The dishonest "option" offered by paragraph 5 of article 133 of Law 8112/1990 to those who illicitly hold more than one public position or job concurrently

Josir Alves de Oliveira

Federal Auditor of External Control at the Federal Court of Accounts, bachelor in Geography and Social Sciences by University of Brasília (UnB), and especialized in Estate Law by Atame Post-Graduate in partnertship with Cândido Mendes University (Ucam). Worked previously as an Analist at the Central Bank of Brazil (Bacen) and Auditor at General Controller of the Union (CGU).

ABSTRACT

The Brazilian Constitution, in general, forbids holding more than one public position, job or function concurrently. The purpose is to preserve principles and behaviors that govern a democratic and republican State: i impersonality, isonomy, deconcentration of power, separation of functions, morality and efficiency. The same Constitution makes an exception for the accumulation of two jobs in the fields of health, teaching, , magistracy, prosecution or in the technical-scientific area, under the terms of article 37, subsections XVI and XVII, article 95, sole paragraph, subsection I, and article 128, paragraph 5, subsection II, item d. This exception is made due to the shortage of human resources in the areas susceptible to accumulation and the correlation and synergy between them. The accumulation of jobs was also conditioned by the Constitution to the compatibility of the working hours. Accumulation of public jobs outside these parameters defies the wording and purposes of such constitutional provisions and must be treated accordingly. A legal provision that characterizes good faith of the employee who chooses one of the positions to hold only after being summoned by the Administration, and which does not consider the previous acts of the employee, goes against the constitutional principles of reasonableness and proportionality. In practice, it can also conflict with the principles of morality, efficiency and other related principles. In addition, such legal provision ends up encouraging the recurrence of the constitutional prohibition infringement, insofar as it makes its administrative and even judicial punishment more difficult. It is imperative to correct such provision and make it sustainable and useful to control instead of an encouragement to the illegal accumulation of public positions, jobs or functions.

Keywords: Unconstitutionality. Dishonesty. Option. Accumulation of positions. Public employee.

1. INTRODUCTION

CORRUPTION, DISHONESTY, IMPUNITY AND CONNIVING LEGISLATION

Corruption and administrative dishonesty are historical problems in societies. Both terms are similar and it is often difficult to tell them apart. The most distinctive element or characteristic is the fact that administrative dishonesty mainly refers to an unlawful act of a public employee or agent, which may eventually affect private individuals, whereas corruption does not necessarily need to be associated to the public sector.

In the Brazilian positive law, administrative dishonesty can be described briefly, according to Law 8429/1992, as the act committed by a public agent that implies private unlawful enrichment or damage to public coffers or violation of the Public Administration principles.

Thus, in this work, the reference to corruption will always encompass administrative dishonesty as a sub-genre of corruption, with the "right of option" established in paragraph 5 of article 133 of Law 8112/1990 being the object now studied.

It was said that corruption historically reaches the entire world and is universal. However, for obvious reasons, it is more common and prevalent in countries suffering from deficiencies of social and political development, as is the case of Brazil. Therefore, concentration of power, depoliticization and marginalization of large portions of society, and, in such condition, reliance of these portions of society on favors from public authorities, the gaps and vices in the state structure of control and monitoring (gaps in terms of competence, lack of cooperation and integration of the actions, etc.,) and the impunity resulting from these factors will tend to be, at the same time, causes and consequences of corruption.

In addition, in the Brazilian case, there are historical and cultural influences that lead to the famous "Brazilian way of doing things", to the so-called "Gerson's Law"[1], to the usual practice of breaking the law or complying with it only occasionally or apparently, and to the saying "and the devil take the hindmost". Such behaviors and expressions of clear selfish morality (practiced in a secret and veiled but also exalted manner) pervade all environments and social strata, and, admittedly, characterize, in part, the behavior of the Brazilian. If such characteristics do not determine impunity, it seems certain that it expands it, making it more acceptable, as it proportionally weakens moral values and spreads this weakness within society.

Well, nothing more conducive to impunity than the relaxation of moral principles, turning into something common and natural values and practices that lead to corruption and dishonesty, through the prevalence of personal and group privileges and the predominance of private interest over the public one. In the words attributed to the famous Brazilian comedian José Eugênio Soares, "corruption is not a Brazilian phenomenon, but impunity does belong to us".

Thus, once the political, social, economic and cultural conditioning factors of Brazil are combined, the country would be almost doomed to corruption, being fed by impunity, making the fight against

1 https://en.wikipedia.org/wiki/G%C3%A9rson%27s_law

it useless. Against such falsehood, there is Stukart's warning (2003, p. 113): "For those who think that corruption is natural, acculturated and indispensable, I must note that more than a hundred years ago that same thought was repeated towards slavery. "

If on one hand, the country is not doomed to corruption, on the other it is not an unquestionable example of the fight against it. The Brazilian State and society have been tolerant of the unlawful practices in question and slow or reticent in combating them. This is especially true when we take into account the recurrent expiration of the statute of limitations of crimes committed by important politicians, the persistent privileges in public careers, the number of moralizing legislative measures being shelved, the constant re-election of prosecuted politicians, the exclusive and corporate treatment of the theme. In this study, such reality is exemplified with a sample of the Brazilian legal system, flawed and incomplete. The focus is on the impertinence of the administrative criminal provision concerning the illegal accumulation of public positions or jobs.

