The interpretation of the Improbity Administrative Law between the public interest and the individual rights of defense*

A interpretação da Lei de Improbidade Administrativa entre o interesse público e os direitos individuais de defesa

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ABSTRACT

Since its origin, the Administrative Misconduct Law (LIA) has been

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confusing interpreters. Starting from ideal types that divide the Administrative Law scholars into two groups (one that emphasizes the "public interest" and the other that emphasizes the "subjective rights"), the hypothesis of this work uses as an object of analysis the way in which the scholars has interpreted the scope of the sanctions provided in article 12, from LIA, since they do not have clear outlines. It is noted that the interpretation of the LIA oscillates between a broad view, that opens more hypothesis to apply sanctions, and a restrictive view, that reduces these hypothesis. In other words, the broad view is aligned with the ideal type of "public interest", while the restrictive view is aligned with the ideal type "subjective rights".

KEYWORDS

Administrative misconduct — sanction — restrictive and broad interpretation — Law n. 8.429/1992

RESUMO

Desde a sua promulgação, a Lei de Improbidade Administrativa (LIA) divide os intérpretes. Partindo de tipos ideais que dividem a doutrina do direito administrativo em dois grupos (um que dá ênfase ao "interesse público" e outro que dá ênfase aos "direitos subjetivos"), a tese deste trabalho usa como objeto de análise a maneira como a doutrina tem interpretado o alcance das sanções previstas no art. 12, da LIA, uma vez que elas não têm contornos claros. Observa-se que a interpretação da LIA oscila entre uma visão ampliativa, que aumenta o espectro sancionatório, e uma visão restritiva, que diminui as hipóteses de incidência da sanção. Assim, enquanto a primeira teria por objetivo maior a proteção do chamado interesse público, a segunda daria primazia aos direitos individuais de defesa.

PALAVRAS-CHAVE

Improbidade administrativa — sanções — interpretação restritiva e ampliativa — Lei nº 8.429/1992

1. Initial considerations

When thinking about public administration control, one of the main memories is the Law of Administrative Misconduct (LIA — Law No. 8.429/1992). However, after more than two and a half decades, this law is also remembered for the various controversies surrounding it. From procedural issues — precautionary blocking of goods, admissibility of the initial petition, competent jurisdiction — to material issues — delimitation of types, meaning of guilt and intent, application of sanctions, prescription —, including even the constitutionality of the LIA,[1] the debate in doctrine is intense. The LIA divides the interpreters: it is a law of struggle, which seduces, mobilizes, appeals to feelings and emotions.[2]

It could be understood as something natural to law, as it happens in any of its areas, since the norms give rise to different interpretations. After all, "dogmatic issues are typically technological. In this sense, they have an explicit directive function, as the situation captured in them is configured as a should-be. This type of questions aims to enable a decision and to guide an action".[3]

The thesis of this article is that the interpretation of the LIA is sometimes made in a perspective of protection of the so-called public interest — the public ´**property** and the administration principles —, sometimes in a perspective of protection of the rights of defense of the accused — the right to a fair hearing. To support the thesis, the article uses as object of analysis the way the doctrine has interpreted the scope of the sanctions provided for in Article 12, of the LIA, since they do not have clear outlines.

As it will be diagnosed, sanctions are sometimes given a broad interpretation[4] — which increases the scope of the sanction — and sometimes

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1 In fact, the constitutionality of the LIA has already been discussed, from a formal point of view, in the Direct Action for the Declaration of Unconstitutionality (ADI) No. 2.182/DF. The action was dismissed. However, there are several material issues of the LIA that are being discussed in the ADI No. 4.925/DF, which has not yet been judged and the rapporteur is Minister Marco Aurélio.

2 SUNDFELD, Carlos Ari. *Direito administrativo para céticos*. 2. ed. Revised and expanded edition. São Paulo: Malheiros, 2017. p. 318.

3 FERRAZ JUNIOR, Tércio Sampaio. *Função social da dogmática jurídica.* 2. ed. São Paulo: Atlas, 2015. p. 90.

4 In the definition of Tercio Sampaio Ferraz Junior, *Introdução ao estudo do direito*: técnica, decisão, dominação. São Paulo: Atlas, 1990. p. 269: "it is a way of interpreting that expands the meaning of the norm beyond that contained in its letter. This means that the interpreter takes the message encoded in a strong code and decodes it according to a weak code".

a restrictive interpretation[5] — which reduces it. In this sense, the first would be the one whose main objective is to protect the public interest, while the second is intended to safeguard the guarantees of the accused.

Therefore, this is not a dogmatic-normative work, in the sense of proposing to establish which is the "correct" interpretation or the "best interpretation" of the LIA provisions. Neither is it intended to be an encyclopedic study. On the contrary, it is a work of understanding the doctrine, here considered the primary source of research.[6]

Therefore, in addition to this introduction, the text consists of three parts: in item 2, the thesis of the work will be presented and explained from a brief context of the LIA and the classification of the doctrine in administrative law. In item 3, the sanctions provided for in the Law will be presented, when the controversial points and the respective interpretations will be presented. Finally, in item 4, comes the final considerations.

2. The doctrinal production of administrative law: public interest vs individual rights

Provided for in Item 4, of Article 37, of the 1988 Constitution of the Federative Republic of Brazil (CRF88), the administrative misconduct,

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[5] According to Tércio Sampaio Ferraz Junior, ibid., p. 268: "a restrictive interpretation occurs whenever the meaning of the norm is limited, regardless of the breadth of its literal expression. As a rule, the interpreter makes use of teleological and axiological considerations to support the reasoning. He assumes, therefore, that the mere specifying interpretation does not achieve the objectives of the norm, as it gives it a scope that harms interests, instead of protecting them. Thus, for example, it is recommended that any norm that restricts recognized and constitutionally established fundamental rights and guarantees should be interpreted restrictively".

[6] The caveat is already important: since the LIA is almost three decades old, much material has been produced on it. Books, magazine articles, book chapters, collections, monographs, dissertations, and theses. There were no conditions —of access and time — for the research to cover all the material produced over the years. The work was not intended to be encyclopedic. Therefore, the methodology, especially in this chapter, was to use particularly the books that dealt specifically with the subject of administrative misconduct, excluding, therefore, the generic manuals of administrative law. Not all books were obtained, either from lending libraries, or bookstores, and second-hand books stores, for purchase. In specific moments, magazine articles and book chapters were used, generally intended to deal with specific aspects of the LIA, such as a text on a certain sanction, for example. As this study will analyze Article 12 of the LIA, the time frame was December 2009, when Law No. 12.120/2009 changed the *caput* of that provision, that is, the preference was to use works after this date. Finally, as far as possible, the study sought to use the most current editions of each work until the time of writing.

which became law amid corruption allegations of the then president of the Republic at the time, incorporated in its Article 4th all the principles of public administration provided for in the *caput* of Article 37, transforming them into duties of all public agents, regardless of level or hierarchy. The principle of morality, specifically, "comes to occupy an important legal-political space and actually extends jurisdictional control in areas of difficult access, such as those traditionally occupied by the misuse of power, abuse of power, and misuse of purpose",[7] enabling control over administrative discretion.[8]

If the Law of Public Civil Action (LACP — Law No. 7.347/1985) had already politicized the Judiciary by allowing the discussion of public policies[9] and promoted the Prosecution Office to the role of main actor in controlling the performance of government officials,[10] the LIA, seven years later, intensified these two phenomena.

