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The guarantee of ne bis in idem and the mitigation of independence among the instances: A study in the light of the new law of administrative improbity in Brazil

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ABSTRACT
This paper discusses the guarantee of ne bis in idem between different sanctioning instances and its contraposition relation with the primacy of independence between the instances, specifically regarding the Brazilian regime of repression of administrative misconduct. It starts with the adoption of the side that defends the incidence of the typical guarantees of the criminal law to the punitive processes ruled by the sanctioning administrative law, from an initial approach of the debate regarding the connections between these two legal branches. Given this discussion, the analysis focuses on the recent changes promoted by the Federal Law 14.230/2021 to the Administrative Misconduct Law (Federal Law 8.429/1992). In this sense, based on a bibliographical review and legislative analysis, it is intended to understand whether the changes promoted in the Administrative Misconduct Law brought new manifestations of the guarantee of ne bis in idem between different sanctioning spheres in the Brazilian legal system, in order to mitigate the traditional independence between the punitive instances enshrined in article 37, § 4, of the Federal Constitution of 1988.

Keywords: Sanctioning administrative law, Administrative misconduct, Bis in idem, Independence between stances.

1 INTRODUCTION

This article addresses the guarantee of ne bis in idem between sanctions and sanctioning processes arising from different spheres of manifestation of the sanctioning power of the State (ius puniendi), especially with regard to public agents defendants in conduct harmful to the Public Administration. More specifically, it seeks to understand the guarantee of non bis in idem in relation to acts of administrative impropriety, and its relationship with the independence of the instances.

The chosen theme is justified by the multiplicity repressive characteristic of the protection of administrative probity. A single conduct practiced by the public agent can trigger distinct processes of accountability in the most diverse spheres: civil, criminal, administrative disciplinary, administrative improbity (Law n. 8.429/1992), political responsibility (Law n. 1.079/50) and control process (Courts of Auditors).

Considering the independence of the instances, and in the case of administrative impropriety the subjection to article 37, § 4, of the Federal Constitution (CRFB/88), it becomes possible the existence of conflicting decisions among themselves, as well as the excessive accumulation of punishments on the same individual in relation to the same fact, requiring hermeneutic effort in harmonization with certain fundamental rights and guarantees.

The option to carry out the delimited approach from the point of view of administrative improbity is also justified by the new changes promoted by Law No. 14,230/2021 in the Administrative Improbity Law (LIA), in a true spirit reforming the system of accountability of the public agent, expressly inserting it in the scope of the sanctioning administrative law4, according to art. 1, § 4 (BRAZIL, 2021)

With the study, it is intended to understand if the changes promoted in the Administrative Improbity Law by Law No. 14,230/2021 brought new manifestations of this guarantee between different sanctioning spheres in the Brazilian legal system, in order to mitigate the traditional autonomy between the punitive instances of administrative improbity.

To answer the proposed question, we use a literature review and legislative analysis (especially the Federal Constitution of 1988 and Law No. 8,429/1992, as amended by Law No. 14,230/2021).

2 GUARANTEED NEBISINIDEM ESUA RELATIONSHIP WITH INDEPENDENCE BETWEEN THE BODIES

The bis in idem is a Latin expression that, translated literally, means "twice in the same", being commonly conceptualized as the multiplication of persecution or sanctioning the same individual because of the same fact. This circumstance is caused by the subsumption of the same conduct to various legal devices capable of leading to a state punishment (JUSTEN FILHO, 2022).

The principle of prohibition of bis in idem is called "ne bis in idem" or "non bis in idem"5, having been enshrined in various international pacts and conventions throughout the twentieth century, such as its provision in the American Convention on Human Rights (Pact of San José de Costa Rica). This international normative provides in its eighth article, which deals with various judicial guarantees as human rights, that "The accused acquitted by a judgment passed in res judicata may not be subjected to a new process for the same facts" (BRASIL, 1992b).

In addition, ne bis in idem is also provided for in article 14, item 7, of the International Covenant on Civil and Political Rights, which states that "No one may be prosecuted or punished for an offense for which he has already been acquitted or convicted by a judgment passed in court, in accordance with the law and criminal procedures of each country" (BRASIL, 1992a).[1]

As a fundamental guarantee in the country's legal system, ne bis in idem is extracted from the systematic and logical reading of the Federal Constitution of 1988, as a corollary of other constitutionally provided guarantees, such as due process, the intangibility of res judicata, the presumption of innocence, legality and proportionality (COSTA, 2013).

