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The role of the PUBLIC PROSECUTOR'S OFFICE and the extrajudicial duty to consider the practical consequences of the decision in the control of public administration

The role of the PUBLIC PROSECUTOR'S OFFICE and the extrajudicial duty to consider the practical consequences of the decision in the control of public administration

Antonio Hortencio Rocha Neto

Summary

Legal pragmatism is postulated in art. 20 of the Law of Introduction to the Rules of Law Brazilian (LINDB) assigning to the judge the duty to consider the practical consequences of your decision as part of your own decision making. The present work aims to analyze the extrajudicial duty to consider the practical consequences of the decision in the Agreements of Non-Criminal and Civil Prosecution, signed by the Public Prosecutor's Office, and in the external control of acts of public administration. This is a descriptive and exploratory study that uses the bibliographic research technique, with theoretical dialogue between authors and analysis of standards legal issues related to the topic. The argument is based, especially, on studies of Didier and Oliveira (2019), Vitorelli (2020), Garcia (2022) and Geraldo and Rocha (2024). It is concluded that the Public Prosecutor's Office has a duty to consider the practical consequences of the decision extrajudicial, in non-prosecution agreements, producing motivated decisions, still, the *Parquet* can and should act preventively in controlling the acts of public administration, recommending that public managers base their decisions on considering the practical consequences, in view of possible alternatives.

Keywords: Public Prosecutor's Office. Extrajudicial composition. Public Administration. Control. LINDB.

1 INTRODUCTION

Legal pragmatism emerges in the doctrine as a theory, loaded with controversies, which addresses the way in which the judge should decide considering the practical consequences of their decision. The debates on the topic involved those who defended a pure legal pragmatism and those who elaborated the critique, proposing an intermediate view, consisting of applying the theory in “problematic cases, understood as those capable of

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give rise to different interpretations and allow for conflicting responses, all of which are legally admissible." (MACCORMICK, 2005 *apud* Didier; Oliveira, 2019, p. 153)

Art. 20 of the Law of Introduction to the Rules of Brazilian Law (LINDB) inserted in the legal system the *"postulate of pragmatism"* which attributed to the judge "the duty to consider the practical consequences of your decision as an element for your own decision-making decision.", as stated by Didier and Oliveira (2019, p. 153). The legal device applies to decisions of the bodies of the jurisdictional sphere, but the postulated pragmatism must apply to decisions of administrative and control bodies.

Thus, this article aims to analyze the extrajudicial duty to consider the practical consequences of the decision in the Criminal and Civil Non-Prosecution Agreements, concluded by the Public Prosecutor's Office, and in the external control of the acts of public administration. In this perspective, first, the legal basis and specific procedures are highlighted relating to the Non-Prosecution Agreement (ANPP) and the Civil Non-Prosecution Agreement (ANPC).

Next, a brief theoretical discussion is presented about the duty to consider the practical consequences of the decision, in addition to addressing legal consequentialism and control of the acts of public administration; and, finally, the actions of the Public Prosecutor's Office are analyzed, as autonomous administrative institution, correlating the duty of the members of the *Parquet* of consider the practical consequences of extrajudicial decisions resulting from compositions, and in the external control of public administration acts.

2 NON-PERSECUTION AGREEMENTS

2.1 Criminal (ANPP)

The Non-Prosecution Agreement (ANPP) was introduced into the legal system Brazilian through the Anti-Crime Law, Law No. 13,964 of 2019 also known as the Package Anticrime, which amended the Code of Criminal Procedure by inserting art. 28-A. Previously, the Resolution No. 181/2017 of the National Council of the Public Prosecutor's Office (CNMP) was the inaugural regulation of the agreement, as it already provided for the legal procedures for concluding the institute (Geraldo and Rocha, 2024).

> Art. 18. If the case is not for archiving, the Public Prosecutor's Office may propose to the investigated party a non-prosecution agreement when, with a minimum sentence of less than 4 (four) years and the crime not committed with violence or serious threat to a person, the investigated party has formally and circumstantially confessed to its practice, under the following conditions, adjusted cumulatively or alternatively: [...] (Public Prosecutor's Office, 2017).

