WHAT THE SITZBLOCKADE CASE HAS TO TEACH THE FEDERAL COURT OF ACCOUNTS

O que o Caso Sitzblockade tem a Ensinar ao Tribunal de Contas da União

Clarice Von Oertzen de Araújo
Pontifícia Universidade Católica de São Paulo - PUC-SP, São Paulo, SP, Brasil
Lattes: http://lattes.cnpq.br/5417631267446471 ORCID: https://orcid.org/0000-0003-2829-6280
E-mail: cvaraujo@pucsp.br

Gabriela Duque Poggi de Carvalho
Pontifícia Universidade Católica de São Paulo - PUC-SP, São Paulo, SP, Brasil
Lattes: http://lattes.cnpq.br/9789835868191095 ORCID: https://orcid.org/0000-0001-7293-2243
E-mail: gabriela@dafonteadv.com.br

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ABSTRACT

The Article makes a critical analysis of the way the Brazilian Federal Court of has been justifying its decisions that fines are imposed on those responsible for causing damages to the public treasury, specifically at the point where they carry out the dosimetry of the penalty, having as a reference the art. 22, § 2, of the Law of Introduction to the Rules of Brazilian Law. The method adopted is the survey and analysis of doctrine, legislation and jurisprudence, through the use of comparative study. By identifying similarities between the grounds of the decisions selected and coming from the Brazilian Federal Court of Accounts and the way the German Federal Court based its judgment on the case that became internationally known as *Sitzblockade*, we propose a reflection, based on the criticism made by leading jurists to the German case, on the method used by the Federal Court of Accounts to justify its decisions. In conclusion, there is evidence that the grounds of the decisions examined by the research and coming from the Federal Court of Accounts do not expose all the elements considered by the judges in the decision-making process, and do not meet the purpose of art. 22, § 2, of the Law of Introduction to the Rules of Brazilian Law, since they are produced from the method of subsumption.

Keywords: Federal Court of Accounts; sanction; decision; subsumption; *Sitzblockade*

RESUMO

O artigo faz uma análise crítica da forma como o Tribunal de Contas da União (TCU) vem fundamentando decisões em que são aplicadas multas aos responsáveis por ocasionar danos ao erário público, especificamente no ponto em que realizam a dosimetria da pena, tendo como referencial o art. 22, § 2°, da Lei de Introdução às Normas do Direito Brasileiro. O método adotado é o levantamento e análise de doutrina, legislação e jurisprudência, mediante o emprego de estudo comparativo. Através da identificação de semelhanças entre a fundamentação das decisões selecionadas do TCU e a maneira como o Tribunal Federal Alemão fundamentou o julgamento do caso que ficou internacionalmente conhecido como *Sitzblockade,* propõe-se uma reflexão, a partir da crítica feita por importantes juristas ao caso alemão, acerca do método utilizado pela Corte de Contas Federal para justificar suas decisões. Ao final, como conclusão, são apresentadas evidências de que a fundamentação das decisões examinadas pela pesquisa e provenientes do TCU não expõe todos os elementos considerados pelos julgadores no processo de tomada de decisão, e não atendem ao objetivo do art. 22, § 2°, da Lei de Introdução às Normas do Direito Brasileiro, uma vez que produzidas a partir do método da subsunção.

Palavras-chave: Tribunal de Contas da União; sanção; decisão; subsunção; *Sitzblockade*

INTRODUCTION

This case judged by the Federal German Court[1], that became internationally known in the 80's, was called *Sitzblockade*[2]. It was a judgment of two young people that had blocked the vehicle's access roads from an establishment that used to be a stockage of ammunition, as a protest against the fabrication of atomic weapons in Germany. The German Court analysed if their attitude could be framed as the penal type provided under the § 240 of the German Penal Code, which predicts the imprisonment for those who practice crime of duress, by using violence. The two of them were judged and considered guilty for the practice of illicit act.

The case had a big midiatic repercussion because of his political background, and the solution found by the German Federal Court was commented on by many eminent jurists. According to the ones who criticized the court's position, the decision was built under a subsumption (application of the law as a simple rule deduction) method that, despite been usual in german jurisprudence at that time, would represent strong limitations, especially for not assuming the value judgements made in the process of decision. Got put in check the method's capacity to produce decisions whose fundamentation exert the real reasons adopted by the judges to make it to the laid down outcome.

The subsumption of deductive base, as a method for conflict resolutions, imagined at the French Exegesis School[3], carries an hegemonic prestige in the doctrine of public law and at the Brazilian Courts. The objects analyzed are the Federal Court's of Accounts decisions, especially those in which a fine is applied, predicted in the art. 57 da Lei 8.443, from 07/16/1992, to the responsables for causing damages to the public administration, whose dosimetry follows the parameters of art. 22, § 2, of the Law of Introduction to the Rules of Brazilian Law, written by the law n° 13.655, from 04/25/2018. P

[1]Corresponds to the Brazilian Superior Court of Justice (apud KAUFMANN, 2007, p. 84)
[2] In free translation, it means seated blockade.
[3] As in the French Exegesis School, the Jurisprudence of concepts, school of thought leaded by Putcha in Germany at the 19th century, also adopted a logical methodology, subsuntive and deductive, that conceived the Law science as a 'pyramid of concepts': "The singular juridical propositions that constitute one nation's Law – as read in hisn *Cursus der Institutionen* (course of the institutions), I, 35 – are, one in relation to the other, in an organic nexus enlightened through the outcome of the people's spirit, as the unity of this fontaine is extended to everything that's been produced from it." What happens, as Larenz's explanation, is that the organic nexus transforms itself in a logical nexus between the concepts (*apud* LARENZ, 1997, p. 24).

From the diagnostic, that says the TCU (Brazilian Federal Court of Accounts) have been increasing his control under the Brazilian public administration and influencing effectively the behavior of public officials, it's justificated the necessity of doing a critical analysis of its decisions. The study is in line with the investigation object of the research project named "Observatório do TCU[4]", that proposes to examine TCU's decisions as they are handed, with an empirical and pragmatic approach.

The debate contained in the article came out from the disquiet about the acknowledgment of the similarities between the way the Federal German Court decided the *Sitzblockade*'s case and at the position that has been adopted by TCU on the application of fines. The main goal is to examine if TCU's decisions have presented a proper justification. The work 's hypothesis is that brazilian's judges bring the same order of problems identified by the great jurists on the german case, what turns possible to draw the referred critical reflection in a useful way to improve TCU's judgements

The article is not concerned about evaluating if the fines that were applied through the referred decisions are correct from the legal and factual standpoint. There is also no intention in this article to provide a framework or a classification on the process's method that has been chosen on its decisions by making a comparison with the theories of decision produced by the Law schools. The intention is more simple: propose a reflection on the way how TCU has been justifying its decisions in these cases - dosimetry on the application of the penalty of fine - from the criticism made on the judgment of the *Sitzblockade's case.*

The main point in this analysis is: the decision-making method reflected on the motivation of the Federal Court of Accounts on its decisions, and not the substantive law in which they were grounded. This has allowed the projection of the criticism made by the authors on the criminal prosecution judged by the German Court on debates about distinct legal materials.