In the legislation of a State that hesitates in fighting corruption, one can observe, from a didactic perspective, three levels of treatment of each subject regarding the fight against corruption. We list them from least bad to worst: (1) the law analyzes the subject, but it does not approach it adequately in order to well equip public administrators and even the legal practitioners; (2) there is total legislative omission on the subject or critical area; (3) there is a legislative provision that is contrary to morality and ethics, which benefits corruption and disrupts the fight against it.

In general, the international anti-corruption agreements can fit, as a whole, predominantly at the level 1 referred to above, as generic provisions, ratified and incorporated by Brazil (Legislative Decree 348/2005 and Decree 5687/2006), but, to a large extent, not specified nationally, not embodied in internal regulations that have practical and actual application. With respect to the political-electoral publicity nature of adhering to these treaties, Ballouk Filho and Kuntz say (2008, p. 31):

> And those conventions do not impose strict punishments, such as commercial blockades, international judgment forums or international isolation of nations that violate the agreements. Although theoretically and technically they represent a breakthrough in the long term (decades) [...], their only practical effect, in the short term, is to become raw material for promoting the image of governments [...] as irrefutable evidence of their concern with ethics, initiatives and endeavor to combat corruption. The impressive amount of nations that become part of these treaties and forums, and their poor practical and/or concrete results in reducing global corruption, could result from, and to a great extent, the risk of political deterioration from not joining in. This fact would mean for any governing group to assume the image of corrupt or conniving and to provide their internal oppositions with a blatant evidence of omission and refusal to support such noble and commendable global anti-corruption initiatives.

In particular, by further analyzing the United Nations Convention against Corruption, which Decree 5687/2006 incorporated as a national regulation (or, at least, federal), one can infer that many of the recommended principles and guidelines are not sufficiently materialized, being examples of levels 1 and 2 mentioned above. That is, many of its provisions have only a guide and do not have a self-enforcing nature, and have not yet led to a national regulation.

As an example, Brazil lacks legislation to comply with the provisions of article 7 regarding editing rules: (a) based on the principles of transparency and efficiency and on the objective criteria of merits, fairness and fitness for positions of trust (the recent Decree 9727/2019 took the first steps in this direction); (b) appropriate for the selection and training of public positions holders that are most vulnerable to corruption; and c) focused on funding transparency of electoral campaigns and political parties.

This study deals with a serious example of flawed legislation, located at the worst level of legislative treatment according to the scale above (level 3), contrary to the fight against impunity and the administrative dishonesty. This is the case of the legal provision contained in the Statute of Federal Civil Public Employees regarding the "option" that is given to the employee to choose one (or two, in certain cases of multiple accumulations) of the unlawfully accumulated positions.

2 CONSTITUTIONAL PROHIBITION OF ACCUMULATION OF PUBLIC POSITIONS

As a general rule, the Fundamental and Supreme Law of the country (BRAZIL, 1988), henceforth called Federal Constitution (CF), prohibits the accumulation of public positions, jobs and functions. The Constitution only allows this in the restricted cases of: (a) a position of teacher with another of teacher or of a technical-scientific nature or of magistracy; (b) a position that is exclusive for health professionals with another equivalent position. These exceptions reflect the wording of article 37, subsections XVI and XVII, article 95, sole paragraph, subsection I, and article 128, paragraph 5, subsection II, item d. In addition, the Constitution also allows the concurrent hold of the position of city council member with another public position, job or function (article 38, subsection III).

With respect to retirement pensions, as a general permanent rule, the Constitution allows its accumulation with the remuneration of a public office only when it comes to offices that may be accumulated, elective offices and commission offices. This is what is established in article 37, paragraph 10. The retirement pensions can be received only with positions subject to accumulation, which is a logical consequence of the constitutional provisions related to accumulation while on duty.

Surely, the constitutional prohibition has the noble purpose of preserving principles and attitudes that govern a democratic and republican Nation: impersonality, isonomy, deconcentration of power, efficiency, separation of functions, etc. Such prohibition intends, thus, to avoid the so-called *cabides de emprego*[2], the concentration of offices and powers, and the poor fulfilment of duties and the principles previously mentioned, within the scope of the public sector.

Meireles (2000, p. 404), quoting Aguiar (1970, p. 57), warned, "in general, the accumulation of positions is harmful, especially because accumulated jobs are jobs that are poorly performed". Indeed, as a rule, the performance and the availability of the person are different when they hold multiple positions.

On the other hand, the strict exceptions are based on the need to use skilled and experienced labor in the deficient and strategic areas of Health and Education, in comparison with the expertise and experience in the technical-scientific area, teaching and magistracy. The correlation between the areas of the accumulative positions and the consequent synergy present in their performance, in

2 A public office that hires more people than necessary for the administration, based on political or personal reasons. [Translator's note]

favor of the full and efficient staffing in the corresponding areas, would help national development and would justify such exception. In the case of aldermanship, the justification appears to be limited to the transience of the mandate and flexibility of the working hours.

