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Constitutional principles of disciplinary law in Brazil and their equivalents in the American Convention on Human Rights*

Princípios constitucionais do direito disciplinar no Brasil e seus equivalentes na Convenção Americana de Direitos Humanos

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ABSTRACT

The present work analyzes the constitutional principles applicable to disciplinary law in Brazil, situated within the framework of administrative sanctioning law and the American Convention on Human Rights (Achr). It examines the historical evolution, dogmatic foundations, and the importance of the principles of legality, proportionality, reasonableness, adversarial proceedings, broad defense, retroactivity of the most favorable rule, and

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the presumption of innocence. It highlights that disciplinary law must respect the inviolable core of fundamental rights and align itself with the constitutional principles inherent to the democratic rule of law and international human rights conventions. The study proposes an approach that balances sanctioning efficiency and the protection of rights, highlighting the necessary hermeneutics to prevent democratic setbacks, based on decisions from Brazilian courts and the Inter-American Court.

KEYWORDS

sanctioning administrative law — disciplinary law — Federal Constitution — constitutional principles — American Convention on Human Rights

RESUMO

O presente trabalho analisa os princípios constitucionais aplicáveis ao direito disciplinar no Brasil, inserido no direito administrativo sancionador e na Convenção Americana de Direitos Humanos (Cadh). Examina a evolução histórica, os fundamentos dogmáticos e a importância dos princípios da legalidade, proporcionalidade, razoabilidade, contraditório, ampla defesa, retroatividade da norma mais benéfica e presunção de inocência. Destaca que o direito disciplinar, deve respeitar núcleos intangíveis dos direitos fundamentais e alinhar-se aos princípios constitucionais inerentes ao estado democrático de direito e às convenções internacionais de direitos humanos. Propõe uma abordagem que equilibra eficiência sancionadora e proteção de direitos, ressaltando a hermenêutica necessária para evitar retrocessos democráticos, com base em decisões dos tribunais brasileiros e da Corte Interamericana.

PALAVRAS-CHAVE

direito administrativo sancionador — direito disciplinar — Constituição Federal — princípios constitucionais — Convenção Americana de Direitos Humanos

1. Introduction

This aim of this work is to reflect on the constitutional principles of disciplinary law in Brazil, with reference to the jurisprudence of the Brazilian higher courts and the Inter-American Court of Human Rights (IACHR). For this

purpose, it is necessary to contextualize disciplinary law within the spectrum of sanctioning administrative law, as the supposed autonomy of disciplinary law with respect to the latter is a point of contention.

In Brazil, the first work with the title *Direito administrativo sancionador* was by Fabio Medina Osório, published in the year 2000 in *Revista dos Tribunais*. This text pioneered academic study in the area. Later, in 2004, the same author established the "Principles of sanctioning administrative law" module on the Master's and PhD courses at the Faculty of Law at Universidade Federal do Rio Grande do Sul.

A brief survey of the current landscape reveals a multiplicity of "Sanctioning Administrative Law" modules in postgraduate courses at law schools in Brazilian universities.[1]

Furthermore, in 1999, in an article published in *Revista de Administración Pública*, n. 149, p. 487-522, Medina Osório introduced a new administrative sanction concept to Brazilian law, consolidated in *Direito administrativo sancionador* (2000),[2] which changed the subjective paradigm that governed administrative sanctions, regarding established national and even European doctrine. Based on a solid understanding of administrative law and the fact that administrative sanctions may also be applied by judicial authorities, it was argued that the legislator could, according to democratic principles, typify infractions and sanctions disciplined by administrative law and thus delegate to the Judiciary the prerogative to apply sanctions.

Based on this reasoning, the author argued that administrative law does not have an exclusively statutory nature—i.e., that it regulates and disciplines only the activities of public administration—but also the function of regulating legal assets or values directly protected by the Constitution, which are substantive in character. In this way, not only was a new concept presented, but also a substantial conception of administrative law, challenging a long-held tradition in Brazilian and European doctrine.[3]

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1 The LL.M Program in Administrative Sanctioning Law, offered by Instituto Brasileiro de Mercado de Capitais (Ibmec) and Faculdade Presbiteriana Mackenzie. Extension course at Instituto de Direito Administrativo Sancionador (Idasan) and Escola Superior de Advocacia. Postgraduate degree in administrative law with an emphasis on administrative sanctioning law at Instituto Brasileiro de Ensino, Desenvolvimento e Pesquisa (IDP).

2 OSÓRIO, Fábio Medina. *Direito administrativo sancionador*. São Paulo: Thomson Reuters Brazil, 2000.

3 Emerson Garcia and Rogério Pacheco Alves, meanwhile, refute the idea that improbity pertains to administrative sanctioning law and that its sanctions belong to this area of law, arguing that "they bear characteristics of a civil nature, resulting in restrictions on the miscreant in the legal sphere based on a methodology of the same nature […]." GARCIA, Emerson; ALVES, Rogério Pacheco. *Administrative misconduct*. 8th ed. São Paulo: Saraiva, 2014. p. 617-628. For

In this context, a new understanding of administrative sanctions was outlined as follows:

> An administrative sanction constitutes an injury or penalty, since it has afflictive effects, of a general and potentially future scope, imposed by the Public Administration, considered materially, and by the Judiciary or public law entities, on a public official, individual or legal entity, whether or not they are subject to a special relationship of subjection to the State, due to illegal conduct defined in a prohibitive norm, with a suppressive or disciplinary purpose, within the framework of the formal and material application of Administrative Law. The suppressive or punitive purpose encompasses the disciplinary objective, but it is worth identifying this inclusion, to avoid doubts.[4]

Disciplinary law, at the same time, does not exhibit peculiarities that justify a different treatment, at the doctrinal level, from administrative sanctioning law. As is well-known, administrative sanctions law emerged from an interpretation of state enforcement powers and has thus moved closer to criminal law, especially since the beginning of the 20th century, under the influence of the sanction theory.[5]

Odete Medauar, "[the] disciplinary process, strictly speaking, is the means of determining the responsibility, for functional infractions, of an identified employee. In general, the statutes use this instrument in relation to conduct that gives rise to serious penalties, such as suspension of more than thirty days and dismissal. Traditionally, the statutes provide for the following phases of the disciplinary process: initiation, investigation, defense, report, judgment. The federal statute indicates three phases, in art. 151: initiation; administrative inquiry, encompassing instruction, defense and report; and judgment". MEDAUAR, Odete. *Direito administrativo moderNo*. 23. ed. Belo Horizonte: Fórum, 2023. p. 355.

4 OSÓRIO, Fábio Medina. *Direito administrativo sancionador*. 9. ed. rev., atual. e ampl. São Paulo: Thomson Reuters Brasil, 2023. p. 108.

