REVISTA ANPPREV DE SEGURIDADE SOCIAL

The Illusory Formlessness Administrative Proceedings Sanctioning: the Principle of Instrumentality of Ways vs. the Purposes of the Process, under the Auspices of Ethics, Morality and Complexity

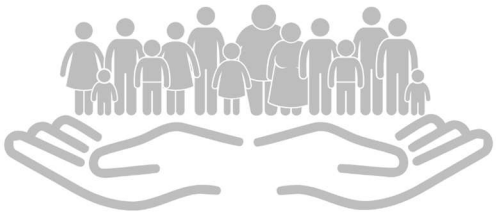
A Ilusória Amorfia do Processo Administrativo Sancionador: o Princípio da Instrumentalidade das Formas vs. as Finalidades do Processo, sob o Amparo da Ética, da Moral e da Complexidade

Submetido em: 14.11.2024
Aceito em: 24.12.2024

Sandro Lúcio Dezan
Doutor em Direito, pelo Centro Universitário de Brasília – UniCEUB
Doutor em Ciências Jurídicas Públicas, pela Universidade do Minho
Doutor em Direitos e Garantias Fundamentais, pela Faculdade de Direito de Vitória
Professor Titular do Mestrado e do Doutorado do Programa do Centro Universitário de Brasília. Membro emérito do Instituto de Direito Administrativo de Sergipe
ORCID: 0000-0002-8524-8309
E-mail: sandro.dezan@ceub.edu.br

Paulo Afonso Cavichioli Carmona
Pós-doutor pela Università del Salento, Lecce, Itália
Doutor em Direito Urbanístico pela Pontifícia Universidade Católica de São Paulo
Mestre em Direito Urbanístico pela Pontifícia Universidade Católica de São Paulo
Professor Titular do Mestrado e do Doutorado do Programa do Centro Universitário de Brasília
ORCID: 0000-0002-7715-3983
E-mail: paulo.carmona@ceub.edu.br

ABSTRACT: This study seeks to analyze this interrelationship between functions and purposes of the administrative process involving the pursuit of internal control of discipline in the public service and the pseudo-normative mechanisms for managing procedural “illegalities," especially the principle of the instrumentality of forms or moderate



formalism, used by case law – and, nevertheless, thus defended by doctrine –, for the maintenance of the effects of illegal procedural, administrative acts given the consideration that it has achieved the purpose that will be obtained with the production of the specific act, legally provided for.

KEYWORDS: due process of law; disciplinary administrative law; public administration; validity.

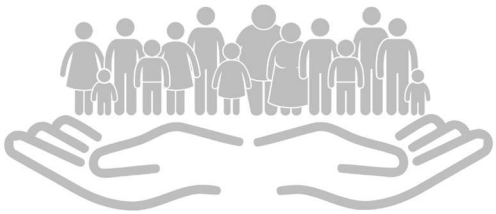
RESUMO: O presente estudo busca a análise dessa interrelação entre funções e finalidades do processo administrativo a envolver a persecução de controle interno da disciplina no serviço público e os mecanismos pseudonormativos de gestão das "ilegalidades" processuais, mormente o princípio da instrumentalidade das formas ou do formalismo moderado, empregado pela jurisprudência – e, não obstante, assim defendido pela doutrina –, para a manutenção dos efeitos de atos administrativos processuais ilegais diante da consideração de ele ter alcançado a finalidade que será obtida com a produção do ato próprio, legalmente previsto.

PALAVRAS-CHAVE: devido processo legal; direito administrativo disciplinar; public administration; validade.

1 INTRODUCTION

The disciplinary administrative process, as a type of administrative process and also derived from the category "legal process" – a subspecies and species of the latter genus[1] – comprehends functions and purposes that have a reason to exist within the normative order and the legal system of general sanctioning and punitive law[2], as a reflective component of the Rule of Law seeking to overcome the Welfare State, based on the need to achieve the democratic ideal[3]. The normative order sets functions and purposes, in addition to

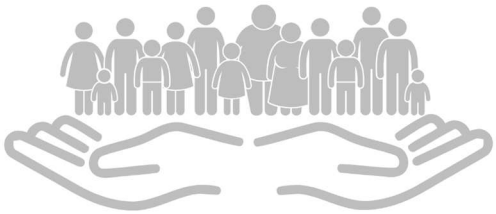
[1] In this sense: Menegale, 1962a; e Menegale, 1962b. In the opposite direction is the doctrine of Spanish Law, which identifies distinct characteristics between disciplinary and sanctioning Law and general criminal Law, for example, Llobregat, 2012a; Llobregat, 2012b; e Nieto, 2012.
[2] See, for all: Enterría; Fernádez, 2013a; and Enterría; Fernádez, 2013b.
[3] See on the search for overcoming the Social State by the democratic Rule of Law: Habermas, 1997.



satisfying the interests of the public administration and the community in seeing the investigations concluded, to the realization of fundamental rights of the procedural party in litigation with the State and, from this corollary premises, the realization of administrative, non-jurisdictional justice for the Brazilian experience.

This study aims to analyze this inter-relationship between functions and purposes of the administrative process involving the pursuit of internal control of discipline in the public service and the pseudo-normative mechanisms for managing procedural "illegalities", especially the principle of the instrumentality of forms or moderate formalism, used by case law – and, nevertheless, thus defended by doctrine –, for the maintenance of the effects of illegal procedural, administrative acts given the consideration that it has achieved the purpose that will be obtained with the production of the specific act, legally provided for. They point out that there is no nullity without prejudice – *pas de nullité sans grief*.

Brazilian courts make this adage a procedural "commonplace", serving as a legal category to eliminate all effects of any theory of procedural administrative nullities. Under this nuance, the possibilities of realizing fundamental rights are hindered, especially the rights and guarantees related to the observance of due process and its corollaries, even though we can already consider a profound evolution of the theory of nullities of administrative acts and the general theory of the process. The law enforcer needs to remember the legality, represented by the framework of legal sciences and their possibilities, to cultivate the unique formula of only recognizing nullity given a clear demonstration of damages to the defendant party. The form of the procedural acts and the process itself, although instrumental in the search for truth and the materialization of justice, does not have the power to undermine the ethical-moral duty of the Public Administration to act in a way that looks for the best



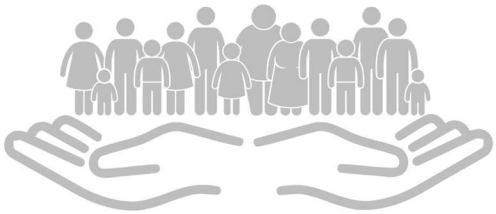
efficiency and effectiveness harmonized with the best decision from the point of view of realization of fundamental rights.

The principle of the instrumentality of forms must be used under harmonious governance of the purpose and function of the process, under the protection of ethics, morals, and the complexity that is measured between these concepts and the conception of legal acts and processes.

