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About the disregard of legal entity doctrine in Brazilian anti-corruption act (Law no. 12,846/2013)

*Sobre a desconsideração da personalidade jurídica no âmbito da
Lei 12.846/13*

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Abstract

The purpose of this review is to analyze the disregard of the legal entity provision in the Brazilian Anti-Corruption Law (Law no. 12,846/13), intended to sanction juristic persons for harmful acts against the Public Administration. It aims to establish criteria for the interpretation and application of the disregard provision in study. In order to do so, we reviewed the birth context of the aforementioned federal law, we studied the constitutionalization of law phenomenon and its contribution to the structuring of a Punitive Administrative legal regime. Therefore, essentials concepts and premises to this investigation were established in light of the Punitive Administrative Law. Then, a necessary introduction was made to the disregard of legal person technique in Brazilian legislation. Finally, we suggested criteria for the interpretation and application of article 14, of the Law 12,846/13.

Keywords: federal law n. 12.846/13; anti-corruption; constitutionalization of Law; sanctioning Administrative Law; disregard of legal entity doctrine.

Resumo

O estudo tem por objeto a análise da hipótese de desconsideração da personalidade jurídica da pessoa jurídica sancionada por atos lesivos à Administração Pública, prevista na Lei 12.846/13. Objetiva-se estabelecer critérios de sua interpretação e aplicação. Para tanto, aprofundou-se no contexto de nascimento da legislação, estudou-se o fenômeno da constitucionalização do direito e sua contribuição para estruturação de um regime jurídico de Direito Administrativo Sancionador. Assentou-se conceitos e premissas essenciais a esta investigação a luz do Direito Administrativo Sancionador. Fez-se, então, uma introdução necessária à técnica da desconsideração da personalidade jurídica na legislação brasileira. Finalmente, propôs-se critérios para interpretação e aplicação do art. 14, da Lei 12.846/13.

Palavras-chave: lei 12.846/13; anticorrupção; constitucionalização do Direito; Direito Administrativo sancionador; desconsideração da pessoa jurídica.

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1. Introduction

The present essay intends to examine the technique of disregarding legal personality in Brazilian Federal Law no. 12,846, of August 1, 2013, also called *Brazilian Anti-corruption Law*, *Clean Company Law* or *Corporate Corruption Law*. Considering the lack of a minimum consensus regarding this law's name, we will treat it here, mainly, by its birth number.

Initially, in this introductory part, it is worth to acknowledge the false impression, albeit unconscious, that Law no. 12,846/13 would apply only against the large contractors in Brazil involved in the so-called Operation Lava Jato (Car Wash), usually deemed as faceless wrongdoers far from the everyday reality of the self-proclaimed "good citizens".

However, one must not forget that this is a general and abstract law, which, because of that, applies indiscriminately to all legal entities that fit within the meaning of *juristic person* definition brought by your article 1, single paragraph. Therefore, this legislation applies also to small and medium-sized enterprises (SMEs), with direct impact on the life of their partners and, notably, on the life of thousands of employees, people of flesh and blood whose destinies can be put in jeopardy without any direct involvement in misdeeds considered as *harmful acts to the Public Administration* by the Brazilian Anti-corruption Law.

That said, it is necessary to highlight two core problems which this paper intends to address. First, whether it is or it is not constitutional to disregard legal personalities in order to extend punitive measures against entities' managers and/or managing partners. Second, if deemed constitutional the aforementioned hypothesis, what criteria and premises shall govern the decision of disregarding legal entities when violations of the Anti-corruption Law are in question? These are the basic features of the debate that we propose to establish here, focused on controversial aspects of the disregard technique under the Federal Law no. 12,846/13.

2. The Brazilian Anti-Corruption Law context of birth and the international anti-corruption efforts

Combating corruption is a matter that draws a lot of the international organisms' attention and efforts. Many treaties and conventions strengthen this declared war against corrupt practices, constituting a real international

anti-corruption regulation, some of which Brazil is a signatory: (i) the Inter-American Convention Against Corruption (IACAC) adopted on March 29, 1996, internally approved by the Legislative Decree no. 152 on June 25, 2002 and enacted by Presidential Decree no. 4.410 (BRAZIL, 2002); (ii) the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions signed in 1997, internally ratified on June 15, 2000, and internally enacted by the Presidential Decree no. 3.678 (BRAZIL, 2000); and (iii) the United Nations Convention against Corruption (UNCAC) of 2003, internally ratified on May 18, 2005 by the Legislative Decree no. 348 and internally enacted by the Presidential Decree no. 5.687 (BRAZIL, 2006).¹

Among other commitments, the aforementioned conventions determined their signatory countries to hold responsible legal entities involved in corruption schemes. That liability should be ensured preferably by the imposition of criminal penalties and, if the criminal responsibility is not applicable to juristic persons under the signatory country legal system, the State party should ensure that the wrongdoer would be punished by an imposition of “effective, proportionate and dissuasive non-criminal sanctions”, pursuant to article 2 and 3 of the OECD Convention on Corruption and also in accordance with article 26 of UNCAC.

The Federal Law no. 12,846/2013 (Anti-corruption Law) was born as the solution found by the Brazilian Legislative Body to the referred international commitments. However, it was hastily approved by the Legislative Branch as a result of social and political pressures in mid of 2013.² The law’s draft, which waited for an approval since February 18, 2010 in the Brazilian House of Representatives, was voted and approved in less than one month in the Brazilian Senate, on July 04, 2013.³

The law’s draft was proposed in 2010 (BRAZIL, 2019) by High Officials of the Brazil’s Cabinet at the time – Minister of Justice, Attorney General of the Union and Minister-chief of the Comptroller General of Union (CGU) – and confessedly inspired in the international conventions listed above as one can see in the paragraph 7 and 8 of its explanatory memorandum.⁴

¹ For an analysis of the IACA and the OECD’s Convention, see: RAMINA, 2003.

² Information extracted from the Brazilian Chamber of Deputies’ website (2019).

³ Information extracted from the Brazilian Senate’s website (2018).

⁴ “[...] 7. In addition, the draft presented includes the protection of foreign Public Administration, due to the need to comply with the international commitments to combat corruption undertaken by Brazil when signed and ratified the United Nations Convention against Corruption (UN), the Inter-American Convention on Combat Corruption (OAS) and the Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International

The investigation of the reasons for the hasty approval of the Law is far from constituting the object of the present study, still we speculate that it should be credited – if not totally, at least in part – to popular riots that took place in Brazil during the 2013 FIFA Confederation Cup. Those protests claimed for changes in Brazilian politics, for public morality and for a more serious fight against corruption.

The rush approval of the law had its price. Often its provisions and institutes demand considerable hermeneutic efforts in order to remedy inconsistencies and incompleteness.

