doi.org/ 10.51891/rease.v8i6.6037

THE PUBLIC SERVER AND ADMINISTRATIVE PROBITY

O SERVIDOR PÚBLICO E A PROBIDADE ADMINISTRATIVA

Antônio José Ribeiro Nunes[1]

ABSTRACT: The Public Power has been promoting changes in legislation aimed at curbing harmful conduct practiced by agents, which cause damage to the treasury and violate the principles of public administration. Given this context, this article aimed to answer the following guiding question: What changes were introduced in the Administrative Improbity Law in relation to intent? Therefore, the objective of this article is to identify the changes applied to the new Administrative Improbity Law, focusing on the issue of intent. Thus, to respond to the objectives of the study and the problem pointed out, it was decided to carry out a bibliographic research based on theoretical foundations of authors, administrative and civil law books, in addition to the analysis of the commented Administrative Improbity Law. It was intended to analyze the importance and political-legal character of Public Administration, to point out the characteristics of Law 8.429/1992; define the crime of administrative improbity and demonstrate the innovations brought by Law 14.230/2021. The results indicated, the changes applied to the new Administrative Improbity Law, focusing on the issue of intent, showing that the new law determined the specification of intent in the crime of administrative improbity, being interpreted as a factor of bad faith in the exercise of function, removing the notion of imprudence, negligence and gross errors. Under this legal view, the exclusion of the culpable modality is analyzed, maintaining the intentional modality, establishing that the axis of the law is to avoid corruption, gain through illicit and improper means. Therefore, questions of guilt regarding agents who perform their function poorly do not fit into this area, although they can be punished in another sphere. The legislator's intention was to create a specific intent for the disreputable public agent who acts trying to obtain benefits at the expense of illegal actions. So, it is understood that currently this characterization logically separates the negligent and reckless agent from the corrupt and disloyal agent. The innovations brought by Law 14.230/2021, was especially the specification of the notion of intent, determining only the existence of the intentional modality for crimes of administrative improbity, starting from the notion of punishment to the illicit will of public agents.

Keywords: Administrative Misconduct. Intent. Intentional Modalities. Public Administration. Innovations.

RESUMO: O Poder Público vem promovendo mudanças na legislação visando coibir condutas lesivas praticadas por agentes, que causam danos ao erário e violam os princípios da administração pública. Diante desse contexto, este artigo teve como objetivo responder à seguinte questão norteadora: Que mudanças foram introduzidas na Lei de Improbidade Administrativa em relação ao dolo? Portanto, o objetivo deste artigo é identificar as

[1] Engenheiro de Minas, Pós-graduado em Engenharia de Segurança do Trabalho, Higiene do Trabalho, Deireito Ambiental, Engenharia de Segurança Contra Incêncio e Pânico. E-mail: Antonio.Ribeiro@anm.gov.br.

alterações aplicadas à nova Lei de Improbidade Administrativa, com foco na questão do dolo. Assim, para responder aos objetivos do estudo e ao problema apontado, optou-se por realizar uma pesquisa bibliográfica baseada em fundamentos teóricos de autores, livros administrativos e de direito civil, além da análise da comentada Lei de Improbidade Administrativa. Pretendeu-se analisar a importância e o caráter político-jurídico da Administração Pública, apontar as características da Lei 8.429/1992; definir o crime de improbidade administrativa e demonstrar as inovações trazidas pela Lei 14.230/2021. Os resultados indicaram, as alterações aplicadas à nova Lei de Improbidade Administrativa, com foco na questão do dolo, mostrando que a nova lei determinou a especificação do dolo no crime de improbidade administrativa, sendo interpretado como fator de má-fé no exercício do direito. função, eliminando a noção de imprudência, negligência e erros grosseiros. Sob essa visão jurídica, analisa-se a exclusão da modalidade culposa, mantendo-se a modalidade intencional, estabelecendo que o eixo da lei é evitar a corrupção, ganho por meios ilícitos e impróprios. Portanto, questões de culpa em relação a agentes que exercem mal sua função não se enquadram nessa área, embora possam ser punidas em outra esfera. A intenção do legislador foi criar um dolo específico para o agente público desonesto que atua tentando obter benefícios em detrimento de ações ilícitas. Assim, entende-se que atualmente essa caracterização separa logicamente o agente negligente e imprudente do agente corrupto e desleal. As inovações trazidas pela Lei 14.230/2021, foi especialmente a especificação da noção de dolo, determinando apenas a existência da modalidade dolosa para crimes de improbidade administrativa, partindo da noção de punição à vontade ilícita de agentes públicos.