2 PRINCIPLE OF INSTRUMENTALITY OF FORMS VS. PURPOSES OF THE PROCESS, UNDER THE PROTECTION OF ETHICS, MORALS AND COMPLEXITY

The concepts of administrative procedure and process evolved from the notion of a complex administrative act, distinguishing themselves from the latter institute – the result of the insufficiency of the notion of *administrative contract*, to explain that the "competition of wills did not necessarily generate reciprocal obligations between the parties" (Cretella Júnior, 1961, p. 77) – insofar as the complex administrative act involves the will and action of more than one autonomous or independent entity or body, wills and actions that are interrelated and directed towards a single final act[4]. It is well known that Law is a dynamic science. It would be no different for the discipline of administrative Law, in which the emergence of subjective interactions and new relationships commonly cannot dispense with reforms or new legal constructions, tending to the transmutation of institutes and diverse adaptations, including internally within the same branch of Law. Evolution imposes (with maintenance or extinction of the original category) and not revolution, gradually, the necessary transformations (Bergel, 2003, p. 22). The essence of each will and act performed is, in particular, of the exact nature, with the sole purpose of completing the necessary steps to produce the intended administrative act. It comprises "the agreement

4 See: Medauar, 2003a; Medauar, 2003b; Medauar, 2013; Cretella Júnior, 1962; and Mello, 2015.

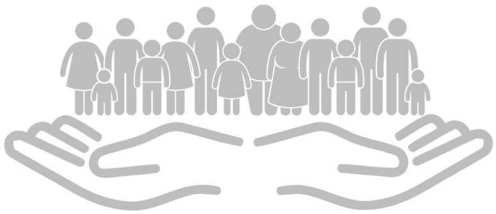


of several wills to give life to an act with a standard scope to all participants, even if conflicting, as a contract" (Miranda, 1998, pp. 45–46). The complex act, under this scope, "can be defined as any administrative act that is only realized with the manifestation of the will, concomitant or successive, of more than one State body" (Cretella Júnior, 1981, p. 245), whose extinction, due to the parallelism of forms, only happens, "by the combined action of the same bodies that gave it existence and validity" (Cretella Júnior, 1981, p. 245).

In a *complex administrative act*, the *will* and *individuality* of each public entity or agency that manifests itself for the structural composition of the final act must be reconciled, which is not to be confused with the definition of the concept of *procedure* and *process*, since in these latter institutes, despite the possible participation of more than one entity or agency, including actions by administered individuals, in the practice of secondary acts to the formation of the final conclusive act of the procedural iter, the conception of wills involved in the practice of acts with the substantial and formal purpose[5], of linking procedural phases is involved, in which the secondary acts do not necessarily aim at the production of a final main act, but rather at the temporal conclusion of a "chronological march" – in the essential meaning of the term process coming from its etymological origin in the Latin "*procedere*", which means "to continue", "to move forward", "to follow one's own course" (Pedra, 2007) – (here again, the conception of substance and form complexly correlated), for the resolution of administrative activity, such as bidding processes, effective hiring of public agents, and, without obstacles, investigation of administrative infractions, in cases, through administrative, fiscal-sanctioning and disciplinary procedures and processes, with regard to illicit acts committed by individuals or public agents[6].

[5] Direito material e direito processual se intercalam de um modo especial, em cada ato administrativo, com o fim de produção do procedimento processual e de sua manutenção nas balizas da ordem jurídica.

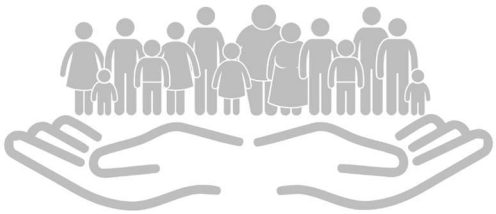
[6] See: Miranda, 1998; Cretella Júnior, 1981.



Galdino Siqueira already added in the scope of criminal Law, citing passages from Lizst and Mezger, when pointing out the need for the sanction to be preceded by a law prescribing both the prohibited conduct and the penalty to be imposed, the aspect of legal reserve, being the principle of legality, in the sense of patent fundamental rights, a *Magna Charta* of the delinquent, protecting him from the penalty that does not apply to him (Lizst) or even a *Magna Charta* of the non-delinquent, as a way of guaranteeing the non-arbitrary intervention of the State (Mezger) (Siqueira, 1947, p. 101).

For us, this conception also easily applies to disciplinary administrative Law when presenting the principle of legality as a *Magna Charta* of the non-offending public agent, of the honest and upright public agent, insofar as it keeps him from possible arbitrary intervention by the State administration, this is the material aspect of the guarantee. It is the material aspect of the guarantee. However, in the same way, from the formal aspect, the process and the efficiency, efficacy, and effectiveness of its nullity conventions, in light of (i) *the constitutional instrumentality of the process* (Gloeckner, 2010) beyond the form as a mere adornment to the legitimization of the penalty and (ii) the principle of due process of Law, presents a categorical burden of Magna Charta of public agents subject to the sanctioning process. Not only does it appear as a necessary path to the validity of the application of the disciplinary sanction and the exercise of power by the State, but in a genuinely democratic Rule of Law, it also presents itself as an insurmountable formula and source of rights and guarantees to the accused, not admitting, for example, any validation of procedural nullities that tends to aggravate the legal, procedural relational situation of the accused.

In this framework, there is a need to preserve the rights of those administered instead of the tendency towards excess and arbitrary use of power by those who exercise it, in this case, the State-Administration (Binder, 2005). In this sense, most of the doctrine is based on clarifying that “state power is placed before individuals drastically and dangerously. Any use



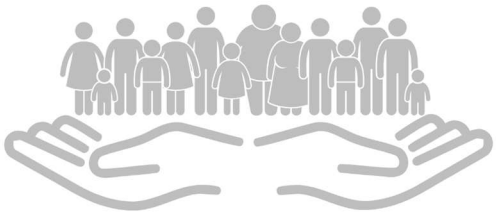
of power involves the possibility of abuse" (Eberhard, 2006, p. 26). It is important to highlight, as a facet of the *constitutionally qualified due process of law*[7], the principle of fair process given respect for the duty of invalidation in the face of null acts, originating from norms of any hierarchy and implicit or explicit in these norms, taking into account the fact that "in terms of procedural principles, there is no universal distinction between those that emerge from fundamental Law (political Constitution) and those that have their origin in common legislation" (Eberhard, 2006, p. 139).

From this perspective, the forms and formalizations of the procedural phases – as well as the material elements and assumptions of the administrative acts that form the procedure – are used to contain, limit and control the correct application of the procedural law to the specific case, to preserve the soundness of due process of law, as a fundamental right enshrined in the Brazilian Federal Constitution of 1988, and, in the same way, to offer all aspects of the rights and material and procedural guarantees to the accused, indicating the principle of "*nulla poena sine processu praevio*" (Eberhard, 2006, p. 249[8]) and aligned with the notion of constitutional instrumentality (Gloeckner, 2010).

The *principle of moderate formalism*, a feature of the *principle of the instrumentality of procedural forms*, despite being widely disseminated not only in national doctrine and

[7] What is now stated is supported, as it is a theory applied not only to common Law but to all theories of respect for fundamental rights in the "doctrine of preferential position" of the American Supreme Court, in which, having established procedural legal relationships involving fundamental rights when the Court employs the balancing and reasonableness technique, it initially gives more weight to the litigious right that contains fundamental values of the human person, that is, is permeated by fundamental rights and "this will occur when there is a deprivation of a Fundamental Right that occupies a preferential position." *Cf* Martel, 2005, p. 348.