Regardless of that, the Federal Law no. 12,846/13 was duly approved and already came into force. Therefore, the jurist must work with the existing legal raw material, mainly when there is no immediate perspective for a legislative reform. Then, it is necessary to study and analyze its provisions, to fill its gaps and elucidate its loopholes, as well as to interpret them in a constitutional manner, notably assuring the observance of defendant's fundamental rights and guarantees set out by the Brazilian constitutional order.

3. The liability regime inaugurated by Federal Law no. 12,846/13

In Brazilian legal system, corporate criminal liability is expressly admitted only in crimes against the Environment, pursuant to the article 225, paragraph 3, of the Constitution of the Federative Republic of Brazil. Thus, there are quasi insurmountable barriers to hold entities criminal responsible for their corrupt practices. That's why the Federal Law no. 12,836/13 created a *non-criminal* liability regime to fulfill the commitments Brazil assumed internationally.

The mentioned Law inaugurated a strict liability regime, that is a liability regime where *mens rea* is not a necessary ground of the legal person responsibility, known in Brazilian legal system as objective liability regime. Hence, no intention, recklessness, belief, knowledge or motive are required

Business Transactions. 8. Under the three Conventions, Brazil was obliged to punish effectively those legal persons who commit acts of corruption, especially the so-called transnational bribery, characterized by the corruption of foreign public officials and international organizations. Thus, it is urgent to introduce into the national law regulations about this issues – by the way, an obligation that the country has been already demanded – mainly because the legislative modifications of the Penal Code made by the Federal Law no. 10,467 of June 11, 2002, which criminalized the corruption in international business transactions, reach only natural persons, not having the power to reach legal entities that may benefit from the criminal act" (BRAZIL, 2019).

to sanction a company for an outcome deemed as a harmful act to the Public Administration within the scope of the Anti-corruption Law. It's important to stress that the Law permits not only judicial sanctioning but also administrative sanctioning (i.e. non-judicial) taken effect by the very same Public Administration, allegedly victim of the legal person's deeds.

It is no secret that the Brazilian Anti-Corruption Law's strict liability regime conveys a certain tranquility, especially to those who deem themselves heralds of morality and ferocious combatants of corrupt practices. Among the jurists, this tranquility is even noticeable in courts' hallway and in the justice system's offices, also populating the corridors of law schools. Under popular punitivism impulses, it is thought that the criteria to hold a company liable by Federal Law no. 12,846/13's provisions are similar to *civil torts strict responsibility regime*, like the one founds in consumer protection's law (articles 12 to 14 of the Brazilian Consumer Protection Code – Federal Law no. 8.078/90) and general Governmental liability regime for damages caused by government agents and/or officials, established by article 37, paragraph 6, of Brazilian Federal Constitution. After all, this is a non-criminal and, along with that, strict liability regime. Yet, one must be caution when analyzing the Brazilian Anti-corruption Law's provisions.

The brevity of this essay makes it impossible to deepen such controversial matter, which will be safeguarded for another opportunity. Despite of that, in short, we can anticipate that the caution we meant when analyzing the strict liability regime to hold accountable legal persons for the perpetration of corrupt practices against Public Administration justifies because this law establishes a *punitive system* that, hence, attracts incidence of the Punitive Administrative legal regime (or Administrative Sanctioning Law), unlike the other two responsibility regime that are focused on the indemnification of the wrongdoing's victims and not on the retributivism and deterrence of the wrongdoing.

If compared the existing sanctions in the article 6 and 19 of the Anti-corruption Law with the sanctions to be imposed against juristic person for the commitment of a crime against the Environment (articles 21, 22 and 24 of Federal Law no. 9,605/98), one can see clearly that the Anti-corruption non-criminal sanctions are more serious or, at least, very similar to those criminal sanctions of the environmental legislation, reason why the tranquility experienced by some jurist and scholars simply cannot thrive.

Bellow, a comparative chart shows the similarity, quasi-identity, we are talking about:

| Criminal sanctions established by Environmental Protection Law (Federal Law no. 9,605/98) | Non-criminal punishment established by Federal Law no. 12,846/13) |
|---|---|
| Fine (art. 21, I) | Fine (art. 6º, I) |
| Restriction of rights and community services (art. 21, II e II) | Extraordinary publication of the conviction (art. 6º, II) |
| Total or partial suspension of legal person's activities (art. 22, I) and temporary interdiction of its establishment, work and/or activities (art. 22, II) | Partial suspension or interdiction of legal person's activities (art. 19, II) |
| Prohibition to contract with the Government, as well as to obtain public subsidies or donations for a term no longer than 10 year (art. 22, III e §3º) | Prohibition on receiving incentives, subsidies, donations or loans from public bodies or entities and from public or publicly controlled financial institutions, for a minimum term of 1 year and a maximum term of 5 years (art. 19, IV) |
| Forfeiture of property that results of the crime (art. 24) | Forfeiture of goods, rights or values that represents, direct or indirect, benefit of the wrongdoing (art. 19, I) |
| Compulsory dissolution of the legal person involved in the wrongdoing (art. 24) | Compulsory dissolution of the legal person involved in the wrongdoing (art. 19, III) |

Thus, it should be clear by now that the Federal Law no. 12,846/13 is a non-criminal punitive law which, because of that, attracts *Punitive Administrative legal regime*, a legal liability regime distinct to civil tort regimes, but similar to criminal responsibility regime.⁵ We intent to

⁵ The *Administrative offense* (or infraction) and the *Administrative Sanction* are the two reference measures that attract the incidence of the Punitive Administrative legal regime. The brevity of this essay

demonstrate in this essay that the existence of an *Punitive Administrative legal regime* derives straight from the Brazilian 1988 Constitution as a necessary consequence of what is usually called as the phenomenon of *constitutionalization of Administrative Law*. Therefore, it is important to this objectives to analyze the aforementioned phenomenon and its reflexes in the construction of the administrative sanctioning regime. That's what we are going to do in the following paragraphs.

4. The constitutionalization of Administrative Law and the punitive administrative legal regime

In Brazil, it was only with the 1988 Constitution's promulgation that one was able to verify with greater intensity the phenomenon of the constitutionalization of Brazilian legal system.

The expression, as one can note, has various meanings⁶ encompassing more than one meaning, idea or notion. Thus, to avoid misunderstandings, we propose a semantic agreement meaning that the *constitutionalization* word, for the ends of this essay, encompasses the idea of "an expansive effect of the constitutional clauses, whose material and axiological content radiates, with normative force, throughout the legal system" (BARROSO, 2008, p.32).