Palavras-chave: Improbidade Administrativa. Intenção. Modalidades Intencionais. Administração pública. Inovações.

1. INTRODUCTION

Public administration is the ordering, direction and control of government services, at the federal, state and municipal levels, according to the precepts of law and morals, and in accordance with legal structures. Therefore, the public administration depends on budgetary resources, human and material resources that are part of a set of actions planned to comply with government programs and policies. According to Medeiros (2013), this public administration organization aims to provide a qualified service to society's desires, based on the efficient and ethical application of resources.

According to Oliveira (2014), the Public Power consists of a set of administrative and legal actions that have their own services, through the bodies of the Direct Administration or in a decentralized way and through the autarchic, foundational entities and state companies of the indirect administration, administrative functions, supported by state and municipal laws, began to share important public functions, previously centralized at the federal level. The theme deals with the public servant and administrative improbity, considering the new changes in the Administrative Improbity Law (LIA) proposed by the

Public Ministry and applied in the current government, determining innovations in Law 8.429/92, which deals with public improbity actions (BRAZIL, 1992).

In 2021, significant innovations were sanctioned with Law 14,230/21, which reforms the previous Administrative Improbity Law, with relevant changes in relation to the old law (BRASIL, 2021).

The guiding question of the research presents the following question: What are the changes that were inserted in the Law of Administrative Improbity in relation to the willful misconduct?

The assumptions of the study indicate that due to the changes implemented resulting from the current reform, there is only the administrative improbity originated from an intentional act, and the culpable modality has been extinguished.

The purpose of this article is to identify the changes applied to the new Administrative Improbity Law, focusing on the issue of intent. It was intended to analyze the importance and political-legal character of Public Administration, to point out the characteristics of Law 8.429/1992; define the crime of administrative improbity, demonstrate the innovations brought by Law 14.230/2021 (BRASIL, 2021).

To respond to the objectives of the study and the problem pointed out, it was decided to carry out a bibliographic research based on theoretical foundations of authors, administrative and civil law books, in addition to the analysis of the commented Administrative Improbity Law.

The choice of topic is justified based on the assumption that this change in the previous law brought innovations in relation to the legal analysis that it is the conscience itself that characterizes the willful conduct, therefore, if the agent is aware that a certain The act has the configuration of a crime and still practices it, it does so from a willful conduct.

According to Pazzaglini Filho (2018), in public administration, administrative improbity is seen from the theory of the will that seeks the result, so that the agent performs the act intentionally, having absolute awareness of its result and the consequences of its practice. In the assent theory, the possibility of a harmful result resulting from a risky conduct is foreseen, even if it is not directly.

The relevance of the study is to demonstrate that the change in the Administrative Improbity Law constitutes the so-called specific intent that characterizes acts such as bad faith, lack of zeal with the responsibility of the public service, the posture of negligence, in

some cases, the disreputable act can be punished in another sphere, outside the legal meaning of Administrative Law, thus ceasing to be simply an act of administrative improbity, such as conspiracy and money laundering.

2. DEVELOPMENT

2.1 IMPORTANCE AND POLITICAL-LEGAL CHARACTER OF PUBLIC ADMINISTRATION

Public administration is of great social and political importance in the Brazilian legal system, whose function is to provide sustainability to the conditions of improvement of populations in terms of services, which are subject to the internal and external control of regulatory and inspection bodies so that the proposals are in line with constitutional precepts and normative acts (PAZZAGLINI FILHO, 2018).

Administrative improbity is an issue that involves multiple processes that determine the urgent need for surveillance, guidance, correction and control against corruption, the use of the public machine for the benefit of public agents (servants and political representatives) (PAZZAGLINI FILHO, 2018).