It is observed that, in view of the various constitutional precepts with which ne bis in idem is related, this guarantee can be explored from different foundations and in multiple situations. The most solidified understanding of the manifestations of ne bis in idem concerns the existence of the substantive and procedural functionalities of this guarantee.

The material aspect is associated with the principle of proportionality (which leads to the prohibition of excess) and the principle of material legality, prohibiting the multiple sanctioning for the same fact. The cases in which the conduct satisfies two or more descriptions of the same unlawful conduct, in norms of a different nature or not, in what is called an apparent contest of norms, are an example of this material aspect.

In addition, another example of the operativity of the nebis in idem material is in the scope of the dosimetry of the penalty in the criminal sphere, being forbidden the consideration, in two or more distinct phases of the three-phase dosimetry, of the same element to give rise to an increase in the penalty (BACH, 2021). In this sense, there is not only a prohibition on double punishment, but also the prohibition of double legislative or negative judicial evaluation, for the same fact, against the same agent, even if in different phases of the sanctioning implementation (MENDONÇA JÚNIOR ; LIMA, 2021).

However, the ne bis in idem does not operate fully in its material aspect, since it is not enough to prohibit multiple sanctions for the same fact, since sanctions are only the final moment of a punitive process capable, by itself, to limit various guarantees of an individual, even if it ends in acquittal/dismissal.

It is in this aspect that the ne bis in idem processual operates, consisting in a prohibition of the possibility of the State to compromise, doubly, the dignitatis status of the citizen, with the promotion

[1] 4 Since before the enactment of Law 14,230/2021, Fábio Medina Osório had already been maintaining in his works the belonging of the regime of administrative improbity to the sanctioning branch of administrative law, a position adopted in this study. In this sense, see OSÓRIO, Fábio Medina. Administrative Law Sanctioning. 8. ed. rev. and current. Sao Paulo: Thomson Reuters Brazil, 2022.

[2] The difference is not relevant enough to generate a modification in the sense, but the particle "ne" more correctly expresses the imperative force of this legal precept, according to Marion Bach, reason for the
which will be adopted in the present work.

of new sanctioning procedural activity (MENDONÇA JÚNIOR; LIMA, 2021). That is, here the prohibition is not only in relation to the sanctioning, but to what comes before it materializes: the punitive processing per se.

It should be noted that the procedural ne bis in idem is broader than the material dimension of the ne bis in idem, considering that the prohibition of double jeopardy, logically, already contemplates the impossibility of double sanctioning for the same fact. Mañalich (2014)

He observed that the procedural ne bis in idem can be carried out to avoid, in relation to the same individual, two or more successive trials for the same fact, as a form of protection to res judicata; and also to prevent two or more simultaneous judgments for the same fact, so as to avoid the occurrence of lis pendens.

Despite apparent simplicity in its theoretical formulation, doctrine and jurisprudence still discuss the extent and limits of ne bis in idem, especially in cases that imply some degree of connection in relation to criminal and administrative offenses. This is because ne bis in idem has been showing its relevance in the face of the discussion about the multiplicity of state sanctions and the limits of the power of the state to administratively punish an individual through the application of sanctions. This discussion is related to the growth of the functions of the contemporary State and the passage, to administrative law, of the right to apply sanctions to individuals due to conduct that was previously typically treated by criminal law - a phenomenon known as "administrativization" of criminal law, giving rise to the legal sphere that is called "sanctioning administrative law" (OLIVEIRA, 2012).

Thus, doubts arise in the legal community as to what would be the legal regime applicable to the sanctioning processes of the Public Administration: whether the precepts of the criminal-legal regime (focusing on criminal and procedural guarantees of individuals) would be applied, or the precepts of the administrative legal regime, focusing on the verticality of the relations between the individual and the public administration and the presumption of veracity and legality of administrative acts (MELLO, 2007).

Adopting the current that defends the transposition of guarantees typical of criminal law to the sanctioning administrative law, it is assumed that it is not possible to confer total autonomy to the State to, unbridled, punish individuals for the same fact in different legal spheres, leading to double suppression of fundamental rights.