The constitutionalization phenomenon reverberates to all fields of Law, including to Administrative Law which is not immune to that. As a direct consequence of this phenomenon, we identify, for instance, "an interesting and sophisticated replacement movement of legality, as foremost source of

prevents us to investigate thoroughly the definition of those concepts. Despite of that, we should stress that in the Brazilian legal system the definition of *Administrative Sanction* is not attached to the presence of an Administrative Official as the one responsible to impose the sanction, as it is in Spanish legal system, for instance. The definition is, otherwise, attached to the formal and material presence of the Public Administration. Because of that, administrative sanction can be imposed by judicial authorities with no prejudice to its administrative nature. The definition we present is broader than the Spanish one, also adhered by part of Brazilian scholars, which, as already we pointed out, is intimately linked to the presence of an administrative official as the one responsible for imposing the sanction. To further investigations about the definition presented, see: OSÓRIO, 2015, p. 107. For a definition linked to an administrative official as the responsible for the imposition of the sanction, see: OLIVEIRA, 2005, p. 52; FERREIRA, 2001, p. 173; VITTA, 2003, p. 62; PUIG et al, 2005, p. 24-25 and TORRADO, 2007, p. 274-275.

⁶ Luís Roberto Barroso explains that it is also possible to use the *Constitutionalization of Law* expression to characterize any legal system where the Constitution is the supreme law of the land, as well as to identify the fact of a Formal Constitution bringing to its own body diverse themes and matters, usually treated as *infraconstitutional* issues (2008. p. 31-32).

Administrative Law, by the Constitution itself, a vertical and direct guideline to administrative action and deed” (CRISTÓVAM, 2015, p. 212).

The technique of interpretation according to the Constitution can also be cataloged as another important consequence of the said phenomenon. According to it, the interpreter must discard interpretative possibilities that make a legal provision incompatible with constitutional order (BINENBOJM, 2008, p. 67). Therefore, this approach imposes constitutional beacons to legal hermeneutics of all legal and administrative provisions (JUSTEN FILHO, 2008, p. 83).

In fact, the constitutionalization of Law not only remodels the traditional institutes of the Administrative Law, it likewise reverberates in its new institutes and structures, conforming them to constitutional principles and rules, precisely by modulating their interpretation and application criteria, henceforth duly constitutionalized.⁷ This is exactly the case of the Federal Law no. 12,846/13, which although born almost 25 years after the 1988 Constitution, have its institutes and provisions subjected to this *constitutional filtering* in order to be analyzed and applied in the light of rules and principles embodied in the Constitution (BARROSO, 2008, P. 43).

In this context, it is possible to extract from the constitutional text principles and rules that directly affect the exercise of the State’s sanctioning power, forming a true legal regime which constrict the administrative punitive power, here referred by *Punitive Administrative Law*, a set of fundamental rights and guarantees assured to the defendants.

Such legal regime lay its foundation in (i) the Brazilian constitutional option to a Democratic State of Law (MELLO, 2007, p. 103); (ii) the fundamental right to due process of law, guarantee to defendants in judicial or administrative procedures, pursuant to article 5 (LIV) of the Federal Constitution (OSÓRIO, 2015, p. 129); and, finally, (iii) the ontological identity between administrative and criminal offenses, which forces us to recognize a certain freedom to Legislators in the task of labelling offenses – sometimes as criminal offenses, sometimes as regulatory offenses –, but not a prerogative to waive defendant’s fundamental rights and guarantees. There are also those who argue that the existence of such a legal regime would be

⁷ In this sense: “[...] the construction of a renewed legal-administrative regime must be built on the basis of the phenomenon of the constitutionalization of Law movement in general, and of the Administrative Law in particular. The Constitutionalization of Law, which in Brazil only began to operate more firmly after the 1988 Constitution, ends up inaugurating not only a restructuring process of constitutional theory, but also of the legal discipline in general, spreading renewed lights and normative reflexes in all directions and to the furthest and remotest spaces of the national legal universe” (CRISTÓVAM, 2015, p. 325).

justified by the mere fact of State's intervention in the fundamental rights and guarantees due to the perpetration of a wrongdoing.⁸

Anyhow, we set as premise the existence of an autonomous punitive administrative legal regime in Brazilian legal system. It is worth registering that, initially, the Punitive Administrative Law borrows principles and rules once seen only as criminal law property but today seen as constitutional clauses against State's punitive powers, borrowing part of criminal law doctrines as well. It is simply an initial inspiration due to the greater scientific developments of the criminal discipline. Notwithstanding, as rightly asserted by Suay Rincon, "once surmounted the emptiness and reached its maturity, the creature shall start to fly alone and on its own" (2008, p. 51).

Thus, our task in this essay is to delimit the normative content of these rights and guarantees within the scope of the Brazilian Anti-corruption Law's disregard of legal entity rule. It is important to highlight that they apply with certain shades and graduations to the Administrative Sanctioning Law, respected minimum obligatory contents. Such shades and graduations are influenced by what is at stake in the enforcement of the punitive norm, by which fundamental rights of the defendant will be subject to constriction in case of imposing a sanction and also by the extent and severity of this constriction. In other words, the greater the limitation of the culprit's rights, the greater the rights and guarantees assured to the defendants (OSÓRIO, 2015, p. 144).

In the specific case of Federal Law no. 12.846/13, we have already established that there is considerable similarity, a quasi-identity, between its sanctions and those provided by the Federal Law no. 9,605 (BRAZIL, 1998), that punishes crimes against the Environment. As a result of that, it will be identical, or at least very similar, the normative content of the rights and guarantees available to juristic persons that bears the burden of being indicted in any Anti-corruption law's sanctioning procedures.

These are the basic hermeneutical premises for the analysis of any provision of the Brazilian Anti-corruption Law, which once established allow us to proceed to the proposed investigation.

5. Some considerations respecting the disregard of legal entity doctrine

⁸ See: COSTA, 2013, p. 176.

The disregard of legal personality doctrine⁹ is a technique aimed at eliminating the patrimonial autonomy between legal entities' property and certain related individuals' property, that is, its partners or managing partners.¹⁰ It aims to hold such individuals liable for unfulfilled corporate obligations.

Broadly speaking, property autonomy in Brazilian legal system means the distinction between the property of the legal entity and the property of its shareholders or members. This autonomy guarantees, minimally, the existence of an *order of preference* (also known as *benefit of order*) to the detriment of corporate assets for the purpose of satisfying the unsatisfied corporate obligations. That means that in debt collection the *business partners' private assets may not be used to satisfy the legal entity's obligations unless after drained the legal entity's assets*, as states the article 1.024 of Brazilian Civil Code (2002). In other cases, that autonomy may mean a legal impediment to members' assets being liable for corporate debts, as it occurs in limited liability companies (LLC's), pursuant to Civil Code's article 1.052, in which its members' liability is limited to the membership units owned.

