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NEWS AND DEVELOPMENTS

The Consolidation of Sanctioning Administrative Law in Brazil: Exclusive Interview with Fábio Medina Osório

By Fabio Alberici de Mello, journalist

Over the past 25 years, Fábio Medina Osório has been a central figure in the consolidation of Administrative Sanctioning Law in Brazil. His work, *Direito Administrativo Sancionador*, originally published in 2000, was the first monograph on the subject in the country and introduced a new concept of administrative sanction, allowing the Judiciary to also impose sanctions of this nature. This innovative doctrine, strongly influenced by the European tradition, was fundamental for the principles of Criminal Law to be applied to the field of administrative sanctioning, providing greater legal certainty and protection to defendants in administrative proceedings.

The relevance of this work is reflected in the tenth edition of the book, recently released by the editor of *Revista dos Tribunais*, consolidating its impact on the legal market. In addition, it was Medina Osório who introduced, for the first time in Brazil, the subject of Administrative Sanctioning Law in the master's and doctoral courses of the Law School of the Federal University of Rio Grande do Sul (UFRGS), in 2004, boosting the academic study of the subject.

Court (STF), and was essential for the reform of the Administrative Misconduct Law (Law 14,230/2021). The new legislation expressly incorporated the legal regime of the Sanctioning Administrative Law for administrative misconduct, consolidating an interpretation that Medina Osório had defended since 1999, when he published an article in the Spanish Public Administration Journal.

In this exclusive interview, Medina Osório analyzes the evolution of Administrative Sanctioning Law in Brazil, the impact of the reform of the Improbity Law, the role of the STF and the Inter-American Court of Human Rights and the challenges of fighting corruption in the era of artificial intelligence.

The evolution of Administrative Sanctioning Law in Brazil: from theory to jurisprudence

Fábio Alberici de Mello, journalist: Dr. Medina Osório, you were a pioneer in the introduction of Administrative Sanctioning Law in Brazil. How do you evaluate the evolution of this area since the publication of your first article in 1999, through the launch of your work in 2000 and the introduction of the discipline at UFRGS in 2004?

Fábio Medina Osório: When I published my first article on the subject in 1999 and, the following year, I launched *Direito Administrativo Sancionador*, Brazil still did not recognize the existence of its own sanctioning regime within Administrative Law. Administrative sanctions were applied in a dispersed manner, without a clear set of principles that guaranteed legal certainty and respect for fundamental guarantees.

The introduction of this discipline in the master's and doctoral courses at UFRGS in 2004 was a milestone, as it brought to the academic debate the need to apply the principles of Criminal Law to Administrative Sanctioning Law, ensuring due process, presumption of innocence, strict legality and proportionality.

Over time, this doctrine directly influenced the case law of the STJ and STF, which began to recognize that administrative misconduct and corporate

the Administrative Misconduct Law and expressly adopted this regime, consolidating an interpretation that I had already defended since 1999.

Furthermore, this evolution in Brazil followed an international trend, especially in the case law of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACHR), which began to directly influence the decisions of Brazilian higher courts.

The STF and the retroactivity of the new Improbability Law

Fábio Alberici de Mello, journalist: The reform of the Administrative Misconduct Law incorporated the Administrative Sanctioning Law regime, but there is still controversy over its retroactive application. How do you assess the STF's position on this issue?

Fábio Medina Osório: The STF has a decisive role in consolidating the reform, but it has adopted a restrictive interpretation in some fundamental aspects. The Inter-American Court of Human Rights has already established that more beneficial sanctioning norms must always be retroactive, since the retroactivity of more favorable laws is an internationally recognized fundamental right.

However, when judging the general repercussions of the statute of limitations on misconduct (Topic 1,199), the STF understood that the statute of limitations is not a matter of substantive law, denying its retroactivity. This position contradicts the case law of both the Inter-American Court and the European Court of Human Rights, which treat the statute of limitations as an essential right of the accused person.