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In recent decades, the prohibition on entering into agreements in the criminal and civil areas has become a point of debate, for the authors Xavier *et al.* (2023, p. 5550) in the criminal field the prohibition was based on the "procedural principle of mandatory public criminal action, as well as the unavailability of the protection of the public interest.", a hermeneutic that was also used in Administrative Misconduct Law, which was only resolved with the enactment of the Law Anticrime.

The possibility of extrajudicial settlement had already been adopted in other regulations, prior to the approval of Law No. 13,964/19, such as the leniency agreement provided for in the Anti-Corruption Law (Law No. 12,846/2013) and the institute of award-winning collaboration provided for in Criminal Organizations Act (Law No. 12,850/2013).

When conceptualizing the ANPP, Geraldo and Rocha (2024) state that it is a legal business of an extrajudicial nature, the agreement being concluded between the Public Prosecutor's Office and the author, formally and circumstantially confessed, to whom the crime is attributed, and its validity depends on the compliance with the conditions provided for by law and the approval of the competent court. The *Parquet* "may propose a non-criminal prosecution agreement, provided it is necessary and sufficient to disapproval and prevention of crime" *(caput* of art. 28-A, of the CPP).

The ANPP focuses on crimes committed without violence or serious threat and with minimum sentence of less than 4 (four) years *(caput* of art. 28-A, of the CPP). Being served the agreement in full, the extinction of punishability is decreed by the competent court (art. 28-A, § 13, of the CPP). Geraldo and Rocha (2024) note that the ANPP differs from other institutes negotiated justice, in the criminal area, such as penal transactions and conditional suspension of process, therefore, requires the author's formal and detailed confession as a requirement essential for the conclusion and approval of the agreement.

The decision to enter into the ANPP is discretionary for the Public Prosecutor's Office, which may deny it. there, but, horizontal dialogue being a prerequisite for self-composition, Geraldo and Rocha (2024, p. 128) assert that the *Parquet* must offer "a reasoned justification for the refusal in offering the proposal to the person under investigation who is entitled to the conclusion of the agreement." The law provides in § 14, of art. 28-A, that in "case of refusal, on the part of the Public Prosecutor's Office, to propose the agreement of non-criminal prosecution, the person under investigation may request that the case be sent to a higher body, in accordance with art. 28 of this Code." (BRAZIL, 2019).

Therefore, the ANPP is included in the list of decriminalizing measures, and, as analyzed Geraldo and Rocha,

> [...] it is demonstrated that the non-prosecution agreement is current and efficient in relation to the structural problems that affect the Brazilian penal system, as it works with punitive criminal law as *the ultima ratio* and constitutes

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> an essential tool in controlling legal processes, avoiding, thus, the slowness and inefficiency of Brazilian criminal justice. (Geraldo; Rocha, 2024, p. 129)

Finally, it is worth highlighting that the ANPP is a consensual and bilateral legal transaction, thus, failure to comply with any of the conditions set out in the self-composition by the author confessed, will lead to the termination of the agreement. § 10, of art. 28-A, orders that the Public Prosecutor's Office will communicate to the competent court, requesting "that the agreement be terminated, the investigation return to its previous status, and it is possible to file the complaint, initiating the criminal prosecution." (Geraldo; Rocha, 2024, p. 139). The celebration and full compliance with the agreement, will not be included in the criminal record certificate (art. 28-A, § 12, of the CPP).

The next topic presents the specifics of the Civil Non-Prosecution Agreement, highlighting the process until the approval of the standard that governs the topic and its applicability.

2.2 Civil (ANPC)

With the advent of Law No. 14,230 of 2021, which amended Law No. 8,429/92 (Law of Administrative Impropriety), the Non-Prosecution Agreement was consolidated in the civil area, thus, allowing the conclusion of agreements, at any procedural stage, in cases of civil action public for an act of administrative impropriety. The Law also introduced intent as a requirement for the imputation of agents for crimes of administrative impropriety that cause harm to the treasury (art. 2, §§ 1 and 2).

Even with the prohibition on the conclusion of agreements that existed in Law No. 8,429/92 and its rejection due to the understanding established by the Superior Court of Justice, the doctrine began to accept its use, based on the standards that supported the aforementioned law and others laws in the field of criminal law, which began to provide for the application of self-composition for various crimes, such as Law No. 12,846/13, known as the anti-corruption law, which deals with the administrative and civil punishment of acts committed against the public administration by individuals legal entities, national or foreign.