Bezerra Filho (2019, p. 33) assesses that:

> From this perspective, there is a need to maintain control of the public administration through specialized bodies over all activities involving the application of public funds in order to determine mechanisms of legitimacy in all administrative measures, as established by law, the defense of rights of those who are administrators and the proper posture of public agents.

Public authorities began to exercise the functions of remodeling public structures, from the public exercise of legality to have mechanisms referring to the delegation of competence within the limits of the Constitution. According to Bezerra Filho (2019), through legal exercise, the federal, state and municipal public administration has the right to tax and regulate economic activities that have profound repercussions both on the current functioning of the system and on its long-term evolution. in terms of the flow of consumer goods and services, as well as the creation of productive capacity in charge of activities related to public administration, such as basic sanitation, infrastructure, public health assistance and other services.

The volume of State responsibilities required internal and external control variables for the development of public administration, in this aspect, the State began to develop a

legal-administrative apparatus and several entities, such as secretariats, ministries, welfare institutes and other autarchies. , public companies, etc. - distributed by the various political-administrative levels (Union, States and Municipalities) (BEZERRA FILHO, 2019).

For Bezerra Filho (2019), public policies began to develop regulatory regimes guided by inspection, whose contemporary phenomenon tends to expand in various ways, taking a modern configuration.

Regulatory activities involve constitutional principles that maintain the guidelines of the legal order. The processes are carried out based on technical provisions in the field of control that are carried out in the regulatory bodies to avoid deviations or administrative impropriety related to public administration (PAZZAGLINI FILHO, 2018).

The Administrative Improbity Law (LIA) n.8.429/92, defined the acts of administrative improbity, which has under its precept the question of bad faith, the practice of acts that give rise to illicit enrichment, cause damage to the public treasury or violate the principles of public administration, defined in art. 37, among which morality is included, alongside legality, impersonality and publicity, in addition to others that are distributed throughout the Federal Constitution (BRASIL, 1992).

According to the Administrative Improbity Law (LIA) n.8.429/92, these acts performed by public agents (servants in general and political representatives) imply the suspension of political rights, the loss of public function, the unavailability of goods and reimbursement to the public purse, in accordance with the legal form and gradation in the legal system (BRASIL, 1992).

According to Osório (2020, p. 56), the act of administrative improbity constitutes "an act of immorality, in doctrine, an affront to honesty, good faith, respect for equality, the norms of conduct accepted by the subjects, the duty loyalty, human dignity and other ethical and moral postulates".

According to Pazzagliani Filho (2018, p. 112),

> O crime se configura tanto no uso indevido de bens quanto no de vendas ou serviços e nesses casos houver a obtenção de proveito, no uso de recursos públicos como saldo médio ou juros e correção monetária, há crime.

Public services cannot be placed as a function of merely private interests (BEZERRA FILHO, 219, p. 19).

Osório (2020), also analyzes another form of administrative improbity that can also be represented by the act of nepotism, which is characterized by the use of the power of the

function to provide benefits to relatives, resulting in personal favoritism, making the administration a hanger for unsupported jobs. legal action through illegal contracts.

Law 8,429/1992 establishes criminal liability in cases of administrative improbity concerning public agents, pointing out acts considered unlawful as enrichment at the expense of the usufruct of public resources. In this process of advantages over access to public office, the law also directs the following illicit way:

> Receive an economic advantage, direct or indirect, to facilitate the acquisition, exchange or lease of movable or immovable property, or the contracting of services by the entities referred to in art. 1st for a price higher than the market value; facilitate the sale, exchange or lease of a public asset or the provision of a service by a state entity at a price lower than the market value; use, in a particular work or service, vehicles, machines, equipment or material of any nature, owned or available to any of the entities mentioned in art. 1 of this law, as well as the work of public servants, employees or third parties hired by these entities; etc. (BRAZIL, 1992, p. 1).