Another point of concern was the restriction of retroactivity for cases that have already been finalized. The Supreme Court ruled that, if the sanction has already been applied and the case concluded, the new, more beneficial law cannot be retroactive. This interpretation needs to be revised so that Brazil is fully aligned with the guarantees enshrined in the inter-American system.

The fight against corruption and the role of artificial intelligence

view?

Fábio Medina Osório: No. The fight against corruption cannot depend solely on a repressive model. It requires a more sophisticated approach, based on integration between control bodies, the use of artificial intelligence and the expansion of the State's investigative capacity.

Technologies such as machine learning and predictive data analysis are essential tools for detecting patterns of corruption before damage is done. In addition, it is essential to strengthen cooperation between oversight bodies and improve information sharing to make the system more efficient.

The reform of the Administrative Misconduct Law brought greater legal certainty to the sanctioning process, without compromising the fight against corruption. The challenge now is to improve investigation mechanisms and modernize methods for preventing and repressing illicit activities.

The future of Sanctioning Administrative Law in Brazil

Fábio Alberici de Mello, journalist: Finally, what are the next challenges for Administrative Sanctioning Law in Brazil?

Fábio Medina Osório: The main challenge is to definitively consolidate the sanctioning legal regime within Administrative Law, ensuring that it does not suffer setbacks in the STF and that it increasingly aligns with the jurisprudence of the Inter-American Court and the European Court of Human Rights.

Furthermore, it is essential to advance in the standardization of the regulation of the Anti-Corruption Law (Law 12.846/2013), avoiding legal uncertainty and divergent interpretations among federative entities.

Brazil is on the right path, but it needs to strengthen these guarantees so that Administrative Sanctioning Law continues to evolve in a fair, safe and efficient manner.

The unconstitutionality of culpable misconduct and the limits of legislative conformity

misconduct, reaffirming the requirement of intent to constitute an improper act. The decision generated intense debates, especially regarding the scope of the reform promoted by Law 14,230/2021 and the possibility that the legislator, in the future, will resume the provision of sanctions for negligent conduct. How do you evaluate this decision by the Supreme Federal Court?

Fábio Medina Osório: The reform of the Administrative Misconduct Law was fully constitutional and falls within the freedom of legislative conformation that the democratic principle grants to the legislator. What Law 14,230/2021 did was to delimit the concept of administrative misconduct, removing the negligent modality to ensure greater legal certainty and align the sanctioning regime for misconduct with the fundamental principles of Criminal Law and Administrative Sanctioning Law.

However, it is important to understand that the removal of culpable misconduct from legislation does not mean that the legislator is prevented from reintroducing it in the future. The democratic principle itself that allowed the revocation of culpable types also allows the legislator, if he considers it necessary, to once again enshrine culpable misconduct within the limits of the freedom of legislative conformation.

There is no constitutional prohibition that prevents the existence of culpable types in the sanctioning legal system. The Penal Code itself provides for types such as culpable embezzlement, and no one has ever stated that this classification would be unconstitutional. Likewise, if the legislator understands that there is a need for sanctions for culpable acts that cause serious harm to the public treasury or compromise administrative morality, he may reintroduce culpable misconduct through a new legislative debate.

Fábio Alberici de Mello, journalist: But from the point of view of the constitutional regime of improbity, would there be any material limitation to this reintroduction of the types of culpable misconduct? Wouldn't the STF, by removing culpable improbity, be setting an interpretative limit for the legislator

Fábio Medina Osório: I do not see this decision by the STF as an absolute obstacle to the legislative establishment of administrative misconduct. What

moment, arises from the will of the legislator and the principle of strict legality. This, however, does not mean that a future law that provides for negligent misconduct would automatically be unconstitutional.

The crucial point here is to understand that administrative misconduct has a sanctioning nature, but is not identical to Criminal Law. The legislator has a wide margin of discretion to define administrative offenses and the respective liability regimes. The Constitution requires that administrative misconduct be combated, but does not impose a single model for classification

Therefore, if tomorrow the legislator decides that certain culpable behaviors represent an unacceptable risk to administrative probity and deserve sanction, it may create new legal types, as long as constitutional principles are respected. What cannot be allowed is that this decision by the STF be interpreted as an insurmountable barrier, under penalty of hindering the normative evolution of Sanctioning Administrative Law.