The entry into force of the new Civil Procedure Code of 2015 came to boost the implementation of consensual means of conflict resolution. In this context, Resolution No. 179/2017 of the National Council of the Public Prosecutor's Office now authorizes members of the Public Prosecutor's Office to enter into the Conduct Adjustment Agreement (CAC/TAC) in scope of the administrative misconduct action. As provided in § 2:

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> A commitment to adjust conduct is admissible in cases configuring administrative misconduct, without prejudice to reimbursement to the public treasury and the application of one or more of the sanctions provided for by law, according to the conduct or act committed. (Public Prosecutor's Office, 2017)

In 2019, Law No. 13,964 or the Anti-Crime Law, inaugurated the authorization for the celebration of Civil Non-Prosecution Agreement (ANPC) in administrative misconduct actions, however, It should be noted that this was a standard of limited effectiveness, as it required regulation specific (§ 1 of art. 17). Even with the revocation of the device by a subsequent rule, such standardization served to put an end to the discussions launched, up until that moment, about the legality of its application.

When analyzing the possibility of the existence of a review body for decisions of the Public Prosecutor's Office that deny the celebration of the ANPC, Garcia (2022, p. 35) reflects that the insertion of the device in the Anti-Crime Law was the result of a "growing perception that the consensus must not only be admitted but also encouraged by state power structures, including, within the scope of sanctioning law".

In his work, Garcia (2022) presents a comparative table to expose the path of the drafting of the normative text, within the scope of the Legislative Power, from the proposal presented by the jurist until the approval of the law, which led to the consolidation of the ANPC in the legal system homeland. **Chart 1** is a section of the chart prepared by the author, bringing the *caput* of the article.

Table 1 – Legislative trajectory of the wording of the *caput* of art. 17-B of Law No. 14,230/2021

Proposta que apresentei à Comissão	Texto aprovado pela Comissão	Texto introduzido pela Lei nº 14.230/2021
Art. O Ministério Público poderá celebrar acordo de não persecução cível com aquele que tenha colaborado efetiva e voluntariamente com a investigação e com o processo cível, desde	Art. 17-A O Ministério Público poderá, conforme as circunstâncias do caso concreto, celebrar acordo de não persecução cível, desde que, ao menos, advenham os seguintes resultados	Art. 17-B O Ministério Público poderá, conforme as circunstâncias do caso concreto, celebrar acordo de não persecução civil, desde que dele advenham, ao menos, os seguintes resultados:

Source: Garcia (2022, p. 38)

In analyzing the complete picture, it is highlighted that in the text introduced by Law No. 14,230/2021, paragraphs were added detailing other procedures of the agreement and

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section III of the *caput was excluded,* which included the possibility of paying a fine (Garcia, 2022). From this perspective, Law No. 14,230/21, in its art. 17-B, brought important changes and provided, in detail, about the ANPC, establishing the *Public Prosecutor's Office's* competence to celebrate it Civil Non-Prosecution Agreements, according to the circumstances of the specific case and provided that at least the following results arise from them: "I - full compensation for the damage; II - the reversal to the injured legal entity of the undue advantage obtained, even if originating from private agents." (Brazil, 2021).

Thus, the ANPC has a dejudicialization nature, as it aims to prevent the beginning of a possible public civil action for an act of administrative impropriety or to conclude it, through acceptance of the conditions and compliance with the sanctions imposed on the agents held responsible for the practice of the alleged acts. Furthermore, the extrajudicial composition is a way to make the repair and compensation for the damage caused faster and more effective fraudulently.

Tourinho (2023) assessed that the jurisdictional decision, within the scope of Sanctioning Law, when it comes especially to acts of administrative impropriety, it has not been effective and efficient in combating crimes against public administration and protecting assets public and society. Corroborating Tourinho (2023), Xavier *et al.* (2023) highlight the result from a survey carried out by the National Council of Justice, in 2015, in partnership with the University of Itaúna, where, when investigating the obstacles to effectiveness in combating to acts of administrative impropriety, a serious flaw was found in the procedural system, with long processing of cases and insufficient actions that obtained reparation damage (CNJ, 2015 *apud* Xavier *et al.,* 2023).