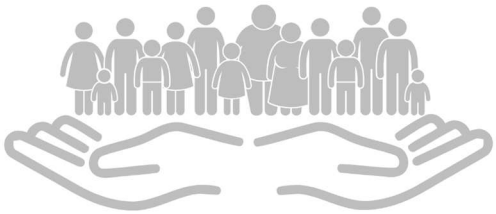
[8] Cf. "Por ello se ha sostenido que la reaccion penal no es inmediata a la perpetracion de un delito, sino mediata a ella, a traves y despues de un procedimiento regular que verifique el fundamento de una sentencia de condena; ello ha sido traducido afirmando la *mediaiez de la conminacion penal,* en el sentido de que el poder penal del Estado no habilita, en nuestro sistema, a la *coaccion directa,* sino que la pena instituida por el Derecho penal representa una prevision abstracta, amenazada al infractor eventual, cuya concrecion solo puede ser el resultado de un procedimiento regulado por la ley, que culmine en una decision formalizada autorizando al Estado a aplicarla" (Eberhard, 2006, p. 249).



jurisprudence but also among law enforcers in countries with a Western legal tradition[9],[10], must be investigated here with parsimony and caution, since, as it is a multi-significant legal concept, it can lead to the complete annihilation of theories of procedural nullities, relegating to the process the function of a mere formal "endorser" of preconceived merit given the initial news of the illicit act. The end of the process cannot be understood as achieving the supposed "truth" at any cost, mainly because without the appropriate formal legal instrument, what occurs is distancing these purposes of truth and justice of the law. As contradictory as it may seem, assessing the process's substantial, material aspect is necessary. The means, the process, and the procedure are the instruments designed by the democratic Rule of Law to, for example, concretize the acceptable resolution of the dispute and, indeed, for the feeling of conformity of the convicted person with the result of the administrative activity and with the quality and quantity of the penalty to be imposed. The procedural rules – regardless of those affecting the chronology and regularity of the procedure, which are also essential to us – are drawn from the Federal Constitution and the entire adjacent legal system as substantial guarantees for those under the jurisdiction, those administered, and

[9] Magra, 2006. In the same sense of maintaining the procedure under the protection of the principle of instrumentality of procedural forms, see also the Decision of the Administrative Court of Veneto: "Tribunale Amministrativo Regionale per il Veneto, Sezione Prima, Sentenza del 16 settembre 2014, n. 1209, in tema di acquiescenza, sul legittimo impedimento di cui all'art. 9, co. 5 del D.P.R. n. 487/1994 e sul quando debba operare il principio di collegialità perfetta". "Regional Administrative Court of Veneto, Section One, Judgment of 16 September 2014 No. 1209 in terms of compliance, due to such failure with art. 9, co. 5 of Presidential Decree No. 487/1994 and when it is needed to operate the principle of perfect collegiality.

[10] An exception to the peaceful acceptance of the principle of the instrumentality of forms and moderate formalism is presented in the studies of Luís Filipe Colaço Antunes, who points out, especially for cases of Portuguese administrative litigation, "the problem of neutralizing formal and procedural defects has arisen among us under the theory of the use of the administrative act, in the following terms: the violation of norms of an adjective or procedural nature, if they only imply the voidability of the administrative act, should not lead to its contentious annulment when its content, seen in the light of the substantive legality that conforms it, cannot be other than what it expresses and contains" (Antunes, 2013, p. 250). "Why, then, is this invalidity not pronounced? Firstly, it is a question of invalidity since we face an illegal act with refractions at the administrative and disciplinary responsibility level. As for the judge's failure to pronounce (illegality), the problem is deeper. In our view, it is based on a dichotomous view that does not properly value formal aspects as the place of the axiological-normative and the content of the act" (Antunes, 2013, p. 252).



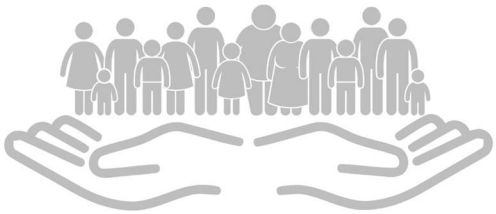
those accused in general, are imposed as being of previously mandatory observance to the confrontation and resolution of the merits of the process.

The legal system correlates – or so it seeks to concatenate – law and justice, as suggested elsewhere, with the improvement of social relations, to repeatedly evolve and present to the legal system fair rules to be applied in an equitable manner (Bergel, 2003, p. 22) and, in the words of Caio Tácito, "the opening key of administrative law is identified, in short, with the validity of the *principle of legality* that serves as a limit to the arbitrariness of power and identifies the frontier of the competence of the Public Administration" (Tácito, 1998, p. 28). From this perspective, the legal procedural phases, as well as the elements and assumptions related to the administrative acts that compose it, are of essential observance to guarantee an administrative action reconciled with the Rule of Law and democracy. This "external concept of legality is deepened in the recognition that the rule of competence of the administrator is not a blank check but must be adjusted according to the specific purpose for which the administrative activity is intended" (Tácito, 1998, p. 28). "Administrative procedural and procedural legality" must be reinforced and not relegated to a secondary level of normativity, subjugated to the material result sought by the State. Despite being an instrument to guarantee the individual, the administrative procedure and process comprise the proper, legitimate, and adequate place for the Administration to act, as the only means of administrative action to resolve conflicts, which mixes and places on an "equal footing" administrative "powers" and rights and guarantees of the administered, for the recognition of this administrative function, the sanctioning function, by the democratic Rule of Law – a form of legitimizing the exercise of the disciplinary duty-power and its internal punitive activity corporis and general sanctioning activity (Antunes, 2013; Antunes, 2015).

The (i) *moderate formalism* and the (ii) *purposes of the processes* are in opposing positions of force, with an initial antagonistic tendency, however, reconcilable and, given this, forming a vector substrate always seeking the unreasonable, unfounded,

disproportionate, and not duly substantiated and demonstrated refutation, for example, of the "non-recognition of nullity without demonstrating the harm to the accused", or of the "maintenance of the null administrative act, in favor of the continuity and conclusion of the process." The principle of prejudice (*pas de nullité sans grief*) cannot be used to reduce the entire theory of nullity of legal proceedings to the need for the interested party to demonstrate that the violation of the Law or some procedural form or formality disadvantaged him. In this regard, it is unacceptable to invert the burden of proving the prejudice caused to the defense by the defense itself in a sanctioning, punitive process. There must be identification by the doctrine, as well as by the Courts, and, however, by the legal system, of procedural nullities *juris et de jure*, absolute and by right, and, in any case, also of other diverse and validatable ones, *juris tantum*, as a reality of a substantialized procedural right to implement the material right in a genuinely fair manner. "The process is the instrument that guarantees man that justice does not need to be done by his own hands, because it will be perfected by the State in a processed form according to well-defined and previously established and known legal paradigms" (Rocha, 1997, p. 190). This notion of legal certainty depends on the adequate recognition of the healthy forms of the process and its procedures, with efficient and effective coercive effects, to curb the arbitrary actions, *exempli gratia*, of the administrative machine and, thus, to provide the contours of Democracy and the Rule of Law, making it a valid Rule of Law. Without these guarantees established in mandatory legal norms, with concrete procedural and procedural sanctions, and, therefore, "without trust in legal institutions, there is no basis for the guarantee of political institutions. The process is, therefore, a guarantee of Democracy that Law can achieve, according to Law and for effective justiciability" (Rocha, 1997, 190).

The procedural norm is not an accessory rule. It is not an *adjective*, serving as a mere qualifier of a substantive right of essential and valid fact, such as the fundamental right of the Rule of Law. It also occurs (or should occur) for administrative procedural norms. The



myth of *administrative simplification* and public administration as a whole in favor of greater efficiency and effectiveness of its concrete actions of laws that carry material rights (influenced by the notion of evolutionary iteration of the state machine, pervasive in the theories of bureaucratic Administration, Managerial Administration, and Dialogical Administration (Lima, 2013)) is, in part, responsible for the "increasing decline in the density of procedural-formal legality" (Antunes, 2013, p. 150), producing a paradoxical and short-term effect of inefficiency and ineffectiveness of the *procedural process* – which is transformed into something merely symbolic – and, thus, of the concrete administrative actions themselves, in the face of legal uncertainties and injustices resulting from this phenomenon.