The issue has already been addressed in judgments of the European Community system of human rights, such as the Grande Stevens case6, when the defendants, held responsible by the Italian justice administratively and criminally, in different processes for the same fact, appealed to the European Court of Human Rights (ECtHR), alleging violation of the principle of ne bis in idem, enshrined in art. 4, Protocol 7 to the European Convention of

Human rights. The ECtHR accepted the defensive thesis and decided to annul the criminal sanctions determined by the Italian courts, since the defendants had already received sanctions for the same fact in the administrative sphere (ECtHR, 2014).[2]

Note the existence of an apparent paradox in the coexistence of the prohibition to bis in idem and the independence of the instances. There is a direct relationship, to the extent that there is an impediment for judgments handed down in one instance to be reviewed or reevaluated by another sphere, ensuring legal certainty and stability of the decisions handed down (GOMES, 2012).

The principle of independence between instances can be defined as the guideline that recognizes the prerogative of the legislator to, within the constitutional limits, typify the illegalities and choose sanctioning models and legal consequences of violations of norms of behavior, as well as opt for punitive subsystems aligned with certain legal branches, in order to better serve the public interest (MENDONÇA JÚNIOR; LIMA, 2021).

However, the constant incoherence between decisions of different punitive spheres and the multiple sanctioning manifestations of the State fulfilling the same objective, in relation to the same individual for the same fact, express the need to question the absolute character of independence between the instances (OSÓRIO, 2022).

In view of this, the ne bis in idem processual as protection to res judicata and lis pendens has a sensitive relationship with the discussion about the mitigation of independence between the instances, which has been defended in certain legal situations in which it is necessary to limit the punitive power of the State, such as when there is a concomitant incidence of criminal law and sanctioning administrative law - a situation that can be solved by ne bis in idem.

3 THE REFORM OF THE LAW OF ADMINISTRATIVE IMPROPRIETY

Law No. 8,429/1992 is a legal norm that defines and typifies several behaviors that characterize administrative impropriety in Brazil, such as illicit enrichment, damage to the public purse and violation of ethical principles. In addition, the law establishes political, administrative and civil sanctions, which aim not only at the reparation of the damages caused, but also at the preservation of morality and probity in public administration.

This normative aimed to regulate in the infraconstitutional scope the regime of repression of administrative improbity, from the provisions of the original constituent that, in article 37, § 4, of the CF/88, declared the possibility of sanctioning acts of administrative impropriety with the "suspension

[3] Paulo Burnier da Silveira conducts an important study on the Grande Stevens case from the Brazilian perspective. In this sense, for further study, cf. SILVEIRA, Paul Burnier of. Sanctioning administrative law and the *principle of non bis in idem in* the EU: a re-reading of the "Great Stevens" case and the impacts on competition protection. Journal of the Defense of Competition (RDC/CADE), vol. 2, no. 2, November 2014, pp. 5-22.

of political rights, the loss of public function, the unavailability of goods and compensation to the treasury, in the form and gradation provided for by law, without prejudice to the applicable criminal action" (BRASIL, 1988).

Thus, it is noteworthy that the constitutional charter opened the door to possibilities of intersection between different spheres of control (criminal, administrative, civil and political), privileging the independence between the instances, and with a direct impact also on the legal regime of administrative impropriety.

Recently, Law No. 14,230/2021 made several changes to the Administrative Improbity Law. See the wording of the fourth paragraph, included in Article 1 of the LIA, which deals with the introductory notions of the system of accountability for acts against probity in the organization of the State and in the exercise of its functions. In that legal provision it was expressly established that the system of administrative impropriety is governed by the principles of sanctioning administrative law.

It should be noted that the legislator sought to make it clear in the new wording of article 17-D of Law No. 8,429/1992, conferred by Law No. 14,230/2021, that the action of impropriety does not constitute a civil action and cannot be confused with the public civil action, which has a different purpose, that is, the control and protection of diffuse legal assets, homogeneous collective and individual (BRASIL, 2021). The purpose of this clarification in the letter of the law is to highlight the repressive and sanctioning character of the action of administrative impropriety:

> Art. 17-D. The action for administrative impropriety is repressive, of a sanctioning nature, intended for the application of sanctions of a personal nature provided for in this Law, and does not constitute a civil action, forbidden its filing for the control of legality of public policies and for the protection of public and social assets, the environment and other diffuse interests, homogeneous collective and individual (BRASIL, 2021).