5 Cesare Beccaria, in his seminal work *Dos delitos e das penas*, highlighted the proportionality and preventive nature of penalties, consolidating the principle of legality as a basis for avoiding arbitrariness: BECCARIA, Cesare. *Dos delitos e das penas*. Lisbon: Fundação Calouste Gulbenkian, 2017. p. 64. Jeremy Bentham, according to his utilitarian perspective, argued that sanctions should maximize social welfare and be applied only when their consequences are beneficial to the community: BENTHAM, Jeremy. *Los principios de la moral y la legislación*. Buenos Aires: Claridad, 2008. Claus Roxin proposed positive general prevention, arguing that the sanction should reinforce the validity of the legal system and prevent future crimes, in line with the principle of culpability: ROXIN, Claus. *Derecho penal*: parte general. Madri: Editorial Civitas, 1997. p. 219. Günther Jakobs and Manuel Cancio Meliá advanced the functionalist theory, which sees punishment in terms of a risk management instrument used to protect the social order, underpinning their theory of "criminal law of the enemy": JAKOBS, Günther; MELIÁ, Manuel Cancio. *Derecho Penal del Enemigo*. Madrid: Civitas Ediciones, 2003. In the area of administrative

In this regard, the application of criminal principles to administrative sanctioning law has been reinforced, by analogy, albeit with nuances.[6] In the case of disciplinary law, it is recognized that there are often relationships of special subjection and that variations in the protection of fundamental rights may occur, including mitigations of the intensity of guarantees and rights protected by the State.

In this work, however, our main purpose is to explain the constitutional principles that govern disciplinary law in certain intangible senses. To this end, certain fundamental rights safeguard administered parties, public servants and defendants, not least in the disciplinary sphere, to the extent that they escape the rigor of special relations of subjection.

2. Dignity of the human person, substantive due process of law, adversarial proceedings and broad defense

Fundamental rights, human dignity, due process (formal and substantive), as well as adversarial proceedings and broad defense are provided for in the 1988 Constitution, in articles 1, paragraph III, and 5, paragraphs LIV and LV,

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sanctioning law, Georges Dellis argued that sanctions are strictly defined when linked to the actions of an administrative authority, vis-a-vis suppressive measures that encompass the economic, health, transport and other sectors, without necessarily having a disciplinary nature: DELLIS, Georges. *Penal droit and administrative droit répressif*: l'influence des principes du droit pénal sur le droit administratif répressif. Paris: LGDJ, 1997. This brief overview does not exhaust the contributions of different authors who have consolidated the study of sanction theory.

6 The concept of criminal sanction has applied to the scope of administrative sanctioning law since the 19th century, when a rapprochement between criminal and administrative law occurred, along with a reduction in the enforcement powers of public administration: MODERNE, Frank. Sanctions administratives et justice constitutionnelle: Contribution to the étude du jus puniendi de l'Etat dans les démocraties contemporaines. Paris: Economica, 1993; MATTES, Heinz. Problemas de derecho penal administrativo, historia y derecho comparado. Madrid: Editoriales de Derecho Reunidas, 1979; ZANOBINI, Guido. Curso de derecho administrativo, parte general, I. Buenos Aires: Ediciones Arayú, 1954. Alejandro Nieto states that sanctioning administrative law is, above all, "administrative law", not criminal law; however, sanctioning administrative law "borrows instruments provided by criminal law, simply because they are useful, due to greater maturity and theoretical superiority". NIETO, Alejandro. Derecho administrativo sancionador. 2. ed. ampl. Madri: Tecnos, 1994. p. 156. Romeu Felipe Bacellar Filho, in turn, observes that "The Federal Constitution of 1988, listing, in the head paragraph of art. 37, express principles of public administration, is in line with the expectations of the community, foreseeing public powers committed to legality, morality, impersonality, transparency and efficiency. Alongside these, other constitutional principles affecting procedural actions may be identified, in terms of the common core of procedurality. This principle-based regime applies to both administrative processes in general and disciplinary administrative processes, establishing limits and normatively guiding the actions of public administration in procedural matters." BACELLAR FILHO, Romeu Felipe. Tratado de direito administrativo: ato administrativo e procedimento administrativo. 2. ed. rev., atual. e ampl. São Paulo: Thomson Reuters Brasil, 2019. p. 780.

and in the American Convention on Human Rights, in articles 8.1, 8.2 and 11.1. These are, in essence, inviolable and intangible.

In the context of disciplinary law, constitutional principles have a binding force, preventing the State from acting arbitrarily to the detriment of individuals. The IACHR highlights that

> due process is centrally reflected in the judicial guarantees recognized in Article 8 of the American Convention. This provision includes a system of guarantees that condition the State exercise of *ius puniendi* and which seek to ensure the person charged or accused is not subject to arbitrary decisions, as appropriate guarantees must be observed, ensuring the right, in accordance with applicable procedure, to due process.[7]

In *Repercussão Geral do Tema 1199*, the Brazilian Supreme Federal Court (STF) stated that, "as in the entire legal system, sanctioning administrative law must conform to and be interpreted in light of constitutional norms, the center of gravity of the normative system. That is to say, the accused must be assured a minimum of rights and guarantees."[8]

Indeed, the principles of human dignity, due process, adversarial proceedings and broad defense are intertwined. Moreover, such constitutional precepts are connected to the principle of the democratic rule of law, to the extent that Canotilho speaks of a *democratic state of fundamental rights*.[9] In fact, these rights in general are founded on the principle of human dignity. Its unique importance, embodied in a transcendental sense in the democratic state of law, is enshrined at the international level in the Universal Declaration of the Rights

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[7] Ruano Torres and others vs. El Salvador. Funds, Reparations ad Costs. Sentenced, October 5. 2015. Series C No. 303.

[8] From the same judgment, the following statement stands out: "In addition to the principles of due process, adversarial proceedings and broad defense (CF, art. 5, LIII, LIV and LV), there are other precepts contained in the Constitution of the Republic which the administrative sanctioning law must observe, namely: that of legality, in the form of typicality, albeit not as demanding as criminal typicality (CF, arts. 5, II and XXXIX, and 37, head paragraph); culpability and the personal nature of the penalty (CF, art. 5, XLV); individualization (CF, art. 5, XLVI); and reasonableness and proportionality (CF, arts. 1 and 5, LIV), as well retroactivity of the most favorable sanctioning law (CF, art. 5, XL)." (STF, ARE 843989 Judicial body: Full Court. Rapporteur: Min. Alexandre de Moraes. Judgment: 18/AUG/2022 Publication: 12/DEC/2022).

[9] CANOTILHO, José Joaquim Gomes. *Direito constitucional*. Coimbra: Almedina, 1993; *idem*. *Rule of law*. Lisbon: Gradiva, 1999.

of Man and of the Citizen of 1798 (art. 7) and in the European Convention on Human Rights (article 6.1).

It may be said, therefore, that the dignity of the human person underpins, in contemporary law, the axiological foundation of fundamental rights as a whole and constitutes the basis that justifies the right to formal and substantive due process of law. This right, notably, gains traction in terms of the extension of implicit and explicit rights to defendants in general, while the fundamental rights to adversarial proceedings and broad defense are directly correlated to the guarantee of due process. Established in the jurisprudence of the IACHR, the due process clause, famously, has its roots in Anglo-Saxon law, more specifically in English law, acquiring greater complexity in the North American setting, especially in the US Supreme Court.[10] At any rate, the essence of these rights is prevention of the arbitrary exercise of administrative power and protection of the individual against unjust, excessive, disproportionate, unreasonable and unrestricted state power.