Fábio Alberici de Mello, journalist: This leads us to a broader debate about the limits of freedom of legislative formation. Administrative misconduct has been a subject of strong judicialization, especially in the Supreme Federal Court, which is frequently called upon to interpret the compatibility of sanctioning norms with the Constitution. Do you believe that there is a risk of hyperjudicialization, in the sense that the Judiciary may end up excessively restricting the legislator's scope of action in this matter?

Fábio Medina Osório: Without a doubt. This is one of the greatest challenges for Administrative Sanctioning Law in Brazil. The STF has a fundamental role in guaranteeing the constitutional order, but the control of constitutionality cannot become an undue limitation of legislative capacity. The freedom to shape legislation is a pillar of the Democratic State of Law, and its excessive restriction can lead to a weakening of the legislative function, generating legal instability and institutional insecurity.

The risk of hyperjudicialization occurs when the Judiciary begins to review legitimate legislative choices, without there being a clear violation of the Constitution. In the case of administrative misconduct, caution must be taken

If there is a democratic debate that leads to the reintroduction of culpable misconduct, and if this reintroduction is done within constitutional parameters, there is no reason for the Judiciary to invalidate this option. The risk is that, in the face of a new law providing for culpable types, there will be a wave of judicialization again, with arguments that today's STF decision would have established a definitive understanding on the need for intent. This would be a mistake, because the current decision is limited to interpreting the current legislation, and not establishing an absolute constitutional principle.

Fábio Alberici de Mello, journalist: Given this scenario, what recommendations would you make for legislators to act more safely, avoiding new challenges in the STF?

Fábio Medina Osório: The legislator must act with solid technical and reasoning. If there is a movement to reintroduce negligent misconduct, it will be essential that the legislative debate be well structured, based on technical studies and parameters already consolidated in Comparative Law. The reasoning must demonstrate that the provision of negligent types serves a legitimate public interest and respects the guarantees of the Administrative Sanctioning Law.

Furthermore, it is important that Congress establish objective criteria for characterizing gross negligence, preventing the rule from being interpreted broadly and imprecisely. The more clearly defined the rule is, the lower the risk that the Supreme Court will consider it unconstitutional for violating the principle of legal certainty.

Another crucial point is the dialogue between the branches of government. The legislator must pay attention to the discussions in the STF and in the legal community in order to create rules that are legally sound and can withstand any challenges. This involves a qualified debate with jurists, academics and legal professionals, ensuring that the legislation is formulated in a way that avoids unnecessary conflicts of interpretation.

between what the legislator proposes and what the Judiciary decides?

The right to legally tolerable error and the impact of the reform of Law No. 14,230/2021

Fábio Alberici de Mello, journalist: Dr. Medina Osório, since your first work on administrative misconduct, published in 1997, you have argued that misconduct was a qualified illegality and that public administrators should have a legally tolerable margin of error. You have always compared this thesis with the functioning of the justice system itself, highlighting that judges can make mistakes and have their sentences overturned, members of the Public Prosecutor's Office can formulate inept petitions or complaints, and, similarly, public administrators should not be punished for common mistakes. Law No. 14,230/2021 adopted this thesis by eliminating negligent misconduct and requiring specific intent for liability. However, gross error, which was previously a differentiating criterion, was abolished. How do you assess this change and the impacts of the requirement of specific intent for the configuration of misconduct?

Fábio Medina Osório: The reform of the Administrative Misconduct Law represented a significant step forward in recognizing that not all illegalities can be treated as administrative misconduct. Since the beginning of the doctrinal debates on the subject, I have always argued that administrative misconduct could not be confused with a mere error in public management. A public agent, in the exercise of his or her functions, must have a space to act that allows him or her to make complex decisions without the permanent fear of automatic liability.