According to Osório (2022), the sanctions provided for in the Administrative Improbity Law (Law No. 8,429/1992) are typical of sanctioning administrative law and attract the incidence of the same guarantees conferred on the defendant in the criminal sphere. This means that, although they do not have a criminal character, the sanctions of the Administrative Improbity Law have a punitive and coercive character, being applied as a form of punishment to public agents who practiced acts of improbity. In this sense, it is essential that the fundamental rights and guarantees of the accused, and the law of impropriety are observed It must also be included in this set of rules and principles that aim to guarantee the protection of the fundamental rights of the accused and to ensure the regularity and legality of the sanctioning procedures.

With regard to the changes promoted by Law No. 14,230/2021, Gajardoni (2021) notes that there was a concern on the part of the legislature to prevent the public agent from being doubly punished for the offense committed, in attention to the principles pertaining to the sanctioning administrative law regime (which attracts the guarantees of criminal law).

In the context of civil sanctions, it is cited, as an example, the situation involving the Law n. 12.846/2013 (Anti-Corruption Law), which provides as illegal a series of conducts committed against the Public Administration, being liable to sanction by said law, but which can often be identified with the conduct described in the Administrative Improbity Law (BRASIL, 2013).

In this regard, it is imperative to mention article 3, paragraph 2, of the LIA, included by Law No. 14,230/2021, which expressly prohibits the possibility of a legal entity being punished with a sanction provided for in the Improbity Law if the conduct committed is also sanctioned as an act harmful to the public administration referred to in Law No. 12,846/2012 (Anti-Corruption Law).

Thus, although the same conduct can be predicted as illegal and receive sanction by both the LIA and the Anti-Corruption Law, caution should be taken so that the principle of independence between these instances does not violate the ne bis in idem principle (GAJARDONI, 2021).

In this sense, article 12, paragraph 7, of the Administrative Improbity Law – already existing before the 2021 reform –, which complements article 3, paragraph 2, of the same legal statute, provides that sanctions applied to legal entities based on the LIA and Law no. 12,846/2013 "shall observe the constitutional principle of ne bis in idem" (BRASIL, 1992c).

Here we are faced with an express prohibition to the material ne bis in idem due to a coincidence of normative disciplines, of similar objectives, on the same conduct for which sanctions are attributed from sanctioning powers of identical natures (JUSTEN FILHO, 2022).

For this reason, without prejudice to the express rule of article 12, paragraph 7, of the LIA – which refers specifically to the ne bis in idem applied between the sanctions provided for in the LIA and in the Anti-Corruption Law –, a more generic § 5 was inserted in article 21, establishing that "the sanctions eventually applied in other spheres shall be compensated with those applied in the action of improbity" (BRASIL, 2021), without specifying the origins of the sanctions that can be subject to compensation – inferring, therefore, that compensation can be given from sanctions arising from any punitive instance, hence we are, again, faced with the mitigation of independence between instances (GAJARDONI, 2021).

Thus, based on the premise of article 1, paragraph 4, of the LIA, the sanctioning regime of the Administrative Improbity Law was further attenuated, expressly determining the compensation, avoiding undue bis in idem.

In addition, article 17-C, V of the LIA, also added by Law No. 14,230/21, is expressed in the sense that the judge of the action of administrative impropriety must consider in the application of the sanctions the dosimetry of the sanctions related to the same fact already applied to the agent, in attention to the principle of proportionality and reasonableness.

It is important to clarify that, in the Brazilian legal system, there is no legal or jurisprudential impediment to the application of multiple sanctions on the same fact, provided that such sanctions are

not identical, in which case they should be compensated, if their nature allows (it is forbidden, for example, the cumulation of the period of suspension of political rights determined in different punitive spheres). In fact, the majority understanding in doctrine and jurisprudence is that the cumulation of sanctions from different sanctioning spheres, per se, does not characterize bis in idem material.

With regard to the systematic repression of administrative impropriety, ne bis in idem finds fertile ground to develop in its procedural aspect – especially after the modifications introduced by Law No. 14,230/2021 in article 21, § 4, of the Administrative Improbity Law, which expanded in an innovative way the binding effect of the absolutory criminal sentence, an effect traditionally restricted to the hypotheses of proof of non-existence of authorship or materiality.