In essence, the dignity of the person is understood as their intrinsic and inherent value. in and of themselves. In this sense, dignity, as a quality inherent to humans, an intangible essence, is seen as a transversal fundamental right, i.e., one that permeates other rights provided for in the Constitution. Furthermore, in terms of the theory of fundamental rights, the protection of human dignity, in addition to due process, adversarial proceedings and broad defense, entails application of the notion of proportionality. In other words, the theory of the democratic rule of law is grounded in human dignity. As Robert Alexy observes, the entire justice system revolves around the dignity of the person.[11]

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[10] Major U.S. Supreme Court cases related to substantive due process include: Lochner v. New York, 198 U.S. 45 (1905), which invalidated the regulation of working hours based on contracting freedom; West Coast Hotel v. Parrish, 300 U.S. 379 (1937), allowing the setting of a minimum wage for women and minors; Carolene Products, 304 U.S. 144 (1938), which delimited fundamental rights based on evolving social traditions and norms; Meyer v. Nebraska, 262 U.S. 390 (1923), on the right of parents to educate their children in accordance with their convictions; Pierce v. Society of Sisters, 268 U.S. 510 (1925), guaranteeing choice between public and private education; Griswold v. Connecticut, 381 U.S. 479 (1965), recognizing the right to marital privacy; Loving v. Virginia, 388 U.S. 1 (1967), on the unconstitutionality of prohibiting interracial marriage; Roe v. Wade, 410 U.S. 113 (1973), recognizing the right to abortion before fetal viability, later reversed in Dobbs v. Jackson Women's Health Organization (2022); Cruzan v. Missouri Dept. of Health, 497 U.S. 261 (1990), regarding the right to refuse medical treatment; Troxel v. Granville, 530 U.S. 57 (2000), solidifying the right of parents to guide the upbringing of their children; and Obergefell v. Hodges, 576 U.S. 644 (2015), which guaranteed the right to same-sex marriage as an expression of personal dignity and autonomy.

[11] ALEXY, Robert. *Teoria dos direitos fundamentais*. Translated by Virgil Afonso da Silva. São Paulo: Malheiros, 2017.

3. Proportionality and reasonableness

The principles of proportionality and reasonableness are expressed in the 1988 Constitution, in articles 1, III, and 5, § 2 and are directly related to the due process clause. They are also supported by articles 5.6 and 30 of the American Convention on Human Rights, considered fundamental for the prevention of arbitrary decisions and to ensure a fair balance in legal and administrative deliberations. Any restrictions imposed by the State must be compatible with the legitimate objectives it pursues, safeguarding equity and justice.

Regarding *Zambrano Vélez et al. v. Ecuador*, the IACHR highlighted that reasonableness and proportionality are essential to legitimize state action, especially in terms of the use of lethal force, which must be exceptional, planned and commensurate with the threat. In the context of a state of emergency, the Court concluded that Ecuador had not demonstrated necessity nor proportionality in terms of the measures adopted, given the lack of evidence that the victims represented an imminent threat. Furthermore, the decision reinforced the importance of strict control of the use of force, and the serious and impartial investigation of state actions, to ensure application of these principles and prevent abuses.[12]

In Brazil, the Superior Court of Justice (STJ), referencing the work of scholar Fabio Medina Osório, stated that:

> An unreasonable conviction, for whatever reason, will be null and void, flawed in its origins, whether the ruling of judicial bodies, or the product of administrative or even legislative deliberations; hence the importance of understanding the presence of the principle of reasonableness within the due process legal clause. (Fabio Medina Osório, in *Direito Administrativo Sancionador, Ed. Revista dos Tribunais*).[13]

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[12] *"[…] This Court has previously understood that those judicial procedures that ordinarily are suitable for guaranteeing the full exercise of rights and freedoms are considered to be indispensable guarantees, which will differ according to the affected rights. […] These indispensable judicial guarantees must persist to verify the necessity, reasonableness and proportionality of the specific measures adopted in exercising these exceptional powers."* Case *Zambrano Vélez et. al vs. Ecuador*. Fundo, Reparações e Custas. Jul. 4, 2007. Series C No. 166.

[13] STJ, REsp n. 664.856/PR, rapporteur Minister Luiz Fux, First Chamber, 6/APR/2006, *DJ* 2/MAY/2006, p. 253.

In the judgment of AO 2,519/DF, these principles were invoked by the STF to uphold an administrative decision by the National Council of Justice (CNJ):

> In this respect, I am convinced that the facts imputed are sufficiently serious to justify the penalty of compulsory retirement, with respect to reasonableness and proportionality, considering the seriousness of the conduct, the damage to the image of the Justice system and the intent derived from the link between the disciplinary infraction and the public function of the party.[14]

Reasonableness, originating in English law, is considered a criterion of justice and functions as a more flexible parameter.[15] In this sense, it is regarded as a general clause that allows judges greater flexibility. Proportionality, in turn, is a normative postulate that derives from the democratic rule of law and permeates the Constitution as a whole, allowing the applicability of fundamental rights. Thus, proportionality must be based on the criteria of adequacy, necessity and proportionality, in the strict sense.

In the context of sanctions, proportionality plays a role both in the interpretative spectrum of types and in the determination of penalties. In this regard, sanctions which are not materially damaging to certain legal precepts protected by current regulation, due to their inappropriateness or innocuousness, may nonetheless be considered unconstitutional in that they violate the principle of proportionality. Similarly, excessive penalties may or should be prevented due to a lack of proportionality.[16]

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[14] STF, AO 2519 Judging body: First Panel. Rapporteur: min. Rosa Weber, Judgment: 29/AUG/2022 Publication: 31/AUG/2022

[15] The principle of proportionality was applied in cases such as *The Sunday Times v. United Kingdom* (1979) and *Dudgeon v. United Kingdom* (1981), reaffirming the notion that state measures must be proportional to their legitimate objectives. An revealing example is the expression "you should not use a sledgehammer to crack a nut" (*Sunday Times v. United Kingdom*, 1979). In the case *Goulandris and Vardinogianni v. Greece* (2022), the European Court of Human Rights concluded that duplication of measures, punishing a single construction offence both with administrative fines and criminal sanctions, violated the principle of *ne bis in idem*. Proportionality was central to the Court's analysis of the coherence and integration of sanctioning procedures.

[16] Alexy, Teoria dos direitos fundamentais, op. cit., p. 90-91. In the same sense, Claus Roxin observes that: "The principle of proportionality flows from the idea of the Rule of Law, with a legal-constitutional and concrete scope, and the notion of weighing benefits in the sense of prohibition of excess: the harm and risk arising from the conduct must be borne, despite the preventive value of avoiding them, when they are lesser than the loss of freedom which I would consider the measure for all those involved. In many cases this idea has been developed in detail in the individual provisions (e.g. § 66 I No. 3 for preventive or secure detention)". Roxin, Derecho penal, op. cit., p. 64.

4. Principles of legality and typicality

The principle of legality, expressed in art. 5, II and XXXIX of the Federal Constitution of 1988, and in ACHR, art. 9, ensures that no one will be punished for an act not previously defined by law. The principle of typicality supplements this provision, requiring a clear and specific description of punishable conduct, in criminal or administrative matters. The aim is to guarantee legal certainty and predictability, protecting individuals against arbitrary interpretations of the norms.