[4] The TCU 's Observatory is a collective research project, permanent in the Public Groupe from FGV Direito SP, in partnership with the *Sociedade Brasileira de Direito Público - SBDP. (* in free translation, Brazilian Society of Public Law). From the diagnostic that TCU has been amplifying his control under public administration and the private parties related to it, the TCU's Observatory proposes to analyze the court's decisions as they are delivered and to produce critical balances of the court's actuation. The main point of the research is to enhance the understanding of this important control organ and to bring more grants for the public debate. The body of researchers is composed of professors, masters, PhDs and postgraduate students of Law from different institutions all over the country.

To develop the study, the method applied was the research and comparative analysis of doctrine, the survey of the legislations related to the application of TCU fines on the responsibles for causing damages on the public purse, and the survey with a critical analysis on its jurisprudences.

The script will be the following.

The item 1 (one) of the article explains the patterns of association of ideas according to the mind's philosophy developed by Charles Sanders Peirce, the precursor of the siomisis and the american philosophical pragmatism. This development intended to present to readers what Peirce called "association by resemblance" as a way of associating ideas that inspired the authors to adopt the comparison of the cases.

The item 2 (two) brings information about the famous german case and summarizes the criticism made by the jurists to the method used by the German Court in the decision and in the way they justified it. The item 3 (three) exposes and analyzes the legal context used as a base on the application of fines by TCU to the responsibles for causing damages to the public purse. The item 4 (four) look into the incidence of the article 22 of the Law n° 13.655, april 25th, 2018, on the fine's applications's dosimetry used by TCU, their purpose and the theoric bases on the contextualization of its decisions, embracing the administrative, legal and supervisory spectrum, and justifying its insertion in the Law of Introduction to the Rules of Brazilian Law.

In the item 5 (five) the TCU's decisions are presented, while exposing the similarity between the way they were grounded and the justification of the German's Court on the *Sitzblockade* case. In the same item, these decisions are criticized in the light of the censorship promoted on the German's Court judgment. Finally, in item 6 (six) the study's conclusions are presented.

1. ASSOCIATION BY RESEMBLANCE AND THE COMPARISON OF CASES AS A METHOD OF RESEARCH

The study and the comparison of cases have revealed themselves the most proper way to deal with the parameters of incongruence in the practice of dosimetry of penalties that were applied in the *Sitzblocade* case and in the jurisprudence of TCU. The idea is to demonstrate the inadequacy of the concrete consequences entailed by the adoption of deductive syllogisms in the process of penalties applications, in situations in which the context was not considered as a variable in the

account. An application that adopts a foundationalist position, by the employment of arguments with *a priori* assumptions, without the correct investigations of the concrete case, can produce unintended consequences, in terms of the universal rationality of decisions. The demonstration of this effect wouldn't have the same clarity with the adoption of an extensive bibliographic research, with the further establishment of an insufficient subsumption .

The bibliographic research draws near to a deductive investigation, which means to do a bibliographic survey and reconstruct a "state of art". This technique gets close to a compilation of systematic information, but it doesn't get to show the unwelcome effects in practical terms. The study and the comparison of cases have shown to be more appropriate to handle the practice, by exhibiting the application of fines and the lack of coherent dosimetry on TCU's penalties.

The selection of similarities between the cases will be explained here, according to parameters of mental philosophy, established by Charles Sanders Peirce, the precursor of philosophical pragmatism.

According to Peirce, the association of ideas come from the arrangement of three principals: similarity, contiguity and causality. Likewise, we could also say that the signs display what they represent on the same three principles of resemblance, contiguity and causality. There can't be doubts that anything is a sign of whatever it is associated with, by resemblance, contiguity or causality: There's also no possibility to have doubts that any sign resembles the signified thing. (PEIRCE, 1992, vol. 1, p. 50; CP 5.307[5]).

Therefore, the similarities selected for the case's comparison call upon the reconnaissance of ideas that are vividly brought to mind. When it looks up to the effects of determined practices, the cases get similar and the mind recognizes them. The different analysis perspectives provided by the case comparison also depends on the contexts in which the minds are; contexts that define the reconnaissance of similarities. In the case addressed in this article, the decisive context for the selection of the similarities was the line of research "observatório do TCU", that provided the analysis perspective for the proposed cutout.

The case's analysis is a method capable of selecting relevant aspects and proceeding to an organized and linear observation of important research data (QUEIROZ, 2012, p. 186). The range of possibilities on the selection of similarities was exactly the factor that attracted the

[5] The abbreviation "CP" refers to the '*Collected Papers'* of Peirce. By referencing this work; the first number means the volume, and the second means the paragraph.

realization of an investigation with the adoption of this method. The international doctrine's comments on the *Sitzblocade* case also provide material for the critical reflection in relation to the TCU's practices.

Peirce explains that the medieval thinkers (following an Aristotle's tip) distinguished real relations and rational relations. A real relation subsists due to the fact that it would be totally impossible if one of the related objects was destroyed; on the other hand, the rational relation subsists due to two facts, and one of them would disappear with the aniquilation of any of these relations. This is how all relations work: To any two objects from a nature that assemble one with each other, and in fact associated with themselves: it's just with a reference of our senses and needs that it is possible to consider a similarity with more emphasis than another. (PEIRCE, 1992, vol. 1, p. 253).

The resemblances are not the only rational relation, considering their prominent character. The contrasts and the comparisons also belong to it. The resemblance is an identity of characteristics; and that means the mind group ideas that are assembled on their conception. (PEIRCE, 1992, vol. 1, p. 253).

Peirce proceed his explication on the pattern of ideas association:

> The association assumes two forms. Because, on one hand, it can be a disposition, that was, since birth, destined to development, independently of external experiences, since the mind hasn't been mutilated or practically mutilated, let us say, when it comes to being imprisoned. Due to his type of association, certain types 9fmideas become naturally allies, as Crimson and Scarlet, it's called association by assemblance. The name is not a good name, once it implies that assemblance causes the association, when, actually, the association constitutes assemblance. Considering themselves, any of the two qualities of sense are what they are on their own, without having any relation to each other. But they can be compared by a mind that hasn't brought any hue of its nature for this comparison, any two ideas could lead to something that looks alike or looks different. However the human mind attributes a peculiar value and an emphasis to some similarities, which means the following: when a quality is vividly brought to conscience, others will have their vividness immediately decreased, ones more with more intensity, and others with less. Thus, one idea could be more or less compared with a photographie compound, and in this composition vividly urges an idea that can be called a general idea. It isn't properly a conception, once a conception is not an idea, but one habit. But the regular occurrence of a general habit or idea and the experience of its utility, results in the formation or enforcement of this habit, which is the conception; or if fthe conception already is one habit completely compacted, the general idea is the habit. (CP 5. 498).

To Peirce the rules that connect phenomena by a sort of an intellectual sintesis, or interior, are widely divided in internal relation rules, or structure similarities, and mind rules. Without association by assemblance it wouldn't be possible to have general ideas, or similarities. The

association by assemblance must be, as it looks like, an analogy, or shape similarity, that calls upon the problem, turning it vivid. (CP 7.498).