From the aforementioned legislative amendment, the communication of the dismissal of criminal claim may be given by all seven hypotheses of acquittal provided for in the items of article 386 of the Code of Criminal Procedure (BRAZIL, 1941). In this sense, the action of improbity can not be filed (or continued, if it is already in progress) even in the scenario that, in the criminal instance, there is no proof of the existence of the fact (item II), of not constituting the fact criminal offense (item III), of there being no proof of having the defendant competed for the criminal offense (item V), of there being circumstances that exclude the crime or exempt the defendant from punishment (item VI, referring to articles 20, 21, 22, 23, 26, § 1, of article 28 of the Penal Code[3] or even in the situation in which there is not sufficient evidence for conviction (item VII) (BRAZIL, 1940).

The reason for this modification in the model of communication between the spheres is directly related to the new provisions of the LIA regarding the nature of the action of administrative improbity, notably in its article 1, § 4 (which establishes its subjection to the principles of sanctioning administrative law), and in its article 17-D (which expressly emphasizes the repressive and punitive character of the action of improbity).

In spite of the possibility of merely compensatory (civil) claims being included in the action of impropriety, it is understood by the preponderance of its eminently punitive nature. This time, "the judgment ordinarily dedicated to the application of sanctions, the criminal, was prestigious, making its decision always generate impacts on the action of improbity before the facts of multiple incidence" (GAJARDONI, 2021, p. 494).

According to Gajardoni (2021), article 37, § 4, of the Federal Constitution, does not establish limits to the activity of the infraconstitutional legislator, who is free to establish the criteria for communication of the grounds between the criminal and civil/administrative instances. Thus, the

[4] Respectively: error by putative discriminators when there is no culpable typification of the conduct, excusable error on the illegality of the fact, irresistible moral coercion, hypotheses of exclusion of illicitness (state of necessity, self-defense, strict compliance with legal duty or regular exercise of law) and nonimputability.

Federal Constitution does not prevent criminal acquittal from having effects on civil or administrative action.

The wording given to article 21, paragraph 4, of the LIA denotes a tendency to advance towards a unitary and coherent dogmatics, a punitive procedural law, in a similar way to what the European courts have already understood, in a context of discussion about procedural rights and guarantees as human rights (such as the Great Stevens Case, mentioned in the first topic).

In view of this, the legislator chose to determine that, if there is the same factual and evidentiary set8 and the same factual description in the actions of improbity, the criminal sentence of acquittal (that is, only the sentence pro reo) will extend its effects to the scope of the sanctioning administrative law (OSÓRIO, 2022). What is intended to avoid is that, by virtue of the same facts and the same evidence (or, even, the lack of them), an individual is acquitted in one sphere of responsibility and condemned in another, denoting the action of an incoherent State.[4]

4 THE MITIGATION OF THE INDEPENDENCE OF THE INSTANCES IN THE LIGHT OF THE NEW LAW OF ADMINISTRATIVE IMPROBITY

As seen, despite the supposed constitutional legitimacy given by article 37, § 4, of the CF/88 for the punishment of acts of administrative impropriety by different instances independently, the independence between the instances has been questioned by scholars of punitive law, given its multiple manifestations capable of compromising fundamental rights and guarantees.

That is, it began to be questioned whether the old understanding regarding the aforementioned provision of CF/88 would be in accordance with the rest of the constitutional order, which generated new interpretations regarding the extension of the principle of independence between the instances.

Before the reform of the LIA, the mitigation of independence between instances was already manifested in some Brazilian regulations. More commonly, this relativization rests on the possibility that the criminal circumstance is prevalent before the other spheres of responsibility in cases of acquittal. This prevalence of criminal judgment is provided for in several legal regulations, such as article 935 of the Civil Code, article 66 and article 386, items I and IV of the Code of Criminal Procedure; Article 126 of Law 8,112/1990 and Article 7 of Law 13,869/2019. However, this

[5] It should also be emphasized that the communication of the grounds for acquittal is not automatic, and occurs only if they relate to the same facts and/or elements necessary for the configuration of administrative impropriety.
For example, often the element that characterizes the criminal type and that has not been proven in the criminal sphere, is not even a requirement for the characterization of improbity in the civil-administrative sphere. That is, if the fact or element that the criminal court found not proven or absent is not relevant to the subsumption of the conduct to the act of impropriety provided for in the LIA, the communication of the basis of acquittal of the criminal action will not take place. In this sense, Cf. GAJARDONI, Fernando da Fonseca et al. Comments on the New Law of Administrative Improbity: Law 8.249/1992, with the amendments of Law 14.230/2021. 5. Ed. See., current. and ampl. Sao Paulo: Thomson Reuters Brazil, 2021, pps. 496-497)

communication of the criminal court is usually restricted to situations of res judicata, when the criminal acquittal is given by proof of absence of authorship or materiality.