The IACHR considered these principles in the case *López Lone et al. v. Honduras*, which involved the dismissal of magistrates after the 2009 coup d'état. The Court acknowledged violations of the principles of legality and typicality, in the application of vague disciplinary parameters, such as "dignity of the administration of justice" and "decorum of office", devoid of objective interpretive criteria. Lack of adequate justification and predictability vis-a-vis the sanctions applied compromised the legal rights of the magistrates. As a result, the Court ordered their reinstatement, payment of compensation for injuries suffered and a review of the disciplinary regulatory framework, to prevent future violations.[17]

Again, with reference to Medina Osório, the Brazilian STJ observed that: 1. Sanctioning administrative law is bound by the principles of legality and typicality, in consequence of constitutional guarantees (Fabio Medina Osório in *Direito Administrativo Sancionador*, RT, 2000)".[18]

There is no doubt that legality, within the scope of sanctioning administrative law, is subject to particular nuances and influences which reflect its peculiarities. However, criminal law also exhibits distinct patterns and specificities in terms of the protection afforded. It should be remembered that the penal

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[17] "*[…] The Court has established that article 9 of the American Convention, which enshrines the principle of legality, is applicable to administrative sanctioning matters. In this regard, it is necessary to take into account that administrative sanctions are, like penalties, an expression of the punitive power of the State, which are, on occasion, similar in character to these, since both involve impairment, deprivation or alteration of rights. […] Thus, in terms of legal security, it is vital that the sanctioning norm exists and is known, or can be so, before the occurence of the omissive or contravening action which is subject to sanction. In agreement with the above, the Court considers that the principle of legality is also applicable in disciplinary matters, although its scope depends considerably on the regulated matter*." Case *López Lone and others Vs. Honduras*. Excepción Preliminar, Fondo, Reparaciones y Costas. Judged on October 5, 2015.

[18] STJ, REsp n. 879.360/SP, rapporteur Minister Luiz Fux, First Chamber, 17/JUN/2008, *DJe* of 11/SEP/2008.

system is variegated in terms of the offenses covered and guarantees provided to the accused.[19]

The systems and subsystems of sanctioning administrative law also offer variable, diverse guarantees, generally speaking, at times distinct from the penal system, in terms of legality and typicality, especially since the sanctioning modalities may differ considerably. It is enough to affirm the possible application of general clauses and indeterminate legal concepts. Yet, the principles of legality and typicality impose an inherent limit on the parameters of guarantees and rights common to both criminal law and administrative sanctioning law, i.e., the impossibility of complete de-legalization, a barrier that prevents the delegation of typicality to the Executive Branch.[20] In this respect, the sanctioning modality cannot ignore a minimum core of prohibited conduct. Thus, its definition must contain a minimum level of predictability, even in the case of a blank sanctioning rule. This requirement also has repercussions for mandatory individualization of the conduct in terms of the initial accusation.

5. Retroactivity of the most benign rule

The constitutional principle of retroactivity of the most benign administrative sanctioning norm is based on the logic of criminal law, provided for in article 5, item XL of the 1988 Federal Constitution. At the international level, the principle is established in article 9 of the American Convention on Human Rights (ACHR), which articulates the principle of legality and retroactivity.

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[19] In this regard, see: JAKOBS, Günther; MELIÁ, Manuel Cancio. *Derecho penal del enemigo*. Madri: Civitas Ediciones, 2003. Although one may disagree with the concept of the "criminal law of the enemy", it cannot be ignored that, within criminal law, certain subsystems provide general guarantees to defendants. This feature can be seen in relation to the most serious crimes, such as terrorism, organized crime and drug trafficking, as well as the so-called lesser crimes of lesser offensive potential, wherein a reduction in procedural guarantees is also found. In this regard, variegation of guarantees also clearly occurs within the scope of sanctioning administrative law. Such variation, however, does not preclude recognition of the intangible core of guarantees and fundamental rights available to the defendant.

[20] On the impossibility of delegalization, see Eduardo García de Enterría and Tomás-Ramon Fenándes Rodriguez: "*la técnica de la deslegalización se limita a un plano formal de manipulación sobre el rango de la ley*". […] "Laws of delegalization function as a *contrarius actus* of the previous law of material regulation, not directly to innovate this regulation, but to formally degrade its range so that it can be modified accordingly by simple regulations". ENTERRÍA, Eduardo García de; RODRIGUES, Tomás-Ramón Fernández. *Curso de derecho administrativo*. 8. ed. Madri: Civitas, 2010. p. 269.

In the case *López Lone et al. v. Honduras*, the IACHR understood that the guarantees provided for in Article 9 of *Pacto de San José da Costa Rica* enshrine the principles of legality, typicality and retroactivity of the most benign criminal law, to be applied within the scope of sanctioning administrative law. The Court equated the effects of disciplinary processes to those of criminal proceedings, since the same fundamental rights are affected.[21]

In the case *Maldonado Ordoñez v. Guatemala*, the IACHR observed that the rights recognized in judicial sanctioning processes are applicable in administrative proceedings. In this sense, it ruled that "*Any action or omission of state bodies within a procedure, be it administrative sanctioning or jurisdictional, must respect due legal process*".[22]

According to STJ, art. 5, XL of the Constitution provides for possible retroactivity in criminal law, allowing for the extraction of a principle implicit in sanctions law, by which the most benign ruling may be retroactive in the case of less serious sanctions, such as administrative sanctions. Under the terms of the decision handed down in *AgInt in REsp n. 2.024.133/ES*: "[…] II—Article 5, XL, of the Constitution of the Republic provides for the possibility of retroactivity in criminal law, from which an implicit principle of sanctioning law may be extracted, according to which the most benign law is retroactive in the case of less serious sanctions, such as administrative sanctions".[23]

Retroactivity of the most benign rule is mitigated in the case of blank sanctioning standards, with regard to supplementary norms of a provisional nature. However, when the blank sanctioning standard is supplemented by a more stable norm, the change is retroactive. In the area of disciplinary law, jurisprudence has already established retroactivity of the most benign rule.[24] Furthermore, in the Brazilian legal system, in regulatory bodies, retroactivity within the scope of sanctioning administrative law is recognized.[25]

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[21] Caso *López Álvarez Vs. Honduras*. 1 February 2006 (Mérito, Reparações e Custas), paragraph.

[22] Case *Maldonado Ordoñez vs. Guatemala*. Judgment, May 3, 2016 (Preliminary Objection, Merits, Reparations and Costs).

[23] STJ, AgInt in REsp No. 2.024.133/ES, rapporteur Minister Regina Helena Costa, First Panel, 13/MAR/2023, *DJe* of 16/MAR/2023. See also: STJ, REsp No. 1.440.099/GO, rapporteur Minister Regina Helena Costa, First Panel, tried on 26/MAY/2020, *DJe* of 29/MAY/2020.

[24] STJ, REsp No. 2.103.140/ES, rapporteur Minister Gurgel de Faria, First Panel, tried on 4/JUN/2024, *DJe* of 18/JUN/2024.

[25] STJ, REsp No. 2.115.852, Minister Regina Helena Costa, DJe of 12/NOV/2024; STJ, AgInt in REsp No. 2.111.613, Minister Regina Helena Costa, *DJe* of 03/SEP/2024.

The jurisprudence of the Federal Court of Auditors (TCU) follows the same model.[26] As does that of the National Financial System Appeals Council[27] and the Administrative Council for Economic Defense (Cade).[28] It is not surprising, then, that, in the disciplinary sphere, retroactivity of the most benign rule is consolidated in the jurisprudence of the National Council of Justice (CNJ),[29] of the Attorney General's Office (AGU) and the Comptroller General's Office (CGU).[30]

Besides the concern for legal certainty, there is a clear focus on the ideals of justice, fairness and the avoidance of arbitrariness, all of which are undermined in the case of retroactive laws, which effectively limit freedoms not previously restricted at the time of the conduct. This is an enduring problem of the general theory of law, since the nature of the law, with its coercive potential, is to elicit freely chosen behavior, guided by the perception of prohibitions or commands, in one direction or another. Retroactivity violates such axiological and normative requirements, as it applies to behaviors that, when they were carried out, were not objectively prohibited according to the terms in question; thus, the subjects were not bound by their repressive commands.