> From the point of view of the Prosecution Office, another great advantage of Law 8.429/92 is to enable the large contingent of prosecutors who act in the first instance to investigate (by means of a civil investigation) and prosecute those occupying public positions located anywhere in the Executive and Legislative branches. This aspect of the legislation on administrative misconduct is especially important for the institution if considered the suspicion that sometimes surrounds the position of attorney general, whose nomination formula eventually casts doubts on the real willingness of its occupant to promote actions against Executive and Legislative politicians.[11]

However, if on the one hand the principles of public administration — provided for not only as duties to be fulfilled, but as a type of misconduct if violated, as provided for in Article 11 of the LIA — allowed greater control of public management, on the other hand, they are pointed out as a

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7 FIGUEIREDO, Marcelo. Comentário ao artigo 37. In: BONAVIDES, Paulo; MIRANDA, Jorge; AGRA, Walber de Moura (Coord.). *Comentários à Constituição Federal de 1988*. Rio de Janeiro: Forense, 2009. p. 725.

8 ARANTES, Rogério Bastos. *Ministério Público e política no Brasil*. São Paulo: Educ; Sumaré; Fapesp, 2002. p. 152.

9 Sundfeld, *Direito administrativo para céticos*, op. cit., p. 334.

10 Arantes, *Ministério Público e política no Brasil*, op. cit., p. 66.

11 Ibid., p. 152-153.

possibility of punitive lack of control if used autonomously,[12] or subjective judgments supported by empty formulas,[13] to the point that some argue their unconstitutionality.[14] The same criticism is addressed to the legal wording of the sanctions, provided for in Article 12, since there are not many parameters for the applicator to make dosimetry. As Carlos Ari Sundfeld summarizes when dealing with the "pasty nature" of the misconduct:

> The legal text is not very concerned about circumstances of administrative management, with exceptions, exculpatory defenses, or mitigating circumstances. It just wants to include as many conducts in the "misconduct" formula (so, due to the length or vagueness of the terms, if the agent did not commit a sin, he must have committed another). Finally, there comes the list of penalties: terrible set, without much gradation, including loss of property and of civil service, suspension of political rights, fine, reimbursement etc.[15]

But then, how does this diagnosis about the LIA — the judicialization of politics and the opening of its provisions — interfere in the way the doctrine behaves? The thesis of this work is that because it touches on problems that have long been on the agenda of Brazilian society — corruption and public management — and because it lacks semantic delimitation — not only is the concept of misconduct not peaceful, but neither is its legal nature (civil, criminal, administrative, or a mixture of the previous three), as will be seen below —, the interpretation of the doctrine regarding the LIA provisions could be classified into two groups: one that emphasizes the so-called public interest, and another that gives emphasis on individual rights.

This classification that consists, it is important to highlight, in ideal types, was based on the conjunction of two works: *Formação da teoria do direito administrativo no Brasil*, by Fernando Dias Menezes de Almeida, and

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[12] OSÓRIO, Fábio Medina. *Teoria da improbidade administrativa*: má gestão pública, corrupção, ineficiência. 4. ed. Revised and updated edition. São Paulo: Thomson Reuters Brasil, 2018. p. 240.

[13] GIACOMUZZI, José Guilherme. *A moralidade administrativa e a boa-fé da administração pública*: o conteúdo dogmático da moralidade administrativa. 2. ed. Revised and expanded edition. São Paulo: Malheiros, 2013. p. 316.

[14] HARGER, Marcelo. *Improbidade administrativa*: comentários à Lei n° 8.429/92. São Paulo: Atlas, 2015. p. 93.

[15] Sundfeld, *Direito administrativo para céticos*, op. cit., p. 330.

Doutrinadores, políticos e "direito administrativo" no Brasil, by Juliane Sant'Ana Bento, Fabiano Engelmann, and Luciana Rodrigues Penna. Both will be explained from now on.

In his work, Fernando Dias Menezes de Almeida dedicates to understanding the formation — or the formative process — of administrative law in the country. Based on ideas developed by Hélio Jaguaribe and Carlos Guilherme Mota, the author argues that, after 1930, the theory of administrative law can be understood from two positions: "a) liberal, with its democratic and subjectivist strands; b) statist, with its nationalist and publicist strands."[16] By liberal, the author understands the position giving "priority to the existence of a sphere free from state interference for the full accomplishment of fundamental rights",[17] whereas by statist — which should not be read as 'totalitarian' —, "state interference for the accomplishment of these same fundamental rights prevails".[18] This dichotomy is also pointed out by Carlos Ari Sundfeld when criticizing what he calls "antiliberal and statist doctrine".[19]

Using the 1988 Constitution of the Federative Republic of Brazil as a milestone for each of the positions, Menezes de Almeida understands that before it the liberal position was notably democratic, while the statist position would be nationalist. After the 1988 Constitution of the Federative Republic of Brazil, the liberal position could be characterized as subjectivist and the statist position, publicist. "The qualifications *subjectivist* and *publicist*, in short, are a reference to the final convergence of theory towards, respectively, the value of *fundamental rights* or the value of *public interest*".[20]

To analyze these two positions, Fernando Dias Menezes de Almeida uses the macro models "legality" and "justiciability": the first refers to the idea of the law as a parameter for the validity of the administrative act, and the second refers to the control of these acts by the Judicial Branch.[21] His thesis is that each of the positions — subjectivist and publicist — takes, before 1988, a substantially different interpretation regarding the macro model of legality, but they converge as to the macro model of justiciability.[22]

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16 ALMEIDA, Fernando Dias Menezes de. *Formação da teoria do direito administrativo no Brasil*. São Paulo: Quartier Latin, 2015. p. 44.
17 Ibid., p. 45.
18 Ibid., p. 45.
19 Sundfeld, *Direito administrativo para céticos*, op. cit., p. 143.
20 Almeida, *Formação da teoria do direito administrativo no Brasil*, op. cit., p. 47.
21 Ibid., p. 175.
22 Ibid., p. 354.

The author's conclusion regarding the post-1988 Constitution of the Federative Republic of Brazil period is pertinent to this work, a moment in which, according to Menezes de Almeida, the opposite of what had happened in the previous period occurs: there is a convergence of the two positions regarding the macro model of legality, but a significant divergence as to justiciability. Because, as for legality, both positions agree with the expansion of legality (no longer restricted to the strict sense of law, but advancing to the Constitution), with the valorization of formal legality, and with a dilution of material legality, before the new role of principles.[23]

However, regarding the macro model of justiciability, the liberal-subjectivist and statist-publicist positions present divergences that are still in the process of consolidation.[24] In any case, it is possible to say that the first position "tends to value the decision of the legislator (or the constituent legislator), and not the decision of the controlling jurisdictional body, regarding the definition of the proper administrative action",[25] that is, there is a prevalence of the liberal-subjectivist position, in the author's view, for the legislative solution — Law or Constitution —, leaving less "space" for the judicial decision. The second position, in turn, based on what is called the public interest (and its unavailability), gives preference to the judicial decision to "always seek to extract, from the analysis concerning the purpose set by the law, the best solution for each specific case, because this is the solution that will imply the effective supremacy of the public interest".[26]

The fact is that these positions — although not rigid, as they represent type-ideas, as previously noted — end up influencing the way the authors interpret different institutes, with "clear connection with their political consequences or the operation of the state machine".[27] In other words, these positions are not confined to the academic world, but influence the way the Brazilian state develops.

This is due to the fact that exponents of the 20th century administrative law in Brazil — all with works analyzed in the thesis of Fernando Dias Menezes de Almeida — have occupied important functions within the bodies of the State, always in close contact with politics. This is what Carlos Ari Sundfeld called the "Order of Publicists":

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[23] Ibid., p. 368.
[24] Ibid., p. 370.
[25] Ibid., p. 371.
[26] Ibid., p. 374.
[27] Ibid., p. 341.