In any case, patrimonial autonomy is a fundamental guarantee intrinsically linked to the free initiative principle, a general principle of Brazilian economic order, as stated in the Constitution's article 170 (BRAZIL, 1988).

The disregard of legal personality technique may also be used to pierce the corporate veil between related legal entities,¹¹ making legal entities of the same economic group responsible for obligations of one another, or, equally, to reach the assets of entity's "hidden partner", hypothesis known

⁹ It is worth mentioning the terminological and linguistic variations of the *disregard doctrine* around the world, inventoried by Flávia Maria de Moraes Geraigire Clápis: *disregard of legal entity*, *disregard of corporate entity*, *lifting the corporate veil*, *piercing the corporate veil*, in Common Law Countries; *superamento dela personalidad jurídica*, in the Italian Law; *Durchgriff der juristischen Person*, in the German Law; *e teoría de La penetración o desestimación de La personalidad*, in the Argentine Law and *mise à l'ecart de La personnalité morale*, in the French Law (2006. p. 51).

¹⁰ A more teleological concept of this institute is offered by Flávia Albertin de Moraes, who asserts: "the disregard of legal personality is the instrument used by the law to curb fraudulent practices that distort the purposes underlying the creation of a legal entity" (2009, p. 1).

¹¹ The prototype of a legal definition of related entities can be provided by the article 243 of the Federal Law no. 6.404/76, which bring the concepts of *connected companies* and *controlled companies*. One can also find a similar definition in the article 23 of Federal Law no. 12.973/14, which, among other things, disciplined the taxation on foreign profits earned by *connected companies* and *controlled companies*.

in Brazilian legal system as *expansive disregard of legal personality*.¹² Last but not least, the technique can be used reversely, holding the corporate responsible for obligations not fulfilled by its members (PEREIRA JUNIOR; DOTTI, 2010, p. 55).¹³

It is a technique whose initial assimilation and subsequent evolution can be credited not to the Legislator, but mainly to Judges' and scholars' initiative. Nevertheless, in the Brazilian legal system there are some disregarding rules expressly contemplated, *inter alia*: article 135 of the National Tax Code; article 28, paragraph 5, of Consumers Code (Federal Law no. 8,078/90); article 4 of Federal Law no. 9,605/98, that punishes crimes against the Environment; article 50 of Civil Code; article 34 of Antitrust Law (Federal Law no. 12,529/11) and article 14 of Brazilian Anticorruption Law (Federal Law no. 12,846/13).

It is convenient to the proposed research to recall the classification of different disregarding rules in *major theory or minor theory*, as classified by Brazilian jurists. Gonçalves explains that, in major theory, the proof of fraudulent and/or abusive use of the legal entity is a requirement for the judge to pierce the corporate veil (2016, p. 254). The minor theory, on the other hand, considers simply the victim's damages as a sufficient reason for disregard, as it occurs in article 28, paragraph 5, of the Consumers Code, by which the juristic person patrimonial autonomy can be disregarded "whenever its personality is in any way an obstacle to the reimbursement of damages caused to consumers." An identical rule is given by the article 4 of Environmental Protection Law (Federal Law no. 9,605/98).

¹² There are only few studies about the *expansive disregard of legal personality*. One can highlight the essay written by Mariana Rocha Corrêa (2011) and also an injunction delivered by Justice Celso de Mello of Brazilian Supreme Court in case MS 32.494.

¹³ Marçal Justen Filho, enumerates the elements behind the concept of the disregard technique: "(i) the existence of one or more legal entity, in which the individual or legal partners are treated separately from the entity and the various others entities, but all bound together by coalitions or control, which are treated individually; (ii) the ignorance of the effects of personification, that is, the removal of the rules concerning personification; (iii) the ignorance of such effects in the concrete case only, that is to say, when disregarding the legal person, it does not become invalid or non-existent, it only remains suspended the effects of the personification to some specific act, a determined period of the activity of the society, or a specific relationship between the legal entity and a certain person; (iv) the maintenance of the validity of specific acts, which is not synonymous with invalidation of legal acts. The legal acts remain valid, but the effects of legal personality are considered ineffective. The lack of act's validity element or presupposition does not mean to overcome the personality; (v) in order to avoid the loss of an interest, which means to say that the purpose of disregard is to ignore the effects of personification in a given case, because of the risk of the conduct adopted in sacrificing an interest protected by law" (1987, p. 55-56).

A historical and thorough investigation is not necessary for this essay's purposes, it was only necessary to delimit preliminary notions in order to facilitate its analysis within the context of Law nº 12.846/13, which is what we are going to do next.

6. The disregard of legal personality rule in the Brazilian Anti-Corruption Law

It is very controversial whether it is lawful to disregard legal personalities by the Public Administration without any judicial procedures, as well as whether it is necessary or not an express legal provision giving the Public Administration this competence/prerogative. Some advocate that the disregard depends on judicial procedures and should not be taken effect in administrative procedures, in this case, it would be necessary to verify the existence of the requirements set on article 50 of Brazilian Civil Code (2002) in order to disregard legal entities personalities. Some others advocate the possibility of disregarding it in administrative procedures if there is a legal authorization to do so, based on the constitutional principle of administrative legality. Lastly, some defend that the Public Administration could lawfully disregard the legal entities in administrative procedures, even without any legal authorization to do so, reasoning this competence in the constitutional principles of administrative efficiency and morality.¹⁴

Notwithstanding, the debate doesn't matter for the punitive administrative procedures triggered based on Federal Law no 12,846/13, because there is an unequivocal legal authorization to do so, as one can see in its article 14:

Art. 14. The legal personality may be disregarded whenever it is used with abuse of right for the purpose to facilitate, cover up or disguise the practice of the harmful acts deemed so by this Law or to cause confusion of property, being extended all the effects of the sanctions imposed to the legal entity to its managers and partners with powers of administration, since observed fundamental right to contradictory and ample defense. (BRAZIL, 2010).

The provision houses a peculiar disregard hypothesis that previously existed only in antitrust legislation (Federal Law no. 12,528/11), which, by

¹⁴ The Brazilian Supreme Court will visit the issue when ruling the aforementioned case MS 32.494, whose opinion will be probably delivered by Justice Celso de Mello (BRAZIL, 2013).

the way, has not been treated with due importance. Contrary to the others hypothesis of disregard of legal person, the aforementioned article 14, alike the article 34 of the Antitrust Act, authorizes piercing the corporate veil to extend sanctions to sanctioned entity's managers and managing partners. Traditionally, however, the disregarding provisions of Brazilian legal system were admitted only to hold natural persons related to an entity liable for compensation, indemnification or reimbursement obligations, not sanction or punitive measures. Therefore, it is necessary to subject this innovation to a constitutionality test.