The illegal accumulation of public positions was not specified by Law 8429/1990 as a misconduct, nevertheless its practice is pervaded, as a rule, by a violation of principles contained therein, which are subsumed under the relevant provisions of said law, according to the specificities of the unlawfulness. Perhaps the legislator did not specify it due to the possibility of the unlawful accumulation being non-intentional or in good faith.

Cammarosano (2006, p. 114) defines misconduct as the intentional violation of the legal system and juridical moral principles (loyalty, good faith, truthfulness, etc.).

The unlawful accumulation is, as a rule, an act of intentional violation. Since no one can justify non-compliance with a law on the grounds that they were not aware of it, this applies even more to a public employee, considering it is their primary duty to know and comply with the law, especially when it comes to a specific rule about their status as employee, notably because it is a constitutional rule.

In addition to the noncompliance with a constitutional principle with moral content, the unlawful accumulation is followed often by other pretenses and intentional unlawful acts: false statement, which omits positions or changes information on working hours, delay of the duty to inform the accumulation, noncompliance with the working hours, etc. Ultimately, the unlawful accumulation often contains multiple acts of dishonesty.

The fact is that those who accumulate positions other than the ones that are constitutional exceptions (a teaching position with another teaching or technical-scientific position or member of the Judiciary or of the Public Prosecution; two positions of health professional) are committing an act that is at the same time unconstitutional (for violating article 37, subsection XVI; article 95, sole paragraph, subsection I; and article 128, paragraph 5, subsection II, item d, of the Federal Constitution), unlawful (for violating the corresponding legislation, being, in the federal sphere, articles 118 to 120 of Law 8112/1990) and immoral (for disrespecting the law and the moral foundations of the constitutional prohibition, that is, to avoid *cabides de emprego*[2] and ensure fairness, impersonality, deconcentration, efficiency, full compliance with the working hours and with the duties).

As an example, there is the case of an employee who omits, in his/her declaration of accumulation of positions, the accumulation of another public position. Wouldn't such employee be dishonest and be acting with self-interest and contrary to the Public Administration, disrupting statistics, diagnoses, human resources planning and other administrative actions, and be committing a crime of false representation?

Another example. Wouldn't the employee who accumulates positions with incompatible working hours be dishonest and be acting with self-interest and against the public coffers? Wouldn't they be obtaining an unlawful advantage, an unlawful remuneration, for a work poorly fulfilled or not fulfilled at all?

One final example. Wouldn't the bosses of the employee that illegally accumulates public jobs, while covering up such unlawful situation, or even directly participating in it (with false statements,

permission for infringing the working hours, etc.), also be dishonest with society and with the State?

The affirmative answer to all these questions is obvious. In the first and last examples, the unlawfulness can be categorized as an act of administrative dishonesty that "violates the principles of Public Administration"; in the second, as a misconduct that "results in unlawful enrichment". All of them are perfectly grounded in the conceptual terms contained in the enunciation of articles 9 and 11 of Law 8429/1992.

Well, there is a legal provision that contradicts all this imperative logic of Law, which provides several opportunities for the employee that illegally accumulates to declare the accumulation in good faith, with this legal provision not making any reservation with respect to its application, being applicable to all and every situation. This is the case of article 133, paragraph 5, of Law 8112/1990. It establishes the good faith of the employee who chooses one of the positions until the deadline established by the Administration for their defense, under the terms referred therein.

It is important to attack this legal provision, characterizing its impropriety and inconsistency, aiming at its revocation or alteration, so that it can be suited to the constitutional principles of morality, proportionality and reasonableness, to the principles of the Administrative Dishonesty Law and to the fight against impunity in the country.

In effect, the option provided in paragraph 5 of article 133 of Law 8112/1990, while in force, brings a range of evidence and perverse theoretical and practical effects to society and the State. Among them, it is worth mentioning: the increase of the sense of impunity; the incentive to the unlawful accumulation and its economic advantages to the offender while the accumulation persists; the discouragement to the investigation of the facts and the search for the material truth.

At the same time, this study seeks to contribute to the fight against administrative dishonesty in several traditional fronts of struggle: by improving legislation, giving it public purpose and making it compulsory, by discouraging the practice of the unlawful accumulation of positions and by fighting impunity. The criticism of the current law and the suggestions for it to change all go in this contributory direction.

3 UNCONSTITUTIONAL ASPECTS OF THE "OPTION"

The text below is an almost full transcript of Freitas' article (2001) Acumulação ilícita de cargos públicos e o direito de opção (Unlawful Accumulation of Public positions and the Right of Option), available at http://jus.com.br/revista/texto/2182. The text deals with doctrinal argumentation about unconstitutionality (permissiveness to unlawfulness, noncompliance with the principle of reasonableness, etc.) in the law in question, in the same line of the present work. The underlined text is the part of the study that deserves an observation: the absolute and universal state of impunity that is presented is, in fact and in practice, a very prevailing situation, which results from the indulgent tendency in the administrative sphere, which, once closer to the tainted facts and the people being investigated, look for the easiest and tolerant path of the legal literal interpretation of the "option".