It is inferred, therefore, that the legislative amendment embodied in article 21, paragraph 4, of the Administrative Improbity Law assumes an avant-garde position. With the aforementioned legal provision, a prevalence of criminal judgment is established in a more forceful way than the provisions in other norms, meeting the new doctrinal and jurisprudential positions defended internationally about the need to attribute a greater harmony between the different punitive arms of the State, notably between criminal law and sanctioning administrative law, as legal branches which have the power to afflict considerably fundamental rights and guarantees and which, therefore, cannot be superimposed at the pleasure of the interpreter of the law.

However, although the Brazilian legislation has some manifestations of the mitigation of independence between the instances, in the doctrine and jurisprudence homelands still prevails the paradigm of the practically absolute character of this independence, with the understanding that, because it is based on the constitutional ideal of separation of powers, there would be almost no room for its relativization (COSTA, 2013).

In the extra-criminal sanctioning context, it is cited, as an example, the situation involving Law No. 12,846/2013 (Anti-Corruption Law), which provides as illegal a series of conducts committed against the Public Administration, being liable to sanction by that law, but which can often be identified with the conduct described in the Administrative Improbity Law.

In the same sense, in relation to the reception of the amendments to the Administrative Improbity Law by the legal community, it should be noted that, in a precautionary measure granted in the Direct Action of Unconstitutionality 7.236 / DF, of the rapporteurship of Justice Alexandre de Moraes, the Federal Supreme Court determined the suspension of the effectiveness of article 21, § 4, and other provisions of the New Law of Administrative Improbity. The legal basis given by the Supreme Court to welcome the precautionary measure is the risk of mitigated independence between legal spheres "eroding the very constitutional logic of the autonomy of the instances" (BRASIL, 2023).

With this, the decision accepted the argument of the authors of the ADI, to the effect that § 4 of article 21 of Law 8,429/1992 would violate the principles of the independence of the instances, of the natural judge, of the free motivated conviction and of the inalienability of the jurisdiction, in the face of the unrestricted communication of the criminal actions with the actions of improbity.

This time, despite the changes promoted by Law No. 14,230/2021 observe the international trends of concern with individual rights in the face of the concomitant growth of administrative and criminal punitive power, it is noted that Brazilian law shows a certain resistance to update itself on this current problem.

It is necessary to understand that the systematic repression of impropriety is conditioned by ne bis in idem, due process of law and democratic principles. Independence between bodies in the regime of impropriety does not mean that arbitrariness or suppression of fundamental rights should be allowed. In article 37, § 4, of the CF/88, the constituent valued the autonomy between the punitive instances of improbable acts, but did not say that the principle of proportionality would be disregarded, and this is the basis of ne bis in idem (COSTA, 2013).

The Public Prosecutor's Office, as the competent authority to file actions of administrative impropriety and criminal actions for administrative crimes, must ensure the unity of its action, in safeguarding the due coherence and harmony in the criminal or administrative approach of the matter (OSÓRIO, 2022).

Thus, it is perceived that the principle of ne bis in idem has general functionality in punitive proceedings, promoting an interface between criminal and administrative law sanctioning. This functionality points to a general rule of prevalence of criminal law, given that, to the extent that it represents a more burdensome alternative to the rights of the accused, because it is the ultima ratio, this legal branch also contemplates greater instruments of protection of fundamental rights threatened by the punitive claim of the State. These aspects seem to have been duly observed by the legislature at the time of drafting § 4 of article 21, introduced by Law no. 14,230/2021.

Thus, the absolutory sentence, even if based on insufficient evidence, produces a presumption of the absence of the presence of the requirements required for the punishment of the agent through improbity9, and the primacy of legal certainty must be observed, which implies the need for consistency between the decisions issued by the various state instances (JUSTEN FILHO, 2022).

