rational and uniform decision-making process, those characteristics tend to contribute to a dishonest practices. These technological innovations are not immune to criticism, such as, the possible manipulation of behavior when using algorithms. For this reason, administrative law should focus on improving the incorporation of these

technological innovations, in order to reduce or even neutralize their disadvantages.

Simplification does not mean total absence of rules to be adopted by management. Just as excessive bureaucracy is harmful, the complete absence of procedural rules on a given topic can stimulate corruption and, also, legal uncertainty.

Another collaboration that administrative law can offer to face corruption comes from the increased transparency in the administrative performance. Corruption does not grow or spread when submitted to public exposure. However, smart disclosure of information is required, so that recipients can easily understand it in order to exercise control over administrative acts. When the government discloses unnecessary data and in a disorganized manner, it compromises popular participation in the control of acts and can stimulate the practice of corruption in the same way and with the same intensity as verified in the face of orders that honor secrecy in the disclosure of acts administration.

Brazilian sanctioning administrative law needs to rationalize the plurality of punitive instances and avoid excessive overlapping of sanctions for the same conduct. An abundance of sanctions is not synonymous with an effective fight against corruption. For this purpose, a logical, precise, proportional and predictable punitive system is better than a disorganized jumble of norms that define a conduct as a crime without a real deterrent concern.

In conclusion, it is always good to remember that the creation of SOE measures or even public bodies to face corruption needs to be accompanied by a true and effective political will from society and government. Otherwise, the news will only serve as a facade that will cover up the illicit acts.

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