> Members of the Order of Publicists belong to a broader category: that of *jurists*, Law professionals with status of professors, men of the Academy. However, even this is only a fraction of the well-known group of Law *graduates*, whose importance in politics and in Brazilian society goes back to the beginning of our history.[28]

In other words, according to Sundfeld, people who make up this group move "between academic life and state bureaucracy — not, of course, *any bureaucracy*, but rather the superior state bureaucracy, the one that brings together well-paid Law professionals with access to the decisions of power".[29]

From this perception of publicists, Juliane Bento, Fabiano Engelmann, and Luciana Penna developed the concept of "publicism", which would constitute an internal dispute in the administrative law doctrine as to concepts and, ultimately, to the notions of what constitutes "the best State" or "good public administration". It is, therefore, a search for legitimacy of the speech, depending on the role — lawyer, attorney, prosecutor — played by each actor (or jurists).

> In other words, the mobilization of "publicism" is treated here not from the point of view of the internal logic of the theoretical production of "Administrative Law", but from the political meanings conferred at least by the agents of each era, as a peculiar mode of political intervention through the delimitation of the meanings of the institutions. (...) We start here with the assumption that, when certain meanings of institutions are legitimized, others are disqualified. Furthermore, the competition of jurists for the monopoly of the authority to classify something as "legal" or "illicit" translates into the legal area what, in fact, are the struggles for social domination and appropriation of power spaces (Penna, 2014, p. 40).[30]

Although analyzing a smaller number of works and authors, the three follow the same chronology of Fernando Dias Menezes de Almeida. Still,

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[28] Sundfeld, *Direito administrativo para céticos*, op. cit., p. 76, emphasis added.

[29] Ibid., p. 83, emphasis added.

[30] BENTO, Juliane Sant'Ana; ENGELMANN, Fabiano; PENNA, Luciana Rodrigues. Doutrinadores, políticos e "direito administrativo" no Brasil. *Política & Sociedade*, Florianópolis, v. 16, no. 37, p. 286-314, Sep./Dec. 2017. p. 287.

unlike him, they analyze the political positions that may be held by the counselors of administrative law. For what concerns this work, when reaching 1990, the three authors briefly dedicate themselves to the LIA, calling attention to the uncertainties that surround it. According to them, "the legal doctrine on corruption will offer an inventory of the arguments for building categories on the discussion that divides jurists",[31] that is, the LIA is an arena that makes it possible to visualize this doctrinal conflict in the attribution of meanings that has, as a background, a struggle for the legitimacy of each group's speech.

> Those who understand the LIA as positive, see it as a perfecter of the State and a way of establishing ethical-legal standards for the judgment of politicians. This is the majority of producers of constitutional and administrative doctrine, encouraged by the "guard of the Constitution" thesis.
> The minority pole, on the other hand, defends the balancing of legislators' intolerance to corruption that enact laws with dubious and unconstitutional techniques. It is composed of critics of legislative production with no acuity of a "demagogic moralizing tendency" and those fearful of the political and media exploitation of scandals, which would need a less passionate view regardless of the speech of hunting for the corrupt.[32]

In this sense, combining the thoughts of the exposed authors, the thesis defended here is that there would be two major positions in the doctrine that interprets the LIA: one mainly concerned with the public interest — the major pole in the classification of Bento, Engelmann, and Penna — as opposed to another, concerned with the individual rights of the accused — the minor pole in the classification of the three authors. This divergence would occur not only with regard to the wording of the LIA (the macro model of legality), but mainly in the way it is interpreted and applied by the doctrine and the professionals, especially by judges (the macro model of justiciability).

This thesis is supported when diagnosing how the doctrine has interpreted the scope of the sanctions provided for in Article 12, of the LIA. As will be evident, the interpretations reflect a deeper concern both with what is generally called the public interest and with the rights of defense of the accused.

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[31] Ibid., p. 308.
[32] Ibid., p. 308.

3. LIA sanctions: between restrictive and expansive interpretations

A first reading of Article 12 of the LIA scares: a *caput* that imposes the independence of the misconduct sanctions in relation to all the other sanctions of other natures; four items that seem to be repeated and combine a series of sanctions separated by commas and, finally, a simple sole paragraph that seems to try to balance all the preceding information. The impression is that the legislator lacked technical rigor and organization.

Starting with the *caput* of the article, since it states that the misconduct sanctions are independent from the criminal, civil, and administrative ones provided for in specific legislation, what would, then, be the nature of the administrative misconduct sanction? No consensus on this. In the bibliography included in this work, it can be said that there are four theses presented on the subject.

The first of them, which constituted the opinion of most of the consulted authors, holds that the legal nature of the sanctions is "hybrid",[33] that is, they are sanctions of various kinds. Thus, there are political (suspension of political rights), political-administrative (loss of civil service), administrative (prohibition to contract and receive tax or credit benefits or incentives), and civil sanctions (fine, reimbursement, and loss of goods or unlawfully added values).[34]

The second thesis adapts the classic notion of the sanctioning administrative law, arguing that it must "protect typically administrative illicit acts, those that should be punished either by the Public Administration or the Judiciary Branch, it does not matter, but that have the Public Administration as a background character in the passive pole of aggression".[35] In other words,

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[33] FAZZIO JÚNIOR, Waldo. *Improbidade administrativa*: doutrina, legislação e jurisprudência. 4. ed. Revised, updated, and expanded edition. São Paulo: Atlas, 2016. p. 487.

[34] In this sense: BEZERRA FILHO, Aluízio. *Atos de improbidade administrativa*: Lei 8.429/92 anotada e comentada. 2. ed. Revised and updated edition. Curitiba: Juruá, 2014. p. 345. PAZZAGLINI FILHO, Marino. *Lei de Improbidade Administrativa comentada*: aspectos constitucionais, administrativos, civis, criminais, processuais e de responsabilidade fiscal. 7. ed. Revised and updated edition. São Paulo: Atlas, 2018. p. 164. PESTANA, Marcio; AMARAL, Luiz Fernando de Camargo Prudente. *Improbidade administrativa na Lei 8.429/1992*. Belo Horizonte: Letramento; Casa do Direito, 2018. p. 133; RIZZARDO, Arnaldo. *Ação civil pública e ação de improbidade administrativa*. 3. ed. Revised, updated, and expanded edition. Rio de Janeiro: Forense, 2014. p. 525; ZIMMER JÚNIOR, Aloísio. *Corrupção e improbidade administrativa*: cenários de risco e a responsabilização dos agentes públicos municipais. São Paulo: Thomson Reuters Brasil, 2018. p. 163.

[35] Osório, *Teoria da improbidade administrativa*, op. cit., p. 200.

"the legal relations that result from the act of administrative misconduct are reduced to those in which the State is victimized".[36]

In this sense, the sanction to punish administrative offenses does not necessarily need to be applied by the public administration — as supported by the classic conception —, but it can also be applied by the Judiciary.[37] Thus, being misconduct a kind of administrative offense — because it affects the integrity of the public administration — its sanctioning has an administrative nature and is carried out in a judicial process.[38] That is, the "illicit of administrative misconduct [would be] as a 'middle ground' between the criminal and the civil illicit".[39]

The third thesis, however, refutes the second by stating that the nature of a sanction should not be analyzed on the bases of the material legal relationship, that is, whether it is a relationship between private parties or between them and the State.[40] Rather, it defends that the analysis must be based on the legal interest to be protected and the system used to apply the sanction. Thus, considering that the sanctions provided for in the LIA mostly affect — with the exception of the sanction of suspension of political rights — the patrimony of the dishonest, plus the fact that the system — procedure, competence, guarantees — for applying such sanctions is the civil procedural (with specificities of the LIA procedure), it can be stated that the legal nature of such sanctions is civil.[41]

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[36] SIMÃO, Calil. *Improbidade administrativa*: teoria e prática. 3. ed. Revised and updated edition. Leme: J. H. Mizuno, 2017. p. 72.

[37] Osório, *Teoria da improbidade administrativa*, op. cit., p. 201.

[38] Simão, *Improbidade administrativa*, op. cit., p. 73.