The suggestion by assemblance is easy enough to comprehend, once the conception is understood: the similarity of two ideas consists in the fact that the mind naturally puts them together on its thoughts in a certain way. For example, yesterday I saw a blue object; and here there is another blue object. I remind myself of the feeling I had yesterday and observe the one from today. At this moment I find myself able to say these two objects are strictly linked; in this consists their assemblance (CP 7.392).

An assemblance, therefore, consists unically in the mind's property for which it naturally imposes a mental signal to things that are similar to each other. It must be admitted that there's something on things that corresponds to this mental signal. Peirce, exploring the question under another point of view , has established that the analytical reasoning depends on the associations by assemblance, and the synthetic one depends on the association by contiguity (CP 6.595).

The assemblance identified on the correlation between the uncriterius dosimetry on the application of fines, as it's been made by TCU, and the condemnation proposed by the German Court in the *Sitzblocade* case was the inadequacy of the practicals consequences, as a result of the lack of a more objective investigation, more concentrated on context of the law application. This type of sanction application, in a decontextualized manner, in the long term, and in terms of the appreciation of systemic effects, produces a distortion of legal concepts that will be reflected in pragmatic and semantic levels.

In this regard, the option for the inductive and qualitative approach of cases comparison highlight the distortions and inadequacies produced by the application of penalties, whose justification is the simple utilization of subsumption

2. THE *SITZBLOCKADE CASE*

In 1979, the members of the North Atlantic Treaty Organization (NATO) have decided to reinforce the weaponry on the Central Europe[6]. After 1983, new atomic missiles were placed in Germany. In a protest act, young people sat in the middle of a public road, used to access an arms depot (Großengstingendepot) in order to obstruct the passage of vehicles on this location.

[6] The context of the measure is reported in a piece of news available in https://www.dw.com/pt-br/1979-otan-aumenta-pressão-contra-moscou/a-707269. Access on the december 14th 2020

The episode became known as *Sitzblockade.* The case was submitted to the German Judiciary, and received different decisions in different instances. Finally, in 1988, the case was judged by the Federal German Court.

The court analyzed if the protester's attitude could be considered the offense typefied on the section 240 of the German Criminal Code, in which was written "Whoever unlawfully, by force or threat of serious harm, compels a person to do, acquiesce to or refrain from an act incurs a penalty of imprisonment for a term not exceeding three years or a fine"[7].

In a mediatic judgment, the German Court considered coercion the conduct of the accused, condemning them to the enforcement of the sentence predicted in the legal provision[8]. The German Court manifested his understanding that the search for remote finalities (the final cause - in this case, the political protest against the increase of nuclear weaponry and the right of manifestation) of the protesters by the criminal judge would be infeasible, in reason of "incalculable" political convictions manifested in different ways by 4 (four) judges from the First Senate of BVerfG and from the Regional Superior Courts. According to the decision, the State's duty of guaranteeing peace, which also includes the power to impose criminal sanctions, prohibits the consideration of any objects distant from the exam of culpability, on the interpretation of the Section 240 of the German Criminal Code.

Which means that, in a level of appeal, the German Court understood that the objectives, as they were distant from the conduct, that correspond to the right to protest of the young people who blocked the public road by sitting on it, shouldn't be considered for the finality of the penalty application. Taking notice that nobody could have the right to deliberately obstruct the traffic and cause a block capable to violate the third-party autodetermination, the German Court adopted the thesis that doesn't consider the objectives distant from the conduct, but defends the appropriate would be proceed with a global ponderation on this situation, with the intention to limitate and mitigate de punishability for the infractors.

Therefore, the german case had his final decision tagged by a context valorization. Considering that the right to protest should stay defined in a clear and unequivocal way, the court made the option to declare the lack of objectivity to establish the aggravating circumstances to the

[7] Section 240 of the German Criminal Code (*apud* LEGE, 1992. p. 64).
[8] The decision is identified by Lege (1992, p. 78) as "Tribunal Supremo Federal (bundesgerichtshof) Resolución del 5 de mayo de 1988 – 1 StR 5/88" -, BGHSt [Resoluciones y sentencias del Tribunal Supremo Federal em material penal], vol. 35, pp 270 y ss.; reproduzida tambien em Neuve Juristische Wochenschrift (NJW), 1988, pp.1739 y ss. " A decisão é identificada por Lege (1992, p. 78) da seguinte maneira: "

agent's conduct, adopted the ponderation of the general situation on evaluating the legality and mitigated the punition for the accused.

The case had an international repercussion, inciting many political discussions.

Years later, the decision was taken as an example of the criticism of the jurist Joachim Lege (1992) to the method of deductive syllogisms adopted by the most part of courts on the decision-taking. In a conference minstrated on the september 14th 1990, the jurist presented a classification of the way how legal cases are solved according to the relation between the logic and valuation on the direct application of law, using the S*itzblockade* of what got named as *intuitionism.*

According to this method, from the law text, would be extracted the assumptions under which the judge would made to a decision, through a logical construction, with a simple deduction. Scrutinizing the decision, Lege says it was formulated in line with the following squema

> "(1) Quien coaccione a otro mediante violencia... será castigado.
> (2) M há coaccionado mediante violência'
> (3) por tanto, M será castigado". (LEGE, 1992, p. 65).
>
> (1) The body that coerces some other person through violence will be punished
> (2) M has coerced through violence'
> (3) therefore, M will be punished
> -free translation

According to the author, the solution (3) would be extracted from the subsumptions (1) and (2), through a logic-deductive process. In face of this information, the author affirms the method wouldn't ensure that sumpsumptions (1) and (2) would be correct, pointing that the role played by the logic, on the method, would be limited to the construction of a formal deductive conclusion. The establishment of subsumptions would follow a distinct reasoning, based overall in value judgements, that are not obtained by logical constructions. The deduction with which it has come to a conclusion would bring only an apparent objectivity on the decision's construction, when, actually, its bases would have been defined on the value judgments of someone.

Arthur Kaufmann (2007) also harshly criticized the way with which the Federal German Court have justified their decision of condemning the protestors, adding that it wouldn't have base in any scientific method[9]. The problem in question draws near to Lege's criticism (1992). He said the court, once declaring that the solution would come exclusively from objectives criteria, wouldn't have turned extern the real justification of its position, because it wouldn't be possible, through a simple sumpsumption. to classify certain actitud as violent, or not. At this point, inevitably, the value judges would burst on the scene, and the personal position took by the judgers has been constructed from its pre-judgments and preconceptions, which, by the way, are not assigned on the decision's justification

Significant part of the international doctrine it's in agreement about the insufficiency of simple sumpsumption, in its logical nature, as a criteria for the production of a fair legal decision. The sumpsumption reveals itself an exclusive logical interference, and, for that matter, insufficient for the qualification of the facts involved in the controversy. The logical nature of this interference has to be followed by the value judgements, able to legally qualify the facts.

In the Brazilian domain, Flavianne Nobrega (2013) comments on the german decision, from the reference of Charles Sanders Peirce pragmatism. She equally presents her reservations about the subsumption method adopted by the court on this decision, recognizing its limitations, and considering the influence of value judgments used on the resolution of this conflict. Finally, proposes the utilization of the abductive method of Peirce as one way for the comprehension of the juridic decision process.