The incidence of ne bis in idem procedural in the sphere of improbity, therefore, prevents that by a miscarriage of justice – and here it refers not to professional error, resulting from malpractice, but rather to the error deriving, naturally, from the human condition of the judge, as noted by Carnelutti (2001) – the accused is accused, for life, for the same fact.

However, this was not the only one of the legislator's pretensions. It is noteworthy, mainly, that Law No. 14,230/2021 was attentive to national and international discussions on the subject and welcomed the doctrine that defends the temperament of independence between the instances, also reinforcing the criminal content of the administrative sanctions applied to improbity acts – even if, formally, they are imposed through extracriminal judicial process. Along with this, the legislator expanded the possibilities of incidence of the axioms of criminal law, due to the common origin between it and the legal regime that guides the action of improbity, that is, the sanctioning administrative law.

From the multi-repressive aspect of accountability for impropriety, It defends the recognition of the institute of ne bis in idem between distinct sanctioning spheres that focus on this kind of

illegality, in order to limit the punitive power of the State, which expands in various forms of manifestations.

In fact, it is understood as imperative – because it is a logical consequence – to assume the applicability of ne bis in idem in the sphere of improbity, given that, as in criminal law, also in sanctioning administrative law there is the phenomenon of the apparent concurrence of repressive norms, which generates the risk of bis in idem. This is a discussion that, like the study of ne bis in idem, falls within the scope of a theory of the application of the sanctioning norm, as proposed by Osório (2022).[5]

It is noteworthy that the possible coincidence between criminal offense and impropriety would result in the impossibility of cumulation of sanctions, due to ne bis in idem. However, there are important distinctions between these two kinds of illicit that prevent the automatic incidence of the principle of ne bis in idem between them, especially in its material aspect.

Therefore, it is possible that the same fact is sanctioned, concomitantly, by means of criminal law and the Law of Administrative Improbity, without this automatically proving to be a violation of ne bis in idem. On the other hand, it is also correct to state that there are situations in which, yes (and for different reasons), sanctioning duplicity violates this principle.

This is because it would be too simplistic to ignore all the similarities found between both criminal offenses and administrative misconduct, which have special gravity and lead to the attribution of sanctions of great impact on the rights of the accused. The principle of proportionality enters the scene, then, for the adjustment between the sanctions imposed, (BACH, 2021).

Within this discussion, the main advance of the Reform of the Administrative Improbity Law was the absorption of the impact of criminal acquittal directly in the field of administrative improbity, in attention to the principle of proportionality of the state response, both in its procedural manifestation (article 21, § 4), and in the application of the sanction (providing that sanctions of different spheres should be compensated, According to Art. 21, § 5.

In consideration of the above, it is noted the relevance of ne bis in idem, both from an individual perspective (of protection of guarantees and fundamental freedoms), and from a state perspective, in

[6] In this regard, Marçal Justen Filho explains that it is necessary for the judgment of the action of impropriety to indicate evidence that logically justifies the distinct conclusion in the face of another judicial decision. If a particular court concludes that there is insufficient evidence to convict the accused, there is an exaggerated burden on the judge of the action of impropriety who, by examining the same evidence, draws a different conclusion from it. It is to say that the invocation of the free conviction of the magistrate is not enough to justify and legitimize contradictory decisions made by different judgments about the same factual and evidentiary set: it is essential that the magistrate adequately motivates his conclusion, indicating the evidentiary elements that led him to a decision different from that reached by another judge who was facing the same scenario. Thus, the legislative amendment in question also aimed to make it clear that the free conviction of the magistrate should not be confused with judicial arbitrariness. Cf. JUSTEN FILHO, Marçal. Reform of the Administrative Improbity Law commented and compared: Law 14.230, of October 25, 2021.1. Ed. Rio de Janeiro: Forense, 2022..

the light of the necessary rationality and efficiency in the performance of the Public Administration (COSTA, 2013).

Finally, despite the difficulty of identifying and systematizing the principle of one bis in idem in the Brazilian legal system, by bringing, with the wording of § 4 of article 21 of the Administrative Improbity Law, a powerful manifestation of ne bis in idem between different sanctioning spheres, also brought a legislative expression of the mitigation of the traditional principle of autonomy between the instances.

Notwithstanding the need for national doctrine and jurisprudence to address in a more in-depth manner the theme of ne bis in idem between different punitive instances, the legislative innovations brought by Law No. 14,230/2021 represent a relevant stimulus for the development of the theme from the perspective of the Brazilian legal reality.