[39] Giacomuzzi, *A moralidade administrativa e a boa-fé da administração pública*, op. cit., p. 304.

[40] Garcia and Alves, *Improbidade administrativa*, op. cit., p. 625.

[41] Ibid., p. 626. Also, GAJARDONI, Fernando da Fonseca et al. *Comentários à Lei de Improbidade Administrativa*: lei 8.429, de 02 de junho de 1992. 3. ed. Revised, updated, and expanded edition. São Paulo: Revista dos Tribunais, 2014. p. 41. To mention other supporters of this third thesis, reference mention should be made of the survey made by Garcia and Alves, *Improbidade administrativa*, op. cit., p. 622, in footnote 11, of ch. 10. However, many of the authors cited were not part of this consultation. This also seems to be the understanding of the courts, specifically the Federal Supreme Court, as it is read in Specific Appeal (Agravo Regimental) AgRg in Petition 3.240/DF (BRASIL. Supremo Tribunal Federal (STF). *Agravo regimental na petição 3.240/DF*. Rapporteur: minister Teori Zavascki. Rapporteur for the decision Relator para acórdão: Minister Roberto Barroso. Brasília. Judgement on May 10, 2018. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=748003291>. Accessed on: 17 Aug. 2019), which dealt with the subjection of political agents to a double sanctioning regime (misconduct and criminal) and the absence of jurisdiction to these agents due to the prerogative of function in a misconduct action.

Finally, the last thesis points out that the sanctions provided for in the LIA may be more severe for the individual than the penalties provided for the punishment of some crimes in criminal law. Thus, for the authors supporting this thesis, "the interpretation to be given to the law of misconduct is equivalent to that of criminal laws",[42] which is why some authors defend the application of the objective imputation theory to the LIA as a containment "dike" of the arbitrary state punishment, especially when considering the 'sandy', 'unstable' land on which the acts of administrative misconduct are located".[43]

And what would be, by type, the sanctions provided for in the LIA? As stated at the beginning of this item, the sanctions provided for in the LIA are grouped (separated by commas) in four items, corresponding to the types of misconduct provided for in articles 9th (unjust enrichment), 10 (damage to the Treasury), 10-A (grant or improper application of financial or tax benefit), and 11 (public administration principles). In order to facilitate understanding, they can be divided into the following box.

Box 11

As sanções em espécie da LIA para cada tipo de improbidade

Article 12	Loss of illicit goods or values	Reimbursement for damage to the Treasury	Loss of civil service	Suspension of political rights	Civil fine	Prohibition to contract with the government or receive tax or credit benefits or incentives
Item I (article 9th)	Yes	Yes	Yes	Eight to 10 years	Up to three times the increase	10 years
Item II (article 10)	Yes	Yes	Yes	Five to eight years	Up to twice the damage	five years
Item IV (article 10-A)	No	No	Yes	Five to eight years	Up to three times the benefit	No
Item III (article 11)	No	Yes	Yes	Three to five years	Up to 100 times the remuneration	three years

Source: Authors' own elaboration.

[42] Harger, *Improbidade administrativa*, op. cit., p. 36.
[43] CAPEZ, *Improbidade administrativa*: limites constitucionais. 2. ed. São Paulo: Saraiva, 2015. p. 219.

Thus, it can be said that there are six sanctions provided for by the LIA, and some types of misconduct may not receive some of them: loss of goods or values unlawfully added to patrimony is not applicable to the conduct of articles 10-A and 11; reimbursement for the damage to the Treasury is not applicable to the act provided for in Article 10-A; there is no sanction for prohibiting contracting with the government or receiving tax or credit benefits or incentives for the acts of Article 10-A.

It is noted, based on the sanctions of suspension of political rights and prohibition to contract, that the misconducts provided for in Article 9th are considered more serious, since the times for suspension and prohibition to contract are longer compared to the other articles. However, as for the fine, possibly a conduct of Article 11 could be punished with a value higher than that of the previous articles.

Another relevant point is that there is no scope of each of the sanctions in the provision of Article 12, that is, there is no description of what function the agent should lose or what is the territorial extent for the agent (or third party) to be prevented from hiring, for example. Nor — although this is not the central theme of this article — is there a description of when a type of sanction should apply and when it should not, what leaves an ample room for the judge to choose which sanctions to apply.[44]

In the next six sub-items, the sanctions will be presented, but especially the main controversial points. As will be seen, to each of these points, there is sometimes a restrictive interpretation — which limits the scope of the sanction — and sometimes a broad one — which increases the sanction spectrum.

3.1 Loss of goods or values unlawfully added

It is a sanction applicable to acts that imply the receipt of illicit values (securities that represent economic value, such as money, negotiable instrument) or (personal and real) property — therefore, unjust enrichment — by the public agent (as stated in Article 9th) or by a third party (as provided

[44] Until Law No. 12.120/2009, there was intense discussion, both in doctrine and in the courts, whether the application of the LIA sanctions should be cumulative or not, that is, whether the sanctions could be applied in isolation (e.g., loss of function and fine only) or should all be applied together. Today, it has been agreed that the application can be isolated. However, there are not enough parameters to indicate to the judge when it is necessary to apply each of the sanctions. It all comes down to a notion of proportionality.

for in Article 6th). Thus, "it presumes the existence of a patrimonial evolution contemporary to the activity of the public agent, and the incompatibility with his remuneration and the *extraneus* that had contributed to the practice of the act or benefited from it".[45]

The amount or good unlawfully received, when recovered, must be returned to the injured legal entity (those of Article 1st, LIA) (according to Article 18, LIA), which is why it would be a kind of "disgorgement".[46] As for this refund, the doubt exists for situations in which the illicit amount received by the agent comes from a third party. For most of the doctrine, due to Article 18, such values or goods must return to the patrimony of the legal entity. For others, the distinction between a third party in good faith or not must be made, according to the provisions of Article 91, item II, of the Penal Code.[47]

It is questioned whether the sanction of the loss of goods unlawfully added to patrimony covers the goods of the dishonest agent obtained prior to the act of misconduct. In other words, it is discussed whether the goods acquired by the agent before the misconduct act would respond for the sanction or only those acquired after it.

Those who argue that it is not possible to maintain that, in addition to the good *in natura*, only account for sanction those "1) directly acquired through the practice of the misconduct act (money, shares, or real property, e.g.); 2) the thing obtained by specification (gold that becomes a jewel, e.g.); 3) the goods and values acquired by the subrogation of the illicit addition (house, apartment, motorboat, or car, e.g.)".[48] This is, therefore, a restrictive interpretation.

Other authors, however, giving the law a broad interpretation, understand that the entire property of the dishonest agent must respond, regardless of whether or not there is a connection with the conduct practiced, especially in the cases in which the goods added illegally have been lost by sale, assignment, or another factor.[49]

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45 Garcia and Alves, *Improbidade administrativa*, op. cit., p. 645.
46 Simão, *Improbidade administrativa*, op. cit., p. 756.
47 Ibid., p. 759.
48 Ibid., p. 760.
49 In this sense: DECOMAIN, Pedro Roberto. *Improbidade administrativa*. 2. ed. São Paulo: Dialética, 2014. p. 237.

3.2 The reimbursement for damage to the Treasury

Also provided for in Article 5th, of the LIA, for many authors, the reimbursement is not exactly a sanction, but a "return or restitution to the previous state",[50] that is, "aims to restore the *status quo*",[51] reflecting "a general duty of conduct expressed throughout the legal system".[52] Others understand that, although it is not punitive in nature, "it is a sanction of an indemnity nature".[53] The reimbursement is usually made by the monetary equivalent, although a specific form is admitted.