The criticisms listed above jeopardize the utilization of the subsumption method on the law application. They demonstrate that the formulation of decisions by a simple deduction of what's written in the law is unreal, because it is impossible to submit facts into a determined rule, without using value judgements. Indeed, the logical syllogism, as a method that intends to apply the law

[9] Commenting the german case, Kaufmann, another jurist that was also dedicated to analyze the case, affirms: "when the court says the condemnation of these two women (both with meritorious services to the public cause) that have blocked the road in front of the stockage of ammunition, to protest in favor of peace, is totally free of valuations, stem from purely objective criteria, that's clearly a subterfuge. Having subsumption or not, it can't be "subsumed" the concept of violence on the type of durres from the section 240 of the German Criminal Code, neither under the "objectionable" legal requisite ; when the Federal Court set up as a criteria for the assessment of censure, rather than the national sentiment from nazism, the national juridical sentiment, gets into a word game without any substance (anyhow, half of the judges of the Constitutional Federal Court involved with this case considered unconstitutional the section 240 of the German Criminal Code) (2007, p. 84).

by deducting the legislation, provides a formula for the decision justification. There is no concern to explain how the judge came to that solution for the case.

Decisions constructed from a squema of assumptions taken from the legislation text, as illustrated by Lege (1992) have a lack of foundation. The expressed motives bring a simple representation of the deductive reasoning stemmed from the law, as if the judge would have extracted his decision from it., without any other interference. By noticing that, during this process, supposedly deductive, in which the judge makes assessments of what's been appreciated, it can be recognized that the deduction pursued from the legal text and manifested on the decision doesn't bring all the real motives on its foundation.

The failure has repercussions in a practical order. It can harm the analysis, the reflection and, as a consequence, the improvement of jurisprudence, because the exam and the criticism to the decision will stem from a fictional base.

3. THE APPLICATION OF FINES BY THE BRAZILIAN FEDERAL COURT OF ACCOUNTS TO THE RESPONSIBLES FOR DAMAGES TO THE PUBLIC PURSE

The TCU's punitive activity it's justified on the article 71, III[10], of the Brazilian Federal Constitution. The device says the Court of Accounts has the competency to "apply predicted sanctions to the responsibles, in case of illegality on expenditures or irregularity on accounts"

By accomplishing the duty and right, attributed by the constitutional text, the ordinary legislator predicted, on the article 57 of the law 8.443, from july 16th, 1992, organicist law from the TCU, the possibility of applying to the managers that have their accounts judged as irregular or responsible for illegal expenses, the penalties of fine, office disqualification in comission or in function of trust in the public administration, and declaration of disreputable.

[10] Art. 71. The external control, incumbent to the National Congress, will be executed with the aid of the Federal Court of Accounts, which is responsible for: [...]
VIII - The application, on the responsibles, in case of illegality in expenditures or irregularity on accounts, of the sanctions predicted in law, establishing, inter alia, a proportional fine for the damage caused in the public purse;

The application of fines hypothesis are predicted in the article 57[11] and 58[12] of the legal document. The first one authorizes the Court of Accounts "when the responsible its judged in debt" to apply fines with up to 100% of the value of the damage to the purse. Therefore, as a mechanism to turn into more effective his attribution to assist the Legislative on its exercise of extern control[13], the TCU has received the competence to sanction, which implies in the possibility of fines application on the responsibles for causing damages to the public purse in the correspondent measure of the damage significance.

Without starting any of the uncountable discussions about the topic, in line with the purpose of the present study, it's enough to say that the legal framework that runs the fine application it's contained in the legal provisions aforementioned. In matters of infralegal rules, it was up to the Resolution n°155, from december 4th, 2002, in which the TCU's Intern Regiment got approved, to regulate the topic. In relation to the fine fixed on the article 57 of the Law n° 8.443, july 16th 1992, the normative remained within the aforesaid resolution, not bringing any adaptations on its application

As seen, the special legislation doesn't offer bigger parametres for TCU to define amount of the fine applications with grounds on the article 57 of its Organic Law, with wide margin of variation (until 100 percent of the damage), whose definition, in reason of the absence of adaptations, is determined by the judger, in this case, the court ministers, in which concrete case.

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[11] Once the responsible has been judged in debt, the court will still be able to apply a fine that reaches up to a hundred per cent the updated value of the damage caused in the public purse as established in the article 57 of the Law 8.443, from 1992.

[12] Art. 58. The court will be able to apply a fine of Cr$ 42.000.000,00 (forty two millions "cruzeiros") or the equivalent amount in another currency, that may come to be the national currency, on the responsibles for:

I - accounts judged as irregular, from which there is no resultant debt, in the terms of the sole paragraph of the article 19 of this law.
II - act practiced with serious offense to the legal rule or to the regulamentar rule from an accounting, financial, operational, budgeting or a property nature;
III - illegitimate ou uneconomical act of management, with damages to the public purse as an outcome;
IV - non-compliance in deadlines, without any justification to the rapporteur's diligence or the court's decision;
V - obstruction of the dre exercise of the determined inspections;
VI - denial of process, documents or information, in inspections held by the court;
VII - recurrence on the noncompliance of court's determinations.

[13] When addressing the competence of sanction of the Federal Courts of Accounts, the professor Marcia Pelegrine explains: "The sanction is one of the instruments setted at the disposal of the Courts of Accounts by the constitutional legislator, with the intention to ensure the fine control of public accounts. Without the possibility to impose sanctions, certainly their function would be drained, because that's an element that imposes the accomplishment of determined obligations on the administrator. (2019, p. 404). free translation

Under the procedural aspect, the application of penalties by the Federal court of Accounts follows its own rules, defined on its Organic Law. This law contains the fixation of the court organs with competence to judge and the formalities that must be part of the communication between the parties. In the processes solved by TCU, it's also possible to apply the general rules of administrative process, contained in the Law n°. 9.784, january 29th, 1999.

Besides, the Civil Process Code predicted, on its article 15, the supplementary and subsidiary application on cases in which there are no administrative provisions, so that it will fall over on the ongoing process of the Court, on subjects that were not delimited by the Organic Law or by the Law n°. 9.784, of january 29th 1999.

There is a relevant discussion on doctrine about the nature of the function held by the Courts of Accounts; if it's administrative or jurisdictional. Notwithstanding the debate, there weren't any doubts on the application of the Civil Process Code on the conflicts in a supplementary and subsidiary form.

4. THE REINFORCEMENT ON CONTEXTUALISM BROUGHT BY THE PARAGRAPHES 2° AND 3° OF THE ARTICLE 22 OF THE LAW OF INTRODUCTION TO THE RULES OF BRAZILIAN LAW.

