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Phronesis and the Control of Public Administration Acts in Brazilian Legal System

Abstract: This article considers the Brazilian Legal System and the requirements of an act performed by public administration. To do so, it presents six main chapters. The first one considers Brazilian Constitution as it regards State form, legal and judicial systems. The second chapter presents the public administration stated in the Constitution. The requirements of a public administration act are presented in the third chapter. The improbity law, which determines how public administration acts should be performed, is presented on the fourth chapter. How one of the main judicial courts of Brazil has understood this law is the topic of the fifth chapter. The sixth chapter presents a proposal of how could be Phronesis used to solve misunderstandings about improbity in the Brazilian Legal System.
Keywords: Phronesi.s Brazilian Legal System. Public Administration

I. The Brazilian constitution: contents and judicial system standards

Brazil is a Federal Republic, as stated in its Constitution first article.

There are two main state character set in its first article: democracy as the system of government and the rule of law.

1. Democracy

Democracy is stated as a representative system. Citizens vote for their representatives in two powers: Legislative and Executive. Those powers are expressed in three spheres: Federal, State and City. Ballot questions are foreseen, but they are not the regular way of citizen's expression.

2. The rule of law

The rule of law figures in the first article of the Brazilian Constitution as a State character. It means that all acts in the Brazilian Legal system must obey the law.

The Brazilian Supreme Court recognizes a double structure to the rule of law: it is a citizen guarantee and the regular path for an action. (HC 73.454 and HC 100.678)

3. State's Powers

In addition to the Legislative and to the Executive powers the Brazilian Constitution also sets standards to the Judicial Power. It has no city sphere, being limited to the Federal and State Levels.

Judges are chosen by governors or, as in most cases, tests. They are granted no wage reduction, cannot be removed from place of duty, except in the legal form, and are entitled to remain in service up to 70 years old, with no exoneration possibility, unless a fault is committed.

4. The Judicial System

The parameters for Brazilian Judicial System are set in its Constitutions, on Chapter III, from article 92 to 135, Brazil's Judicial System is set in Courts. Those are responsible for themes, persons in reason to public duties performed, places or values, as stated in the Constitution.

The two main courts in Brazil are Supremo Tribunal Federal and Superior Tribunal de Justiça.

5. The Supremo Tribunal Federal

The Supremo Tribunal Federal is the court responsible for guarding the Brazilian Constitution. It has also others jurisdictions, but the guard of the Constitution prevails as its main function. That is stated in the article 102 of the Brazilian Constitution.

6. The Superior Tribunal de Justiça

The Brazilian Constitution was delivered in 1988, after the end of a dictatorship era. It brought innovations which were not limited to the form of government. The Superior Tribunal de Justiça is the main innovation on the Judicial System. Naming itself as the "citizenship court", its jurisdiction is set in article 105 of the Brazilian Constitution.

The Recurso Especial is a judicial form of appeal due to solve questions which denies validity to the federal law, accepts a state or city law or act against a federal one and solves misunderstandings about the federal law found between courts of different jurisdictions, as two state courts. This sort of appeal is relevant to this study.

II. The Public administration in the Brazilian constitution.

Article n. 37 of the Brazilian Constitution sets parameters for Public Administration. Those must be observed in every single act of a public administrator. They are: Legality, Morality, Impersonality, Publicity and Efficiency.

Legality expresses the rule of law. Every act must obey the law. Therefore it is also related to the state form.

Morality means what is considered moral in the public sphere. A public agent shall act perceiving the general good and not to please itself.

Impersonality is to be considered in a way to allow not a person to be favored by law or a public administration act in individual pattern.

Public Administration has to disclose every act it practices. That is the expression of publicity in constitutional terms.

Efficiency is taken as the need of every act performed by public administration to reach its ends.

III. Requirements of a public administration act in Brazil.

As stated in the article 104 of the Brazilian Civil Code, an act, to be considered legal, must have an agent, an object and obey the form established by law.

An act performed by Public Administration must also, besides those, observe reasoning and purpose. These are stated in article 2 of Federal Law n. 4.717, delivered in 1965.

Reasoning means it must rely on legal grounds and facts. It is what creates the public administrator will to do so.

Every act performed by the public administration in Brazil must reach an end. That end is not chosen by the performer, but by the legal system. That is purpose.

IV. The public administration improbity law:

As the public administration and its acts must obey to law we find a need of regulating the public administrator actions under such parameters.

The article 15, IV of the Brazilian mentions the loss of political rights due to improbity. The article 37§4^{o} adds the following penalties: loss of public function, unavailability of goods, and payback to the State.

Federal Law n. 8.429 was delivered in 1992 in order to turn those penalties effective.

This Law is applicable to public administrators and those who are government employees. It sets standards to improbity, which is a misconduct act performed by public administration agent.

There are three sorts of acts which may be considered an expression of improbity. The firsts are those practiced to increase the wealthy of the public administrator, stated in law article 9. The seconds are those which allow harm to the public wealth, stated in law article 10. The last ones are those against the parameters public administration, stated in law article 11.

In legal terms, acts harmful to public wealth are punishable if meant by deceit, guilty or if effects mentioned in law are perceived. But the Superior Tribunal de Justiça decided that only the two first are meant to be punished. This decision was published in august, 2.010 out of a consensus in court. So, from this date, there is no punishment if only the effects stated in law are perceived.