The doctrine discusses about the possibility of including, in the reimbursement for damage, community pain and suffering. This is a question related to the meaning of the Treasury which, at first, would only cover property damage, that is, material damage.[54] In this way, giving the concept a restrictive interpretation — to the exact meaning —, the damage to the Treasury could not cover nonpecuniary damages. On the other hand, the justification for its admissibility would be both in the broad interpretation of the concept of public patrimony[55] and in the need to repair the damages to the principles of public administration provided for in Article 11, which do not require material damage.[56]

3.3 Loss of civil service

It is about the dissolution of the relationship between the public agent and the government. The legal relationships of the public agent subject to sanction are those listed in Article 2nd, of the LIA, and the dissolution, which only operates after the decision becomes final and unappealable, is definite (not temporary). Therefore, once punished with this sanction, the agent ceases his relationship — statutory or contractual — and, to reoccupy a public function, a new investiture will be required.

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50 Rizzardo, *Ação civil pública e ação de improbidade administrativa*, op. cit., p. 541.
51 Garcia and Alves, *Improbidade administrativa*, op. cit., p. 647.
52 Harger, *Improbidade administrativa*, op. cit., p. 153.
53 Simão, *Improbidade administrativa*, op. cit., p. 761.
54 In this sense: Pestana and Amaral, *Improbidade administrativa na Lei 8.429/1992*, op. cit., p. 137.
55 Garcia and Alves, *Improbidade administrativa*, op. cit., p. 659.
56 Fazzio Júnior, *Improbidade administrativa*, op. cit., p. 509.

There are two issues widely discussed in the doctrine. The first is whether the sanction for loss of public service covers any function occupied by the dishonest agent, even if it is not the one in which his act was carried out.

Since the LIA did not provide for which function is affected by the sanction, those who defend that any function occupied by the agent can be reached, even if it has no relation to the misconduct act, rely on an interpretation of Article 20. Thus, if the LIA provided that the loss of the civil service only occurs at the moment the decision that established the sanction is final and unappealable, this is the time when the agent must lose the function he occupies, which may be the same in which he performed the act of misconduct or not.[57]

Hence why some judicial decisions could condition the effects to "eventual occupation of public office", that is, for the future.[58] Furthermore, by attributing an amplifying teleology to the sanction, it is alleged that the loss of the public function was provided to "extirpate from the Public Administration the one who exhibited unsuitability or moral disqualification and ethical deviation for the exercise of the public function".[59]

The authors who oppose to the expansion of the scope of the sanction, in turn, argue that there must be a causal link between the illegal conduct and the position used for that purpose. They add that the provisions that restrict rights cannot be interpreted broadly or by analogy.[60] Furthermore, if the teleology of the sanction was to "remove the dishonest from the Administration", as the supporters of the broad interpretation understand, this sanction should be applied to any and all cases of misconduct. Since this does not happen — many judges fail to apply it — this is not the purpose of the sanction.

The second question is whether the loss of civil service could be applied to public agents who had retired from it. It is a discussion similar to the previous one, since it analyzes a legal relationship between the government and the citizen that is different from the one in which the misconduct act was performed.

For the defenders of this possibility, "if the position, job, or function has been used to perpetrate the serious act of misconduct, it does not matter if the employee subsequently retired or not, the sanction will cause the loss of

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57 In this sense: Decomain, *Improbidade administrativa*, op. cit., p. 240.

58 Ibid., p. 242.

59 AGRA, Walber de Moura. *Comentários sobre a lei de improbidade administrativa*. Belo Horizonte: Fórum, 2017. p. 165. Also in this sense: Gajardoni, *Comentários à Lei de Improbidade Administrativa*, op. cit., p. 179.

60 In this sense: Bezerra Filho, *Atos de improbidade administrativa*, op. cit., p. 349.

retirement".[61] The same teleological argument of the previous question would apply to this issue,[62] in order to increase the scope of the sanction for loss of civil service.

As for those who opt for a restrictive interpretation of the norm, "the revocation of retirement does not constitute a sanction provided for in the LIA. And its extinction does not constitute a result from the loss of the civil service subsequently decreed".[63] Again, it is argued that there can be no analogy or broad interpretation in sanction matters.

3.4 Suspension of political rights

It is a suspension of political rights and not a loss, as provided for in Article 15, of the 1988 Constitution of the Federative Republic of Brazil. There are many legal consequences for the individual who has his political rights suspended, which, of course, does not represent a status of "non-citizen, since several rights remain, including the right to exercise civilian acts, such as negotiating and performing economic activities, petitioning, having a passport",[64] among others.[65]

In the case of action against misconduct, the suspension of political rights does not occur automatically, that is, it must be expressly declared — and set the time, depending on the misconduct act practiced — in the decision. And,

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[61] Agra, *Comentários sobre a lei de improbidade administrativa*, op. cit., p. 166.

[62] Some authors, although they understand that the annulment of the retirement act is not applicable, defend that this is desirable, reason why the law should be changed to provide for this sanction. In this sense: Garcia and Alves, *Improbidade administrativa*, op. cit., p. 703.

[63] Pazzaglini Filho, *Lei de Improbidade Administrativa comentada*, op. cit., p. 168.

[64] Rizzardo, *Ação civil pública e ação de improbidade administrativa*, op. cit., p. 550.

[65] As Agra, *Comentários sobre a lei de improbidade administrativa*, op. cit., p. 171 summarizes: "To fully enjoy political rights means to be able to register for elections, to be eligible for candidacies for elective positions or for nominations for certain non-elective public positions (articles 87; 89, VII; 101 and 131, item 1, all of 1988 Constitution of the Federative Republic of Brazil), to participate in suffrages, to vote in elections, plebiscites, and referendums, to submit bills through the popular initiative (articles 61, items 2 and 29, XI, both of 1988 Constitution of the Federative Republic of Brazil), and to propose citizen suit (Article 5, LXXIII, of 1988 Constitution of the Federative Republic of Brazil). Likewise, those who are deprived of the political rights cannot join a political party (Article 62 of Law No. 5.682/71) or invest in any public office, even non-elective ones (Article 5, II, Law 8.112/90). They cannot be director or editor in chief of a newspaper or periodical either (Article 7, Item 1, of Law 5.520/67), obtain a passport, attend public college, and hold office in a union entity (Article 530, V, of the Consolidation of Labor Laws). Thus, it is clear that the loss of political rights is much stronger than the sanctioning ineligibility, in which the citizen is only deprived of his prerogative to run for public office".

as in the case of the sanction of loss of civil service, the suspension of political rights is only effective when the decision is final and unappealable.

There are those who understand that the suspension of political rights automatically implies the loss of the public function, as the exercise of this would depend on the fullness of those.[66] Others, however, prefer a restrictive interpretation, understanding that the sanctions are autonomous, which is why the application of the suspension of political rights does not lead to the loss of civil service.

3.5 Civil fine

It is a punitive and non-indemnity sanction to repair damage, aiming at reaching the patrimony of those who practice the misconduct act. Thus, it is an autonomous sanction, independent of the occurrence of damage and that reverts to the legal entity injured by the misconduct act. Its purpose, therefore, is punitive.

Two doubts are recurring in relation to this sanction. The first refers to the transferability to the dishonest agent's heirs, if he dies. According to Article 8th, of the LIA, the successor of the dishonest agent is liable for the damages to the treasury and the damage to the public property caused by the deceased he succeeds. In principle, the civil fine would not be transmitted. For those who do not admit transmission, it would be a constitutional guarantee, which is why the interpretation must be restrictive.[67] Furthermore, since the fine is a punishment, it would have a very personal character, which is why the successor cannot be held liable for it.[68]

As for those who defend transmission, the fine for misconduct is civil and not criminal, that is, the constitutional guarantee could be relativized, and the sanction could have its spectrum increased. In addition, the fine would affect the assets of the estate, not that of the heir.[69]

The second issue is related to the possibility of adding or not the amounts of civil fine in the case of a joinder of offenses,[70] that is, if a conduct can be classified

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66 Rizzardo, *Ação civil pública e ação de improbidade administrativa*, op. cit., p. 545.