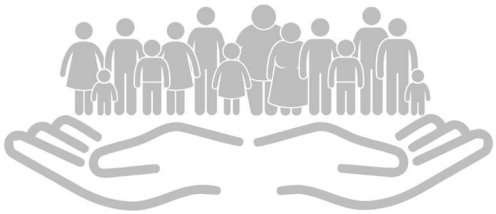
However, it is essential to clarify that we are not here defending an *exacerbated formalism*, or "form as an end in itself", as a cult of theories unrooted from the need to protect fundamental rights. However, within the scope of the disciplinary process, without the coherent deference to the essential formalities of the theories of nullity of administrative acts and procedural nullity, in a broad sense, the process "can be the certainty of the anti-democratic ruler of the insecurity constituted in forms that should lead to the opposite objective, that is, the security that only democratic Llaw can offer" (Rocha, 1997, p. 191). The administrative process has a peculiar characteristic: the possibility of the procedural administrative act presenting intrinsic and extrinsic defects (material and formal). The former compromises the act from the inside out, from its essence as a legal or administrative act to the effects produced in the process's procedural chain of administrative acts. The second type of defect in the act, the *extrinsic and formal ones*, generally arise from administrative acts devoid of intrinsic defects but functionally irregular, illegitimate, and illegal in their purposes and effects within the procedural procedure. Procedural, administrative acts may present these two types of defects

separately or in combination, composing the genus that Portuguese doctrine calls *organic defects* of the administrative procedure (Antunes, 2013; Antunes, 2015).

The *form of the law* must regulate the *substance* of the Law – and the form by the substance, in a genuinely complex interrelation –if democracy and the Rule of Law are not to be sustained in the face of the arbitrariness that can be installed with the application of norms devoid of their formal essence to guarantee legal certainty to the regulatory system. However, the formalism of the law, by itself, is also not synonymous with securing justice and has already been demonstrated in history, as exemplified by its use by Nazism, with its mechanical use, through an automaton bias, to be used to mask and legitimately validate the most diverse expressions of injustice, of all kinds, in the name of the pseudo-application of a legal, positive and textual right, voted and approved by the State in the name of its representatives.

In this context, the importance of theories of nullity is inserted, whether of material or *procedural* characteristics, iterating among themselves and also in *substantial* and *formal* spectrums[11], based not only on the law-text, formalized by the State, but also and essentially nuanced in doctrinal scientific studies, such as the general *theory of nullity of administrative acts* and *the general theory of the process*, to identify, alongside principles and rules exposed

[11] Let us note that the words "substantial" and "formal" can refer, the first, to natural and moralized Law and the second, to positive Law, in the interaction between the idealist philosophy of Law and the positivist philosophy of Law and, however, both as species of the genus positive law, in which the word "substantial" would refer to material Law. In contrast, the second would refer to procedural Law. Gustavo Zagrebelsky uses the terms in these two concepts (ZAGREBELSKY, 2008), while Jean-Louis Bergel only uses the first notion, referring to the substantial and formal perceptions of Law. The first is assessing the justice of Law from an evaluative legal system perspective. The second is to form a need for legal certainty through the hands of the rules of positive Law. (BERGEL, 2003). Jürgen Habermas points out the interrelationship between "moral and legal norms, on the complementary relationship between rational morality and positive law," moving away significantly from the conceptions of substantive prescriptions of law and formal prescriptions of law formulated by Zagrebelsky (*Ibidem*) and Bergel (Bergel, 2003), insofar as the latter two still maintain evaluative morality as inserted within Law itself, as a legal norm, while Habermas distinguishes two types of norm, the moral norm and the legal norm, despite agreeing on the fundamental interaction between them (Habermas, 2012, pp. 139-142).



by regulatory texts in general, *normative principles and values implicit* in the legal order, drawn from qualitative and quantitative concepts that pre-found the legal systems and regimes.

The substance of law, material law, cannot be conceived under the formalistic guise of Law, law-text, without applying a value-based, ethical, and moral perspective to this object, arising from the sociocultural context that forms, despite being changeable and flexible over time, the notion of justice in the legal system. The law must be distanced from a hermeneutics "blind" to substantial constitutional and legal principles and values, "as a pure formalized force, as mere legality" (Zagrebelsky, 2008, p. 19).

Here, we make a reasoning that is opposite to that of the defenders of *pure substantialism of law*, who refer to the arbitrary acts that can be carried out in the name of the application of the law, of the law-text, since we defend positive law governed by theories that reveal its nullities in the application of material law, in the rational and dialectical evolution of the acts of the parties to the legal relationship, for the fair resolution of the dispute. Through the process, it is possible to shape material law and extract from this substantial contribution the ethical-legal and moral-legal evaluative concepts. *Substantialism* and *formalism* must interrelate in an equitable, harmoniously functional, and interdependent manner to operationalize material and procedural law as an expression of justice:

> (...) the polarity of the two juridical fields - substantial and formal - is not a complication to be simplified, an inconvenience to be ignored or a defect to be corrected for a more 'pure', 'linear' and 'rigorous' conception, but a constitutive datum to be aware of and a value to be preserved. When this dualism is missing because the law adopts only one of its two sides, the form or the substance, or when it loses the notion because both sides are confused and indistinct, society is in danger and, as has been said, the legal-political system can be transformed into a lethal machine. In fact, the law with only one dimension escapes any examination and can become an instrument of blind and uncritical domination (Zagrebelsky, 2008, p. 22).

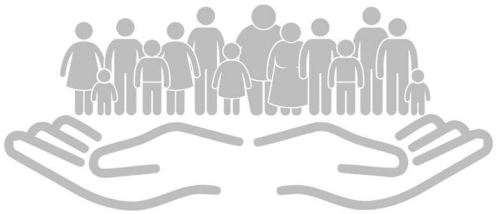
The balance between substantive law and procedural law, and these governed by theories of substantive and procedural nullities originating from the general theory of law,

should not be summarily dismissed under the argument of the moderate formalism of procedures and processes and the instrumentality of forms, given that the instrumental scope of erroneous forms and those that are detached from normative prescriptions must be thoroughly assessed to the point of clarifying the absence of any harm to the subject of jurisdiction and, in the case of disciplinary proceedings, to the person being administered, under penalty of patenting the application of substantive law, through a merely fictitious, simulated, unreal due process of law.

As seen, there must be a balanced dualism between the two poles of law and, if the normative field is presented in only one of its two conceptions, or if the normativity of one nucleus prevails over the other, or, on the other hand, these conceptions lose the tension of stability and agreement, "because both sides are confused and indistinct, society is in danger and, as has been said, the legal-political system can become a lethal machine" (Zagrebelsky, 2008, p. 22). In this regard, the theories of material and procedural nullities of law appear essential for the stability of the normative order. "Indeed, law with a single dimension escapes any examination and can become an instrument of blind and uncritical domination" (Zagrebelsky, 2008, p. 22).

The unregulated institution of the principle of moderate formalism in the disciplinary administrative process supplants the essence of justice of formal law in its function of limiting substantial law to enforce the latter at all costs, as if the process and due process of law only presented themselves in the legal context as mere "figurative" institutes, of form for form's sake, without essence in fact, and to grant the "air" of legality to the applied substantive law.