Law No. 14,230/2021 adopted this view by eliminating the negligent form of misconduct and establishing specific intent as an essential requirement for liability. This change is fundamental because it prevents public officials from being punished for technical or administrative decisions that, although possibly erroneous, were made without bad faith.

Before the reform, the existence of gross error was used as an intermediate criterion for establishing misconduct. With the new law, gross error is no longer

erroneous administrative act are no longer sufficient to characterize misconduct.

Fábio Alberici de Mello, journalist: This change also directly impacts the way in which misconduct lawsuits are structured, especially with regard to the initial claim and the need to describe the specific intent. How does this requirement affect the dynamics of the lawsuits?

Fábio Medina Osório: The requirement of specific intent has profound implications for the way in which misconduct actions should be conducted. Before the reform, it was common for actions to be filed based on a generic formulation, simply alleging that a certain public agent had acted with the intention of violating norms. Now, that is no longer enough.

The initial claim for an action for misconduct must describe, in detail, the specific intention of the public agent. Generic intent, that is, the mere intention to commit an act contrary to the law, is no longer enough. It is necessary to demonstrate the illicit purpose intended by the agent, what his real intention was in committing the act.

If a lawsuit is filed without such a precise description of the specific intent, the judge must order the amendment of the initial claim. If the claim is not amended, it must be dismissed. This represents a strategic shift in the narrative of wrongful conduct, as it requires the plaintiff to present a detailed description of the agent's intent from the outset of the lawsuit.

Furthermore, this requirement also applies to actions for compensation to the public treasury. It is no longer possible to file actions of this nature without demonstrating specific intent. This means that the mere fact that a public manager has caused harm to the public treasury is not enough for him to be held liable for misconduct. It is necessary to prove that he acted deliberately to harm the public coffers.

Fábio Alberici de Mello, journalist: This distinction between generic intent and specific intent revives a debate that has long permeated Criminal Law and now assumes a central role in Administrative Sanctioning Law. In practical terms,

Fábio Medina Osório: The distinction between generic intent and specific intent has always been a fundamental theme in Criminal Law, and now it has become a central element in Administrative Sanctioning Law. In the context of administrative misconduct, this distinction is crucial because it directly affects the classification of improper acts and the way in which the accusation should be formulated.

Generic intent, which was limited to the mere intention of failing to comply with regulations, can no longer be used as the basis for an action for misconduct. Now, the prosecution must demonstrate that the public agent had a specific purpose in carrying out the act, which requires a much greater level of detail in the description of the facts. This makes the accusation more technical and prevents actions from being based on subjective inferences about the manager's intention.

This change provides greater legal certainty for public officials and prevents the trivialization of administrative misconduct. For a long time, there was a tendency towards excessive criminalization of public management, in which any wrong decision was subject to liability. With the requirement of specific intent, liability now depends on a more rigorous analysis of the agent's intentions and the specific circumstances of the case.

Fábio Alberici de Mello, journalist: And how do you see the practical application of this change by the courts? Are the Public Prosecutor's Office and the Judiciary prepared for this new requirement?

Fábio Medina Osório: The application of this change by the courts is still in the adaptation phase, and I believe that a transition period will be necessary for all actors involved – Public Prosecutor's Office, judiciary and lawyers – to adjust their procedural practices to this new reality.

The Public Prosecutor's Office, for example, will have to reformulate its approach when filing lawsuits, as it will no longer be able to base accusations on generic inferences about the conduct of public officials. More detailed

Judges will also need to adopt a more rigorous criterion when analyzing initial petitions, requiring that the specific intent be duly described before accepting the action. If this requirement is not met, the action should not even be admitted. This is a reflection of the sanctioning logic itself, which requires a higher level of precision and predictability so that the right to defense is fully ensured.

Furthermore, the case law of the higher courts should consolidate more objective parameters for the characterization of specific intent, ensuring that the new requirement is not interpreted in a restrictive or expansive manner that is at odds with the legislator's intention. This will be a crucial phase for the consolidation of the reform and for the improvement of the administrative misconduct regime in Brazil.

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