> The disciplinary administrative procedure to investigate the unlawful accumulation of positions began, after the publication of Law 9527 in 1997,

to be conducted under a new rite, called summary procedure. It takes place in stages identical to those of the common rite, but has shortened deadlines for the development, conclusion and judgment, which may not exceed 30 days, with the exceptional possibility of a 15-day extension, if overriding circumstances so require.

The main novelty brought by Law 9527/1997, however, does not concern the rite of the procedure, but rather the unusual and reprehensible opportunity given to the employee, before the start of the procedure, of choosing one of the positions being accumulated and of characterizing, with this act, their good faith, thereby preventing the continuation of the disciplinary action. [...] the disciplinary procedure can only be started after the employee has been offered the opportunity of choosing one of the positions, a situation which characterizes, with this act alone, their good faith, and, as a result, the procedure will not even be initiated.

[...] The new legal rule goes even further to the point of allowing that, even after the procedure has been initiated, the employee has a new opportunity of choosing one of the positions [...].

With this new legal rule, no commission will ever be able to prove the bad faith of the employee who is illegally accumulating positions, taking into account that the choice for one of the positions within the deadline established by law will characterize the employee's good faith and will lead to the discontinuation of the procedure or, if this has already occurred, its immediate archiving. […] In other words, no employee will ever be punished for having accumulated public positions, jobs or functions, thus turning into dormant law the constitutional prohibition of accumulating public positions. There will be cases, therefore, in which the employee will accumulate public positions for one, two, five or ten years with the clearest bad faith, until the irregular situation is detected by the control authorities and the employee is then invited to choose one of the positions, thus solving the unlawful situation, without them being fired or forced to return the sums of money unlawfully received for years (underlined by us).

It is easy to realize that the provisions of Law 8112/1990 that establish this option are unconstitutional, therefore deserving immediate revocation or the decreeing of their invalidity through the appropriate judicial means. The option in question, in addition to infringing the Federal Constitution, is a true encouragement to the unlawful accumulation of positions, because only after the irregular situation has been verified that the employee will be invited to choose among the positions. Besides, they will also receive, as a reward, the forgetting of the past, being exempt of the obligation to return the sums of the money that was unlawfully received. […] A simple right to choose, obviously, does not have the power to solve the irregular past. Unconstitutional acts cannot be legitimized by means of an ordinary law, except if one intends to destabilize the constitutional legal system.

> The argument used is that this right of option aims to avoid unjust enrichment of the Public Administration that has benefited from the employee's labor for a certain time, and therefore it cannot demand the return of the amounts paid because such sum represents only the payment for the work that was actually performed. [...] Relinquishing the amounts wrongly received should only occur in cases where the true good faith of the employee was verified, as in the cases where there was reasonable doubt as to the legal nature of both positions and their possible lawful accumulation. To admit, however, by a legal presumption, that good faith may be obtained by means of a simple act of choosing is to attack reasonableness, besides serving as a true legal incentive to committing acts that are prohibited by the Federal Constitution. Well, if the employee is forced to declare at the moment they take office that they do not accumulate public positions, how is it possible to later ignore this statement? If they made a false statement, they committed a crime. It is not, therefore, reasonable from a legal perspective that, once the accumulation has been verified, the declarations made when taking office do not serve for absolutely anything. We might as well remove such requirement.
>
> Therefore, it seems to me that the rules previously in force were more in line with the Federal Constitution, because, once the legitimate and true good faith had been verified - not this one admitted by presumption -, the employee was given the opportunity to choose one of the positions, in which case they were exempted from having to return the sums of money, which, although unlawful, had been received without malice or bad faith. However, if their bad faith had been verified, the employee was subject to dismissal from both positions, in addition to having to return the amounts they had unlawfully received during the period of accumulation. The right of option that is now in force by law compromises the good intentions that led the constituent to prohibit the accumulation of public positions, that is, to prevent that few citizens monopolize the occupation of such positions in order to obtain double gain, without the necessary dedication to each job, bringing a negative impact to public service provision. The law that instituted such option is, therefore, blatantly unconstitutional, deserving, for that reason, to be immediately invalidated or corrected by the appropriate judicial means. Good faith cannot be acquired by making an option.

In addition to the legal and logical reasons presented by Dantas, it should be highlighted the potentially harmful effects to the public coffers and to society derived from any unlawful accumulation, as well as the exponential impact of the disputed legal provision on those adverse effects. The unlawful accumulation results in the following potential adversities of legal, ethical, social, and economic natures: affront to the Constitution and legislation of the country, dissemination of such recurrence as something normal/acceptable in society and in public entities, withdrawal of a job position from the market, reducing the efficiency of the service provided (as a result of unfulfilled working hours or work overload), and damage to the public coffers (by remunerating a poorly provided or simply not-provided service by an employee with multiple jobs and by allocating funds to verification/control).