Given the above, it is clear without a shadow of a doubt that the process is endowed with a substantial aspect, provided with efficiency and effectiveness, as complexly systematized under the protection of substantive law, and vice versa. Given the paradigm of complexity (Morin, 2015), the phenomenon corresponds to a character visibly

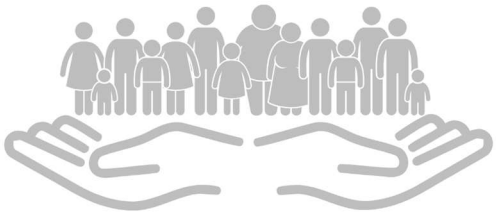


constituted by diversity within unity. This diversity necessarily composes the one and corresponds to the systemic complexity theory (Morin, 2011, p. 61).

Thus, moderate formalism and the instrumentality of forms tend to supplant the efficiency and effectiveness of the material aspects of procedural rules, as if the law were merely a syllogism from the concept of fact to the concept of the norm of substantive law, immediately giving rise to the result provided for in the normative order. In language commonly known in disciplinary law, this is an application of the "known truth" without due process or its procedural rules and of existence and validity being duly respected. It shows the importance of the balance between legal substance and legal formality, in which both are complexly at the service of each other and, nevertheless, intertwined with the purposes of justice as the scope of law.

The facts of life submitted to the contexts of law, such as litigation or the claim to be litigation, as well as the institutes and categories of substantive law and procedural law, are interconnected in a much more complex way than the simplistic, isolated, and temporal analysis of each element in a watertight manner, as if it were excluded from the sociocultural context of litigation and worked on in a fictitious and artificial environment, then to reinsert it into the plexus of things of law, giving it the suggested effects. The facts of life submitted to the contexts of law are correlated in a complex way, as are the intersubjective interrelations of the real world. It also occurs with the instrumentality of forms; now, how to categorically state that a specific procedural illegality did not generate procedural or even material damages or losses to one of the parties if, on the contrary, if the nullity that benefited the accused party were recognized, the benefit would be clear, at least in seeing the expectation of the right to prescription being able to materialize.

In the case of the State as a party in the sanctioning process – in the case in question, the disciplinary administrative process – notwithstanding other state punitive processes such as

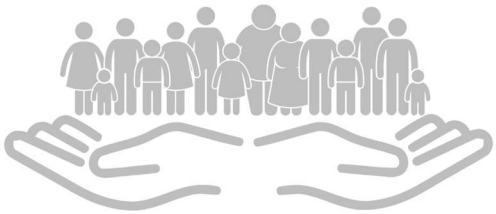


criminal proceedings, fiscal proceedings, or tax proceedings, it is clear that moderate formalism and the instrumentality of forms are, in fact, measures that benefit the punitive body responsible for the prosecution, since the law is usually responsible for stipulating the formalities and content, elements and assumptions of procedural acts, whose prescriptions become useless and "dead letters" in the eyes of the judge or administrator, who seeks the end of the process – and the punishment of the alleged offender –, without the application of the procedural rights and guarantees to which the accused is entitled. It violates due process of law in its substantive aspect since the Federal Constitution of 1988 did not elect it as a fundamental right devoid of normativity, in which the procedural norm, the essence of the principle in question, is found precisely in the duty to recognize the conditions of admissibility of the disciplinary action and the prerequisites of existence and validity of the process, as general prerequisites of validity of the confrontation and resolution of the merits of the disciplinary administrative process.

The process and justice through the process are concrete applications of ethics[12], in which, in the view of contemporary philosophers[13], in the contours of the expression of ethics, two prominent principles must be identified: the *principle of inclusion* and the *principle of exclusion* (Morin, 2011, pp. 19-20). *Inclusion* involves the insertion of the "I" into the "we" – "the whole is in the part and the part is in the whole" (Morin, 2015, p. 75) – and, consequently, apprehending the whole at the center of oneself. It is instinctively about the vital need for the other, as, in Aristotle, based on the premise that "man is a political [social] animal" (Aristóteles, 2002), resulting from the interaction between logos

[12] "La sujeción de la acción administrativa a determinadas formalidades, la necesidad de que la acción administrativa se realice a través de los cauces formales de un procedimiento ha sido siempre – y sigue siéndolo – una de las más firmes garantías del interés público. El procedimiento administrativo podrá cumplir otras finalidades – como la garantía de los derechos de los ciudadanos –. Pero es, ante todo, garantía de que la actuación de los administradores va a dirigirse hacia el interés público, y, por tanto, garantía de un comportamiento ético" (Pérez, 2014, pp. 207-208).

[13] Although it does not deal with the process and procedural justice categories, Edigar Morin's theory requires checking exclusion and inclusion through ethics. See: Morin, 2011.



and polis, between reason and life in society (Krohling, 2010; Krohling, 2011). On the other hand, from the perspective of the exclusion principle, there is a biased search for the preservation of individualism, of the "I", in which the other is a "stranger", and this, perhaps, as an aporetic vertex [without a defined *path*, *hódos*, and resulting from the combination of the words *metá* and *hódos* (method)], representative of remnants of visions of the liberal legal model influencing the neoliberal format of the State. This principle leads to competition and exclusion (Morin, 2011, pp. 19-20) between individuals, with the phenomenon, however, going beyond the individual sphere, encompassing intersubjective relations and permeating subjective and objective legal institutions, legal entities, and the law, and, nevertheless, imposing the modulation of the form of *justification* (normative legislation) and *application*[14] (normative interpretation and concretion) of its legal categories. Given these arguments, we identify the tendency to impose substantive, substantial law over procedural law, sometimes understood as a mere instrumental adjective directed at concretizing positive substantive law. Thus, we identify the imperativeness of the exclusion principle in any attempts to undermine principles and rules of procedural nullities, which could favor the rights of the accused. The thought of the *process as a complex institute* must be harmonized with the first *principle of inclusion* since it intersperses, in actions of interdependence, substantial law, and formal law, in which, inclusively, one depends on the other, for the search for possible – although really unattainable within an ideal conception – certainty, truth, and justice of law.

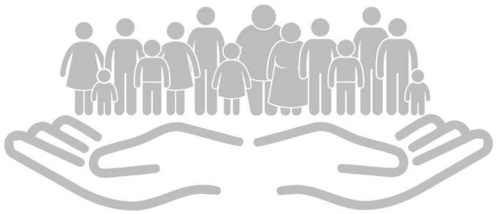
In everything there is an organization, or rather, a more or less detailed form of conformation, in which "separation, dispensation and annihilation are constantly and simultaneously triggered (...) and in this agitation forces of reconnection arise" (Morin,

[14] Words about the judgments of justification and application are used only to use the initial meaning of the concepts put forward by Klaus Günther without entering into the theory of legal argumentation. *Cf* Günther, 2004. In this same sense, the words are used by Habermas (2003a; 2003b).

2011, p. 31), through the occurrence of an *inseparable dialogue (dialogical tetragrammaton:* order, disorder, interactions, organization and reorganization, in antagonistic, competing and complementary cycles) (Morin, 2011, p. 32), for the resumption of the natural order of things. So, too, is the process and the disciplinary process, with its predictions of nullities, useful and even essential, notably as a "force of reconnection" and correction of the course of the process, in search of its possible scopes – certainty, truth, and justice.