Xavier *et al.* (2023) raise the controversies surrounding the approval of the ANPC, through Law 14,230/21, arguing that obstacles must be overcome by filling of regulatory gaps, whether through doctrine, jurisprudence or other regulations, because, According to the authors, the main premise is the fight against illegal acts committed in disfavor of public administration. However, it is worth noting that other authors, such as Garcia (2022), warn about the problems in using alternative standards to supplant what Law No. 14,230/21 did not address it.

The law provides that the celebration of the ANPC depends, cumulatively: on the hearing of the entity injured party; approval by the Public Prosecutor's Office body responsible for assessing promotions of archiving civil inquiries, when prior to the filing of the action, within the period of sixty days; and "of judicial approval, regardless of whether the agreement occurs before or

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after the filing of the administrative misconduct action." (item III, § 1, of art. 17-B of Law 14,230/21).

In this sense, it becomes essential to analyze the duty to consider the consequences decision-making practices in the extrajudicial sphere, in the agreements that were presented, taking into account the role of the Public Prosecutor's Office in monitoring the acts of public administration and the legal consequentialism, inserted by the hermeneutics of pragmatism postulated in art. 20 and 21 of LINDB, as will be done in the next topic of this work.

3 THE PUBLIC PROSECUTOR'S OFFICE AND ITS ROLE IN ENFORCEMENT OF COMPLIANCE ON THE DUTY TO CONSIDER THE PRACTICAL CONSEQUENCES OF THE DECISION

3.1 Art. 20 and 21 of the LINDB and the Duty to Consider the Practical Consequences of Decision

The wording given to art. 20 and 21 of the LINDB was included by Law No. 13,655 of 2018, which provides for the mandatory duty to observe the practical consequences of the decision and make explicit their motivation for assuming such implications. The purpose of such changes in LINDB, according to Sundfeld *apud* Didier and Oliveira (2019), was to provide greater legal certainty, stability and predictability to Brazilian public law. Legal certainty is effective when the decision is made avoiding only the use of abstract legal values or vague, that is, the aim is to qualify the decision.

> Art. 20. In the administrative, controlling and judicial spheres, decisions will not be made based on abstract legal values without considering the practical consequences of the decision.
>
> Sole paragraph. The motivation shall demonstrate the need for and adequacy of the measure imposed or the invalidation of an act, contract, adjustment, process or administrative rule, including in view of possible alternatives.
> Art. 21. The decision that, in the administrative, controlling or judicial spheres, decrees the invalidation of an act, contract, adjustment, process or administrative rule must expressly indicate its legal and administrative consequences.
>
> Sole paragraph. The decision referred to in the caput of this article must, when applicable, indicate the conditions for regularization to occur in a proportional and equitable manner and without prejudice to general interests, and cannot impose on the affected parties burdens or losses that, due to the peculiarities of the case, are abnormal or excessive. (Brazil, 2018)

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In public administration, the principle of legal certainty is an element indispensable and needs to be promoted based on clear, well-founded, stable and predictable (Couto e Silva, 2017). As Couto e Silva (2017) highlights, there is an understanding general that the notion of legal certainty cannot be separated from the notion of law, both being inseparable. In Brazil, at the end of the 20th century, security protection was recognized as constitutional principle and placed in the list of principles to which the administration is subject public. (Couto e Silva, 2017)

When analyzing the normative structure of art. 20 of the LINDB, Didier and Oliveira (2019, p. 146) claim that the device brings a hermeneutic postulate, thus establishing "a guideline interpretative for the adjudicating body: it must consider the practical consequences of the decision be taken." In the interpretation given by Didier and Oliveira (2019), "legal values abstract", referred to in the device, are "less densified normative principles", that is, principles such as human dignity, health, morality, equality, among others.
From this perspective, citing Fernando Leal, they emphasize that art. 20 has a redundancy, having in view of the fact that the Code of Civil Procedure (art. 489, §1º, II, CPC) provides that, when the decision is based on legal principles, the judge must necessarily consider their possible practical consequences and explain their reasons (Didier; Oliveira, 2019).