From the "right of option" provided in article 133, paragraph 5, of Law 8112/1990, derives the maximization of the mentioned adverse effects, in a vicious spiral, in the legal, ethical, social and economic sphere: such provision disrespects the Constitution by allowing that such affront is not subjected to accountability and punishment (suspension, dismissal, reimbursement, fine, etc.); it encourages the unlawful accumulation, by leaving the misconduct without its corresponding penalty, being a bad example of the State for society; it favors the prolongation, dissemination and recurrence of the unlawful accumulations, further affecting the public sector and its job market; and it maximizes the losses to the public coffers, by resulting in expenses with poorly provided service and with investigations without criminal and financial results (reimbursements).

With respect to the violation of the Constitution, the tolerance towards the practice of the unlawful accumulation, established by paragraph 5 of article 133 of Law 8112/1990, directly violates several constitutional principles. The principle of morality is compromised by the tolerant nature of the "right of option" towards immoral practices, such as false declaration of non-accumulation, concealment of holding accumulated positions, postponement of the unlawful accumulation until the last moment, etc. The principle of efficiency is undermined, because the permissive "right of option" causes the Public Administration to lose power and means of controlling and stopping the multiplicity and recurrence of accumulations that are unlawful and with poorly performed work and duties. The principle of reasonableness is despised in view of the irrationality of the "right of option", which magically withdraws from the world of law the real world, forgiving or providing the offender with immunity. The principle of proportionality is ignored once the "right of option" levels all unlawful accumulations, disregarding specifics and aggravating factors, such as multiple jobs, provision of false statements, recurrence of accumulation, etc. Finally, the principle of accountability for unlawful acts is rejected by the "right of option", when it withdraws from the legal system penalties that would be applicable to those who benefit from unconstitutional acts.

Regarding this last aspect (disrespect to the principle of accountability for unlawful acts, provided in paragraph 5 of article 37 of the Constitution), the legal provision in question proves to be incomplete from a legal perspective, because it establishes the rule (prohibition of accumulating positions save for those cases allowed by the constitution) and the manner of stopping it, without establishing the corresponding sanction (penalty for anyone who violates the rule). One cannot confuse dismissal from a position not subject to accumulation, which is the ultimate necessary way of enforcing the Constitution, with the penalty to be imposed on the offender, which is the part of the rule that intends to coerce people into compliance, bringing security and justice to the community and effectiveness for the rule. Thus, the law lacks the coercive element that must be present in any rule that deals with unlawful acts. Therefore, the legal provision have vices regarding its form and substance.

4 EXAMPLES OF ADVERSE PRACTICAL EFFECTS: IMPUNITY AND LEGAL CONFUSION

The "option" given to the employee who illegally accumulates public positions of choosing one position and resigning from the other, which characterizes their good faith, prevents or hinders the accountability of the employee for the unlawful acts committed during the unlawful accumulation, particularly in the administrative sphere, more than in the judicial sphere.

It is no surprise that the obstacle is more recurrent in the administrative area (Executive Power and in the administration sector of the other Powers) due to its proximity to the employee and

considering that it delimits the provisions in their statute. In addition, it is the first level to deal with the problem of accumulation, which results in a greater number of cases to be analyzed, etc. In this context, the tendency is for the Public Prosecution and the Judiciary to examine more thoroughly and with more acuity (and even impartiality, for being furthest from the facts) the small portion of cases they come across, examining the matter, including from the perspective of other codes.

Legislative indulgence has led to administrative inaction. While the Statute of the Federal Public Employees provides easy forgiveness to those who unconstitutionally accumulate, the central authority and the decentralized bodies of human resources, in synchrony with that indulgence, fail to adequately investigate and fight the wrongdoing. This is the conclusion one reaches from the lack of studies and more systematic and national surveys on the issue, from the lack of a more decisive action to broadly prevent and punish the unlawful accumulations throughout the country. An exception is made, however, regarding the more consistent control action that occurs in the federal level, carried out specifically by the Brazilian Federal Court of Accounts (TCU) and by the internal control system of the Executive Power.

One of the few pertinent national surveys to date pointed out 164,000 indications of irregularities, accounting for 5.3% of the analyzed records, and it estimated that solving the irregularities would generate savings of BRL 1.7 billion. Such survey encompassed only 13 federal states and left out states that are more representative of the amount of public employees, such as São Paulo and Minas Gerais (see http://oglobo.globo.com/pais/mat/2010/03/17/servidores-sao-suspeitos-de-acumular-cargospublicos-916096872.asp). The limited, sporadic, specific and isolated nature of these surveys is one of the indicators of the lack of effective action on the part of the public authorities in this area.

Although partial, the survey released by the press shows alarming data of irregularities that would be categorically and easily characterized as very serious: 53,793 employees accumulating more than two public positions and 47,360 university professors hired under an exclusive dedication working regime accumulating more than one function. Two extreme situations of unconstitutionality and unlawfulness often aggravated by accumulation with positions in the private sector, resulting in partial or total damage to the presence and production in public offices.