67 The non-transferability of penalties is provided for in Article 5th, XLV, 1988 Constitution of the Federative Republic of Brazil.

68 In this sense: Pestana e Amaral, *Improbidade Administrativa na Lei 8.429/1992*, op. cit., p. 156.

69 In this sense: Garcia e Alves, *Improbidade Administrativa*, op. cit., p. 361.

70 The substantive joinder of offenses and the joinder of offenses are provided for in the Penal Code in articles 69 and 70, respectively.

in more than one type — for example, in articles 10 and 11 —, if it would be possible to apply more than one fine — of items II and III, of Article 12.

For these cases, those who defend the impossibility of cumulating sanctions allowing for temporary or quantitative variations — not only the civil fine, but the suspension of political rights, prohibition to contract or receive tax or credit benefits — argue that thinking otherwise would be to violate the *non bis in idem* principle.[71] Others, however, understand that the sum of sanctions is possible, that is, they accept a broad interpretation of the civil fine sanction,[72] so that it would be possible to apply more than one fine to the same conduct.

3.6. The prohibition to contract with the government or receive tax or credit benefits or incentives

The full sanction is "prohibition to contract with the government or receive tax or credit benefits or incentives, directly or indirectly, even though through a legal entity of which he is a majority shareholder". Although, in truth, there are two sanctions, the majority of the doctrine understands that they must be applied together, that is, both "contract" and "receive", and cannot be fragmented.[73]

The sanction has punitive and preventive function, so that the government does not re-contract, for a given period, with a dishonest individual or legal entity. By temporarily banning the rights of negotiation with the government, the sanction prevents the convict from participating in bidding or other selective processes aimed at contracting goods or services, including the exemption from bidding process or the sole-source contract procedures.

Regarding tax or credit benefits,[74] they do not refer to unconditional ones, that is, intended for the whole community without the need to meet specific requirements or consideration, "because these benefits, in fact, do not represent a privilege, but a fiscal policy measure adopted in favor of the community, being granted in a generic way".[75]

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71 Harger, *Improbidade administrativa*, op. cit., p. 64.
72 Rizzardo, *Ação civil pública e ação de improbidade administrativa*, op. cit., p. 556.
73 Pestana and Amaral, *Improbidade administrativa na Lei 8.429/1992*, op. cit., p. 170.
74 On the kinds, check, Simão, *Improbidade administrativa*, op. cit., p. 823.
75 Garcia and Alves, *Improbidade administrativa*, op. cit., p. 715.

Along with the sanction of loss of function, this sanction of prohibition of contracting and receiving tax benefits is quite controversial as to its scope. There are at least three issues discussed.

The first is whether the sanction affects all legal entities in which the punished person is a majority shareholder. Here, the individualization of the sanction is discussed. As some maintain, it would be unconstitutional precisely because, although applied to an individual, its effects are extended to one or more legal entities in which the convicted agent is a majority shareholder or even to one or more individuals with whom the convicted agent could indirectly benefit (examples: spouse and children).[76]

For those seeking to increase the scope of the sanction, the LIA, in doing so, would have automatically disregarded the legal personality in order to prevent fraud.[77]

However, those who do not admit this extension of the sanction consider that the legal personalities (company and partners) are different, that the majority shareholder is not always the controller, and that a person can be a shareholder in several companies (independent and in different commercial branches) at the same time.[78] Thus, the prohibition of contracting or receiving benefits could disproportionately cause harm to companies that had nothing to do with the act of misconduct and in which the convicted person does not even have a relevant participation, such as the large public corporations.[79]

A second doubt concerns the extent of this sanction: does it reach all the Branches (Executive, Legislative, and Judiciary) and all entities of the federation (Union, states, municipalities, Federal District, and territories)? In other words, if the public or private agent were convicted on the grounds of a misconduct act in a contract with municipality X, would he automatically be prohibited from contracting with the Union or municipality Y?

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[76] In this sense: Harger, *Improbidade administrativa*, op. cit., p. 100. The point is also being discussed in a direct action for the declaration of unconstitutionality (ADI) (Federal Supreme Court, ADI 4295, rapporteur Minister Marco Aurélio).

[77] In this sense: Garcia and Alves, *Improbidade administrativa*, op. cit., p. 716. Fazzio Júnior, *Improbidade administrativa*, op. cit., p. 521.

[78] In this sense: SUNDFELD, Carlos Ari; SOUZA, Rodrigo Pagani. A Lei de Improbidade e a proibição de receber benefícios fiscais ou creditícios. *Revista da Faculdade de Direito da UERJ*, Rio de Janeiro, no. 29, p. 2748, June 2016. p. 42.

[79] In this sense: Simão, *Improbidade administrativa*, op. cit., p. 647.

Some authors are concerned with the principle of the preservation of the company.[80] Thus, for them, the ban should be related to the entity harmed by the misconduct act or the contract in which the misconduct occurred, and not universally.[81] Even the prohibition of receiving tax or credit benefits could be limited to some kinds and in the federative sphere where the act was practiced.[82]

Others understand that the teleology of the sanction is to prevent the government from contracting again, for a given period, with dishonest people, which is why the geographical or institutional limitation would not make sense. Therefore, they give a broad interpretation to the sanction concerning the geographical aspect.[83]

The third unknown is whether the sanction prohibiting contracting or receiving tax or credit benefits would automatically affect ongoing contracts or benefits. It is a discussion about the perfect legal act.

For some, favorable to the scope expansion, when there is a sanction prohibiting contracting with the government, the constitutional guarantee of the perfect legal act[84] is removed. This is because in administrative contracts the contractor must, under the terms of Article 55, XIII, of Law No. 8.666/1993, maintain the license conditions throughout the whole implementation of the contract.[85]

For others who do not admit this interpretation, in addition to the need to ensure constitutional guarantee, it is about preventing retroactive penalties.[86]

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[80] According to ACCIOLY, João Pedro. *Improbidade administrativa e proibição de contratar com o poder público.* Rio de Janeiro: Lumen Juris, 2017. p. 58: "Companies cannot be understood or punished, as if they were invariably a monolithic block. In rules, large corporations are subdivided into managements, directorships, or agencies — which usually operate with relative autonomy. If the present sanction is always applied in absolute terms, companies will often be disproportionately punished, and their employees, society, and the Brazilian State will also be penalized — given the aforementioned economic and social roles of the companies".

[81] Ibid., p. 167 and 168.

[82] In this sense: Sundfeld and Souza, *A Lei de Improbidade e a proibição de receber benefícios fiscais ou creditícios*, op. cit., p. 31.

[83] In this sense: NEVES, Daniel Amorim Assumpção; OLIVEIRA, Rafael Carvalho Rezende. *Manual de improbidade administrativa*: direito material e processual. 7. ed. Revised, updated, and expanded edition. Rio de Janeiro: Forense; São Paulo: Método, 2019. p. 255. FERRARESI, Eurico. *Improbidade administrativa*: Lei 8.429/1992 comentada artigo por artigo. Rio de Janeiro: Forense; São Paulo: Método, 2011. p. 148.

[84] Protection is provided for in Article 5th, XXXVI, of the 1988 Constitution of the Federative Republic of Brazil.

[85] Garcia and Alves, *Improbidade administrativa*, op. cit., p. 713.

[86] In this sense: Harger, *Improbidade administrativa*, op. cit., p. 157.

Likewise, care must be taken when terminating ongoing contracts, as this may cause more damage to the administration itself.[87]

Once again, therefore, it appears that one reading intends to give more scope to the sanction — reaching all contracts — while another tends to restrict its spectrum — admitting only future effects.

4. Final considerations

From what has been presented, it appears that, given the uncertainties about the scope of the sanctions provided for in Article 12, of the LIA, the literature sometimes adopts a restrictive interpretation, sometimes a broad one.

