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The new law on administrative improbity: a useful instrument to combat corruption?[1]

The new law of administrative misconduct: a useful instrument for combating corruption?

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SUMMARY
The administrative improbity action is the procedural instrument that aims to apply sanctions to public agents or third parties who carry out acts of administrative improbity. With the new law, proof of specific intent on the part of the public manager in committing the act is required. The act of administrative improbity will only be classified in cases where the public agent's intention to commit illegality with the purpose of causing damage to public property, to favor themselves or third parties, is proven. With law 14,230/21, one of the main legal provisions to combat corruption was modified, law 8,429/92. This change requires specific intent in all cases to constitute improbity. The change does not punish the incompetent public agent, but rather the dishonest one. And this change brought divergences between scholars and part of the judiciary. This article shows some points of the change and the political context for it. **Key words:**Impropriety. Corruption. Constitution.

ABSTRACT
The administrative improbity action is the procedural instrument that aims to apply sanctions to public agents or third parties who practice acts of administrative improbity. With the new law, proof of specific intent by the public manager in committing the act is required. The act of administrative improbity will only be typified in cases where the intention of the public agent to commit the illegality with the purpose of causing damage to public property, to favor himself or third parties is proven. With law 14,230/21, one of the main legal provisions to combat corruption, law 8,429/92, was modified. This change requires that specific intent be required in all cases to set up misconduct. The change does not punish the incompetent public agent, but the dishonest one. And this change brought differences between scholars and part of the judiciary, this article shows some points of change and the political context for this.

Keywords:impropriety. Corruption. Constitution.

1. INTRODUCTION

This article deals with the fight against corruption and the new law on administrative improbity. As a general objective, the question is whether the changes will facilitate the impunity of the criminal agent and whether there will be effectiveness of article 1, § 2 on the voluntariness of the agent who committed the fraud.

The choice of theme was constructed based on public hearings and debates on Law 14,230/21, the most striking point of which is possible intent, in which the error is not enough, but the intention to make a mistake. Proving that the agent really wanted to commit the offense is a very difficult task.

The hypothesis, with the new law, requires proof of specific intent on the part of the public manager in committing the act and differentiating the criminal and civil nature of said Law. Only the act of administrative improbity will be typified in cases where the intention of the public agent to commit illegality with the purpose of cause damage to public property, for the benefit of oneself or third parties.

In order to identify how the new law on misconduct weakens the punishment of public agents who committed crimes against the public administration, Law 8,429/92 is compared with the new wording of Law 14,230/21.

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The research will be developed based on recent judicial decisions in doctrine, matters of newspapers that point out the difficulty of investigating possible intent. Recent decisions of the Federal Supreme Court. In analyzes by renowned jurists, legal processes and consultations with specific bodies.

The article is divided into three chapters, in addition to this introduction and conclusion. In the first, we seek to explain the political context behind the new wording, analysis of specific processes of the main articulator of the Law in Congress, the President of the Chamber of Deputies has a personal interest in these changes and this article will show what they are.

In the second, the positive and negative points of the changes will be addressed, what came to help the fight against corruption and what came to help the investigated agent not to be punished for the possible crime.

In the third, the theme will be the most beneficial retroactivity, of acts of improbity that occurred before the legislative teration. There were differences in decisions of the Federal Supreme Court. Some ministers looked at it from a criminal perspective and others from a civil perspective. The votes of each Minister on the topic will be analyzed as a source of discussion.

As justification, this article presents the political context of some individuals who, in the exercise of power, can directly affect our lives, and show the benefits and harms of Law 14,230/21 and prescriptive changes and non-retroactivity of the Administrative Improbity Law (LIA).

2 POLITICAL CONTEXT

The word improbity comes from the Latin *improper*, indicating poor quality of something. *Improbus*, bad, poor quality. When mentioning the dishonest agent, we are not referring to his dishonest characteristic, but to his poor management quality.

For jurist Matheus Carvalho (CARVALHO, 2021, p.11), probity is a sub-principle of morality. In article 37 of the 1988 Magna Carta, its caput mentions improbity as an injury to the principle of morality. Improbity cannot be confused with immorality. The improper administrator will always violate the principle of morality, but his illegal act does not necessarily violate the principle of morality.

Law 8,429/92 classifies the types of impropriety that are: actions or omissions that generate illicit enrichment, through some public position; damage to the treasury and acts against the principles of public administration.

In 2021, a project was made to amend the LIA, thus making it more flexible than the 1992 Law. During the discussion in the Senate, the fact that it would alleviate illicit acts by public agents throughout the national territory was questioned, but it would also directly benefit the main articulator: Arthur Lira from the Progressive Party, current President of the Chamber.