At the federal level, the unlawful accumulation of positions has resulted in some punishments over the years in the Executive Branch, according to the "Follow-up report on the dismissals imposed on public employees within the Public Administration", produced by the Brazilian Ministry of Transparency and Comptroller- General of the Union in 2016. However, they are calculated together with the occurrences of abandonment of office and insufficient assiduity, with these three causes for expulsion accounting for only 23% of the total number of such dismissals. One should question the lack of proper categorization (specific calculation of expulsions caused by unlawful accumulations), the percentage of 4 to 16% of reinstatements[3] in the period, the effect of the judicial action on the dismissals and reinstatements, as well as the lack of relevant public reports within other Powers and spheres.

3 Reinstatement is a form of re-hiring that occurs when the employee returns to their public position after the acknowledgment of the unlawfulness of the act that had previously caused their dismissal. [Translator's Note]

In these examples, as in many others, considering only the duties and prohibitions listed in articles 116 and 117 of Law 8112/1990, one could find the following legal violations, probably committed by the employees that illegally accumulate positions, to be investigated and punished, according to the degree of incidence: infringement of the legal and regulatory rules (related to the presence, working hours, duties, etc.); insufficient assiduity and lack of punctuality to the duty; absence during working hours; negligent work; performance of activities incompatible with the office duties and working hours; refusal to update one's registration data, when requested.

Thus, paragraph 5 of article 133 of Law 8112/1990, by establishing the good faith and the reparation of the irregularity when there is the mere option for one of the positions, ends up annihilating many of its own provisions related to the employee's good conduct, in particular those regarding the duties, prohibitions and penalties (Articles 116 to 132).

The "option" in question works as an obstacle to the correct and proportional accountability of those who illegally accumulate positions. Moreover, by making it possible that the State does not properly punish those who commit the wrongdoing, it acts as a serious obstacle to the prevention of unlawful accumulations. By providing a barrier to the due accountability of the violating employee, it ends up not preventing the violation. What is worse, it ends up encouraging it.

In addition, it generates, in practice, a sort of anticipated limitation of actions against the wrongdoings associated with the unlawful accumulation, a kind of immunity to the conduct of the accumulators. Lack of investigation of wrongdoings and impunity of their agents are the harmful effects of such "right of option".

Another ill effect is that of confusing the legal professionals, taking into account that the provision not only differs from the Constitution, but also from related infra-constitutional rules. That's what occurs, for example, with Law 8429/1992, which defines, in the main section of article 11, "acts of administrative dishonesty that attack the principles of Public Administration" such as the "action or omission that violates the duties of honesty, impartiality, lawfulness and loyalty to the institutions".

It is certain that the Public Prosecution seeks to categorize certain unlawful accumulations as administrative dishonesty. This can be verified by searching official websites of the courts of justice or of federal regional courts. Contrary to this position, there are articles and sentences that highlight the literality of the provision in question.

One of these articles is the study by Mattos (2006), where we may find its entire content compiled in the titles of the summary:

> Irregular accumulation of positions. The timely choosing of one of the public positions removes the characterization of the administrative dishonesty lawsuit. I - The open nature of Law 8429/1992 enables the Public Prosecution to improperly handle the administrative dishonesty lawsuit. II - The general constitutional rule establishes the impossibility of accumulation of positions, except for the cases defined by law. III - The right to choose one of the positions generates good faith of the public agent and therefore cannot be subsumed into the legal type of Law 8429/1992. IV - Impossibility of reimbursement to the public coffers of what was received as remuneration.

The author's argument focuses on the understanding that the characterization of the unlawful act requires the element malice (bad faith) and that the law removes this element from the unlawful accumulation when the public employee chooses one of the positions within the legal deadline, pursuant to paragraph 5 of article 133 of Law 8112/1990. He quotes an excerpt of the vote of a judgment of the Superior Court of Justice (STJ), in the Ordinary Appeal in the Writ of Mandamus 11.197/RJ, to reinforce that the "option" removes the bad faith from the unlawful accumulation, declaring it as an act of good faith:

To continue, if the accumulation is illegal, the employee must choose (which is a right) in order to remedy this unlawfulness. It is not about assuming the employee's bad faith. It is about only considering of good faith the employee who, in becoming aware of the unlawfulness of their employment status, exercised the right to remain in the public service, choosing one of the positions. […] The objective with this measure is, therefore, only to guarantee that the employee is given the right of option, so that they may choose one of the positions. If, nonetheless, they do not wish to do it, (it is then) characterized the bad faith, because then it shall be objectively characterized their intention of accumulating positions.

Contrary to what can be inferred from the provision transcribed above, the STJ did not analyze the legitimacy, morality or constitutionality of the "option", nor the integrity an "opting employee". Nor could it do so in the context of an Ordinary Appeal in which the ruling ratified a decision of the Court of Justice of Rio de Janeiro (TJ/RJ) against the dismissed employee. In fact, there are decisions of the STJ that consider the illegal accumulation an act of administrative dishonesty, depending on the legislation applicable in each case, regardless if it is characterized by a lack of choice from the employee. In the context of a Special Appeal – Resp 1129423/SP - , for example, the STJ upheld a decision of the previous court that understood that the administrative dishonesty had been characterized as a result of the accumulation of three public municipal positions by a political agent. Summary: "Civil and administrative procedural. Public civil lawsuit. Dishonesty. Unlawful accumulation of positions. Former mayor. Application of law 8429/1992. Compatibility with Executive Law 201/1967. Deficiency in justification. Precedent 284/STF".