The absence of objective criteria for the dosimetry of administratives sanctions is not an exclusivity of the Federal Court of Accounts (TCU). His presence can be noticed in a grat portion of sancion activity of public administration. The paragraphes 2° and 3°of the Law of Introduction to the Rules of Brazilian Law helps to face the problem, by reinforcing the *contextualism*[14] on the application of sanctions. According to the legal provision:

[14] Concerning the contextualism brought by the article 22 of LINDB, Eduardo João explains: "the project wants to put in the center of concerns of the administrative law these material limitations and the factual contexts that inform the implementation of rules. The idea is that this more realistic form (and, therefore, more effective) of taking juridical promises from the speech, to the reality. How does the project do that? Demanding the contextualization on the interpretation of law, on the annulation of administrative acts, on the application of sanctions and in the responsibilization of the public administrators. Respected, this contextualization would give the adequate importance to the material conditions that would allow a more realistic application of the Brazilian public law." (2018, p. 69)

> Art. 22. On the interpretation of public management rules, it will be considered the obstacles and the real difficulties of the manager and the requirements of public policy to his office, without any prejudice to the administrator rights [...]
> § 2º On the application of sanctions, it will be considered the nature and the seriousness of the infraction committed, the damages stemming therefrom for the public administration, the aggravating or mitigating circumstances and the agent's antecedents.
> § 3º The sanctions applied to the agent will take in consideration the dosimetry of the many sanctions stem from the same nature or relative to the same fact.
> -free translation

The rule commands the law applicator to consider the context (here represented by the nature and seriousness of the infraction, damages caused by it, aggravating or mitigating circumstances, and criminal background) on the occasion of the decision of application of penalties on the judicial, administrative or supervisory field. Eduardo João (2018) attributes to the *contextualism* brought by the legal provision two aspects: one substantial, the other procedural. The first one guides the judge to observe the factual context on the application of sanctions. The second one requires a "reinforced motivation" or a "qualified motivation" for the sanctioning.

Both aspects tend to produce better decisions on the scope of the administrative law of sanctions. The substantial aspect, provides criteria for dosimetry on penalty, from the analysis of the factual mechanism that rounds the infraction, the procedural requires the explanation on the decision of the elements chosen as determinants on the sanction definition.

The discussion about the necessity of contextualism on legal decisions does not overlook that the procedures of interpretation and application of laws are procedures in which prescriptives texts are interpreted. The application of laws always will face social contexts, whose important facts and relations will be judicialized.

The concept of "context" provided by semiotics and by the theories of language refers to the explicit or linguistic context, or to the implicit, qualified, extralinguistic or situational contexts (GREIMAS, 2008). In face of the failure on the positivist proposals to establish an accurate correspondence between the linguistic universe and the reality, establishing equivalences, term to term, between the linguistic signs and the extra-linguistic objects , the language theories attempt to insert, on the interpretation of the enunciate, the construction of a reference net, that underlies the instances of enunciation. That's precisely the intention revealed in the article 22 of the Law of Introduction to the Rules of Brazilian Law, as in the articles 2º and 8º of the Decree 9.830, from june 10th 2019, which regulamented the articles 20 and 30 of the referred law.[15]

[15] Decree 9.830/2019.

Rafael de Oliveira explains how the juridical pragmatism reflects on the acts of control of the administrative function:

> In reason of pragmatism, the juridical control shouldn't be restricted to the theoretical matters, being concerned with the factual content and with the consequences of the decision that will be delivered in each case (2012, p. 29).
> -free translation

It also may be said that the parameters of the factual contextualization and of consequentialism, from the innovations brought to the public law by the Law n°. 13.655, from april 25th 2019, are no more restricted to the external control of administrative juridicity, but are also extended to internal control, that is realized in the interior of the executive power, ant to the external control, held by the Court of Accounts.

The theory of juridical argumentation proposed by MacCormick (1986), the philosophical pragmatism of John Dewey (1950) and the quotidian pragmatism of Richaar Posner (2010), here adopted as methodological parameters for the analysis of contextualization required by the article 22 of the Law of Introduction to the Rules of Brazilian Law, also questions how insufficient the juridical positivism is on the determination of a decision and its justification, in terms of law application on concrete cases. One or other, the theory of argumentation by MacCormick (1986) and the juridical pragmatism criticize the positivist conception, according to which the materialization of the law could be summed in the mechanical application of legal devices on concrete cases.

The american pragmatist philosophers were all oriented for the correlation between the investigation and the value. In the center of their attention it always has been the activity guided by the men's intelligence. Never the activity was seen by the pragmatists as a simple movement; indeed the simple movement was never praised, not even when it comes to the scientific investigation about nature phenomenus. Peirce (1999) correlated the normative sciences, like ethic,

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[...]
Art. 2º The decision will be motivated with the contextualization of the facts, when it's possible, and with the indication of the basis of the decision of juridical merits
§ 1º The decision will contain its foundations and will present the congruence between the rules and the facts in which they are based, in an argumentative way.
[...]
Art. 8º On the interpretation of public management rules, it will be considered the obstacles, the agent's real difficulties and the requirements of public policy to their office, without any prejudice to the administrator's rights.
§ 1º On the decision about the conduct regularity, or about the acts validity, adjustments, processes, our administrative rules, it will be considered the practical circumstances that have imposed, limited or conditioned the public agent's action. *free translation

logic and aesthetic, by postulating the investigation oriented to a finality[16]. John Dewey criticizes the *spectator theory of knowledge*[17].

The necessity of the contextualization of propositions is underlined by the contextualist aspect of juridical pragmatism, and brings the heritage of Dewey's philosophical pragmatism. The American philosopher explains that the sense determination of a proposition depends on its insertion in a contextual situation. Any proposition isolated from the environment and from its functions would be logically undetermined. (DEWEY, 1950, p. 155).

Dewey calls the absence of context valorization as the "analytic fallacy" of philosophy. According to the American philosopher, the negligence with the context is the bigger isolated disaster that philosophical thinking could suffer.

> "The context includes, at least, the subjects that, in reason of brevity, I will call selective interests and background. By 'background' I mean the whole environment that philosophy must consider in all of its undertakings. One background is implicit somehow, in some level, in all thoughts, although , as a background, he is not in purview, that is to say, it doesn't integrate part of the subject that is consciously treated, conceived, examined, inspected, reverted. The background is temporal and spatial" (1998, v.1, p. 211)

Elizabeth Anderson also illustrated the importance of contextualization, by comparing pragmatism with other investigative referencials:

> In the first place, the pragmatists avoid appealing to ethical principles that belong to a way too high abstraction level, that stems from human experience data. They don't try to articulate or justifie ethical principles that are supposedly true in all possible or valid worlds for rational beings. The ethical principles on pragmatism are contained, reflecting the circumstances of culture, local and history. In second place, the pragmatists conducted ethical queries with empirical investigations about particular characteristics of the institutions, practices and categories in which real

[16] Peirce declares: "But, in second place, the procedure of normative sciences (logic, ethic and aesthetic), isn't purely deductive, as it is in mathematics, or even in a principal way" . His analysis of familiar phenomenus, that should be lined by phenomenology, in a way that the math science is never lined, separates Normative Science of mathematics in a radical way. In third place, there is an element unique and essential of Normative Science that it's even more characteristic of it. Their peculiar appreciations, to which nothing exists, on their own phenomenus, correspondant to them. These appreciations are related to the compliance between the phenomena and the finalities. (PEIRCE, 1999, p. 200)

[17] "Through the taking office of the conception of knowledge as contemplative by part of the dominant religion in Europe, crowds were influenced, totally unconnected to the theoric philosophy. The idea that knowledge is intrinsically a simple contemplation or vision of reality, the spectator conception of knowledge, was transmitted to generations of thinkers as an unquestionable axiom. This idea was so fundamentally rooted that it prevailed for centuries, even after real science progress has shown that knowledge is the power to transform the world, even centuries after the practice of effective knowledge has been adopted as the experimental method" (DEWEY, 2011, p. 107).