5 FINAL CONSIDERATIONS

From the present study, it was possible to understand, initially, that ne bis in idem has two main meanings, which operate differently in legal practice. On the one hand, there is the nebis in idem material, which consists in the prohibition of multiple punishment for the same conduct. On the other hand, the procedural ne bis in idem acts as a prohibition of multiple prosecution or trial for the same conduct, preventing lis pendens and/or violation of res judicata.

The ne bis in idem processual shows its relevance in the contemporary panorama of sanctioning multiplicity, from different legal spheres (especially criminal and administrative) on the same fact, enabling a temperament to independence among the punitive instances (precept used to justify this excess of state punishment).

The principle of ne bis in idem manifests itself as a force that opposes the principle of independence between the instances and constitutes an important guideline to avoid that the different sanctioning provisions for the same fact end up, in practice, taking on exacerbated and offensive proportions to the fundamental rights and guarantees connected to due process of law, especially to the postulate of proportionality.

The Brazilian legislator brought, by promoting a series of changes in the Administrative Improbity Law, an important novelty regarding communication and the mitigation of independence between the instances. Article 21 of Law No. 8,429/1992 seeks to establish a series of guidelines for the application of the sanctioning rule in the context of administrative misconduct proceedings. Law No. 14,230/2021 introduced important changes in the aforementioned legal provision, by establishing a new regulation for communication between criminal and civil/administrative instances.

It is not ignored that the Brazilian legislation had already established, in a punctual way in different legal diplomas, the hypotheses of communication of the absolutory criminal sentence for the

impediment or locking of action of an extracriminal nature by the same factual and evidentiary substrate, provided that the acquittal has been based on proven inexistence of the fact and/or negative of authorship (grounds of acquittal provided for in the respective items I and IV, of art. 386 of the CPP), according to art. 935 of the CC and art. 66 of the CPP.

However, the new wording of the LIA facilitated the normative interpretation in the light of the procedural guaranteeism traditionally associated with criminal law, from which relevant principles are extracted to guide the application of the sanctioning norm - among them, is the ne bis in idem.

In this sense, the reform of the LIA generated the fomentation of the debate about the multiplicity of sanctions displayed by the State and also demonstrated an innovative position regarding the principle of independence between the instances, by expanding the possibilities of communication between the criminal and administrative spheres, through the introduction of article 21, § 4, to Law no. 8,429/1992.

The prohibition of ne bis in idem, in addition to being provided for in Law No. 8,429/1992 in an explicit manner with regard to its material aspect, for example, in relation to the sanctions attributed by the Anti-Corruption Law to the same facts also disapproved in the LIA (article 12, § 7), also manifests its procedural dimension implicitly in the LIA, especially in § 4 of its art.21. The prohibition of multiple procedural prosecution for the same fact demonstrates special importance in matters of punitive law, since it expands its scope of operation beyond the guarantee related to the material ne bis in idem and has a close relationship (in the opposite sense) with the principle of independence between punitive instances.

The wording given to article 21, paragraph 4, demonstrates the legislator's concern to clarify that the principle of independence between instances should not be interpreted absolutely, especially when the incidence of different spheres of an essentially repressive character on the same individual is at stake, due to the same unlawful act.

This time, it can be concluded that we are facing a paradigmatic change in the treatment given to administrative impropriety, to the extent that, while before the principle of autonomy of the instances was in force – especially due to the provision embodied in article 37, § 4, of CF/88 – today this principle would be mitigated by the need to limit the state punitive power, in view of the various gaps and ambiguities of the old wording of the LIA, which generated a large volume of punitive actions, whose convictions resulted amount to R$ 3.2 billion in the last decade (MARTINES, 2017). Such actions are accompanied by the suppression of fundamental procedural guarantees that, because they are not expressly provided for in the applicable legislation, were ignored by the operators of the law.

In this regard, we obtained the answer to the question raised ("Did the changes promoted in the Administrative Improbity Law bring new manifestations of the guarantee of ne bis in idem between different sanctioning spheres in the Brazilian legal system?"), in the sense that the new wording of

Law No. 8,429/1992 enshrined the principle of ne bis in idem in its art. 21, which contains rules for the application of the sanctions provided for in that law. Therefore, the hypothesis supported in the present study was confirmed.

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