There is also a ruling that considers that bad faith is characterized when there is a false statement (Appeal in Writ of Mandamus – RMS 24643/MG):

> CONSTITUTIONAL. ADMINISTRATIVE. (…) ABSENCE OF GOOD FAITH IN THE EMPLOYEE'S CONDUCT. (…) 5. The statute of limitations of 5 (five) years of the right of the Administration to invalidate administrative acts which result in favorable effects to the recipients is not considered when bad faith is characterized. Hypothesis in which the appellant made a statement that was not true when she took office in her second job. She stated that she did not have another job funded by the public coffers.

Case law of the Federal Supreme Court (STF) also authorizes to analyze the agent's accountability case by case, depending on the procedural truth, according to what may be inferred from the summary of the Writ of Mandamus MS 26085//DF, which would remove the conclusive immunity nature of the "option":

> WRIT OF MANDAMUS. […] 1. The compatibility of the working schedules is an indispensable requirement to acknowledge the lawfulness of the accumulation of public positions. The accumulation of jobs is illegal when both of them are subjected to the 40-hour-per-week working regime and one of them requires exclusive dedication. […] 3. The acknowledgment of the unlawfulness of the accumulation of salaries does not automatically establish the reimbursement to the public coffers of the values received, except if the employee's bad faith is proved, which was not demonstrated in this case. […].

On the other hand, some wrongdoings committed by those who illegally accumulate are typified as crime, as is the case of false statement of non-accumulation, which is characterized as false representation, as subsumed under a judgment of the STF itself in the Extraordinary Appeal (RE) 86863/ES:

> CRIME OF FALSE REPRESENTATION. THE APPELLEE HAD THE LEGAL DUTY OF DECLARING THE PUBLIC POSITIONS THEY HELD, INCLUDING IN PRIVATE AND PUBLIC JOINT STOCK COMPANIES, BECAUSE IT WAS THEIR OBLIGATION […].

Thus, the mentioned study by Mattos (2006) proves to be incomplete and partial, as it limits itself to the literality of one of the confronted laws (Law 8112/1990), disputing only the scope of the other (Law 8429/1992). In addition, it fails when it specifies that the purpose of the study was to oppose the dishonesty lawsuits filed by the Public Prosecution of São Paulo against employees that exercised the "right of option". Well, the author, while addressing cases in São Paulo, did not quote any legislation of the State nor did he exemplify any concrete situation of a Public Prosecution action in São Paulo that he deems absurd. His article, however, serves here to show, once again, the controversy within the application of the Law (activity of the Public Prosecution and of the judicial system of São Paulo versus the administrative activity) generated by the legal provision being disputed.

Thus, although the courts have not denied application to the legal provision in question and the STF has not declared it unconstitutional, since it was not provoked to do so by a Direct Action of Unconstitutionality [ADI], there is room for confusion by the legal professionals and for diverging decisions by the administrative and judicial bodies. Another bad effect of the current provision of paragraph 5 of article 133 of Law 8112/1990 is the potential to legal controversies.

5 CONCLUSION

PROPOSED ALTERNATIVES

By the concept of dishonesty contained in article 11 of Law 8429/1992, the unlawful and unconstitutional accumulation of public positions are subsumed, in principle, into that sub-genre of dishonesty. Besides, it falls within the classification provided in subsection I of the aforementioned article 11: "To perform an act aiming at a purpose forbidden by law or by a regulation or that differs from that provided in the rule of competence".

In effect, the federal public employee who participates in a public entrance examination, takes office and begins working in a job that does not allow accumulation is clearly being dishonest and

disloyal to the institutions (Constitution, law, public bodies involved). Besides, such conduct often leads to the complicity of employees, with typically immoral behavior (dishonest, partial, illegal and disloyal), according to the same subsection I of article 11 of Law 8429/1992.

Therefore, the legal treatment to be given by Law 8112/1990 must be the opposite of the current one: the unconstitutional accumulation of public jobs proves to be legally abominable, being considered, as a rule, a dishonest act, with presumed bad faith. In order to fight it, it would be necessary to have a history of measures taken by the employee, that pointed to a different direction, towards signs or evidence of good faith, such as: timely and truthful declaration of accumulation of jobs, formal consultation to the public bodies in question with respect to the lawfulness of the accumulation, adequate attendance and performance in the accumulated jobs and other positive conducts and initiatives.

The law that deals with unlawful acts must establish the corresponding penalties. In this specific case, there should be levels of sanctions as well as the obvious and imperative dismissal from the unlawfully accumulated job. As an example, the penalties could include dismissal or suspension from the remaining position, reimbursement proportional to the incompatibility of the working hours, fine and establishment of the unlawful accumulation as administrative dishonesty. To accomplish that, the aggravating factors of the offense should be considered. Some of the are recurrence of accumulation, multiple accumulation, false statement, non-compliance with the corresponding working hours, the overlap of working hours and the employment in more than one job (a more cunning subcategory of non-compliance with working hours, as is the case, for example, of the employee who has been assigned or requested to take another position, in which case they will end up working at the same place, holding two positions, but with a single working schedule), the failure to comply with the department's request and the combined practice of unlawful acts.