Notwithstanding the notion of retroactivity of the most benign norm in terms of administrative sanctioning law, the STF, in the context of the protection

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[26] On this, see the following: "The mere allegation that his successor would be his political opponent does not preclude his responsibility as a administrator, since it is up to the [admnistrator] to present the documentation relating to the PSB/PSE resources in a timely manner and in good order" (Judgment 18986/2021-TCU-Second Panel, rap. Marcos Bemquerer Costa). Also: TCU, Ruling 3323/2022 — Second Panel. Rapporteur: Antonio Anastasia. Process No. 040.247/2018-0. Process type: Special Accounting (TCE). Session held on July 5th. 2022.

[27] See: "[…] 10. With respect to sanctioning law, even in the administrative sphere, it is a logical conclusion that observation of the principle of retroactivity of the most benign norm is a mandatory constitutional principle applicable in all areas. The existence of a legal norm which alleviates a restrictive situation imposed by a previous norm behooves the State to apply it in its entirety. The STJ decision in RMS 37.031-SP, 8/FEB/18, overseen by Fábio Medina Osório, followed the same path: There is no doubt that, in the criminal law, the principle of retroactivity of the most lenient or decriminalizing norm fully applies, respecting express constitutional guarantees and a reasonable and rational legal policy for the protection of socially relevant precepts, such as institutional stability and the legal security of punitive relations. If this is the policy of criminal law, then punitive law in general, and especially administrative sanctions law, must be guided by the due process of law". CRSFN Ruling 16/2020. Statement of Clarification filed by Murillo Cerello Schattan. Rapporteur: Ana Paula Zanetti de Barros Moreira. Process No. 10372.000447/2016-80. 27 Nov. 2019.

[28] CADE. Administrative Process 08012.009834/2006-57 0912169, Publication: 20/February/2013 See also: CADE. Administrative Process 08012.008850/2008-94. Published 12/FEB/2016.

[29] CNJ—QO—Point of Order in PAD—Administrative Disciplinary Proceedings—0000036-08.2019.2.00.0000—Rap. LUIZ FERNANDO BANDEIRA DE MELLO—13th Virtual Session of 2024—13/SEP/2024).

[30] Opinion No. 203/2021/CONJURMINFRA/CGU/AGU; Opinion No. BBL—08 Administrative Process No. 00688.000720/2019-10.

of administrative improbity, which is governed by administrative sanctioning law, mitigated the principle of retroactivity; it applied, by analogy, the rules and principles of criminal law, but did not enshrine retroactivity in terms of the statute of limitations, nor accept retroactivity vis-a-vis protection of the rights of the accused or defendants after the final and unappealable decisions.

In fact, if there had been a more consistent similarity between criminal law and administrative sanctioning law, the Supreme Court may have extended the analogy to protect the fundamental rights of the accused in relation to convictions *after* they have become final and unappealable, and also in relation to the statute of limitations, given it is an instrument of substantive law. Administrative improbity in Brazil is governed by Law No. 8,429/1992, which classifies illicit acts against the public administration, particularly those detrimental to the public sector. Such crimes are committed by public officials, possibly in conjunction with private citizens or entities.

6. Presumption of innocence and the reasonable duration of process

The right to the presumption of innocence, enshrined in Article 5, LVII, of the 1988 Constitution and in Article 8.2 of the ACHR, determines that every individual is considered innocent until proven guilty. In addition, the principle of reasonable duration, set out in Article 5, LXXVIII of the Constitution and in Article 8.1 of the ACHR, requires that judicial and administrative procedures are concluded in a timely fashion, to avoid unfair losses resulting from procedural delays. This precept, in addition to protecting the rights of those involved, relates directly to the principle of administrative efficiency, established in the head paragraph of art. 37 of the Federal Constitution.

The presumption of innocence is a guarantee that fully applies to the sanctioning process. The European Court of Human Rights and IACHR consider the principle of the presumption of innocence in the sphere of criminal law and the context of administrative sanctioning law, safeguarding the fundamental rights of defendants in general.

The IACHR reaffirmed the applicability of the presumption of innocence in the context of administrative sanctioning law, highlighting that violations may occur not only in the judicial context, but due to actions of authorities in the Executive Branch. In the case *Lori Berenson Mejia vs. Peru*, this principle was

violated when the accused, charged as an accessory to terrorism, was presented in the media as guilty even before her case was formalized, prejudicing public opinion. Although the subsequent civil trial was considered valid, the use of evidence from a military tribunal marked by serious irregularities demonstrated the need to enforce fundamental guarantees in all procedural spheres.[31]

In interpreting Article 8.2 of the ACHR, the IACHR reaffirmed the importance of this principle, placing the burden of proof on the prosecuting authority and not on the accused. In the case *Maldonado Ordoñez Vs. Guatemala*, for example, the risk of arbitrariness and repression was highlighted, wherein the burden is inverted in the sanctioning process, on the grounds that:

> *Excluding the presumption of innocence from the sanctioning process and attributing the burden of proof to the accused, rather than the accuser*, always engenders a considerable risk that arbitrariness will generate repressive conditions, completely alien to the democratic society that the American Convention promotes.[32]

In the judgment of Theme 1,199, Minister Carmen Lúcia stated that:

> […] Fabio Medina Osório teaches that the administrative sanctioning process is ultimately aimed at seeking a balance of power, a level playing field and the consecration of the presumption of innocence, while at the same time concerned with verifying applicable responsibilities and imposing appropriate sanctions. In general terms, we observe that sanctioning power has evolved into punitive law, and the latter into a functional specialization, diversifying into criminal law and administrative law. First, punitive law constitutes a limit to the sanctioning power of the authority. This, in turn, has come to embody the so-called enforcement function in Police States, already an evolution in terms of what was conceived in typically feudal regimes. The generic state function of police power was subdivided into others, including the judicial function. Administrative law already appeared, in embryonic form, alongside criminal law, at that time, in terms of the

[31] Caso Lori Berenson Mejía Vs. Perú. Background, Repairs and Back. Judgment on November 25, 2004. Series C No. 119, paragraph 159.

[32] Case *Maldonado Ordoñez vs. Guatemala*. Judgment of May 3, 2016. Series C, No. 311.

> protection of the ordering and repressive functions of the authority. Subsequently, criminal law emerges as the most serious, rigorous, strict branch of law, identifying itself above all with punitive law.[33]

The constitutional guarantee of a reasonable duration of the legal process functions, in the punitive sense, in favor of the accused in general. In this regard, the principle cannot be invoked by administrative authorities to justify restricting rights of defense and accelerating the punitive process.[34] Indeed, although it is recognized that reasonable duration, in civil procedural law, limits exacerbated formalism, prevention of the exercise of the right to broad defense and adversarial proceedings in the disciplinary sphere, under the pretext of implementing this basic right in favor of the State, is unfeasible. It is understood, in this context, that the fundamental right of the accused is preponderant, as their defense status entails risk and must be protected by the State itself.[35]

Application of the principle of reasonable duration and its relevance in the administrative sanctioning area are supported by the jurisprudence of the IACHR. In the case *Genie Lacayo vs. Nicaragua. Fondo, Reparaciones y Costas*, the Court highlighted the failure of the State of Nicaragua to provide effective judicial protection and due process to the victim's family, stating that "*[…] According to the European Court, three elements must be taken into account to determine the reasonableness of the process which unfolds: a) the complexity of the matter; b) the procedural activity of the interested party; c) the conduct of judicial authorities*".