The first is characterized by the non-increase in the scope and range of the sanction, that is, in the intensity of the punishment. Thus, if a given norm does not detail which situations are reached by it, the interpretation cannot broaden its spectrum. Generally, the norms that restrict rights — such as those of a sanctioning nature, mainly within the scope of criminal or punitive law — receive this treatment, giving the defendant a favorable interpretation.[88]

The broad (or extensive) interpretation, in turn, goes in the opposite direction, that is, it seeks to expand the scope and range of the norm, in order to allow that more legal situations are reached by it. As a result, the punitive intensity and the chances of incidence of the sanction are increased. Therefore, more situations can be achieved by the punitive effects.

The thesis of this study is that the two types of interpretation reflect the ideal types of administrative law doctrinal production, considering the classification proposed by Fernando Dias Meneses de Almeida. Thus, while the broad interpretation aims to protect what is conventionally called the public interest — the public property, in the case of the LIA —, the restrictive interpretation is concerned with protecting the rights of defense of the accused. The first, therefore, would align with the publicist position,

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[87] In this sense: Accioly, *Improbidade administrativa e proibição de contratar com o poder público*, op. cit., p. 71.

[88] This is an extension of the principle of legality, which, according to BATISTA, Nilo. *Introdução crítica ao direito penal brasileiro*. 10. ed. Rio de Janeiro: Revan, 2005. p. 75: "The total inapplicability of the analogy, given the principle of legality, to any and all norms that define crimes and provide for or aggravate penalties, stands out, whose logical expansion, by any process, is strictly forbidden, there being on this point unanimity in Brazilian doctrine".

while the second would align with the subjectivist position, within the classification adopted.

On the whole, generally for those who are responsible for the prosecution, the contours must be expanded, in order to increase the scope and the range of punishments against dishonest agents; in the opposite sense, generally for those who defend, the contours must be restricted (or strict), so as to give the sanctioning norm an interpretation favorable to the defendant. These are two speeches that end up mixing with judicial practice and reflecting the political nature of the LIA, as highlighted in the text by Juliane Sant'Ana Bento, Fabiano Engelmann, and Luciana Rodrigues Penna. There certainly is a dispute for the legitimacy of the speech based on the interpretation of the norm.

Therefore, the controversies over the legal outline of the LIA sanctions are no accident. They reflect this continuing internal dispute of administrative law among "new publicists". Evidently, in times of "*Lava Jato*" and a strong anti-corruption speech, this dispute over the meanings of the LIA and probity intensified, being the recent decision of the Federal Supreme Court on the imprescriptibility of reimbursement for damage to the Treasury an example of this dispute.[89]

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[89] This is the Extraordinary Appeal (RE) 852.475/SP, rapporteur for the decision: minister Edson Fachin, on trial on August 8, 2018. In the first session of the trial, the rapporteur minister, Alexandre de Moraes, denied the appeal of the Prosecution Office of São Paulo State, maintaining the decision that had recognized the quinquennial prescription of the request for reimbursement for the Treasury due to an act of administrative misconduct. He therefore recognized, interpreting Article 37, item 5, of 1988 Constitution of the Federative Republic of Brazil, that the reimbursement to the Treasury is not imprescriptible, being subject to the limitation period of five years. Already in the first session, the vote was accompanied by ministers Roberto Barroso, Luiz Fux, Dias Toffoli, Ricardo Lewandowski, and Gilmar Mendes. Two votes were dissenting (recognizing the imprescriptibility), namely, ministers Edson Fachin and Rosa Weber, but the majority for the prescriptibility was already formed. Afterwards, the session was suspended. Between this first session and the second, a week went by, during which the Federal Attorney General of Brazil, Raquel Dodge, visited some ministers, took memorials, and gave lectures at events dedicated to the topic of corruption. In the second session, after the votes of ministers Marco Aurélio, not granting the appeal (recognizing the prescriptibility), Celso de Mello and Carmen Lúcia, who granted it (recognizing the imprescriptibility), ministers Luiz Fux and Roberto Barroso adjusted their votes to uphold the appeal and acknowledge the imprescriptibility. As minister Barroso's vote shows, his concern was to not leave unpunished the acts of corruption. So, the majority was modified to recognize the imprescriptibility of the reimbursement to the Treasury, substantiating the following thesis: "The actions of reimbursement to the treasury based on the practice of intentional act typified in the Law of Administrative Misconduct are imprescriptible". On the week between the trial sessions, check out the reports by AFFONSO, Julia. "Vitória histórica", diz Raquel a todos os procuradores. *O Estado de S. Paulo*. São Paulo, 8 Aug. 2018. Estadão Blogs — Fausto Macedo. CURY, Teo. Raquel diz que fixar prazo em ação de improbidade terá "enorme impacto negativo". *O Estado de S. Paulo*. São Paulo, 6 Aug. 2018. Estadão Blogs — Fausto Macedo.

This, in a way, should not be ignored by those responsible for judging actions of administrative misconduct. The moment the judge chooses a specific author to support his decision, he, albeit unconsciously, is making a choice about a certain line of thought: either more restrictive or more expansive. Or either more aligned to the protection of the "public interest" or to the protection of the individual rights of defense.

Finally, since the legislator offered the LIA enforcer six sanctions designed to punish various types of misconduct without attributing to each of them, individually, the specific sanctions — as in criminal law or in Traffic Law —, and considering that there are few parameters offered by the LIA to carry out the dosimetry of the sanctions (only the severity of the conduct, the extent of the damage caused, and the agent's financial gain), a lot of discretion space was left to the judge when setting sanctions. Although this topic is not the subject of this work, it certainly raises concerns.

References

ACCIOLY, João Pedro. *Improbidade administrativa e proibição de contratar com o poder público*. Rio de Janeiro: Lumen Juris, 2017.

AFFONSO, Julia. "Vitória histórica", diz Raquel a todos os procuradores. *O Estado de S. Paulo*. São Paulo, 8 Aug. 2018. Estadão Blogs — Fausto Macedo. Available at: <https://politica.estadao.com.br/blogs/faustomacedo/vitoria-historica-diz-raquel-a-todos-os-procuradores/>. Accessed on: 27 Jan. 2019.

AGRA, Walber de Moura. *Comentários sobre a lei de improbidade administrativa*. Belo Horizonte: Fórum, 2017.

ALMEIDA, Fernando Dias Menezes de. *Formação da teoria do direito administrativo no Brasil*. São Paulo: Quartier Latin, 2015.

ARANTES, Rogério Bastos. *Ministério Público e política no Brasil.* São Paulo: Educ; Sumaré; Fapesp, 2002.

BATISTA, Nilo. *Introdução crítica ao direito penal brasileiro*. 10. ed. Rio de Janeiro: Revan, 2005.

BENTO, Juliane Sant'Ana; ENGELMANN, Fabiano; PENNA, Luciana Rodrigues. Doutrinadores, políticos e "direito administrativo" no Brasil. *Política & Sociedade*, Florianópolis, Vol. 16, no. 37, p. 286-314, Sept./Dec.

2017. Available at: <https://periodicos.ufsc.br/index.php/politica/article/view/21757984.2017v16n37p286>. Accessed on: 27 Jan. 2019.

BEZERRA FILHO, Aluízio. *Atos de improbidade administrativa*: Lei 8.429/92 anotada e comentada. 2. ed. Revised and updated edition. Curitiba: Juruá, 2014.

BRASIL. *Constituição da República Federativa do Brasil (1988).* (Atualizada até Emenda 99/2017). Senado Federal: Secretaria-Geral da Mesa: Secretaria de Informação legislativa. Available at: <http://legis.senado.leg.br/legislacao/ListaTextoSigen.action?norma=579494&id=16434803&idBinario=16434817&mime=application/rtf>. Accessed on: 27 Jan. 2019.