As an example, this "right of option" should only serve to provide the employee who acted in good faith with the opportunity to choose the position he/she wishes to keep, before the competent public entity (in which the last admission occurred) acts pursuant to its legal duty and dismisses them. Having the option to choose one of the accumulated unlawful positions would characterize a benefit to the employee that proved their good faith. Otherwise, if they did not prove their honesty in the accumulation, there should be a range of penalties proportional to the gravity of the offences committed, to be imposed by the entities involved and offended, after the due investigative process and legal defense.

Thus, it is reasonable that the lack of option for one of the positions, when the employee is summoned, characterizes the employee's willingness to persist in the unlawful practice, making it clear the presumed bad faith or reinforcing the already verified one. The option for one of the positions, on the other hand, must only benefit those who have undeniably acted in good faith, when there are no other irregularities characterizing bad faith.

Instead of establishing rules that tolerate the unconstitutionality, distort the dishonest acts and as a result, even encourage the continued and recurrent unlawful accumulations, the law could have dealt with this subject in the way suggested above and should have approached the elements that characterize the bad faith, its cases and relevant penalties.

In face of the problems inherent to the legal provision in question, and considering the urgent need

to change it, what is required of conscientious citizens, academics of applied social sciences and Law, of control authorities, entities and individuals who elaborate and are part of social and state control, is that they somehow make an intervention on the mentioned unconstitutionality, making the efforts they can. It is important to cease the unconstitutional practice that damages the Brazilian State and Nation, affecting public coffers and services, hindering the State's social activity, especially in the critical and important areas of health and education, which are the ones most vulnerable to the misconduct in question.

As possible actions, there is the production of critical and constructive works, such as this study, in order to join a continuous and progressive effort to form opinion and to support the performance in the judicial or legislative sphere by those entitled. Judicially, there is the possibility of filing a Direct Action of Unconstitutionality [ADI] by the those legitimized, which include the Presidency of the Republic, the Directing Boards of the federal, state and municipal Legislative Houses, the governors, the attorney general of the Republic, the Brazilian Bar Association (OAB), the political parties represented in the National Congress (CN) and confederations of labor unions or professional associations of a nationwide nature. In the legislative sphere, there is the possibility of initiatives such as the creation of a bill or a provisional executive act to change and improve the relevant provisions of Law 8112/1990 (and of Law 8429/1992).

In a general way and conclusively, there is a strong argument for changing the legal provision in question, in view of its unconstitutionality, taking into account that it is not in line with the notorious constitutional principles of morality, efficiency, reasonableness and proportionality. Neither is it in line with the constitutional principle of the accountability of wrongdoings (Article 37, paragraph 5t, of the Federal Constitution). Social, academic and state initiatives are urgent and will be most welcome.

REFERENCES

AGUIAR, Joaquim Castro. **O servidor municipal**. Rio de Janeiro, 1970.

BALLOUK FILHO, Benedito Marques; KUNTZ, Ronald A. **Corrupção política: a luta social pelo resgate da dignidade no exercício do poder**. São Paulo: Madras, 2008.

CAMMAROSANO, Márcio. **O princípio constitucional da moralidade e o exercício da função administrativa.** Belo Horizonte: Fórum, 2006.

BRASIL. **Constituição da República Federativa do Brasil.** Enacted on October 5th, 1988. Brasília, 1988. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm> Accessed on: December 15th, 2017.

_____. Ministério da Transparência, Fiscalização e Controladoria-Geral da União. **Relatório de acompanhamento das punições expulsivas aplicadas a estatutários no âmbito da Administração Pública federal, 2017**. Available on: <http://www.cgu.gov.br/assuntos/atividade-disciplinar/relatorios-de-punicoes-expulsivas/arquivos/consolidado-por-ano-2003-a-2016.pdf>. Accessed on: December 15th, 2017.

FREITAS, Izaías Dantas. **Acumulação ilícita de cargos públicos e o direito de opção**. Jus Navigandi, Teresina, year 6, issue 51, October 1st, 2001.

MATTOS, Mauro Roberto Gomes de. **Acumulação irregular de cargos. Opção tempestiva por um dos vínculos públicos retira a tipicidade da ação de improbidade administrativa**. Rio de Janeiro, 2006. Available at: <http://gomesdemattos.com.br/wp-content/uploads/2016/04/2006_acumulacao_-de_-cargos_-irregular.pdf>. Accessed on December 16th, 2017.

MEIRELES, Hely Lopes. **Direito Administrativo brasileiro**. 25th edition. São Paulo: Malheiros, 2000.

STUKART, Herbert Lowe. **Ética e corrupção**. São Paulo: Nobel, 2007 (reprinted).

Received on March 16th, 2018

Approved on November 9th, 2018