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[33] STF, ARE 843989 Judging body: Full Court Rapporteur: min. Alexandre de Moraes. Judgment: 18/AUG/2022 Published 12/DEC/2022 *Apud* OSÓRIO, Fábio Medina. *Direito administrativo sancionador*. 4. ed. São Paulo: Revista dos Tribunais, 2013. p. 189.

[34] On the principle of reasonable duration, Alexandre Freitas Câmara points out that "There is a clear option in the system to build a framework designed to allow production of the result of the process without undue delays. It is worth noting, however, that if everyone has the right to a process without undue delay, it follows that no one has the right to a process without due delays. In other words, the system is committed to the reasonable duration of the process, without implying an unfettered search for procedural alacrity at any price. And this is because a process that respects fundamental guarantees is, necessarily, a process that takes some time." CHAMBER, Alexandre Freitas. O novo processo civil brasileiro. 8. ed. rev. e atual. São Paulo: Atlas, 2022. p.22.

[35] In the area of punitive procedural law, meanwhile, reasonable duration takes on another dimension. In this regard, the constitutional principle must be interpreted differently. It is not uncommon, in fact, for victims of illegal acts to exhibit and possess fundamental rights protected by the Constitution, by international conventions and treaties, as already stated in this work. However, when it comes to the functionality of disciplinary law, as highlighted, the perspective of protecting the fundamental rights of the accused must prevail, not that of the public interest of the administration or the Executive Branch. This is a paradigm that must be guided by the theory of fundamental rights and the democratic rule of law.

In Brazil, the constitutional principle of reasonable duration, especially in the punitive sphere, is provided for in the infra-constitutional provisions of Article 4 of the Code of Civil Procedure and in Articles 2, sole paragraph, and 29, § 2, of Law No. 9,784/99. Against this backdrop, the STF ruled that a criminal investigation should be closed due to the inordinate time taken to file charges.[36]

In such cases, notably, there is application, albeit in reverse, of a consequence inherent to the principle of reasonable duration, since it entails recognizing a kind of abuse of power or even some form of misuse by the prosecution in omitting to file a complaint, in view of the expiry of a reasonable period of time.

In this context, as Aury Lopes Jr. correctly points out, the principle of reasonable duration translates into a formula that allows the termination of the process on account of excessive delay, since, notably, the process itself amounts to a penalty, insofar as it violates the principle of presumption of innocence. In fact, excessive prolongation frustrates the right to full defense and adversarial proceedings, also as regards the collection and safeguarding of evidence, and may compromise the reputation of the accused, whose honor and dignity are damaged over time. For these reasons, the Judiciary may, in the case of excessive delay, legitimately terminate the process, for violating the principle of reasonable duration, regardless of the statute of limitations,[37]

If prolonged processing of a criminal case impinges on the honor of the defendant, the same is true in the administrative context. Administrative authorities must comply with legal and sub-legal deadlines. The prescription that processes must adhere to a reasonable timeframe applies equally to disciplinary law, protecting defendants in general. In this regard, the guarantees and norms of criminal legislature correspond to sanctioning administrative law. The essential principles which shore up fundamental rights must not be ignored. There is no doubt that overlong disciplinary processes also have an impact on reputations.

Similarly, restrictive hermeneutics in relation to the imprescriptibly of compensation lawsuits for willful acts of misconduct, in terms of their impact on the public treasury, as decided by the STF, must be considered a consequence of the principle of reasonable duration. In this respect, and for no other reason, the STF decided that, for the recovery of money, imprescriptibly presupposes a prior conviction for an intentional act of improbity; hence, the understanding

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[36] See STF, Inq 4419 Judging body: Second Panel. Rapporteur: min. Gilmar Mendes. Judgment: 11/SEP/2018 Published: 23/NOV/2018.

[37] LOPES JR., Aury. *Direito processual penal*. 21. ed. São Paulo: SaraivaJur, 2024. p.51.

that any act of public mismanagement is sufficient for imprescriptibly to result in a compensation action has been superseded. In this sense, the former position of the STF allowed public administrators to linger for indefinite periods of time, with the ever-present threat of being sued for damages to the treasury, a circumstance that would certainly violate the constitutional principle at hand.[38]

In the sanctioning area, in reality, the process regulates the punitive intent and, in this context, the statute of limitations in the abstract informs the expectation of the subject in relation to the investigation and the process as such. In this sense, if a public servant performs a function and carries out certain acts, the principle of legal certainty must generate expectations regarding the prescriptive period in order to guide expectations regarding potential investigations and proceedings with respect to the punitive intention of the State. In this context, it is clear that the principle of reasonable duration has immediate consequences for these legitimate expectations with regard to legal certainty.[39]

It should be noted that reasonable duration of the process, as a fundamental right, in the punitive context, must be considered from the perspective of the right of action. This arises for the state from the punitive intent, which derives from commission of the unlawful act. The occurrence of the unlawful act triggers the first statute of limitations, which defines punitive action, in criminal law, administrative sanctioning law or even disciplinary law. Furthermore, the unlawful act defines the prescriptive period, including for the State's own claim for compensation.

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[38] "[…] given the absence of conviction for the practice of an act of impropriety, contrary to what the Public Prosecutor's Office claims, the conviction for the practice of an act of impropriety is indeed a prerequisite for the recognition of the imprescriptibly of the claim for compensation to the public treasury. In this case, once the statute of limitations on the action for misconduct has been recognized, the Topic 897 thesis of general repercussion cannot be applied." (STF. ARE 1475101/SP. Rapporteur: Min. Alexandre de Moraes. Judgment: February 1, 2024. Publication: February 6, 2024.). This understanding contrasts with the previous position adopted by the STF regarding the imprescriptibly of the compensation action for damage to the public treasury. In this sense, see: STF. MS 26.210. Rapporteur: min. Ricardo Lewandowski. Judgment: 4 Sep. 2008. Publication: Oct 10, 2008.

[39] On the principle of reasonable duration in the administrative sanctioning process: "[…] 1. It is up to the Administration to assess, within the period set by the related legislation, requests addressed to it by interested parties, and analysis of the requests cannot be postponed indefinitely and without plausible justification, at risk of violating the principles of efficiency, morality and reasonable duration of the process, as established by Law No. 9.784/1999 and articles 5, item LXXVIII, and 37, head paragraph, of the Federal Constitution. 2. Judgment granting security, which is upheld. 3 Official remittances dismissed". (TRF-1—REOMS: 10026898420224013000, Rapporteur: Federal Judge Daniel Paes Ribeiro, Judgment Date: 13/03/2023, 6th Panel, Publication Date: *PJe* 03/15/2023 PAGE *PJe* 03/15/2023).

The origin of this demand of the State, therefore, defines expectations in the light of objective good faith, an idea inherent to legal certainty, due process and proportionality. In the sphere of disciplinary law, as well as in other areas of public punitive law, if a public servant performs certain duties, there is a legitimate expectation that the State will exercise its punitive claim based on the reasonable procedural duration from the moment the punitive demand arises.