____. *Decreto-Lei nº 2.848, de 07 de dezembro de 1940 (Código Penal — CP).* Presidência da República: Casa Civil: Subchefia para assuntos jurídicos. Available at: <www.planalto.gov.br/ccivil_03/decretolei/Del2848compilado.htm>. Accessed on: 27 Jan. 2019.

____. *Lei 7.347, de 24 de julho de 1985 (Lei da Ação Civil Pública — LACP).* Disciplina a ação civil pública de responsabilidade por danos causados ao meio ambiente, ao consumidor, a bens e direitos de valor artístico, estético, histórico, turístico e paisagístico (VETADO) e dá outras providências. (Text updated until access date). Available at: <www.planalto.gov.br/ccivil_03/Leis/L7347orig.htm>. Accessed on: 25 July 2018.

____. *Lei 8.249, de 02 de junho de 1992 (Lei de Improbidade Administrativa — LIA).* Dispõe sobre as sanções aplicáveis aos agentes públicos nos casos de enriquecimento ilícito no exercício de mandato, cargo, emprego ou função na administração pública direta, indireta ou fundacional e dá outras providências. (Text updated until access date). Presidência da República: Casa Civil: Subchefia para assuntos jurídicos. Available at: <www.planalto.gov.br/ ccivil_03/LEIS/L8429.htm>. Accessed on: 27 Jan. 2019.

____. *Lei 8.666, de 21 de junho de 1993 (Lei Geral de Licitações — LGL).* Regulamenta o artigo 37, inciso XXI, da Constituição Federal, institui normas para licitações e contratos da Administração Pública e dá outras providências. (Text updated until access date). Presidência da República: Casa Civil: Subchefia para assuntos jurídicos. Available at: <www.planalto.gov.br/ ccivil_03/LEIS/L8666cons.htm>. Accessed on: 27 Jan. 2019.

____. Supremo Tribunal Federal (STF). *Agravo Regimental na Petição 3.240/DF.* Relator: ministro Teori Zavascki. Relator para acórdão: ministro Roberto

Barroso. Brasília. Julgamento em 10/5/2018. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=748003291>. Accessed on: 17 Aug. 2019.

____. Supremo Tribunal Federal (STF). *Informativo nº 909*. Brasília. 30 de julho a 3 de agosto de 2018. Available at: <www.stf.jus.br//arquivo/informativo/documento/informativo909.htm>. Accessed on: 27 Jan. 2019.

____. Supremo Tribunal Federal (STF). *Informativo nº 910*. Brasília. 6 a 10 de agosto de 2018. Available at: <www.stf.jus.br//arquivo/informativo/documento/informativo910.htm>. Accessed on: 27 Jan. 2019.

____. Supremo Tribunal Federal (STF). *Recurso Extraordinário 852.475/SP*. Relator: ministro Alexandre de Moraes. Relator para acórdão: ministro Edson Fachin. Brasília. Julgamento em 8/8/2018. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=749427786>. Accessed on: 17 Aug. 2019.

CAPEZ, Fernando. *Improbidade administrativa*: limites constitucionais. 2. ed. São Paulo: Saraiva, 2015.

CURY, Teo. Raquel diz que fixar prazo em ação de improbidade terá "enorme impacto negativo". *O Estado de S. Paulo*. São Paulo, 6 ago. 2018. Estadão Blogs — Fausto Macedo. Available at: <https://politica.estadao.com.br/blogs/ fausto-macedo/raqueldizquefixarprazoemacaodeimprobidadeteraenorme-impacto-negativo/>. Accessed on: 27 Jan. 2019.

DECOMAIN, Pedro Roberto. *Improbidade administrativa*. 2. ed. São Paulo: Dialética, 2014.

FAZZIO JÚNIOR, Waldo. *Improbidade administrativa:* doutrina, legislação e jurisprudência. 4. ed. Revised, updated, and expanded edition. São Paulo: Atlas, 2016.

FERRARESI, Eurico. *Improbidade administrativa*: Lei 8.429/1992 comentada artigo por artigo. Rio de Janeiro: Forense; São Paulo: Método, 2011.

FERRAZ JUNIOR, Tércio Sampaio. *Introdução ao estudo do direito*: técnica, decisão, dominação. São Paulo: Atlas, 1990.

____. *Função social da dogmática jurídica*. 2. ed. São Paulo: Atlas, 2015.

FIGUEIREDO, Marcelo. Comentário ao artigo 37. In: BONAVIDES, Paulo; MIRANDA, Jorge; AGRA, Walber de Moura (Coord.). *Comentários à Constituição Federal de 1988*. Rio de Janeiro: Forense, 2009. p. 709-729.

GAJARDONI, Fernando da Fonseca et al. *Comentários à Lei de Improbidade Administrativa:* lei 8.429, de 02 de junho de 1992. 3. ed. Revised, updated, and expanded edition. São Paulo: Revista dos Tribunais, 2014.

GARCIA, Emerson; ALVES, Rogério Pacheco. *Improbidade administrativa*. 9. ed. São Paulo: Saraiva, 2017.

GIACOMUZZI, José Guilherme. *A moralidade administrativa e a boa-fé da administração pública:* o conteúdo dogmático da moralidade administrativa. 2. ed. Revised and expanded edition. São Paulo: Malheiros, 2013.

HARGER, Marcelo. *Improbidade administrativa*: comentários à Lei nº 8.429/92. São Paulo: Atlas, 2015.

NEVES, Daniel Amorim Assumpção; OLIVEIRA, Rafael Carvalho Rezende. *Manual de improbidade administrativa*: direito material e processual. 7. ed. Revised, updated, and expanded edition. Rio de Janeiro: Forense; São Paulo: Método, 2019.

OSÓRIO, Fábio Medina. *Teoria da improbidade administrativa*: má gestão pública, corrupção, ineficiência. 4. ed. Revised and updated edition. São Paulo: Thomson Reuters Brasil, 2018.

PAZZAGLINI FILHO, Marino. *Lei de Improbidade Administrativa comentada*: aspectos constitucionais, administrativos, civis, criminais, processuais e de responsabilidade fiscal. 7. ed. Revised and updated edition. São Paulo: Atlas, 2018.

PESTANA, Marcio; AMARAL, Luiz Fernando de Camargo Prudente. *Improbidade administrativa na Lei 8.429/1992*. Belo Horizonte: Letramento; Casa do Direito, 2018.

RIZZARDO, Arnaldo. *Ação civil pública e ação de improbidade administrativa*. 3. ed. Revised, updated, and expanded edition. Rio de Janeiro: Forense, 2014.

SIMÃO, Calil. *Improbidade administrativa*: teoria e prática. 3. ed. Revised and updated edition. Leme: J. H. Mizuno, 2017.

SUNDFELD, Carlos Ari. *Direito administrativo para céticos*. 2. ed. Revised and expanded edition. São Paulo: Malheiros, 2014.

____; SOUZA, Rodrigo Pagani. A Lei de Improbidade e a proibição de receber benefícios fiscais ou creditícios. *Revista da Faculdade de Direito da UERJ*, Rio de Janeiro, no. 29, p. 2748, June 2016. Available at: <www.epublicacoes.uerj.br/index.php/rfduerj/article/view/23668>. Accessed on: 27 Jan. 2019.

TEIXEIRA, João Pedro Accioly. Os contornos objetivos da proibição de contratar com o Poder Público por improbidade administrativa. *Revista Brasileira de Direito Público*, Belo Horizonte, no. 54, p. 185216, July/Sept. 2016.

ZIMMER JÚNIOR, Aloísio. *Corrupção e improbidade administrativa*: cenários de risco e a responsabilização dos agentes públicos municipais. São Paulo: Thomson Reuters Brasil, 2018.