In this sense, the public agent inattentive to the Administrative Improbity Law (LIA) n.8.429/92, has civil and criminal liability in cases of illicit actions against the public treasury, based on the immediate verification of the facts that, in the case of civil servants federal agencies, and, in the case of a military employee, in accordance with the respective disciplinary regulations. And in case of guilt, the confiscation of the assets of the agent or third party that has unlawfully enriched or caused damage to public property occurs, through the blocking of assets, bank accounts and financial investments held by the accused abroad, under the terms of the law and of international treaties (BRAZIL, 1992).

In this context, when it comes to a situation that involves an act harmful to administrative morality, the common citizen can propose a popular action, with the objective of annulling the harmful measures to the public treasury. In this process, it is necessary to prove the bad faith and the occurrence of the damage to the public property, by willful action or omission (from the new Law 14.230/2021) of the agent or the third party, full compensation will be given. of the damage. And in the previous Law, there was both the intentional modality and the culpable modality, which was extinguished with the changes from Law 14.230/2021 (MINASI, 2021).

The intent presupposes the intention to practice the administrative illicit act, in Law 8.429/92, it determined that the agent would act culpably, when due to malpractice, negligence or recklessness he fails to perform an administrative act, generating an act harmful to someone or public property. So, regardless of whether public administration

accounts are approved or disapproved by the bodies responsible for internal control and the Board of Accounts (NEVES; OLIVEIRA, 2022).

In the previous Law, there is no need for damage to public resources so that in the legal system in the administrative sphere it is characterized as an improper act, insofar as this is just a kind of classification of misconduct (NEVES; OLIVEIRA, 2022).

According to Berti (2016, p. 2):

> Despite the fact that it is an action that is being processed in the civil sphere, it seems reasonable to defend that the principles that should guide the process are those of the criminal procedure and not those of the civil procedure, given that the sanctions regulated by art. 12 of Law 8.249/92 have, without a doubt, a penal sanctioning nature. It is explained: the LIA has an eminently sanctioning/penalizing bias. Their penalties are often even more severe than those provided for in the Penal Code. Hence why the rules that must prevail in the procedural environment are those that guide the criminal procedure and not the civil procedure. So that the discussion about the nature of the sanction for the loss of public function in Law nº 8.429/92, whether civil or criminal, although it still exists, is gradually losing its raison d'être, with the deepening of the analysis of the subject by jurists and courts. The doubt begins to dissipate in the very text of the law.

Although sanctions have a civil and administrative nature, criminal sanctions are not excluded, which implies the responsibility of the agent for his own acts. In this regard, the legal system is based on a guideline that tends to exclude the possibility of including the criminal modality, which means that the penalties provided for must be instituted independently of the occurrence of criminal actions (BERTI, 2016).

The creation of the Fiscal Responsibility Law n. 101/2001 or Complementary Law no. 101, of May 4, 2001, originated in the project sent by the National Congress, within a period of 180 days, contained in Constitutional Amendment No. Administrative Misconduct Law (BRAZIL, 2001).

So that the matters that deal with public finances, public debt were contemplated in the law, bringing as an axis the fiscal responsibility that is object of legal discipline, also in other countries. With this law in place, it can be said that it concerns public policies, major and profound changes were being carried out in public administration, such as the balance of public accounts, a fact that contributes to the public power managing budget resources (LOHBAUER et al., 2021).

According to Bezerra Filho (2019, p. 44):

> In the evolution of the processes, the fundamental reasons for the existence of planning and budgeting within the public sector are the main framework, as these mechanisms are the main tools for achieving policies consistent

with the requirements of a democratic and participatory society, whose members must be integral parts of the public resource management process.

The Fiscal Responsibility Law (LIA) 14.230/2021, brought new perspectives in the field of guidelines on financial rules that imposes responsibility on tax management processes, in this perspective, the rules bring provisions on administrative punitive acts in case of administrative improbity (BRAZIL, 2021).

In this perspective, the institution of the law aimed to apply legal norms to ensure that the application of the public purse is carried out based on transparency, planning, control and accountability (PAZZAGLIANI FILHO, 2018).