Thus, there are basically two issues surrounding this examination: First, whether it is or it is not constitutional to disregard legal persons with the purpose of extend sanctions to their managers and/or managing partners. Second, if affirmative the answer to the first question, what would be the criteria of interpretation and application of this disregarding hypothesis and what would be its prerequisites.

6.1. The (un)constitutionality of disregarding legal personality for the purpose to extend sanctions, imposed against the entity, toward its managers and/or its managing partners

The pretension of disregarding the legal personality of an entity to impute to its managers and managing-partners sanctions imposed against it appears to breach directly the fundamental right to non-transcendence of any penalty (*no punishment shall go beyond the convicted person*), encompassed in the article 5 (XLV) of Brazilian Constitution (1988). As well it seems to infringe the American Convention of Human Right's article 5 (3) which states that *a punishment shall not go beyond the person of the offender*.

By the way, it is worth mentioning that, in Brazilian legal system, it is attributed to human rights convention's clause, at least, a *supralegal* status, by which the clause has the power to *paralyze the legal force of any rule below the constitutional level conflicting to it*, as already ruled the Supreme Court of Brazil, in the case RE n. 466.343, whose opinion was delivered by Justice Cezar Peluso (BRAZIL, 2008).

Thus, once inserted the aforementioned clauses in the Punitive Administrative legal regime, they lead to a prohibition of punishments' transcendence, prohibition which is not applied to reparatory obligation –

what is not a sanction, by the way – nor to forfeiture sanctions,¹⁵ both expressly excluded of the protection by article 5 (XLV) of Brazilian Constitution. Nevertheless, the convention provision houses a stricter ban when does not accept transcendence of any kind in punitive matters.

There is no doubt that the Legislator is free to label offenses as criminal and/or regulatory ones. However, this freedom does not give lawmakers the power to dispose of defendant's fundamental right and guarantees. Thus, if administrative sanctions subject the offender to penalties as serious as criminal ones, despite the label of non-criminal penalties, as is the case of Federal Law no. 12,846/13 – what was already proved by the analytical comparison we did between its penalties and the crimes provided by the Federal Law on crimes against the Environment –, the rights and guarantees of the defendant must have a similar content of the ones assured in the criminal sphere, as an example of that, the penalties' non-transcendence rule is absolutely applicable to the Brazilian Anti-corruption Law non-criminal procedures.¹⁶

Therefore, the disregard provision in question must be subject to an interpretation according to the Constitution in order to establish that it will be possible to disregard the legal personality of the entity only for the purpose to extend to its managers and managing partners (i) the reparatory obligations and (ii) the forfeit of assets, rights and values that represent an advantage or benefit directly or indirectly obtained from the wrongdoing, there are provided by the article 6, paragraph 3, and by the article 19 (I) of the Brazilian Anti-corruption Law. Other sanctions of that Law, on the other hand, are in what can be designated as a *zone of prohibited sanctioning transcendence*, pursuant to Constitutional article 5 (XLV) and article 5(3) of the American Convention on Human Rights. Furthermore, the transcendence of such sanction would violate the principle of proportionality, failing in its suitability sub-test,¹⁷ because it would undermine any deterrence goals of the sanction, serving, on the contrary, as a stimulus to the perpetration of wrongdoings once the real wrongdoer

¹⁵ To investigate the nuances of the *forfeiture* penalty in Punitive matters, specifically in Spanish Administrative Punitive Law, see: PUIG, 2000, p. 151-206.

¹⁶ Fábio Medina Osório (2015, p. 395) and Rafael Munhoz de Mello (2005, p. 45-56) also recognize the impossibility of transmitting sanctions to a person distinct from the person of the offender in Punitive Administrative matters.

¹⁷ For a panoramic study on the theory of principles and, in particular, the principle of proportionality and its sub-principles – suitability, enforceability and proportionality in the strict sense –, see: CRISTÓVAM, 2016.

would not suffer the negative consequences of its deeds (MELLO, 2005, p. 46).

None the less, we live tough times in Brazil, where the violation of the defendants' fundamental rights seems to assume the condition of the State's institutional policy, apparently endorsed by broad sector of public opinion. In this context, some imagination exercise is necessary in order to ensure minimum standards of interpreting and applying the Brazilian Anti-corruption Law's article 14 accordingly to the Constitutional order. That said, it is necessary to analyze the interpretation and application criteria, as well the requirements of the disregarding rule provided by the Federal Law no. 12,846/13, although we find it unconstitutional to extend all of the law's sanction in detriment of natural persons related to the punished corporation, as explained above.

6.2. The interpretation and application criteria for disregarding legal entities under the article 14 of Federal Law no. 12,846/13

If it prevails the comprehension that the article 14 shelters a constitutional hypothesis of disregarding legal entity to extend all of the law's sanctions to its related natural person, on the contrary to what we advocated, it is necessary to acknowledge that, in order to do so, such provision brings one central requirement that must be combined with at least one of the other two specific/alternative requirements: there must have been had an abusive utilization of the entity (i) to facilitate, cover up or disguise the practice of any harmful act listed in the Law's article 5 or (ii) to cause a patrimonial confusion between natural persons and the respective legal person.

As can be noted, the disregard doctrine in the Brazilian Anti-corruption Law can be classified as *major theory*, once it requires the fraudulent or abusive use of legal entities. It has been already said that in contrast to the *major theory*, there are *minor theories* that does not require any fraud or unlawful exercise of rights as condition to the disregarding goals. Such theories authorize to pierce the corporate veil simply because the legal personality is considered a difficulty to the offender's obligation to indemnify its victims. As already said, these minor theories can be found in the Consumer Code provisions (article 28, paragraph 5) and also in the Environmental Protection Law (article 4).

In explaining the disregard provision of Federal Law no. 12,846/13, Santos, Bertoncini e Custódio Filho point out that the piercing of the veil is also authorized when one verifies the legal entity's economic impossibility to pay fines or pecuniary reparations (2014, p. 229). Nevertheless, with all due respect, this hypothesis was not contemplated by the Law.

Accepting this understanding would be tantamount to assuming an unequivocal creative or extensive interpretation that may be valid in other fields of law, but it is far from being acceptable in the Punitive Administrative legal regime, where reigns the principle of strict legality that demands strict and literal interpretation of rules which create punitive hypothesis or imply howsoever in a freedom restriction.

It is already clear at this point that the disregard provision of the Federal Law no. 12,846/13 has the *abusive exercise of a right* (more precisely, the abusive use of a legal entity) as its gravitational center. Thus, it is essential to know the legal meaning of this institute, found in article 187 of Brazilian Civil Code, according to which one is abusing of a right whenever the exercise of it exceeds, clearly, the limits imposed by the right's economic or social purpose, or by good faith or morality. A legal definition surrounded by indeterminate, vague and multi-meaning terms, which makes it very difficult to establish the definition's operative / interpretive / integrative limits, especially for the purposes of applying sanctioning provisions.