> agents participate, that they have constructed and with each they confront. In third place, pragmatists justify their recommendations on the context. They perceive the search for ethical principles that can be lived, situated in particular, cultural and historic contexts. The justification works by showing the practical superiority of the solution proposed for the limited and concrete alternatives imagined in that moment." (*apud* POSNER, 2010, p. 41).

The institutional theory of Neil Cormick, in affinity with the juridical pragmatism, adopts the postulate of the true fact finding, that the scottish philosopher considers, moreover, an evident requisite or even banal for the delivery of fair decisions (MACCORMICK; WEINBERGER, 1986). The consideration of the manager real circumstances, implied by the article 22 of the Law of Introduction to Rules of Brazilian Law and by the article 8º of the Decree 9.839, from june 10th 2019, underline, in accord with pragmatism, that the nature of the significance only can be clarified in reference to the actions.

All classic pragmatists agree with the relation between the significance and the action as a striking feature of pragmatism. Appreciating the many legal devices inserted on the Law of Introduction to the Rules of Brazilian Law by the Law 13.655, from the april 25th of 2018, the significance under exam is the administrative juridicity or anti-juridicity, reflected in decisions of the public management (that can assume the form of facts, acts and administrative contracts), examined em control operations on the sphere of juridical and administrative control.

Projecting on the administrative law, the valorization of contextualization brought by juridical pragmatism intensifies the relevance of the motivation and justification on the adinistratives actuations (OLIVEIRA, 2011). This pragmatic characteristic, adopted by the new devices inserted on the article 22 of Law of Introduction to the Rules of Brazilian law, reinforce the relevance of the 'theory of determinant motives'on the motivation of the administrative acts. According to this theory, the facts that lead to the decision taking compose the act's validity. If the motives are fake, non-existent or inadequately qualified, this faulty motivation defiles the administrative act, compromising its validity. (MELLO, 2006).

The necessity of contextualization of decisions taken on the sphere of administration reveals the adequacy of the contextualization, reinforcing the anti-foundationalism nature of pragmatic theories, hereinafter revoked by the contemporary administrative law (MENDONÇA, 2014). The contextualism rescues the experience value. When this contextualism is projected for the juridical interpretation, the article 22 of the Law of Introduction of the Rules of Brazilian Law reveals the necessity to consider the context in which the manager was at the moment that he took

the decision. The second paragraph of the legal device follows this line, by declaring the importance of the aggravating and mitigating circumstances and the infraction consequences, for the decision about the sanction.

In this regard, the devices of the Law of Introduction to Rules of Brazilian Law examined have a direct repercussion on the application of fines predicted in the article 57 of the law 8.443, from july 16th 1992, by TCU. Briefly, once defined his value, inside that wide margin of variation established by the law (up to a hundred per cent of the damage to the public purse), the judges of the Court of Accounts must take in consideration the contextual elements indicated in the second paragraph of the article 22, of whats comes to be the nature and the seriousness of the infraction committed, the damages stemming therefrom for the public administration, the aggravating or mitigating circumstances and the agent's antecedents. The contextualist reinforcement present in the legal device comes to enhance the sanction activity of the Federal Court of Accounts (TCU)

After presenting the legal framework in which is the application of fines to the responsibles for causing damages to the public purse by the external organ of federal public administration, the theoretical basis and the purpose to include the article 22 of the Law of Introduction of the Rules of Brazilian Law, it remains now to examine TCU's decisions on concrete cases.

5. EXAMINATION OF THE JURISPRUDENCE OF THE FEDERAL COURT OF ACCOUNTS

Due to the present study, many of the TCU judgements[18] were examined, more precisely the ones from the beginning of the validity of the Law n° 13.655, from the april 25th 2018, until may of the year 2020, and that mention expressly the article 22 of the Law of Introduction to the Rules of Brazilian Law. A relevant portion of the decisions that were examined bring in their justification a problem similar to the one pointed by Kaufmann (2007) and Lege (1992) in the judgment of the *Sitzblockade* case.

[18]Foram examinados cinquenta e um acórdãos proferidos no período. A seleção foi realizada mediante ferramenta de pesquisa na jurisprudência TCU disponível em: https://pesquisa.apps.tcu.gov.br/#/pesquisa/acordao-completo. Utilizou-se como critérios de busca os termos "Lei n° 13.655"; "Lei de Introdução às Normas do Direito Brasileiro" e "artigo 22" isolados e de forma combinada.

The decisions are about judgements on accounts of the responsibles for the management of federal public resources. In all of them, it was applied to the managers that had their accounts appreciated the penalty predicted in article 57 of the organic law of the Court of Accounts. To justificate the definition of the fine's value, the judges mention the second paragraph of the article 22 of the Law of Introduction to the Rules of Brazilian Law, announcing, briefly, assumptions considered on the dosimetry of the penalty. With the intent to illustrate the exposed, it will be reproduced forward the excerpt of three decisions that addresses this specific topic:

> 17. In relation to the dosimetry of the fine, in attention to the dispositions of the article 22, second paragraph, of the Law of Introduction to the Rules of Brazilian Law, the irregular application of resources from the *Sistema Único de Saúde- SUS* (Healthcare Unic System) configures a serious misconduct, which resulted in damages to the public purse.
>
> 18. Furthermore, Josilan Pereira dos Santos is involved in another TCE (TC 041.260/2018-0) for the same irregularities, observed in another project, therefore, the fine to be imputed must reach 100% (a hundred percent) of the updated debt (TCU, 2020, *on line*). - free translation
>
> 13. Concerning to fines dosimetry, in attention to the dispositions of the article 22, second paragraph, of the Law of Introduction to the Rules of Brazilian Law, the irregularity referent to the omission on duty of reporting, configures a serious misconduct, capable to generate the presumption of prejudice to the final gains of the public purse. On the other side, it can be seen that the responsibles are not in the registers of Cadirreg (system of thus court for the registration of accounts judged as irregulars), and there aren't any other processes on the TCU in which they are responsibles. Therefore, after balancing the aggravators and the mitigators, the fine must be around 40% (forty percent) of the amount of the updated value, divided between the enterprise and the managing partner. (TCU, 2020, *on line*) -free translation
>
> 15 Concerning to fines dosimetry, in attention to the dispositions of the article 22, second paragraph, of the Law of Introduction to the Rules of Brazilian Law, the irregularities to the non-execution of the object and the absence of reports to justify the causal links between the resources withdrawn from the account and the expenses configure serious misconduct, which resulted in damages to the public purse. Furthermore, the responsible is involved in another TCE for the same irregularities, observed in other projects; Therefore, after balancing the aggravators and the mitigators, the fine must be around 40% (forty percent) of the amount of the updated value, divided between the enterprise and the managing partner. (TCU, 2020, *on line*) -free translation

In all three cases, it was considered the seriousness of the conduct, its consequences (prejudice to the public purse or presumption of prejudice to the public purse and the responsible's antecedents (if he was part of another process in TCU) for the definition of the fine's amount. In a nutshell, the minister judges, in short words, have classified the conducts investigated according

to their seriousness, pointing the occurrence of consequences, damages to the public purse, and the agent's antecedents.