The application of the law is timely insofar as it has best governance practices in public administrations, presenting guidelines that must be taken to implement effective controls and preventive measures against corruption in the public administration, minimizing illicit procedures or acts of improbity.

Failure to comply with the regulations, in addition to causing the personal sanctions of the agent from whom the act contrary to the legal provision that imposes compliance as a condition of effectiveness of the act, and cominate the penalty of nullity for what is practiced with transgression of its precept (OSÓRIO, 2020).

2.2 CHANGES TO THE ADMINSTRATIVE IMPROBITY LAW

In 2021, Law 14,230/2021 was enacted, which determined changes to Law 8,429/1992 or the Administrative Improbity Law (LIA), which began to establish significant changes in the responsibility associated with the practices of public agents in the act of administrative improbity. Among the change process, innovations such as the inclusion of the presence of intent stand out so that in legal terms the action of improbity can be configured (NEVES; OLIVEIRA, 2022).

The substantial changes with the new Law, represents a renewal in legal terms in the treatment of administrative improbity, highlighting the exclusion of the culpable modality, determining only the prevalence of the intentional modality that implies a specific intention for the characterization of the practice of improbity, in which it refers to the notion of bad faith by the public agent.

In this sense, with Law 14.230/2021, acts of negligence and imprudence in the administrative function will not cease to be legally an illicit act, but will not be governed by jurisprudence in the administrative sphere, therefore, they do not constitute elements that

are part of the characteristics of improbity. . From this perspective, an intentional act is characterized in this aspect, a set of actions that denote collusion between agents for their own benefits, bad faith in the function, using the public machine to obtain advantages from third parties and the intention to harm (NEVES; OLIVEIRA, 2022).

In the interpretation of the new administrative improbity law, the agent's intent is specifically represented by the conditions of existence of conscience associated with the will and objective of obtaining one's own benefit, acting improperly with a focus on privileges.

The difference is that the Law wants to punish dishonest and corrupt public agents, but prefers to leave out those who act with incompetence and unpreparedness (Cintra; Spaziante, 2022). In a way, the Courts of Justice had the notion of the need to specify the specific intentional modality of administrative improbity, the intention being bad faith.

Under this new legal field, administrative improbity represents the free and conscious will to obtain financial results and benefits during the usufruct of the function, which implies an illicit posture, generating eventual willful misconduct. While, in the case of guilt, there is the legal act of exclusion, therefore, the law determines the liability of the public agent who practices the illicit act, removing the reckless or incompetent public agent from this field (CINTRA; SPAZIANTE, 2022).

Cintra and Spaziante (2021) state that although being a reckless and negligent agent in the administrative function can cause harm to others, due to ineffectiveness in the processes, even if consciously, there is no misconduct in the interpretation of the new law, taking into account that the framework refers to corrupt and dishonest agents.

According to Lohbauer, et al. (2021), it can be said that a typology of intent was created, the specific one for cases of administrative improbity, with the intention of punishing and preventing the expansion of these acts proven to be disrespectful, from the chain that focuses on a subjective element logically consecrated by the conscious will to obtain results through illegal actions.

In both laws, the characterization of intent in the position of the public agent is evident, in the doctrinal interpretation, the element of guilt was present in law 8.429/1992. Therefore, with the changes from the new Law 14.230/2021, we sought to specify the intent, based on the notion of improbity as an act of bad faith. In this aspect, currently there is only the intentional modality as a characterization of administrative improbity, removing the culpable modality from the law (BRASIL, 2021).

CONCLUSION

From the perspective of the following guiding question: What are the changes that were inserted in the Administrative Improbity Law in relation to intent? This article aimed to identify the changes applied to the new Administrative Improbity Law, focusing on the issue of intent.

Thus, from the enactment of the new Administrative Improbity Law (LIA), this study showed that probity began to define the duties applied to public servants, imposing sanctions on violators for the practice of acts in disagreement.

The study showed that the new law determined the specification of intent in the crime of administrative improbity, being interpreted as a factor of bad faith in the exercise of the function, removing the notion of recklessness, negligence and gross errors.