The problem, which seems to be ignored, is that the perpetration of any of the harmful acts typified by article 5 of Law 12,846/13 may be subsumed under the legal concept of *abusive use of a right*, meaning more specifically an abusive use of a legal entity. Such conclusion is indisputable and even dispenses the reasoning technique of *reductio ad absurdum* to evidence itself. After all, these so-called harmful acts are, necessarily, perpetrated by a legal person, as defined by the Law's article 1,¹⁸ otherwise the Brazilian Anti-corruption Law would not even be applicable.

It seems obvious and safe to recognize that the use of a legal person to promise, give or pay improper advantage to public agent; to fund unlawful acts against the Public Administration; to use fraudulent means to award public procurements and gain public contracts or to obstruct Government's investigative and audit activities are not within the using limitations imposed

¹⁸ It is important to stress that the Federal Law no. 12,846/13 brings a schizophrenic definition of legal entity, that does not encompass all possible legal entities permitted by Brazilian Civil Code's article 44. Besides, the definition encompasses also groups of individuals that are not deemed as a "legal entity" by our civil legislation.

to a legal person by its economic or social ends, or even by the morality or good faith.

In fact, despite conditioning the disregard technique to an abusive use of an entity, the Anti-corruption Law's article 14 can be considered, ultimately, as a *minor theory*. After all, if proven that the legal entity has perpetrated any of the harmful practices provided by article 5, automatically, would be served the article 14 requirement to pierce the corporate veil. Thus, if one interprets literally the provision, one might find it houses an *ex lege* hypothesis of the disregard technique.

The gravity of the situation consists precisely in the fact that the article 14, if interpreted in its literal contours, can be used to conceal a strict liability rule (i.e., without *mens rea* investigation) of the natural person related to the sanctioned legal person, what is repudiated by the Brazilian Constitutional Order. As one can see, a literal interpretation conducts the interpreter to an inadmissible conclusion, reason why the provision claims an interpretation according to the Constitutional if it intends to be constitutional.

The fundamental premise is that, in interpreting and applying the provision, one must bear in mind that it is an institute that belongs to Punitive Administrative legal regime, not any other civil liability regime. It is a punitive matter that constricts fundamental rights and freedoms. Thus, elastic, creative or extensive interpretation are not welcomed in this domain. The hermeneutic must be strict and obsequious to fundamental rights and guarantees proclaimed by the Constitution.

Once accepted that premise, we can extract three necessary conclusions.

First, the interpretation and application of the disregarding provision should avoid enabling the *responsibility for the fact of another person*, also unconstitutional in punitive legal regimes due to the fundamental right to personality or non-transcendence of the punishment (article 5, XLV, CRFB). Therefore, the disregard of legal personality under Federal Law 12.846/13 requires that the targeted manager or managing-partner has effectively collaborated and/or concurred for the consummation of the harmful act subject to the sanction that is to be extended to him. Without this causal participation, disregarding the legal personality would violate the fundamental right of non-transcendence of the punishment.

As matter of fact, the Brazilian Anti-corruption Law's draft, in the 22 paragraph of its explanatory memorandum, reinforces our first conclusion laboring as a source of authentic interpretation of Article 14:

22. The foreseen effect of disregarding is the possibility of applying to the members with administrative powers and to the administrators of the legal entity the same sanctions as may be applied against it, for example **extending the company's declaration of inability to the natural persons involved in the practice two illicit** (BRAZIL, 2013). (emphasis added)

In order to assure a minimum Constitutional conformity to the provision, it is not enough to prove a causality between the abusive use of the legal entity, as a requirement to the disregard of it, and a conduct attributable to its manager or its managing partner. The causal relationship must be verified between the harmful act set forth in article 5 of the Anti-Corruption Law and the targeted individual.

Second, the interpretation and application of the provision cannot result, in practice, in a strict liability of the legal entity's manager and/or managing-partner, even indirectly. The Brazilian Constitution does not authorize the imposition of sanctions¹⁹ on individuals in an objective manner, i.e. regardless of any *mens rea* assessment. This is a question that might be controversial against legal entities, but it is indisputable when natural persons are at stake. This possibility would depend, at least, on an express constitutional basis, which does not exist in our constitutional order.²⁰

Third, the interpretation and application of the provision cannot result in piercing the corporate veil to the detriment of any other person different than the legal entity's manager or its managing partner. For reasons of *strict*

¹⁹ The word "sanction" is used here meaning only the punitive/retributive effect foreseen by the Law as a consequence of the perpetration of an unlawful act by an offender. Hence, it differs of other "sanctions" whose main purpose is not the retribution, like the reparatory obligations that aim the victim's reparation. Still, one must not forget that the term "sanction", etymologically and grammatically, admits also the idea of a positive consequence of something, like the sanction of a law. About that, see: PUIG, 2000, p. 153-154.

²⁰ Fábio Medina Osório shares the same conclusion: It is unacceptable the strict liability, this is one of the consequences of the principle of the no-transcendence of the administrative sanction. Liability for the fact of others and strict liability is fundamentally repulsed. The offense is the work of man, as is the administrative infraction practiced by a natural person, being unconstitutional any law that disregards the principle of subjective responsibility" (2015, p. 394).

legality, there can be no use of the technique to reach non-managing-partner, and neither to extend sanctions to possible hidden partners of the entity, what we call *expansive disregard*, as already mentioned.

This third conclusion does not weaken the effectiveness of the legislation with respect to its primary purpose of combating corruption. That is because a natural person continues to be possibly liable for the unlawful act if proven, after due process, that he/she knowingly or willfully perpetrated the act, as demand the article 3 and its paragraphs of the Federal Law no. 12,846/13.

Regarding to the second specific requirement (*to cause a patrimonial confusion*), the disregard technique can only be justified for purposes of extending reparatory obligations and/or forfeiture measures. Excluded these two hypothesis, the piercing of the corporate veil is necessarily conditioned to the observation of the first, second and third conclusion settled above.

Lastly, two observations are needed.

First, it is worth mentioning the provisions of the Anti-corruption Law's Article 4 and its paragraph that prescribe, in summary, (i) the subsidiary liability of the sanctioned legal entity's successor and (ii) the joint liability of the entity's holding and subsidiaries, its affiliated companies and consortium member, within the scope of the contract, to the payment of the fine and to the reparatory obligation imposed against the entity. Note that no disregard technique is need in order to do so, such shared liability is *ex lege* in these cases. That does not exempt the rule from a constitutionality test, mainly concerning to the possibility to hold the entity's related individual accountable for *finis* (an undeniable punitive measure) imposed against it. On the other hand, no questions rise about the constitutionality of the extension of the reparatory obligation.