> The *caput* of art. 20 inaugurates, in dogmatic terms, the hermeneutic postulate of pragmatism, according to which practical consequences must be considered when assessing and choosing one of the possible meanings of the normative text with open semantic content.
> This postulate does not apply only to judicial decisions. It also applies to administrative decisions and decisions taken by control bodies, such as audit courts and regulatory agencies. (Didier; Oliveira, 2019, p. 150)

Therefore, the duty to consider practical consequences arises for decisions judicial and extrajudicial, as is the case with the results of extrajudicial settlements, that is, the ANPP and the ANPC, already analyzed in this article. Furthermore, art. 20 assigns to the judge a duty to motivation, which must go beyond pragmatic judgment, by demonstrating "the need and suitability of the measure taken" in contrast to other possible alternatives and observing the proportionality (sole paragraph, Art. 21, LINDB). For Didier and Oliveira (2019), the sole paragraph of art. 20 embodies the constitutional principle of the justification of decisions (art. 93, IX, CF/88).

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But there are risks that need to be considered when pragmatism becomes the postulate. main aspect of the legal norm, which Didier and Oliveira (2019) call predictive in nature, meaning a leading role of the practical consequence in the decision-making process, making it the judge prepares his decision by attributing a meaning to the normative text that is in accordance with the consequence that he considers the most appropriate. According to Didier's criticism and Oliveira (2019), in this pragmatic interpretation, the judge may incur in an escape from own legislation and precedents.

To avoid such risks, the judge must reconcile his decisions with the postulates of coherence and integrity, in addition to considering the real and appropriate consequences of the case concrete and explain the criteria and reasons adopted within proportionality and reasonableness. Thus, the judge's failure to observe his duty to consider the practical consequences of the decision entails its nullity due to the absence or deficiency of justification, in a way that demonstrates its non-compliance. Therefore, compliance with the *caput* of art. 20, of the LINDB, is linked to the analysis of the grounds for the decision (Didier; Oliveira, 2019).

The next topic discusses legal consequentialism as a theoretical concept. which applies within the scope of acts and decisions of the public administration for control purposes of these.

3.2 Legal Consequentialism and the Control of Public Administration Acts

Contemporary legal consequentialism emerges in the context of the post-positivist and the sociocultural changes that occurred in the second half of the 20th century, which contributed to strengthening the role of the Judiciary in relation to the powers Executive and Legislative (Silva, 2023). From the new Constitutions, other legal sources promoted a restructuring in hermeneutic activity, thus, “With the greatest appreciation of principles, which brings law closer to morality, legal argumentation experienced the growth in the use of indeterminate legal concepts and abstract legal values.” (Alves, 2019 *apud* Silva, 2023, p. 24).

When conceptualizing legal consequentialism, Silva (2023) asserts that the argument consequentialist is of external justification, that is, the justification of a decision consequentialist focuses on the specific case and its possible effects, ignoring the pure examination of the rules of positive law and empirical statements.

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> Consequentialism is understood as the adaptation of decisions to their consequences in the reality for which they are intended, with flexibility in the technological understanding of norms, in the search for transcendent justice. (Gandra, 2020 *apud* Silva, 2023, p. 20)

Thus, the doctrine of legal consequentialism requires the judge to consider in its decision the factual reality and the practical consequences, but, must indicate the motivation and justify their choice in light of the possible alternatives, with the aim of combating the decisions based on abstract legal values. In Brazil, the consequentialist doctrine was made positive through the changes inserted in the LINDB by Law No. 13,655/18.

Author Edilson Vitorelli (2020) discusses the changes in LINDB with a focus on problem of control of administrative acts. Discretion, the author states, is a concept that authorizes public managers to make decisions that are outside the law without there is control of the law, this control being the greatest mark of the democratic State contemporary. However, administrative discretion becomes necessary when there is a specific case that the norm does not offer a solution (Vitorelli, 2020). When addressing the discretion in the practice of administrative acts in relation to existing legal norms, Vitorelli highlights that:

> [...] the semantic openness of a legal concept is capable of creating a range of possible solutions, not of indiscriminately allowing any solution, nor of excluding the manager from the scope of internal (controllers, audits) and external (Courts of Auditors, Public Prosecutor's Office and Judiciary) controls. The control of administrative acts, in the Rule of Law, is the rule, not the exception. (Vitorelli, 2020, p. 84)

Administrative acts that are based on norms or principles, even if they are more abstract, must undergo legal control. According to Vitorelli, the Constitution of 1988 provided, in its art. 5, XXXV, on jurisdictional control and consolidated that “the jurisdiction may invalidate administrative acts and impose sanctions on managers who, in a unjustifiable, they deviate from the dictates of the legal order, whether these are endowed with greater or lesser degree of abstraction.” (Vitorelli, 2020, p. 84).