It ended up causing discomfort in parliament, as it is a “targeted” proposal and could increase cases of misconduct by 40%, according to Senator Alessandro Vieira. Senator Randolfe Rodrigues called it “in dubio, pro Lira”.

But why this distrust in changing the new Law and the particular interest of the then President of the Chamber? For the simple fact that Arthur Lira faces two lawsuits for administrative improbity, due to the intercurrent statute of limitations, the new law could benefit him.

Arthur Lira is a defendant in a criminal action in the First Panel of the Federal Supreme Court for passive corruption. According to the Attorney General's Office, Arthur Lira received a bribe of R$106,000 from the then president of the Brazilian Urban Transport Company (CBTU), Francisco Colombo, who was seeking political support to remain in office. The transfers would have occurred in 2012.

The money was seized at São Paulo airport, along with an aide from Lira. He tried to board a flight to Brasília with the amount hidden in his clothes and the ticket was paid by Lira himself.

Arthur Lira is also responsible for criminal organization in the second group of the STF, in the Lava Jato investigation nicknamed “PP Quadrillion”. Allegedly he participated in embezzlement schemes that lasted for more or less a decade, R$29 billion from Petrobras.

In 2007 Lira was convicted in Operation Taturana, which investigated embezzlement of public funds in the Alagoas Assembly. The action is in progress, awaiting analysis by the STJ, under the risk of statute of limitations. With the new Law, the prescription will take place in four years. In the case of Lira, since the date of promulgation of the second instance ruling, the deadline has already expired.[3] When the prescription is recognized, the conviction establishing the loss of public functions will be annulled, making the person ineligible.

Article 23 of Law 14,230/21 deals with the prescription of eight years from the occurrence of the fact.

3 The processes relate to the “PP gang” and “Operation Taturana” by Federal Deputy Arthur Lira (PP-AL) takes place in judicial secrecy. Assistance from a lawyer was sought for consultation, but I was unsuccessful.

If the judiciary delays in analyzing the case, the deadline will be cut in half. The prescription institute comes from the principle of legal certainty. Marçal Justen Filho (Op. Cit. CARVALHO 2021, p.75), says *"Legal security is even more relevant in relation to state action. In a State of Law, the conduct of state agents must be predictable".*

3 MAIN CHANGES TO LAW 14,230/2021

The most relevant change is the requirement of specific intent for the agent to be held responsible. Damages due to imprudence, incompetence or negligence are not considered misconduct. To be improbable, the agent's will and conscience must be proven, just the function or position is not enough. The action or omission will not be punished if the interpretation of the law differs.

The changes were to guarantee greater legal security for public agents and reduce the subjectivity of the application of laws by the judiciary and Public Prosecutor's Office. Only what is listed in law is considered improbity, today it is an exhaustive list, previously it was exemplary. Professor Guilherme Barcelos says: "A great merit of the New LIA, that is, the differentiation, once and for all, of what is illegality and what is an act of improbity, linked to the application, by force of law, of the principles of sanctioning law to the issue of impropriety".

To constitute an act of administrative improbity, proof of specific intent to harm the public administration is necessary. Generic intent is the desire to practice typical conduct, without any special purpose. Specific intent is the desire to practice typical conduct, but with a special purpose.

With the new LIA, to configure misconduct, the agent must have awareness, will and purpose, that is, specific intent. Paragraph 1 of article 1 of Law no. 14,230/2021 says:

> Acts of administrative improbity are considered to be intentional conduct typified in arts. 9th, 10 and 11 of this law, except for types provided for in special laws.

Only intentional actions are subject to administrative improbity actions. Paragraphs 2 and 3 of the same article contain the concept of intent:

> §2º The conscious and free will to achieve the illicit result typified in the arts. 9, 10 and 11 of this law, the agent's voluntariness is not enough.
> §3 The mere exercise of the function or performance of public powers, without proof of an intentional act with an illicit purpose, eliminates liability for an act of administrative improbity.

The Law can regulate any person, even if they are not paid, who causes any damage to the public administration and who has become illegally enriched, causing damage to the treasury regardless of the sphere, which may be federal, state or municipal.

Citizens responsible for illegal acts are classified as active subjects, which can also vary between appropriate and inappropriate: while the proper active subject is the person who exercises, temporarily or permanently, the position or function of a public agent, the inappropriate active subject is the one who commits an improper act without a public function.