Second, the Legislator did not establish an opportune time to carry out the disregarding technique. Therefore, it can be done both simultaneously to the sanctioning procedure, or subsequently, after the entity's conviction. The exercise of that power to disregard legal personality is subject to temporal limitations (*statute of limitations*), thought. It is applicable the five years limitations provided by the article 25 of the Law. After all, it is a

fundamental guarantee of all citizens that their past deeds may one day become, in fact, past.²¹

7. Conclusions

After the Brazilian Constitution of 1988 and the constitutionalization phenomenon that follows it, one can assert the existence of a Punitive Administrative legal regime, different of the Criminal legal regime and of the ordinary (non-punitive) Administrative legal regime. Such legal regime conditions and conforms the punitive norms' interpretation to the fundamental rights and guarantee assured to all defendants, whose contents will vary according to the severity of the sanction to be imposed, always ensured their minimum contents.

It is, then, indisputable that the Federal Law no. 12,846/13, also known as Brazilian Anti-corruption Law, is a law subjected to the Punitive Administrative legal regime. Mainly after demonstrated that its punishment is more serious or, at least, very similar to those criminal sanctions provided by the Environment Protection Law (Federal Law no. 9,605/98) against legal entities. Therefore, the rights and guarantees of the defendant in an Anti-corruption procedure must have a similar content of the ones assured in the criminal sphere to the juristic persons.

As a result of that, the disregard of legal personality rule provided by Anti-corruption Law's article 14, in the matter of extending sanctions to individuals related to the punished entity, violates directly the fundamental right to non-transcendence of any penalty (no punishment shall go beyond the convicted person), encompassed in the article 5 (XLV) of Brazilian Constitution. It also infringes the American Convention of Human Right's article 5 (3), which states that *a punishment shall not go beyond the person of the offender*. Thus, it fails the constitutionality test. As asserted, the rule could only be justified for purposes of extending reparatory obligations and/or forfeiture measures if, and only if, ignored the paralyzing effect of the American Convention's supralegal prohibition on the transcendence of punishments.

²¹ There are some controversies about that. For instance, in the case REsp 1.180.714/RJ the Brazilian Superior Court of Justice ruled that the disregard technique is not subjected to time limitations. The case, however, discussed civil and business obligations, not the imposition of sanctions. In the domains of Punitive Law such understanding could not be validated, because it could not be compatible with the fundamental right to legal certainty.

Even if one overcomes that Constitutional obstacle, the hypothetical application of the rule must obey a minimum coherence and conformity to the Constitutional order, reason why some fundamental hermeneutic premises are needed: (1) the disregard of legal personality under Federal Law 12.846/13 requires that the targeted manager or managing-partner has effectively collaborated and/or concurred for the consummation of the unlawful act subject to the sanction that is to be extended to him, avoiding with that the *responsibility for the fact of another person*, also unconstitutional in punitive legal regimes due to the fundamental right to non-transcendence of the punishment (article 5, XLV, CRFB); (2) beyond that *causal relationship*, one must investigate the *mens rea* of the targeted individual, being proscribed any strict liability of the legal entity's manager and/or managing-partner, even indirectly; and, (3) the interpretation and application of the provision cannot result in piercing the corporate veil to the detriment of any other person than the legal entity's manager or its managing partner. For reasons of *strict legality*, there can be no use of the technique to reach non-managing-partner, and neither to extend sanctions to possible hidden partners of the entity, what we call *expansive disregard*, as already mentioned.

Fundamental rights and guarantees must be assured to those who face an Anti-corruption Law's punitive procedure. The fight against corruption can never be properly and validly fulfilled if outside the Brazilian constitutional borders, mostly if it has the potential to jeopardize, at the same time, the employment of thousands of Brazilians and to weaken entire sectors of the national economy.

References

ALARCÓN SOTOMAYOR, Lucía. Los confines de las sanciones: en busca de la frontera entre Derecho penal y Derecho administrativo sancionador. **Revista de Administración Pública**, Madrid (Espanha), v. 195, p. 135-167. 2014.

BRAZIL. Brazilian House of Representatives. **Law Draft no. 6.826-A, of 2010**. Establishes the administrative and civil liability of legal persons for the practice of acts against the public administration, national or foreign and makes other provisions; having the opinion of the Special Committee on the constitutionality, legality, good legislative technique, compatibility and financial and budgetary adequacy; and, on the merits, the amendments to paragraphs 1, 5, 16, 21, 26, 27, 28, 29, 30 and 35 offered to him of the amendments to paragraphs 3, 5 and 10

offered to the Substitute; and by rejection of Amendments Nos. 2 to 4, 6 to 15, 17 to 20, 22 to 25 and 31 to 34, offered to the project, and Amendments Nos. 1, 2, 4, 6 to 9 and 11 to 13 offered to Substitute. Available on: <https://www.camara.leg.br/sileg/integras/1084183.pdf>. Accessed on: May 02, 2019.

BRAZIL. Presidency of the Republic. **Decree no. 3.678, of november 30, 2000.** Promulgates the the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions signed on December 17, 1997, in Paris. Available on: http://www.planalto.gov.br/ccivil_03/decreto/d3678.htm. Accessed on: May 02, 2019.

BRAZIL. Presidency of the Republic. **Decree no. 4.410, of october 07, 2002.** Promulgates the Inter-American Convention Against Corruption (IACAC) adopted on march 29, 1996, excluded the article XI, paragraph 1, "c", provisions. Available on: http://www.planalto.gov.br/ccivil_03/decreto/2002/d4410.htm. Accessed on: May 02, 2019.

BRAZIL. Presidency of the Republic. **Decree no. 5.687, january 31, 2006.** Promulgates the the United Nations Convention against Corruptions (UNCAC), adopted by the General Assembly of United Nations on october 31, 2003 and signed by Brazil on december 09, 2003. Available on: http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2006/Decreto/D5687.htm. Accessed on: May 02, 2019.

BRAZIL. Presidency of the Republic. **Law no. 9.605, of february 12, 1998.** Provides for criminal and administrative sanctions derived from conducts and activities harmful to the environment, and provides other measures. Available on: http://www.planalto.gov.br/ccivil_03/LEIS/L9605.htm. Accessed on: May 02, 2019.

BRAZIL. Presidency of the Republic. **Law no. 10.406, january 10, 2002.** Establishes de Civil Code. Available on: http://www.planalto.gov.br/ccivil_03/leis/2002/l10406.htm. Accessed on: May 02, 2019.

BRAZIL. Presidency of the Republic. **Law no. 12.846, august 1, 2013.** Establishes the administrative and civil responsibility of legal persons for the practice of acts against the public administration, national or foreign, and makes other provisions. Available on: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12846.htm. Accessed on: May 02, 2019.