It is in the *act* and performance that the *intention* risks failing or deviating from its purposes. In Law, the legislator expresses his initial will, his intention, which we understand as *mens legislators*, which, however, is handed over, upon becoming law-text, into the hands and evolution of the interpreters and appliers of the law. At this point, the act of "interpreting" and "applying" the norm to the specific case corresponds directly to "acting," which, hermeneutically misunderstood, can vitiate the entire initial purpose of the norm. It is a facet of the uncertainty of ethics due to the work of morality, influencing ethics in the "game of inter-retro-actions" (Morin, 2011, p. 41) "Hence the insufficiency of a morality that ignores the problem of the effects and consequences of its acts" (Morin, 2011, p. 41).

As with any legal process, the administrative process comprises a complex open to the dialectical exercise of reason (Braga, 2012) in frank confrontation with the direct and objective application of substantive law. In this regard, we must rethink how administrative and judicial authorities have viewed the process's ends, functions, and purposes not only as a mere form of rites but also as, in particular, endowed with substance for the realization of fundamental rights. However, despite all the arguments tried so far, the conclusion that we reach, especially when we observe the decisions of the Brazilian Superior Courts that endorse all types of administrative-procedural decision-making, is that there is no deference whatsoever to the "broad legal procedural" to contemplate the path of Public



Administration. For all that, the state administration, in its processes and procedures, remains at a sub-legal level – perhaps, with a small quantity of goodwill, at the legal effects of administrative acts isolated in themselves –in which it is not even possible to speak of procedural nullities and legal effects of procedural acts, and valid or invalid procedural phases; all this under the protection of the pathologically directed purposes that administrators and jurisdictional bodies seek in a preconceived way, through the administrative "process", their "jurisdictional review" and the judicial control of their acts.

Without any intention of disqualifying our institutions and in addition to possible lousy faith in the grounds for administrative decisions ("the problem of false justifications" (Rodriguez, 2013, p. 22)); what has been apparent up to now are administrative authorities who are oblivious to any notion of the legal importance of the functions they perform in the administrative process, without the slightest qualification or pre-qualification for the exercise of this public office, and, on the other hand, the inalienable jurisdiction, the jurisdictional bodies (Fancinni Neto, 2011; See: Luiz, 2013), fed back by the doctrine and reciprocally, not recognizing, in fact, substantially, the administrative procedural and the consequent *administrative justice* (action by the *law* and the *justice* – applied legal sciences) of the administrative process and, as a corollary, of the disciplinary process.

It is the "state of the art" of the administrative process: a pseudo-procedural, understood only as a chain of administrative acts, without any study or pragmatism dedicated to the recognition and deepening of the legality and, thus, of the categories of existence, validity, and nullity of the administrative acts, of the procedural phases and of the administrative process itself, as a legal relationship in contradiction, concrete of principle and constitutional values of the Rule of Law[15].

[15] In the Brazilian case, this pathologically, although in smaller proportions, extends to jurisdictional processes, especially criminal proceedings, as Ricardo Jacobsen Gloeckner points out (2010).

3 THE TELEOLOGICAL PURPOSE OF THE DISCIPLINARY PROCESS

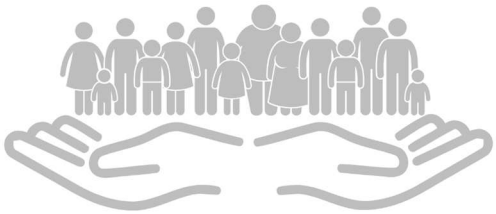
The word "end" can be defined as that which goes beyond infinity (Abbagnano, 2012, p. 531), in the sense of "terms or conclusions of temporal episodes" (Abbagnano, 2012, p. 531). The chronology of actions leads to the conclusion, to the term, in the sense of an initial term and an end term, in which something has a beginning and an ending point.

In this sense, the process, especially the disciplinary administrative process, as we have already said, is a series of administrative acts and acts of the Administration (administrative acts in the strict and broad sense) aimed at achieving the public interest. Despite this link between administrative acts, the disciplinary process is also understood – through these same acts – as a set of legal positions of the public administration and the public agent, that is, of the active party and the passive party, experiencing powers, faculties, duties, subjects, and burdens under the protection of legality and, thus, of a legal regime representing due process.

In effect, the "end," the teleological purpose, is to obtain a final result in response to a demand from the Public Administration for cases involving the control of internal discipline in the public service.

4 FUNCTION AND PURPOSE OF DISCIPLINARY PROCEEDINGS

The function of something "is the operation *proper* to the thing, in the sense of being what the thing does better than other things" (Abbagnano, 2012, p. 548), considering, "from a teleological point of view, the synthetic unity (...) of operation for an end, or capable of achieving an end" (Abbagnano, 2012, p. 548) – "action directed towards an end"(Abbagnano, 2012, p. 548).



In effect, the process comprises the materialization of the formal legal relationship, bringing the parties involved in the dispute "face to face". In the case of the disciplinary administrative process, this facilitates the procedural dialectic in adversarial proceedings.

Given these arguments, the function of the legal process and, however, of the disciplinary administrative process is the formation, maintenance, and conclusion of the procedural legal relationship[16].

The *purpose* of something can be understood as "the correspondence between a set of things or events [involving the sense of function, as the operation proper to the thing] and an end" (Abbagnano, 2012, p. 532), which encompasses the conception of *finalism*, as elements and/or events organized to achieve an end.

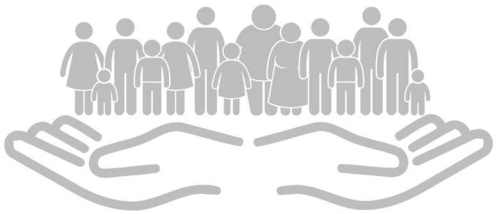
In this regard, considering the *purpose* and *function* of the disciplinary administrative process to identify administrative infractions within the public administration, the *purpose* of this administrative instrument in the democratic Rule of Law and as a vehicle for the realization of democracy, through fair law, in the noted conception of justice of law, must be permeated by the factual concretions of (i) general legal guarantees, of the public administration, of the administered and, nevertheless, of the entire social collective, recipient of public services; as well as (ii) guarantees associated with fundamental rights; (iii) optimization of the content of decisions; (iv) effectiveness of decisions; (v) legitimization of disciplinary power; (vi) correct performance of the function; (vii) realization of justice by the Public Administration; (viii) rapprochement between Administration and administered; (ix) systematization of administrative action; (x) facilitation of administrative control; (xi) application of the principles and rules of

[16] We understand the disciplinary administrative process as a legal relationship in contradiction (BÜLOW, 1964) and not as a legal situation (GOLDSCHMIDT, 1935; 1936; 1950).

administrative activity (Medauar, 2003, p. 65-74).

(i) The general legal guarantees of the Administration, of the administered and, however, of the entire social collective, recipient of public services, become the purpose of the guarantor State, a democratic Rule of Law, as an entity responsible for ensuring compliance with legal norms, as well as submitting to them. The Public Administration, in carrying out the disciplinary process, is guided in its sanctioning power by the limits stipulated by law and by the legal order as a whole. The public administration has the power to punish, the disciplinary power or the disciplinary duty-power to apply administrative sanctions to its public agents who violate the statutes, however, with the scope of prohibiting arbitrariness, with a negative aspect, and in the proactive deference to the constitutional and legal rights and guarantees of the public agents prosecuted, as an active aspect of guarantee. In this sense, it efficiently and effectively pursues and achieves the public interest, which generally intersects with the collective interest of the entire social group. The general guarantees of observance of the legal order by the Administration through the process, that is, due process and its corollary principles and rules, directly and immediately carry out all (ii) the guarantees associated with fundamental rights, encompassing the exercise of the adversarial system and complete defense, the right to information and expression in and out of the proceedings, the right to reply, refutation and petition, notwithstanding many others associated with the search for truth and justice of the Law, through the process as a constitutional instrument of ethical and moral state action (Morin, 2011).