In this regard, the process cannot be dissociated from the right of action and, therefore, from the very origin of the punitive intent. For these reasons, the constitutional principle of reasonable duration imposes, from a hermeneutical perspective, the obligation to exercise the investigative power of the State according to a sensible timeframe, insofar as accurate determination of the illicit act is essential to trigger the subsequent punitive process. Thus, unlike in civil proceedings, punitive processes require prior determination, so that the investigative stage is conditioned by the principle of reasonable duration. Indeed, the word "process" relates to both the administrative and judicial spheres. But, in the administrative sphere, it goes far beyond the meaning of a process in the strict sense.

In this context, excessive delay must be calculated from the moment the unlawful act occurs, in the criminal or disciplinary context, a circumstance that impacts the hermeneutic effects of the principle of reasonable duration in the legal sphere. For this reason, investigations that exceed a reasonable period of time can result in the extinction of the state punitive claim, whether or not a sanctioning or disciplinary process has begun, as established, to the same end, in the criminal area, in an STF precedent.[40]

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[40] The STF precedent in the sphere of criminal law: STF, Pet 8090 AgR-segundo-Extn-oitava / DF—DISTRITO FEDERAL OITAVA EXTENSÃO NO SEGUNDO AG.REG. NA PETIÇÃO. Rapporteur: min. Gilmar Mendes. Judgment: 19/OCT/2021 Publication: 21/OCT/2024 In this specific case, Minister Gilmar Mendes ordered the closure of the police investigation due to excessive time and lack of evidence, stating that: "this Court hereby grants the allegations of excessive time and violation of the right to a reasonable duration of the process (art. 5, LXXVIII, of the CF/88) as adequate justification for determining the archiving of unavailing investigations, as can be seen from the following precedents: Pet 8.186, Rapporteur Min. Edson Fachin, in which I was appointed minute taker of the judgment, Second Panel, judged on 15/DEC/2020; Pet 7.833 AgR, Rapporteur Min. Edson Fachin, in which I was appointed minute taker of the judgment, Second Panel, judged on 23/FEB/2021; Inq 4.393 AgR, in which I was the rapporteur, Second Panel, judged on 23 /10/2018; Inq 4,660, in which I was the rapporteur, Second Panel, judged on 23/OCT/2018; Inq. 4,441, Rel. Min. Dias Toffoli, single judge decision, on 29/JUN/2018; Inq. 4,442, Rel. Min. Roberto Barroso, single judge decision, on 6/JUN/2018; Inq. 4,429, Rap. Min. Alexandre de Moraes, single judge decision, on 8/JUNE/2018; Inq. 4215, Rap. Min. Edson Fachin, single judge decision, judged on 1.AUG.2018""

7. Right to a natural judge, independence and impartiality

The principle of impartiality of the administrative judge is based on the precept of impersonality, provided for in art. 37, head paragraph, of the 1988 Constitution, as well as in the guarantee of a "natural judge", established in art. 5, items XXXVII and LIII, of the Constitution. This safeguard, owing to the "principle of symmetry", also applies to administrative sanctioning processes, bringing them closer to the guarantees of criminal proceedings. At the international level, these are enshrined in Article 8.1 of the ACHR, which ensures that no one shall be subjected to trial by courts established *ad hoc*, guaranteeing the right to be judged by legally established judges. The independence and impartiality of judges are fundamental, protecting processes from external influences and ensuring decision-making fairness.

The IACHR, analyzing the case *Apitz Barbera y outros vs. Venezuela*, reaffirmed that the right to a natural judge requires that the trial is held in regular and previously established courts, prohibiting the creation of *ad hoc* bodies or special bodies for specific cases. Such protection is essential to preserve impartiality, independence and legality in sanctioning processes.[41]

The principle of independence and impartiality arises from that of natural justice, considered essential by the IACHR for the exercise of full defense. In this sense, the IACHR based its reasoning in the case *Apitz Barbera y otros vs. Venezuela* on the notion that:

> *[…]* impartiality requires that the judge involved in a particular case approach the facts without subjective bias and provide sufficient objective guarantees to dispel any doubt the defendant or the community may harbor regarding the absence of impartiality".

In fact, *ad hoc* prosecutors or judges are prohibited in administrative proceedings. Judicial powers must be predetermined by law, as, otherwise, misuses of power or purpose would be commonplace. The guarantee of natural justice applies fully in sanctioning administrative law, from the perspective

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[41] *"The State must not create courts which do not apply duly established procedural norms to replace the jurisdiction that normally corresponds to ordinary courts.* This is intended to prevent defendants being tried by special courts, created for the case, or ad hoc courts."" Case *Apitz Barbera y otros ["First Court of Administrative Litigation"] vs. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 5, 2008. Series C No. 182.

of substantial due process, to prevent arbitrary acts by public authorities, dereliction of purpose, excess power and persecution.

The rule of law and justice requires normative predetermination by the adjudicating authorities in administrative sanctioning processes, in accordance with art. 5, items LIV, XXXVII and LIII, of the 1988 Constitution. Incidentally, it is no coincidence that, in the administrative sphere, the STF has made the analogy between the principle of the natural judge and the "natural prosecutor", establishing the prohibition of ad hoc prosecutors.[42]

8. Prohibition of regression and objective good faith

The prohibition of regression, derived from the interpretation of art. 5, § 1, of the Federal Constitution, and art. 26 of the ACHR, prevents social rights already achieved from restriction or suppression. In turn, the principle of objective good faith, implicit in art. 5, § 2, of the Federal Constitution, guarantees that legal relationships are governed by trust and loyalty between the parties, reinforcing legitimate expectations and legal certainty.

The IACHR has established that certain crimes cannot be excluded from state jurisdiction, at risk of serious violation of internationally protected human rights. Hence, given the seriousness of some crimes, amnesty for their perpetrators is not permissible. In this regard, the prohibition of regression for the protection of fundamental rights applies.[43]

In the case *Cuscul Pivaral y outros vs. Guatemala*, the Court reaffirmed that States must adopt effective measures to guarantee access to fundamental rights, prohibiting delays that compromise these rights. This understanding reinforces the responsibility of the state to act continuously and efficiently to ensure the effectiveness of social and human rights.[44]

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[42] In that regard, see: STF, ADI 7170, rapporteur: Carmen Lúcia, Full Court, judged on 03/JUL/2023, Electronic Process *DJe*-s/n Divulg. 21/AUG/2023 Public. 22/AUG//2023; STF, HC 67,759, rap. min. Celso de Mello, Full Court, *DJe* 1/JUL/1993.

[43] *Barrios Altos v. Peru* Judged on March 14, 2001.

[44] *"[…] 98. In this regard, the Court affirms that, in relation to the first (immediate obligations), the States must adopt effective measures to guarantee access, without discrimination, to services instrumental to the right to well-being. In relation to the second point (progressive obligations), progressive implementation means that State parties have a concrete and constant obligation to proceed in the most expeditious, effective way for the full effectiveness of this right […]." Cuscul Pivaral y otros Vs. Guatemala*, 2018.

The IACHR clearly advances the notions of "irrevocable prohibitions" and "crimes against human rights", legal principles whose contents and contours take on varied forms. In this regard, the prohibition of retrogression is used to protect fundamental rights. Indeed, in relation to the commission of serious crimes, it is unlawful for the State to endorse impunity.