The Public Prosecutor's Office, when carrying out the examination of the legality of administrative acts, must consider the practical consequences of managers' decisions (Vitorelli, 2020). At this point, Vitorelli (2020) argues that when applying art. 20 of the LINDB, members of the Public Prosecutor's Office can and should, in specific situations, consider as lawful conduct that, despite being contrary to the legal provision, their consequences bring greater benefits to society than if the rule had been complied with. Thus, “the act must be considered in accordance with the

legal system, even if contrary to a legal text", if this is the possible alternative chosen over others with the potential to lead to worse results (Vitorelli, 2020, p. 105). In this sense, for Vitorelli, consequentialism must be "moderate, concrete, maximizing, aggregating, non-egalitarian and loss-averse." (2020, p. 108)

The manager has a legal duty to motivate, this means that it is up to the administrator justify your act, demonstrating the need and adequacy, by presenting the possible alternatives and their outcomes. Therefore, "it is appropriate to conclude that LINDB imposes that all discretionary administrative acts are motivated, in view of their consequences that are reasonably foreseeable and the possible alternatives to their adoption." (Vitorelli, 2020, p. 108). However, the understanding is that the administrator should not be punished for unpredictable consequences at the time of the act, provided that the decision was made duly substantiated, in accordance with the provisions of art. 22 of the LINDB (Vitorelli, 2020).

Vitorelli (2020) lists some consequences and brings them together as a practical guide for activity to motivate managers, in line with the LINDB and the Constitution. These would be: Microconsequences, macroconsequences, temporal distribution, maximization of well-being in light of alternatives, representation, social distribution and economy.

In this scenario, the Public Ministry and the control bodies have what Vitorelli (2020) calls it a "preventive role", which must be played by helping managers to carry out an adequate application of the LINDB. For the author, "the supervision of the bodies administrative and control must act preventively and based on the needs of public managers in order to manage and reduce risks in public management." (Vitorelli, 2022, p. 106). Furthermore, he argues that this preventive control can provide managers with preparation for that they begin to analyze the practical consequences of actions in decision-making (Vitorelli, 2020).

On the supervision and control of public administration acts by the bodies provided for in art. 20 of the LINDB, Vitorelli concludes that:

> Furthermore, if the manager is able to present these circumstances to the control bodies, the Public Prosecutor's Office and the Judiciary, these bodies must take into account the practical consequences of the decision and the possible alternatives in controlling the legality of administrative acts and in applying penalties to the administrator. The consequences may not even prevail as a criterion justifying the act, but if they are presented, they must be considered. (Vitorelli, 2020, p. 108)

This type of preventive and monitoring control has a pedagogical character.
which can enable the improvement of the quality of public management acts and the appreciation
the administrator's decision-making autonomy (Silva, 2023).

In the following topic, the discussion outlined so far is taken as a basis for
analyze the performance of the Public Prosecutor's Office in applying art. 20 and 21 of the LINDB in the context
of the Criminal and Civil Non-Prosecution Agreements.

3.3 The Role of the Public Prosecutor's Office in Non-Prosecution Agreements (ANPC and ANPP) and in Compliance with the Application of Art. 20 and 21 of the LINDB by the Public Administration

The National Organic Law of the Public Prosecutor's Office, established by Law No. 8,625, of 12
February 1993, provides in art. 1 on the legal nature and powers of the *Parquet:* "it is
permanent institution, essential to the jurisdictional function of the State, responsible for defending the
legal order, the democratic regime and the unavailable social and individual interests."
The institutional principles of the Public Prosecutor's Office (MP) are: unity, indivisibility and
functional independence (art. 1, sole paragraph, of Law No. 8,625/93).