But is not the concision of an eventual incompleteness of the foundation of the decision that it's been analyzed here. The present article calls out for the form as it was justificated the dosimetry of penalties in relation to the criteria of seriousness of the infraction fixed in the article 22, second paragraph, of the Law of Introduction to the Rules of Brazilian Law. Under this point, the judges said: "the irregular application of resources on the *Sistema Único de Saúde- SUS* (Unified Health System) configures serious misconduct"; "irregularities related to the non execution of the object and the absence of reporting to justify the causal links between the resources withdrawn from the account and the expenses configure serious misconduct"

As one can see, by defining the fine's amount, the judges of TCU have grounded their decision as if the solution reached has been extracted directly from legal text, especially from the article 57 of the law n° 8.442 from the june 16th of 1992, cumulated with the article 22, second paragraph, of the Law of Introduction to the Rules of Brazilian Law, through a logical deductive process.

To reinforce this assertion, it can be represented, through Lege's squema of presumptions, the path taken by the judges, according to the foundations of their decisions, to define the amount of the fine, as the following:

(1) The body that damages to the public purse through serious misconduct…. will only be punished with a fine on the amount X
(2) M Caused damages to the public purse through serious misconduct;
(3) Therefore, M must be punished with a fine on the amountX.

According to the reasoning described above, the conclusion (3) is deducted directly from the assumptions (1) and (2). It is a sequence of information that is easy to follow and understand, being a simple assimilation and acceptance for the ones who may examine the decision without any major reflections and criticisms. It turns out that as in the *Sitzblockade* case, the foundations of the decision does not explain why the assumptions (1) and (2) would be valid, or better put, does not express the path taken by the judges to assert them.

Peirce explains that one analytical proposition is one definition or one deductible proposition of definitions; a synthetic proposition is a non analytical proposition.The analytical reasoning is that one in which the conclusion follows (necessarily, or probably) do state of things expressed on the assumptions, in contradiction with the scientific or synthetic reasoning, that is a reasoning in which the conclusion follows probably or approximately the assumptions, due to the conditions of their observation, or in another determined form (PEIRCE, CP 6.595), That's the fundamental importance, also recognized by Dewey (1950, p. 155), of the contextualization of propositions on the elaboration of scientific investigations

The same problem can also be identified when it comes to the application of fines by the Federal Court of Accounts. The contextualization must be effectively made, in order to establish in the most real form the nature of assumptions that ascertain the antecedents, aggravating or mitigating, on the public agent's conduct, in order to obtain the correct dosimetry on penalties.

In the three decisions brought above as examples, the TCU's ministers do not enunciate the reason of having considered the application irregular on the Unified Health System, the omission on the duty of reporting the accounts and the non-execution of the covenant object, in conjunction with the absence of reporting accounts serious misconducts. In the first case, the infraction's seriousness would be explained by the potential prejudices to the essential services to the population? IN the second case, because the omission means some type of fraud? In the third one, in reason of the reunion of two infractions (non-execution of the covenant and omission of the report of accounts)? .

The hypothesis raised in these questions above can proceed, or not. The point is that the judges did not notify on the decision's justification if it was due to their precedence, or due to other reasons, that would have adopted the assumption (2) represented above as the cause to decide: that the infraction examined would be serious.

One can see, therefore, that the logical deductive schema extracted from the foundation of the decision is not able to express all motives considered by the judges to reach the announced solution (in this case, the fine's amount) as it happened in the judgment of the German Federal Court, according to Kaufmann (2007) and Lege (1992). In the same way that it's not possible to

classify as violent certain conduct from a simple subsumption, it's not viable to say that this misconduct is serious through this method[19].

By classifying a fact according to his seriousness, the pre-conception of the judges, inevitably, steps into the decision process. Certain infractions can be serious under someone's opinion or can be considered a low level infraction, under another person's point of view, according to his life experiences or preconceptions. The formation of value judgements by the judges is inevitable, and if these are not present in the decision's wording, it's a case of an incomplete decision, whose decision motives weren't completely revealed. In this scenario, it won't be possible to properly understand and analyze the jurisprudence behavior, in prejudice to his enhancement.

The problem could be treated with the application of the article 1°, §3°, II, of the TCU's Organic Law, which asserts that the justification used by the Minister Reporteron the analysis of fact and law is an essential part of the court decisions.

However, the application of the referred devices has limited effects on the solution of the issue raised in this study. It's undeniable that the mentioned articles were very important on the law enhancement, but this isn't about decisions without motivation or with unexplained relations between the normative rule and the issue decision; and neither is it a case of omission in relation to appreciation of arguments deducted in the process. The decisions expose a logical path between the rule's enunciation and the conclusions reached. The failure is antecedent, product of the syllogistic method used in the decisive process put in check by the criticism of Kaufmann (20027) and Lege (1992); is not solved through the duty observance of motivating

Returning to the examination of the three decisions aforementioned, is possible to observe the symptoms of the situation explained above. On the first decision, three elements were considered on the fine's dosimetry, elements that can be summarized as: (a) Serious misconduct; (b) caused damage to the public purse; and © the agent have negative precedents. From this context, the fine's amount was defined as 100% (a hundred percent) of the significance of the

[19]Taruffo says: "There is no doubt, in fact, that subsumption can enter the syllogism as part of the minor premise (see infra in the text), whereby the subsunctive model is a mere reduction of the syllogistic model - nor does Calogero demonstrate otherwise. It follows that the same objection that he addresses to the syllogistic model can be directed against his thesis, given that the subsumption also expresses a way of configuring the judgment, but does not indicate how the judge obtains and carries out the choices that the subsumption presupposes. On the other hand, it should also be remembered that resorting to the category of subsumption does not, by itself, solve any problem, since the very concept of subsumption is ambiguous and lends itself to a plurality of different definitions (according to Lazzaro, Storia e teoria dela costruzione giuridica, cit., p. 201 ss.)" (2015, p. 151).

damage to the public purse. In the second decision, the rulings n°. 1460/2020 it was considered: (a) Serious misconduct; (b) caused damage to the public purse; (c) absence of antecedents of the agent. Resulting in the application of a fine with significance corresponding to 40% (forty percent). Finally, in the third and last decision, ruling°. 640/2020, it was considered: (a) Serious misconduct; (b) caused damage to the public purse; and (c) the agent have negative precedents; also resulting in the application of a fine with significance corresponding to 40% (forty percent). One can see that, even though the second and the third decisions, rulings n°s. 1460/2020 and 640/2020, point distinct elements on the dosimetry justification, they apply the same penalty. On the other hand, Moreover, the foundation of the first and the third decisions, rulings n°s. 1461/2020 and 640/2020, point to similar circumstances, but offer a whole different solution, in terms of the penalty's dosimetry.

This doesn't mean, necessarily, that the percentual defined for the fine's significance in one of the two decisions would be wrong under the juridical-material aspect. The fact that it has been determined the same percentual of fine in decisions whose motivations describe distinct circumstances is an evidence that not all the motives considered by the judges on the dosimetry were exposed in their justification. It's not possible to say the reason why in the rulings n°s. 1460/2020 and 640/2020, the fine was defined in 40% (fort percent) of the debst's significance if, in the first one, the infractor had no antecedents, but in the second he did.