BRAZIL. Brazilian Senate. **The Constitution of the Federative Republic of Brazil.** Available on: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: May 02, 2019.

BRAZIL. Brazilian Supreme Court of Law. **Medida cautelar em mandado de segurança 32.494**. Relator Min. Celso de Mello, julgamento em 11 de novembro 2013. Available on:

<<http://portal.stf.jus.br/processos/detalhe.asp?incidente=4484385>>. Accessed on: May 02, 2019.

BRAZIL. Brazilian Supreme Court of Law. **Recurso Extraordinário n. 466.343**. Delivering Justice Cezar Peluso, Brasília, julgamento em 3 dez. 2008. Available on: <<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=595444>>. Accessed on: May 02, 2019.

BARROSO. Luís Roberto. A constitucionalização do direito e suas repercussões no âmbito administrativo. In: ARAGÃO, Alexandre dos Santos; MARQUES NETO, Floriano de Azevedo (Coord.). **Direito administrativo e seus novos paradigmas**. Belo Horizonte: Fórum, 2008. p. 31-63.

BINENBOJM, Gustavo. **Uma teoria do direito administrativo**: direitos fundamentais, democracia e constitucionalização. 2. ed. São Paulo: Renovar, 2008.

CLÁPIS, Flávia Maria de Moraes Geraigire. **Desconsideração da personalidade jurídica**. 2006. 205 f. Dissertação (Mestrado em Direito) – Pontifícia Universidade Católica de São Paulo, Programa de Pós-Graduação em Direito, São Paulo, 2006.

CEREZO MIR, José. Limites entre el derecho penal y el derecho administrativo. **Anuario de Derecho Penal y Ciencias Penales**, tomo 28, p. 159-175. 1975.

CORRÊA, Mariana Rocha. **A eficácia da desconsideração expansiva da personalidade jurídica no sistema jurídico brasileiro**. Artigo Científico apresentado à Escola da Magistratura do Estado do Rio de Janeiro como exigência para obtenção do título de Pós-Graduação. 2011. Available on: <http://www.emerj.tjrj.jus.br/paginas/trabalhos_conclusao/1semestre2011/trabalhos_12011/MarianaRochaCorrea.pdf>. Accessed on: May 02, 2019.

COSTA, Helena Regina Lobo. **Direito penal econômico e direito administrativo sancionador**: *ne bis in idem* como medida política sancionadora integrada. São Paulo, 2013. Tese (livre-docência). Faculdade de Direito da Universidade de São Paulo (FDUSP).

CRISTÓVAM, José Sérgio da Silva. **Administração Pública democrática e supremacia do interesse público**: novo regime jurídico-administrativo e seus princípios constitucionais estruturantes. Curitiba: Juruá, 2015.

CRISTÓVAM, José Sérgio da Silva. **Princípios constitucionais**: razoabilidade, proporcionalidade e argumentação jurídica. 2. ed. Curitiba: Juruá, 2016.

FERREIRA, Daniel. **Sanções administrativas**. São Paulo: Malheiros, 2001.

GONÇALVES, Carlos Roberto. **Direito civil brasileiro**: parte geral. 14. ed. São Paulo: Saraiva, 2016.

JUSTEN FILHO, Marçal. **Desconsideração da personalidade societária no direito brasileiro**. São Paulo: Revista dos Tribunais, 1987.

JUSTEN FILHO, Marçal. O direito administrativo de espetáculo. In: ARAGÃO, Alexandre dos Santos; MARQUES NETO, Floriano de Azevedo (Coord.). **Direito administrativo e seus novos paradigmas**. Belo Horizonte: Fórum, 2008. p. 65-85.

MELLO, Rafael Munhoz de. Sanção administrativa e o princípio da culpabilidade. **A&C Revista de Direito Administrativo e Constitucional**, Belo Horizonte, ano 5, n. 22, 2005.

MELLO, Rafael Munhoz de. **Princípios constitucionais de direito administrativo sancionador**. São Paulo: Malheiros, 2007.

MORAES, Flávia Albertin de. A teoria da desconsideração da personalidade jurídica e o processo administrativo punitivo. **Revista de Direito Administrativo**, Rio de Janeiro, v. 252. 2009.

NIETO, Alejandro. Régimen sancionador de las administraciones públicas: últimas novedades. Passos recientes del proceso sustantivador del derecho administrativo sancionador. **Cuadernos de Derecho Local**, Madrid, n. 14, p. 7-13. 2007.

OLIVEIRA, Régis Fernandes de. **Infrações e sanções administrativas**. 2. ed. São Paulo: Revista dos Tribunais, 2005.

OSÓRIO, Fábio Medina. **Direito administrativo sancionador**. 5. ed. São Paulo: Revista dos Tribunais, 2015.

PEREIRA JUNIOR, Jessé Torres; DOTI, Marinês Restelatto. A desconsideração da personalidade jurídica em face de impedimentos para participar de licitações e contratar com a Administração Pública: limites jurisprudenciais. **Revista IOB de Direito Administrativo**, v. 5, p. 79-112. 2010.

RAMINA, Larissa. Tratamento jurídico internacional da corrupção: a Convenção Interamericana contra a Corrupção da O.E.A e a Convenção sobre o Combate da Corrupção de Funcionários Públicos Estrangeiros em Transações Comerciais Internacionais da O.C.D.E. **A&C Revista de Direito Administrativo & Constitucional (impresso)**, Belo Horizonte, v. 11, p. 186-198. 2003.

RAMÍREZ TORRADO, Maria Lourdes. La sanción administrativa y su diferencia con otras medidas que imponen cargas a los administrados en el contexto español. **Revista de Derecho**, Barranquilla (Colombia), n. 27, p. 274-275. 2007.

REBOLLO PUIG, Manuel. El contenido de las sanciones. **Revista Justicia Administrativa**, Madrid, n. extra 1, p. 151-206. 2000.

REBOLLO PUIG, Manuel; IZQUIERDO CARRASCO, Manuel; ALARCÓN SOTOMAYOR, Lucía. BUENO ARMIJO, Antonio. Panorama del derecho administrativo sancionador en España. **Revista Estudios Socio-Jurídicos**, Bogotá (Colombia), v. 7, n. 1, p. 23-74. 2005.

SANTOS, José Anacleto Abduch; BERTONCINI, Mateus; CUSTÓDIO FILHO, Ubirajara. **Comentários à Lei 12.846/2013**. 1. ed. São Paulo: Revista dos Tribunais, 2014.

SUAY RINCON, José. La potestade sancionadora de la Administración y sus exigencias actuales: un estudio preliminar. **Revista Documentación Administrativa**, Madrid, n. 280-281, p. 43-64. 2008.

VITTA, Herald Garcia. **A sanção no direito administrativo**. Malheiros: São Paulo, 2003.