(iii) Optimizing the content of decisions also involves the function of the process and the disciplinary process, and this occurs in the same way as the phenomenon is measured in a jurisdictional environment, to the extent that the dialectical discussion between the procedural parties, even though it is a process with a linear and dual relationship (public administration-plaintiff and public agent-defendant), is taken to exhaustion, in each phase

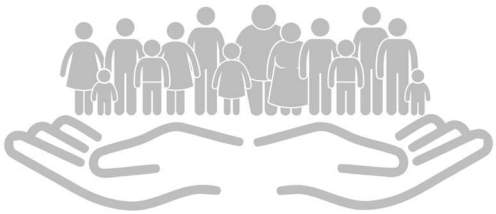


of the procedural procedure, to provide a broad definition of the factual concepts of interest to the dispute, fundamental to the issuing of the decision. The conclusion of the process, established in a broad debate between the parties, with general opportunities for diligence and varied evidence, approaches the truth of the facts to support the (iv) effectiveness of the decisions. As a constitutional instrument of guarantees for the accused, the process grants effectiveness to administrative decisions and, nevertheless, (v) legitimizes the exercise of the disciplinary duty-power. It is not permitted to speak of any sanction in the democratic Rule of Law without it being preceded by due legal process, substantially carried out with the aim, not of the need for punishment and exemplification of a mode of state action to repress the illicit, but rather the exhaustive exercise of the fundamental rights of the accused[17], in favor of his defense, adversarial proceedings and related values.

As a means of reviewing, monitoring administrative actions, and analyzing the results of the pursuit of public interest, a means of (x) facilitating administrative control, the process, implemented by the legal system, provides for the (vi) correct performance of the function, exempting public agents in charge of its administrative phases and acts from liability.

Considering the claim of correction and search for truth by law, as well as the claim of justice through legal norms and their correct interpretation and application through legal sciences, in the form of object and metalanguage – positive law and legal sciences applied to it –, the due disciplinary legal process leads to (vii) the realization, by the public administration, of an acceptable justice, applicable to the specific case submitted to it for decision. The assessment of the Judicial Branch is not excluded, as recognition of the

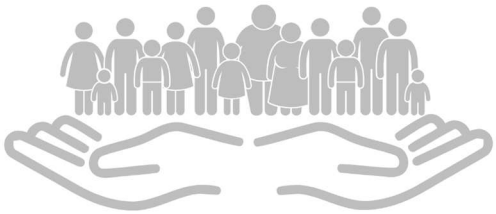
[17] If the incidence of the normativity of fundamental constitutional rights and guarantees is already admitted in private relations (horizontal effectiveness erga omnes, or effectiveness in private relations), it should be applied mainly to the public service, given the formation of an accusatory and punitive procedural relationship. Regarding the "binding of individuals to fundamental rights", see Sarlet, 2011; and Rothenburg, 1999a; 2000; 1999b.



principle of ubiquity or the inalienability of jurisdiction, but it provokes a tendency for the administered to conform and satisfy the result of the state process and the final administrative act, discarding the eventual interest in seeking the Judiciary since there is no arbitrariness on the part of the State-administration. This phenomenon of satisfaction and acceptance, even in the face of a more serious outcome for the individual, e.g., a disciplinary punitive act, causes, at least indirectly, the (viii) rapprochement between the Administration and the individual, who now has the possibility of shaping and even changing the results of administrative acts, through a non-jurisdictional process, carried out within the public administration itself. As a procedural party, the individual is inserted in the procedural relationship in an equal manner and with procedural “powers" equal to those of the public administration, in “equal legal arms”, as well as being responsible for the outcome of the legal relationship.

The aforementioned control of the acts of the public administration and the accountability of its actions aligned with the correct application of the legal order under the support of the theories proposed by legal sciences and, in effect, with the proper application of the due administrative disciplinary legal process, leads to (ix) the systematization of administrative action, an aspect of the principle of legal certainty, to give the administered the projection of future results given specific proceduralized facts, without the risk of contradictions between results incident on similar facts, in different cases, according to *the theory of particular acts* (Dantas Júnior, 2006; Souza, 2006; and Aragão, 2010).

This entire framework of legal process functions applied to the disciplinary process confers the principle of administrative legality, with the duty-power of its action by the law and the justice (*legal sciences*), providing for the specific, safe, and fair implementation (xi) of the principles and rules that involve the administrative activity and, in the case we are dealing with now, the disciplinary administrative process.



5 CONSIDERAÇÕES FINAIS

In conclusion, the principle of moderate formalism, or instrumentality of forms, represented in the various epistemological branches of the State Legal process by the adage pas de nullité sans grief is used indistinctly to guarantee a material right, giving it a rigid structure significantly superior to the procedural instrument. The latter would remain, in fact, merely a "mere instrument" serving the purposes of material law.

However, process and substantive law must be at the same level of importance and functionality within the system of standards, and this paradigm is measured in light of the Federal Constitution and its principles and values governing the fundamental rights of each administered and jurisdiction.

In this sense, the function ends, and the purpose of the process is present. Under the principle of administrative legality of acting by the *law* and the *justice*, the ability to restructure this ideal lost interaction between substantive law and procedural law is present.

REFERENCES

ABBAGNANO, Nicola. **Dicionário de filosofia.** São Paulo: Martins Fontes, 2012.

ANTUNES, Luís Filipe Colaço. **A ciência jurídica administrativa.** Coimbra: Almedina, 2013.

ANTUNES, Luís Filipe Colaço. **A teoria do acto e da justiça administrativa. O novo contrato natural.** Coimbra: Almedina, 2015.

ARAGÃO, Alexandre Santos de. **Teoria das autolimitações administrativas: atos próprios, confiança legítima e contradição entre órgãos administrativos.** Revista de Doutrina da 4ª Região, n. 35, abr. 2010.

ARISTÓTELES. **A política.** Traduzido por Roberto Leal Ferreira. São Paulo: Martins Fontes, 2002.

BERGEL, Jean-Louis. **Théorie générale du droit.** Paris: Dalloz, 2003. BINDER Aberto M. La fuerza de la Inquisición y la debilidad de la República" en Política Criminal Bonaerense. Ciências Penales, v. 17, n.23. São José da Costa rica, 2005.

BRAGA, Luiz Felipe Nobre. Primeiras linhas para os princípios da filosofia do direito processual civil. **Ciência Jurídica**, v. 26, n. 168, pp. 253-293, nov./dez., 2012.

BÜLOW, Oskar Von. **La teoria de las excepciones dilatorias y los resupuestos processuales.** Trad. Santiago Sentis Melendo. Buenos Aires: EJEA, 1964.

CRETELLA JÚNIOR, José. **Direito administrativo do Brasil. Atos e contratos administrativos.** Vol. III. São Paulo: Revista dos Tribunais, 1961.

CRETELLA JÚNIOR, José. **Direito administrativo do Brasil. Processo administrativo.** Vol. V. São Paulo: Revista dos Tribunais, 1962.

CRETELLA JÚNIOR, José. **Curso de direito administrativo.** 6. ed. Rio de Janeiro: Editora Forense, 1981.