The *Parquet* has functional, administrative and financial autonomy and its decisions,
as an autonomous institution and in harmony with legal formalities, are fully effective and
immediate enforceability, observing the constitutional competence of the Judiciary and the
Court of Auditors (art. 3, sole paragraph, of Law No. 8,625/93).

In relation to art. 20 and 21 of the LINDB, the Public Prosecutor's Office was included in the sphere
administrative, therefore, its members must consider the practical consequences of
decision, not deciding based on abstract legal values, and observing the duty to
motivation, which will be demonstrated in light of the principle of proportionality (necessity and adequacy)
that the measure taken or the act, contract, adjustment, process or administrative rule is invalidated,
was the alternative with the least harmful consequences compared to the other possible ones.
Therefore, LINDB imposes on the *Public Prosecutor's Office* the duty to provide reasons for decisions.

Having outlined these general considerations, the analysis is divided into two issues: 1st.
The Public Prosecutor's Office has the extrajudicial duty to consider the practical consequences of
decisions taken under non-prosecution agreements; 2nd. The *Parquet* is assigned the role
preventive control of public administration through monitoring and guidance of
acts performed by public administrators.

The Criminal and Civil Non-Prosecution Agreements, discussed at the beginning of this work, arose
in the context of promoting consensual methods of conflict resolution in the legal system

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Brazilian legal system, especially after the new CPC of 2015. However, each of the agreements aforementioned have traveled a path, in the doctrinal and legislative spheres, until their approval. In the case of the Non-Prosecution Agreement (ANPP) it was approved at the time of the Anti-Crime Package, through Law No. 13,964 of 2019. The Civil Non-Prosecution Agreement (ANPC) was inserted into the legal system with Law No. 14,230 of 2021, which modified the prohibition for the conclusion of agreements in cases of acts of administrative impropriety, as provided for in Law No. 8,429/92 (Administrative Misconduct Law).

The decision to enter into the ANPP is discretionary by the Public Prosecutor's Office. Art. 28-A of the CPP, provides that "the Public Prosecutor's Office may propose a non-criminal prosecution agreement, provided that is necessary and sufficient for the reprobation and prevention of crime" and through compliance of the conditions agreed between the parties. According to Geraldo and Rocha, when there is a negative proposal of the agreement the *Parquet* must offer "a reasoned justification for the refusal in offering the proposal to the person under investigation who is entitled to the agreement." (2024, p. 128).

Given the horizontal and voluntary dialogue nature of self-composition, if there is compliance with the agreed conditions, in accordance with the law, and the fact of the proposition or not of the ANPP constitutes a decision, it is understood that the MP must weigh the consequences practices in each specific case and justify your decision, presenting the motivation for your decision. proposal or for its denial, even when all legal requirements have been met filled.

> In fact, the non-prosecution agreement is one of the main reasons for the reduction in criminal actions involving medium-level offenses, in addition to acting as a means of avoiding conviction and, consequently, the social effects of the sentence, as it works with punitive criminal law as the *ultima ratio.* (Geraldo; Rocha, 2024, p. 156)

As for the ANPC, the Public Prosecutor's Office may, depending on the circumstances of the case concrete, enter into a civil non-prosecution agreement in negotiation with the person under investigation or defendant and his/her defender, provided that there is full compensation for the damage and/or reversion to legal entity harmed by the undue advantage obtained, even if it comes from private agents (art. 17-B, items I and II, of Law No. 14,230/21). In this case, the greatest speed and effectiveness in combating illegal acts committed in an onerous manner against the administration public. As already discussed, the doctrine assesses that Sanctioning Law must seek extrajudicial and self-composition forms to qualify the fight against crimes against public administration and protect the public interest. Corroborating this understanding, the standard provides that:

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> § 6º The agreement referred to in the **caput** of this article may include the adoption of internal mechanisms and procedures for integrity, auditing and encouraging the reporting of irregularities and the effective application of codes of ethics and conduct within the legal entity, if applicable, as well as other measures in favor of the public interest and good administrative practices. (BRAZIL, 2021)

Law No. 14,230/21 determines that the conclusion of the agreement must consider "the personality of the agent, the nature, circumstances, gravity and social repercussions of the act of impropriety, as well as the advantages, for the public interest, of a quick resolution of the case." (§ 2, of art. 17-B). The Public Prosecutor's Office must hear the competent Court of Auditors to determine the value of the damage to be compensated (§ 3, art. 17-B). The execution of the ANPC may be made in any of the phases, whether in the civil investigation, during the improbity action administrative or in the execution of the conviction (§ 4, of art. 17-B).