Under this legal view, the exclusion of the culpable modality is analyzed, maintaining the intentional modality, establishes that the axis of the law is to avoid corruption, gain through illicit and disreputable act. Therefore, questions of guilt regarding agents who perform their function poorly do not fit into this area, although these may be punished in another sphere.

The legislator's intention was to create a specific intent for the disreputable public agent who acts trying to obtain benefits at the expense of illegal actions. So it is understood that currently this characterization logically separates the negligent and reckless agent from the corrupt and disloyal agent.

The legal regime is in place to discipline negligent administrative actions that involve their own or others' interests in the use of public resources for their own enrichment, or misuse of resources of which they are only a representative.

The creation of improbity laws (previous and current), as well as the Fiscal Responsibility Law, was of great political-legal importance for the Brazilian public administration, which must be regulated and exercised within the scope of the Federal Constitution and its complementary laws. The Administration is granted rights, but limits are established, and they should never be extrapolated. Law 8429/1992 presents itself as the first to be defined as a law of administrative improbity, which is the technical designation for the so-called administrative corruption, which, in different ways, promotes the distortion of Public Administration and affronts the core principles of the Legal Order.

The crime of administrative improbity is configured with actions that determine the obtaining of undue patrimonial advantages at the expense of the treasury, for the harmful exercise of public functions and jobs, clientelism, for the peddling of influence in the spheres of Public Administration, increase and fixation of subsidy to increase their own salaries and favoring the few to the detriment of the interests of society, by granting unlawful gifts and privileges or by improperly using public goods, income or services for their own benefit or others.

The innovations brought by Law 14.230/2021, was especially the specification of the notion of intent, determining only the existence of the intentional modality for crimes of administrative improbity, starting from the notion of punishment to the illicit will of public agents.

REFERENCES

BERTI, Márcio Guedes. **A Natureza Penal da Lei de Improbidade Administrativa**. 2016. Disponível em: <https://www.jusvox.com.br/revista/edicoes-anteriores/item/151-a-natureza-penal-da-lei-de-improbidade-administrativa.html>. Acesso em: 28 mar. 2022.

BEZERRA FILHO, Aluízio. **Processo de improbidade administrativa anotado e comentado**. 2. ed. São Paulo: JusPODIVM, 2019.

BRASIL. **Lei n. 8.429, de 2 de Junho de 1992**. Presidência da República: Casa Civil. 1992. Disponível em: <www.planalto.gov.br/ /ccivil_03/leis/l8429.htm>. Acesso em: 26 mar. 2022.

CINTRA, Rodrigo Suzuki; SPAZIANTE, Ana Clara. **O dolo específico na nova lei de improbidade administrativa.** Disponível em: <https://www.migalhas.com.br/depeso/360052/o-dolo-especifico-na-nova-lei-de-improbidade-administrativa>. Acesso em: 27 mar. 2022.

LOHBAUER, Rosane et al. **Comentários sobreas mudanças na Lei de Improbidade Administrativa.** 2021. Disponível em: <https://www.conjur.com.br/2021-nov-13/opiniao-comentarios-mudancas-lei-improbidade>. Acesso em: 27 mar. 2022.

MINASI, Júlio. **Mudanças na Lei de Improbidade Administrativa entram em vigor**. 2021. Disponível em: <https://www.camara.leg.br/noticias/820702-mudancas-na-lei-de-improbidade-administrativa-entram-em-vigor/>. Acesso em: 26 mar. 2022.

NEVES, Daniel Amorim Assumpção; OLIVEIRA, Rafael Carvalho Resende. **Comentários à reforma da Lei de Improbidade Administrativa**. Rio de Janeiro: Forense, 2022.

OLIVEIRA, Ricardo de. **Gestão pública:** Democracia e eficiência – uma visão prática e política. 1. ed. São Paulo: FGV, 2014.

OSÓRIO, Fábio Medina. **Teoria da Improbidade Administrativa: Má gestão, corrupção e ineficiência**. 5. ed. São Paulo: Revista dos Tribunais, 2020.

PAZZAGLINI FILHO, Marino. **Lei de Improbidade Administrativa Comentada**. 1. ed. São Paulo: Atlas, 2018.