DANTAS JÚNIOR, Aldemiro Rezende. **A teoria dos atos próprios. Elementos de identificação e cotejo com institutos assemelhados.** 2006, 463 fl. Tese (Doutorado em Direito) – Pontífica Universidade Católica – PUC, São Paulo, 2006.

EBERHARD, Schmidt. **Los fundamentos teóricos y constitucionales del derecho procesal penal.** Córdoba: Lerner, 2006.

ENTERRÍA, Eduardo García e FERNÁNDEZ, Tomás-Ramón. **Curso de derecho administrativo.** Tomo I, 16. ed. Madrid: Civitas, 2013a.

ENTERRÍA, Eduardo García e FERNÁNDEZ, Tomás-Ramón. **Curso de derecho administrativo.** Tomo II, 13. ed. Madrid: Civitas,
2013b.

FACCINI NETO, Orlando. **Elementos de uma teoria da decisão judicial – hermenêutica, Constituição e resposta corretas em Direito.** Porto Alegre: Livraria dos Advogados, 2011.

GLOECKNER, Ricardo Jacobsen. **Uma nova teoria das nulidades: processo penal e instrumentalidade constitucional.** 2010, 637 fl. Tese (Douto-rado em Direito) – Faculdade de Direito, Setor de Ciências Jurídicas, Universidade Federal do Paraná – UFPR, Paraná, 2010.

GOLDSCHMIDT, James. **Princípios Generales del Proceso: problemas jurídicos y políticos del proceso penal.** Buenos Aires: Europa-América, 1935.

GOLDSCHMIDT, James. **Derecho Procesal Civil**. Trad. de Leonardo Prieto Castro. Madrid: Labor, 1936.

GOLDSCHMIDT, James. **Teoría General del Proceso.** Barcelona: Labor, 1936;

GOLDSCHMIDT, James. **Problemi Generali del Diritto.** Padova: CEDAM, 1950.

GÜNTHER, Klaus. **Teoria da Argumentação no Direito e na Moral: justificação e aplicação.** Tradução de Claudio Molz. Introdução à edição brasileira de Luiz Moreira. São Paulo: Landy, 2004.

HABERMAS, Jürgen. **Direito e democracia: entre facticidade e validade.**Vol. I. Tradução de Flávio Beno Siebeneichler. Rio de Janeiro: Tempo Brasileiro, 1997.

HABERMAS, Jürgen. **Direito e democracia. Entre facticidade e validade.** Vol. I, 2. ed. Rio de Janeiro: Edições Tempo Brasileiro, 2012.

HABERMAS, Jürgen. **Direito e democracia. Entre facticidade e validade.** Vol. II, Tradução de Flávio Beno Siebeneichiler. Rio de Janeiro: Tempo Brasileiro, 2003.

KROHLING, Aloísio (Org.). **Ética e a descoberta do outro.** Curitiba: Editora CRV, 2010;

HABERMAS, Jürgen. **A ética da alteridade e da responsabilidade.** Curitiba: Juruá, 2011.

LIMA, Raimundo Márcio Ribeiro. **Administração pública dialógica.** Curitiba: Juruá, 2013.

LLOBREGAT, José Garberí. **Derecho administrativo sancionador prático.** Vol. I, Barcelona: Editorial Boch, 2012a.

LLOBREGAT, José Garberí. **Derecho administrativo sancionador prático.** Vol. II, Barcelona: Editorial Boch, 2012b.

LLOBREGAT, José Garberí. **Derecho administrativo sancionador prático.** Vol. II, Barcelona: Editorial Boch, 2012.

MAGRA, Salvatore. **Principio di conservazione del provvedimento amministrativo fra nullità, annullabilità e inesistenza.** Roma: Overlex, 2006.

MARTEL, Letícia de Campos Velho. Hierarquização de direitos fundamentais: a doutrina da posição preferencial na jurisprudência da suprema corte norte-americana. **Revista de Direito Constitucional e Internacional**, vol. 51, p. 346-361, abr. 2005.

MEDAUAR, Odete. **A processualidade no direito administrativo.** 2. ed. São Paulo: Revista dos Tribunais, 2003a.

MEDAUAR, Odete. **O direito administrativo em evolução.** São Paulo: Revista dos Tribunais, 2003b.

MEDAUAR, Odete. **Direito administrativo moderno.** São Paulo: Revista dos Tribunais, 2013.

MELLO, Celso Antônio Bandeira de. **Curso de direito administrativo**. 32. ed. São Paulo: Malheiros, 2015.

MENEGALE, J. Guimarães. **O Estatuto dos funcionários.** Vol. I.1. Ed. São Paulo: Forense, 1962a.

MENEGALE, J. Guimarães. **O Estatuto dos funcionários.** Vol. II.1. Ed. São Paulo: Forense, 1962b.

MIRANDA, Sandra Julien. **Do ato administrativo complexo.** São Paulo: Malheiros, 1998.

MORIN, Edgar. **O método 6**. Ética. 4. ed. Tradução de Juremir Machado da Silva. Porto Alegre: Editora sulina, 2011.

MORIN, Edgar. **Introdução ao pensamento complexo**. 5. ed. Tradução de Eliane Lisboa. Porto Alegre: Editora sulina, 2015.

NIETO, Alejandro. **Derecho administrativo sancionador.** 5. ed. Madrid: Tecnos, 2012.

PEDRA, Adriano Sant'Ana. Processo e Pressupostos Processuais. **Revista da Advocacia Geral da União**, AGU n. 68, Set/2007, pp. 1-20, 2007.

PÉREZ, Jesús González. **Corrupción ética y moral en las administraciones públicas.** 2. ed. Navarra: Civitas, 2014.

ROCHA, Cármen Lúcia Antunes. Princípios constitucionais do processo administrativo no direito brasileiro. **Revista de Direito Administrativo FGV**, Rio de Janeiro, 209, pp. 189-222, jul./set. 1997.

RODRIGUEZ, José Rodrigo. **Como decidem as cortes? Para uma crítica do direito (brasileiro).** Rio de Janeiro: Editora FGV, 2013.

ROTHENBURG, Walter Claudius. Direitos fundamentais e suas características. **Revista de Direito Constitucional e Internacional**, vol. 29, pp. 55-64, out. 1999a; **Revista de Direito Constitucional e Internacional**, vol. 30, p. 146-155, jan. 2000; Doutrinas Essenciais de Direitos Humanos, vol. 1, pp. 1033-1042, ago. 2011DTR,1999b.

SARLET, Ingo Wolfgang. Direitos fundamentais e direito privado: algumas considerações em torno da vinculação dos particulares aos direitos fundamentais. **Revista de Direito dos Tribunais, Doutrinas Essenciais de Direitos Humanos**, vol. 1, pp. 383-326, Ago, 2011.

SIQUEIRA, Galdino. **Tratado de direito penal. Parte Geral.** Rio de Janeiro: José Confino Editor, 1947. t. I.

SOUZA, Wagner Mota Alves de. **A teoria dos atos próprios: esboço de uma teoria do comportamento contraditório aplicada ao direito.** 2006, 178 fl. Dissertação (Mestrado em Direito) – Faculdade de Direito, Programa de Pós-gra-duação em Direito, Universidade Federal da Bahia – UFBA, Bahia, 2006.

TÁCITO, Caio. Transformações do direito administrativo. **Revista de Direito Administrativo FGV**, Rio de Janeiro, 214, pp. 27-34, out./dez. 1998.

ZAGREBELSKY, Gustavo. **La ley y su justicia. Tres capítulos de justicia constitucional.** Madrid: Editorial Trotta, 2008.