In both agreements (ANPP and ANPC) the legislation determines that there must be judicial approval to validate the agreement. Thus, administrative decisions go through the jurisdictional control. The control carried out by the competent courts must be part of the assessment the legality of the agreements and the practical consequences of the decision. Silva states that "the consequences also became part of the assessment of the legality of administrative acts by external control bodies." (2023, p. 41).

Regarding the second problem that is analyzed on this occasion, it has already been highlighted that the The Public Prosecutor's Office has a preventive role in guiding the public administrator to an adequate application of LINDB. This action should result in the improvement and qualification of administrative and management acts, considering the practical consequences, with the aim of producing effects that are more beneficial to the citizen and/or society (Vitorelli, 2020). The importance of this preventive action is highlighted, since:

> [...] the Public Prosecutor's Office, in the exercise of the authority provided for in art. 6, XX, of Complementary Law 75/1993, may issue recommendations and warnings to managers, as the case may be, to the effect that the lack of adequate motivation regarding the analysis of the practical consequences of administrative acts, including in the face of possible alternatives, constitutes illegality and, in serious circumstances, may constitute an act of administrative impropriety. (Vitorelli, 2020, p. 106)

These recommendations and alerts can help managers in evaluating consequences and justification of the acts performed in view of the possible alternatives. The

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administrative impropriety, with Law No. 14,230/21, became a willful crime, that is, the act an unlawful act committed by a public agent during the exercise of his/her duties and which causes harm to the treasury, must be practiced consciously and intentionally. However, even if the action preventive measures by the *Parquet* do not inhibit improper conduct, there is no doubt that it contributes so that honest administrators do not make mistakes that could have been avoided.

The *Public Prosecutor's Office* is responsible for defending the legal order, the democratic regime and the interests social (such as the unavailability of the public interest) and individual unavailable (such as the right to life, freedom, health, image and dignity), in this sense, it is essential observe the various practical consequences, not just basing decisions on values abstract and, still, motivating them in the face of possible alternatives.

4 FINAL CONSIDERATIONS

The Law of Introduction to the Rules of Brazilian Law (LINDB) has undergone recent changes which included the theory of legal pragmatism in the national legal system, providing in art. 20 and 21 on the duty to consider the practical consequences of the decision, in the areas jurisdictional, administrative and control. Consequentialist theory also applies to control of the acts of public administration, understanding that the decisions of public administrators must also consider the practical consequences in light of the determination of the standard.

Thus, the Public Prosecutor's Office, as an autonomous administrative institution, has the duty to consider the practical consequences of the extrajudicial decision, in the Non-Disclosure Agreements Criminal and Civil Prosecution, producing motivated decisions that avoid arguments with based on abstract legal values and based on the principle of proportionality (need and suitability). It is debated that *Parquet* has a preventive role in external control of the acts of public administration, since, in the exercise of supervision, it can issue recommendations and warnings to public managers so that they can base their decisions considering the practical consequences.

The Public Prosecutor's Office, when examining administrative acts, must consider the following: practical consequences of managers' decisions. Edilson Vitorelli (2020) states that, when applying art. 20 of the LINDB, members of the Public Prosecutor's Office can and should, in situations specific, consider lawful conduct that, despite being contrary to the legal provision, its consequences bring greater benefits to society than if the law had been complied with.

However, it is the public administrator's duty to provide motivation, justifying the practice of his act. as determined by art. 20 of the LINDB.

The *Public Prosecutor's Office* is responsible for defending the legal order, the democratic regime and the interests of the social and individual unavailable, therefore, it is essential to observe the various practical consequences of the decision, in their own decisions and when acting in control of acts of public administration, observing the duty to motivate and the principle of proportionality in the face of possible alternatives.

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