It sets a pattern in Brazilian legal system and changes the way public administration shall be promoted.

Therefore it is of great interest to take that decision into a close exam.

V. The Recurso Espcecial Nº 479.812

As previously stated the Superior Tribunal de Justiça solves misunderstandings about the federal law. To do so it observes a regulation which divides the processes received to the correspondent "Turma".

The whole court of the Superior Tribunal de Justiça is composed by 33 judges, due to Art. 104 of the Constitution. Three judges are occupied by administrative tasks. They act as Court President, Court Vice President and Federal Justice Coordinator.

The other 30 are divided in groups of ten. Each of these groups has jurisdiction set by themes, as stated in the Art. 9 of its regulation. These groups are divided in two sets of judges, with five judges. Each of these sets of five judges are named "Turma". Each of these deals with determined subjects. These arrangements are stated on the Regimento Interno do Superior Tribunal de Justiça.

Although one of the main attributions of the Superior Tribunal de Justiça is solving misunderstandings, disagreements might happen as well between "Turmas" in the same group. Therefore no solution will be found for such cases or the solution to each of those cases might depend on which "Turma" it was assigned to.

It was the case with the Federal Law n. 8.429. While the first Turma considered that improbity acts could only be those considering deceit or guilty, while the second Turma considered that neither was necessary to punish the agent, once improbity was also found in a expression which might only accomplish some effects stated by law.

The final decision in the ED no Resp 479.812, showed an agreement between the "Turmas". Now improbity acts can only be punished if deceit or guilty is perceived.

Therefore, there will be improbity only in guilty or deceit form.

At this point we are able to face the main task in this paper: how can we mark improbity? If it accepts guilty and deceit, it cannot be marked by agent conduct, as it might be noticed in both forms. So it must be found somewhere else.

As mentioned earlier, an administrative act in Brazilian Legal System must attend five requirements and obey to public administration parameters. Between those, purpose and efficiency stand out as they are not necessary in a act performed by others than the public administration.

But answering what is efficiency or purpose as standards to verify improbity is hard as those concepts might be vague or only verified in a real case. This is the point where *phronesis* comes in. Considering it, those concepts might be measured in perspective.

VI. Phronesis and Public Administration

The truth of *Phronesis* is found on a person we credit with it. This person may not only find good between those things particular to him, but also in those things which conduce to a good life in general. (EN. VI.5. 1140a 25-30) It is a reasoned and true state of capacity to act with regard to human goods, although it is not possible to find excellence in *Phronesis* (EN. VI.5. 1140b 20-25). It deals with things that are variable (EN. VI. 6. 1141a 1-5) and is required to the good man (EN. VI. 12. 1144a 35 - 40). No virtue can exist without *Phronesis* (EN. VI. 13. 1144b 15-20). It determines what is to make towards an end (EN. VI. 13. 1145a 1 - 5).

As *Phronesis* determines what is to be done in the reaching of a end it measures efficiency.

As the main of *Phronesis* are exposed it is now possible to relate it to the parameters of Brazilian Public Administration and also to Brazilian Federal Law n.8.429/92.

Public administration acts are supposed to be effective. It means they should reach the end. To do so, there are many options available. So, two characters of *Phronesis* are present, once those options are variable and aimed to an end. But not only that, it will be up to administrator to determine goods perceived in a specific act, although he may always need to

choose alternatives compatible with the parameters of public administration. These will set what is right.

But the Federal Law establishes acts which are punishable and the Superior Tribunal de Justiça these to be the ones practiced with guilty or deceit. The concept of guilty in Brazilian legal system is taken in three ways: malpractice, reckless or negligence. These are recognized in the Supremo Tribunal Federal decisions (RE 395942 AgR / RS - RIO GRANDE DO SUL)

Even though these concepts are clear, they might be in excess to reach those acts practiced by the public administrator and considered as improbity. This argument is clear when we accept that public needs are different from a single concept of efficiency. Taken efficiency as simply obeying the law is not what may reach needs aroused in public disaster situations or in situations which other criteria than the economic one might be considered. Efficiency considers the use of means towards an end and the measurement of it is made through *Phronesis*. Therefore it is the criteria able to determine if an act is riddled by improbity.

As remembered by Pierre Aubenque in his book "*La prudence chez Aristote*[1]", law speaks universally, but not all cases are covered by that (EN, V, 14, 1137b). So, considering the Brazilian Public Law, it is necessary to move forward from the law, although not leaving it, towards a new model in which *Phronesis* takes role measuring efficiency. That may allow an improvement in the handling of public goods as well as an improvement in government efficiency.

VII. Final Appointments

It has been mentioned that Brazil is a Federal Republic ruled by law in a democratic system of government. It has a complex judicial system. Public Administration and its acts are determined by law. Improbity practiced by public administrator is fought in the sense of the law. The Superior Tribunal de Justiça has a particular understanding about the improbity law, as it might take away from one of the law's article. That is justified in a sense of appropriateness, as it allows efficiency of a public act to be measured through *Phronesis*. *Phronesis* might be the way for a change in Brazilian Public Administration, as it allows the focus not only in law itself, but also includes efficiency.

[1] This book is available in French, published by Presses Universitaires de France, Portuguese, as "A prudência em Aristóteles, published by Paulus, and German, as "Der Begriff der Klugheit bei Aristoteles", published by Meiner.

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