The clause prohibiting retrocession, in fact, must be understood in conjunction with other constitutional norms and from the perspective of the entire normative system. It is impossible to ignore, in this respect, the role of the Executive Branch in the division of Powers and the dispensation of justice. There should be no question of impunity or retrogression when granting the benefits of representation or pardon, in which there are clear discretionary spaces for the executive branch to operate. This clause, protecting fundamental rights, does not undermine other elements, much less the democratic principle.[45]

In Brazil, the consolidation of prohibitive norms was raised by the Public Prosecutor's Office in ADIs 4,295 and 7,236, with respect to combating administrative impropriety, in view of potential setbacks in this area concerning the protection of rights. It seems clear, in fact, that prohibition of retrogression cannot be applied arbitrarily, as it undermines the democratic principle and the prerogative of the legislature to reconfigure offenses and sanctions in a constitutional setting.

As can be seen, rights and guarantees within the scope of administrative sanctioning law, in terms of formal and substantial due process, encompasses a range of fundamental rights. The following may be highlighted: the principle of legality (art. 5, II), the principle of typicality (art. 5, XXXIX), the principle of culpability (art. 5, XLV and XLVI), the right to individualization of punishment (art. 5, XLVI), due process of law (art. 5, LIV), the right to a natural judge (art. 5, LIII), the principle of equality (art. 5, head paragraph) and the prohibition of acts of arbitrariness by public authorities (art. 5, II and XXXV).[46] In this context, it is clear that such rights are protected by the constitutional clause prohibiting regression, in terms of the guiding rules established in the Constitution. Furthermore, when such rights are linked to permanent clauses, their protection

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[45] In this regard, see: STF, ADI 5874. Judging body: Full Court. Rapporteur: min. Roberto Barroso. Judge: min. Alexandre de Moraes. Judgment: 09/MAY/2019; STF, ADPF 964. Judging body: Full Court. Rapporteur: min. Rose Weber. Judgment: 10/MAY/2023 Publication: 17/AUG/2023.

[46] Tellingly, even in relation to so-called defense rights, legislation classifies as criminal offenses any abuses of authority by public officials that violate these fundamental rights, under Law No. 13,869/2019.

is even more robust, preventing constitutional reforms from subtracting or diminishing from their essential character.

The rights provided for in art. 5 of the Federal Constitution are key in this regard, including those to equality (item I), freedom of expression (item IV), freedom of belief and worship (item VI), liberty (item XV), property (item XXII), intellectual property (item XXVII), security (item LIV), non-discrimination (item XLI), the fight against racism (item XLII), an ecologically balanced environment (item LXXIII) and consumer protection (item XXXII). Furthermore, the constitutional precept of human dignity, expressed in Article 1, paragraph III, provides the bedrock for administrative probity, equitable public administration and administrative efficiency (Article 37, *head paragraph*). A simple reading of the international conventions on anti-corruption shows the role and obligation of the State, and its commitments, culminating in the sphere of disciplinary law. In this context, attention falls on the principle of the prohibition of regression, for the protection of fundamental rights, insofar as the clauses that typify illegal acts are considered in this respect.

Indeed, the so-called *criminalizing clauses* make certain types of crime legally enforceable. These Constitutional clauses must, then, be adhered to by the legislator, under penalty of unconstitutionality. To this end, some constitutional clauses function as criminalizing warrants.

The constitutional clause that prohibits regression for the protection of rights is directly linked to the principle of the rule of law, particularly in its democratic and social dimensions. This construction is mainly related to fundamental social rights but can be extended to others. Certain rights, as recognized in legal doctrine, have more robust constitutional protection than others, especially those involving social guarantees.[47]

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[47] On the history of the clause prohibiting regression, see: SARLET, Ingo Wolfgang; BENJAMIN, Antonio Herman. Princípio da proibição de retrocesso ambiental. In: BRASIL. National Congress. Senado Federal. Comissão de Meio Ambiente, Defesa do Consumidor e Fiscalização e Controle. *O princípio da proibição de retrocesso ambiental*. Brasília: Federal Senate, 2011. p. 55-72; SARLET, Ingo Wolfgang. Direitos fundamentais sociais e proibição de retrocesso: algumas notas sobre o desafio da sobrevivência dos direitos sociais num contexto de crise. *Revista do Instituto de Hermenêutica Jurídica*, Belo Horizonte: a. 1, n. 2, jan./dez. 2004; SARLET, Ingo Wolfgang. Os direitos fundamentais (sociais) e a assim chamada proibição de retrocesso: contributo para uma discussão. In: *Revista da Faculdade de Direito da Universidade de Lisboa*, a. 2, n. 1, 2013; SARLET, Ingo Wolfgang. O Estado Social de Direito, a proibição de retrocesso e a garantia fundamental da propriedade. *Revista da Faculdade de Direito da UFRGS*, v. 17, 1999; BÜHRING, Marcia Andrea. Direito social: proibição de retrocesso e dever de progressão. *Direito & Justiça*, v. 41, n. 1, p. 56-73, jan./jun. 2015; GOLDSCHMIDT, Rodrigo. O princípio da proibição do retrocesso social e sua função limitadora dos direitos fundamentais. *Revista Justiça e Direito*, v. 14, p. 29, 2000.

Notwithstanding the prohibition of regression provided for in the Constitution, offenses may, at the same time, be legislatively defined, in light of the democratic principle, so that, for example, in the face of corruption and dishonesty, the legislator has broad freedom to classify negligent and intentional offenses and freely apply legal configurations.

With regard to the principle of good faith, the IACHR ruling on *Acevedo Buendía y otros vs. Peru* is instructive, as the Court extrapolated an interpretation of property rights, applying the principle of objective good faith, provided for in Brazilian administrative law. Through its actions, the Court adopted a natural law approach, establishing the right to effective judicial protection and, foundationally, the principle of objective good faith as an instrument to protect human rights. This precedent, originating in a different procedural context, may be applied in disciplinary proceedings.[48]

9. Conclusion

Administrative sanctions law, an essential component of the state *jus puniendi*, is a distinct legal field where the convergence between constitutional guarantees and the state sanctioning prerogative culminates. Our analysis of the constitutional principles applicable to disciplinary law has revealed the complexity and sophistication of a legal regime that not only function as a suppressive instrument, but which, in its essence, serves democratic ideals and the protection of fundamental rights.

Structuring principles, such as legality, proportionality, reasonableness, substantial and formal due process, and the presumption of innocence, are inseparable from sanctioning actions that respect constitutional and international parameters of justice. Furthermore, within the scope of disciplinary law, mitigation of guarantees in situations of special subjection cannot, under any circumstances, compromise the intangible character of fundamental rights. The punitive power of the State must ensure the protection of those under its jurisdiction, consistent with democratic prescriptions and the prohibition of regression.

In this way, administrative sanctioning law is understood as a legal discipline in constant evolution; influenced by international paradigms and

[48] Case *Acevedo Buendía y Otros vs. Peru*, July 1st, 2009.

deeply rooted in the constitutional values of the democratic rule of law. Legal doctrine, the courts and practitioners alike are responsible for reinforcing a hermeneutics that combines sanctioning efficiency with maximum protection of fundamental rights, reaffirming the importance of justice over arbitrariness.

Our aim in this work has been to contribute to the development of sanctioning administrative law as a discipline in Brazil and in the international context. In this sense, disciplinary law ought to be seen as an essential aspect of administrative sanctioning law, so that the constitutional principles applicable to the latter fully extend to it, submitting fundamental rights, at their core, to the maximum protection of the state. It is vital, therefore, to consolidate the role of constitutional courts and international tribunals that protect human rights. In this sense, analysis of the constitutional principles that govern disciplinary law, in light of IACHR jurisprudence, may provide a benchmark for Latin American and international law, highlighting the importance of Brazil as a major center of study in the field of comparative law.

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