To be included, however, it must act as an active subject of its own. Once again, the law addresses the need for expression of will, also to make public agents equal. The provisions of the law also apply to persons other than public officials who knowingly induce or contribute to improper conduct, including individuals and legal entities. Another change was the expansion of succession liability, as set out in article 8 of Law No. 14,230/21:

> Art. 8 The successor or heir of someone who causes damage to the treasury or who enriches himself illegally is only subject to the obligation to make reparations up to the limit of the value of the inheritance or assets transferred.

This article talks about the extension of property sanctions to the heirs and successors of the deceased agent. The law has a specific chapter for dosimetry, which was missing in the previous wording. Among the penalties provided for are the treasury, unavailability of assets and suspension of political rights. Article 17-c, item IV was included, which says:

> Consider, when applying sanctions, individually or cumulatively: a) the principles of proportionality and reasonableness;
> b) the nature, severity and impact of the offense committed;
> c) the extent of the damage caused;
> d) the financial benefit obtained by the agent;
> e) aggravating or mitigating circumstances;
> f) the agent's actions in mitigating the losses and consequences arising from his conduct omissive or commissive;
> g) the agent's background.

This wording guarantees the proportionality of the penalty being applied, and now provides for the need for the judge to consider the aforementioned article when setting the sanction. It also provides for a dosage of the penalty, in the event of an offense against public administration, the penalty may be limited to a fine, without prejudice to compensation for the damage. The Magistrate may authorize the payment to be paid in up to 48 installments, if the defendant cannot pay it off immediately. And the maximum period for suspension of political rights increases to 14 years, from 8 years previously.

In the debates on administrative improbity present in topic 1,199, according to the case records (ARE 843989 RG, of 02/24/2022, Rapporteur Minister Alexandre de Moraes), the Federal Supreme Court subdivides the principle of proportionality into 3 sub-principles: adequacy, necessity and proportionality *stricto sensu*. Here is the syllabus:

> SUMMARY: EXTRAORDINARY APPEAL WITH APPEAL. LAW 14,230/2021. RETROACTIVE APPLICATION OF THE PROVISIONS ON INTENT AND PRESCRIPTION IN ADMINISTRATIVE IMPROBITY ACTIONS. GENERAL REPERCUSSION RECOGNIZED. 1. It reveals special relevance, in accordance with art. 102, § 3, of the Constitution, the definition of possible (IR)RETROACTIVITY of the provisions of Law 14,230/2021, in particular, in relation to: (I) The need for the presence of the subjective element of intent to configure the act of administrative improbity, including in article 10 of the LIA; and (II) The application of the new general and intercurrent limitation periods. 2. General repercussion of the recognized matter, under the terms of art. 1,035 of the CPC.

The sub-principle of adequacy is the use of the appropriate measure to achieve the intended purpose. The sub-principle of necessity is about defining whether it is really necessary to achieve the proposed end or whether there is another milder alternative to meet that end. You*tricto sensu*it is a balance between the intensity of the fundamental right and the importance of realizing the fundamental right, that is, a balance of values and goods.

Another change is the principle of independence of instances, the new law establishes that the action of administrative improbity is impossible in cases of criminal acquittal of the accused, already confirmed by a collegial body if the action discusses the same facts. If acquitted in the criminal sphere by a collegiate body, the administrative improbity action must be dismissed from the civil action.

The new wording has become more demanding in receiving the initial petition, as set out in its article 17, §6°:

> The initial petition will note the following:
> I - It must individualize the defendant's conduct and point out the minimum evidentiary elements that demonstrate the occurrence of the hypotheses in arts. 9th, 10 and 11 of this Law and of its authorship, unless duly substantiated impossibility;
> II - It will be instructed with documents or justification that contain sufficient evidence of the truth city of the facts and the alleged intent or with well-founded reasons for the impossibility of presenting any of this evidence.

This change established objective criteria for the continuation of the action, requiring greater evidentiary effort on the part of the Public Prosecutor's Office.