The joint analysis of decisions calls our attention to the omission. . But the flaw is not clearly perceptible because the grounds of the decisions follow the assumptions schema, in which the assumptions would be extracted directly from the text of the law and the conclusion reached by the judges would be deduced from them through a logical process.

This is where the TCU decisions are similar to the German Court's judgment. The reasoning of the three examined rulings presents the same order of problems as those pointed out by the critic in the *Sitzblockade* case: it does not expose all the reasons that led the judges to reach the conclusion presented. The omission goes unnoticed because their reasoning expresses a logical deductive path that is understandable and easily assimilated by the observer.

Although the criticisms by Kaumann (2007), Lege (1992) and Nobrega (2013) were made years ago, they are still contemporary and useful, being applicable to the Brazilian scenario represented, in this study, by the jurisprudence of the Federal Court of Accounts.

In a practical way, it is possible to extract the following lessons from the jurists in relation to the decisions examined: it is not enough to say that a certain misconduct is serious to determine the imposition of a fine in a certain percentage, according to the criteria brought by article 22, §2, of the Law of Introduction to the Rules of Brazilian Law. It is necessary for the judge to explain the path he took to reach such a premise, that is, why he considers the misconduct serious, including any value judgments that may have been considered in his position.

The subsumption method continues to produce decisions with incomplete reasoning, as can be seen by examining the recent rulings of the Federal Court of Accounts (TCU). And there are two potential consequences of this failure. The first of them, already mentioned, consists in the incompleteness of its foundations, which do not express all the reasons taken into consideration by the judges to reach the solution. The second, directly associated with administrative sanctioning law, consists in frustrating the objective intended by the inclusion of paragraph 2 of the article 22 in the Law of Introduction to the Rules of Brazilian Law, of reinforcing contextualism in the application of penalties in the judicial, administrative and controlling spheres. If judges do not take care to justify why they attributed a certain seriousness to a certain infraction, the dosimetry in the application of the penalty will continue to be carried out based on value judgments and unrevealed preconceptions of the judge, reducing the role of the factual context in which the infraction was committed, as intended by the ordinary legislator.

6. CONSIDERAÇÕES FINAIS

Through the analysis of the German Federal Court's decision in the case that became internationally known as Sitzblockade, the jurists Joachim Lege (1992) and Arthur Kaufmann (2007) heavily criticized the logical syllogism used by courts to solve disputes. According to this method, which has its roots in the French Exegesis School, decisions could be extracted directly from the legal text through a logical deductive process. The application of the law would be similar to a mathematical process.

Those authors showed that the method has serious limitations, notably because it does not address the value judgments made by the judge in the decision making process. They demonstrated that the production of decisions by deduction from the legal text is unreal, as it is not possible to subsume facts to a given rule in a manner totally free of value judgments. Seen in this terms, the

logical syllogism works more like a formula for the justification of the decision, and does not lend itself to explaining the path taken by the judge to reach the solution of the case put on trial

Although the jurists' criticism has been made decades ago, here in Brazil it is also possible to observe the same order of problems in the decisions. Through a thematic[20] and temporal[21] cutting in the jurisprudence of the Federal Court of Accounts, it was verified the existence of decisions whose foundations are limited to stating premises, supposedly extracted from the legal text, from which the solution given to the case would have been reached, without, however, any concern with contextualizing and justifying the validity of those premises.

The examination was made in decisions of the Federal Court of Accounts in which fines are imposed on those responsible for causing damage to the public treasury, as foreseen in article 57 of Law n. 8,443, of July 16, 1992, specifically in the point in which the dosimetry of the penalty is made according to the reference of article 22, §2, of the Law of Introduction to the Norms of Brazilian Law. The analysis of the decisions shows evidence of a tendency to classify the conducts examined according to their seriousness, for the purpose to define the amount of the fine, without presenting the necessary justifications. The premise (seriousness of the violation) is established in an unjustified manner and from there the conclusion (amount of the fine) is directly drawn.

In both cases, the Sitzblockade and the rulings of the Federal Court of Accounts (TCU), the same method was used to justify the decisions: the presentation of assumptions extracted from the legal text from which the solution would derive, through a logical deductive process. Criticism from German jurists has shown that the method produces decisions with incomplete or imprecise reasoning, as it omits reasons considered by the judges in reaching their decisions.

The ideas of Lege (1992), Kaufmann (2007) and Nóbrega (2013) serve as a basis for the reflection on the way the TCU has been justifying the dosimetry in the application of the fine provided for in Article 57 of its Organic Law. The conclusion is that it isn't enough for judges to say that an infraction is serious or light, in order to calculate the penalty according to the parameters of paragraph 2 of Article 22 of the Law of Introduction to the Rules of Brazilian Law. It is necessary that they explain why they attributed this or that degree of gravity to the conduct under review.

[20] Decisions that apply fines to those responsible for damages to the public treasury and mention § 2 of article 22 of the Law of Introduction to the Norms of Brazilian Law.
[21] Judgments rendered between the effective date of Law No. 13,655, April 25th, 2018, and the month of May 2020.

There are two consequences of this kind of omission. The first is the very incompleteness of the grounds of the decision, which can serve as a subterfuge for judges not to state the real reasons that led them to decide in a certain way. The second puts at risk the purpose of the inclusion of paragraph 2 of article 22 in the Law of Introduction to the Rules of Brazilian Law, which is to reinforce the contextualism in the application of penalties in the judicial, administrative and controlling spheres. If the premise is not explained (seriousness of the conduct), the context announced in the decision will serve only as formal justification of the solution given to the case (amount of the fine) and not properly an element considered and reflected in the decision-making process.

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Sobre as autoras:

Clarice Von Oertzen de Araújo
Livre Docente em Filosofia do Direito pela Faculdade de Direito da USP - FDUSP. É Doutora em Filosofia do Direito pela PUC/SP, Mestre e graduada em Direito pela PUC-SP. É Professora concursada da Faculdade de Direito da PUC-SP, ministrando aulas na Pós-Graduação Stricto Sensu do Programa de Direito da PUC/SP.
Pontifícia Universidade Católica de São Paulo - PUC-SP, São Paulo, SP, Brasil
Lattes: http://lattes.cnpq.br/5417631267446471 ORCID: https://orcid.org/0000-0003-2829-6280
E-mail: cvaraujo@pucsp.br

Gabriela Duque Poggi de Carvalho
Mestre em Direito Administrativo na Pontifícia Universidade Católica de São Paulo – PUC/SP (Brasil)
Pesquisadora do grupo de pesquisa "Formas contemporâneas de contratação pública e seu impacto e efetividade nas atividades administrativas" da PUC/SP. Pesquisadora do Observatório do TCU da FGV Direito SP + Sociedade Brasileira de Direito Público
Pontifícia Universidade Católica de São Paulo - PUC-SP, São Paulo, SP, Brasil
Lattes: http://lattes.cnpq.br/9789835868191095 ORCID: https://orcid.org/0000-0001-7293-2243
E-mail: gabriela@dafonteadv.com.br

As autoras contribuíram igualmente para a redação do artigo.