These changes are somewhat controversial, as they come with the aim of punishing truly dishonorable agents, with the idea of guaranteeing the full exercise of public administration without fear of incurring the law by becoming few innovators in the exercise of their function. But some changes end up looking carte blanche for the error, as article 12, §9º says that "the sanctions provided for in this article can only be executed after the conviction has become final". Therefore, there cannot be provisional execution of the sentence. And article paragraph 10 of the same article informs that "p*For the purposes of counting the period of the sanction of suspension of political rights, the time interval between the collegial decision and the final judgment of the conviction will be computed retroactively".*

This paragraph is aligned with Complementary Law No. 135/2010 (Clean Record Law), which declares political agents with convictions in a collegial body to be ineligible. Totally inconsistent with paragraph 9 of the same article 12. There will be cases in which such a sentence will be served. Because it makes retroactive a shame

which will often not be fulfilled, benefiting the illegal agent. To illustrate, imagine a hypothetical case: suppose that, in the year 2022, the Court of Justice of Bahia (TJBA),*second instance collegial body*, sentenced a councilor to suspend his political rights for four years. This councilor files several appeals in higher courts, and the case becomes final in 2029. How will the sentence be served, if in article 12, §10 says that it should be retroactive to 2022, applying the sentence until 2026 (four years). But how to apply the penalty if we are in 2029, and the councilor will no longer be exercising his mandate where he was convicted.

Paragraph 9 prevents an innocent person from serving a sentence in advance, but as stated in § 10, dealing with retroactivity, it can lead to situations in which the sentence will not even be served.

4 IRRETROACTIVITY OF THE RULE IN THE FEDERAL SUPREME COURT

Sanctions for administrative improbity fall within the context of sanctioning administrative law, and do not constitute a disciplinary administrative penalty nor a civil penalty.

The Supreme Court decided that the new statute of limitations is not retroactive and that the deadlines occurred as of publication on 10/26/2021. Minister Alexandre de Morais was the rapporteur of the Extraordinary Appeal with Appeal 843989. The Minister understood that the LIA falls within the scope of sanctioning administrative law, and not criminal law. So the most beneficial rule does not retroactively apply in these cases.

The Ministers understood that it only applies to culpable acts that have not yet had a definitive decision. As the text did not consider the will but rather the action of the agent, with the new wording it is impossible to continue ongoing actions. Each Judge will analyze case by case before closing.

Minister Rosa Weber, in the same debate, understood that the retroaction of the most beneficial law set out in the Magna Carta in its article 5, item XL, should guide criminal issues, as the interpretation in the civil sphere. As the Administrative Improbity Law is in the field of civil law, it would not be appropriate to speak of non-retroactivity.

Minister Fux, in the debates, considered that the law has a civil nature, but emphasizes that:

> As unintentional (culpable) acts are no longer classified as administrative improbity, the new text must be applied to actions in progress when the law came into force, as they no longer constitute illegality.

Minister Lewandowki understands that the field of sanctioning administrative law is equivalent to criminal law and that the law must retroact for cases that occurred before its publication, even when there is a final judgment.

Minister André Mendonça considers improbity as a sanctioning genre, where criminal law and civil law are part of it. Therefore, nothing prevents the application of the general principles that sanction impropriety, where the retroactivity of the law most beneficial to the accused is applicable. Following this line, he concluded that the rule that excluded the culpable modality retroacts to affect ongoing processes.

Minister Nunes Marques understands that the new deadlines are retroactive to reach ongoing processes and considered that “in addition to the constitutional rule of non-retroactivity being a one-way street: it is a citizen's guarantee against more severe legislative innovations, which do not can be invoked by the State in favor of itself”.

Minister Dias Toffoli followed the votes of Minister André Mendonça in the rule that abolished the culpable modality and the new prescriptive frameworks defended by Minister Cassio Marques. And it must apply the same logic as Criminal Law. Minister Gilmar Mendes voted with the rapporteur in the sense that the law only goes back to affect ongoing processes. He voted for the retroactivity of the new general limitation period.

With the doctrinal divergences, the STF pacified the understanding that people who were prosecuted exclusively for the practice of a culpable act must be acquitted, but those whose knowledge process has already ended and are in the sentencing phase, will not be able to benefit from the new essay; and the new statutes of limitations would only run from the publication of the law.

CONCLUSIONS

It is concluded that the new wording of Law 14,230/21 came to give more security to public agents, enabling them to work more freely, without fear of a possible error due to lack of technical knowledge that could harm them, thus incurring , in criminal sanctions.

It was observed that the change in the LIA had a strong influence from its main coordinator, the President of the Chamber of Deputies, Arthur Lira, who, according to the old wording, would be ineligible. A great divergence was pointed out in the STF regarding non-retroactivity, in which some understood that the law is retroactive, supported by the constitutional principle, while other Ministers understood that it was not, as improbity is linked to the civil and not criminal area.

Proving possible intent will make it difficult to follow the processes, as it will be practically impossible to prove that there really was intent. In this way, the natural consequence will be that, due to procedural deadlines, the offending agent will end up using the process to let time pass, preventing him from paying for the illicit act.

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