Analysis of the incidence of the Statute of Introduction to the Rules of Brazilian Law (in the writing given by Act nº 13.655/2018) on the interpretation of public law rules: interpretative operations and general principles of administrative law*

Análise acerca da aplicação da Lei de Introdução às Normas do Direito Brasileiro (na redação dada pela Lei nº 13.655/2018) no que concerne à interpretação de normas de direito público: operações interpretativas e princípios gerais de direito administrativo

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ABSTRACT:

The present work intends to analyze the legislative innovations produced by Legal Act no 13.655/2018, as well as its legal consequences. This legislation modified Legal Act n° 4.657/1942, called "Statute of Introduction to the Rules of Brazilian Law". In order to do so, the work was divided into six theoretical axes: first, it discusses the legal modifications that draw interpretive parameters with a focus on "consequentialism" and the "realism" of the interpretation of Public Law. Consequently, the provisions on legal certainty are examined. In a third plan, emphasis is placed on the legal mechanisms that lead to greater participation and consensus between the Public Administration and the citizen. Also, it will be a question of analyzing the responsibility of the public authorities and of the agents that act in the advices function. Also the administrative efficiency will be object of study, realizing what the mentioned legislation innovated in the subject. Finally, it will be demonstrated how the motivation of administrative conduct, already deserving of due importance, given its status as a constitutional principle, remained even more prestigious under Legal Act no 13.655/2018. Such legislation will be analyzed, essentially in relation to the aspects related to the incidence of the Statute of Introduction to the Rules of Brazilian Law (in the wording given by Legal act n° 13.655/2018) regarding the interpretation of norms of Law Public and, in particular, to the way in which, in these interpretative operations, certain general principles of Administrative Law are formed, in order to understand analytically the changes and potentialities made by the edition of the recent norm.

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KEYWORDS:

Interpretation of public law — legal certainty — efficiency — responsibility of the public agent — administrative efficiency

RESUMO:

O presente trabalho pretende analisar as inovações legislativas produzidas pela Lei no 13.655/2018, bem como suas consequências jurídicas. Tal Diploma Legal modificou o Decreto-Lei n° 4.657/1942, denominado de "Lei de Introdução às Normas do Direito Brasileiro". Para tanto, o trabalho se dividiu em seis eixos teóricos: primeiro se disserta sobre as modificações legais que traçam parâmetros interpretativos com foco no "consequencialismo" e o "realismo" da interpretação do direito público. Por conseguinte, analisam-se as disposições relativas à segurança jurídica. Em um terceiro plano, confere-se ênfase aos mecanismos legais que franqueiam maior participação e consenso entre a administração pública e o cidadão. Ainda, tratar-se-á de analisar a reponsabilidade das autoridades públicas e dos agentes que atuam na função consultiva. Também a eficiência administrativa será objeto de estudo, percebendo o que a legislação mencionada inovou no tema. Por fim, será demonstrado como a motivação das condutas administrativas, já merecedora da devida importância, dado seu *status* de princípio constitucional, restou ainda mais prestigiada pela Lei no 13.655/2018. Analisar-se-á dissertativamente tal legislação, essencialmente em relação aos aspetos relativos à aplicação da Lei de Introdução às Normas do Direito Brasileiro (na redação dada pela Lei no 13.655/2018) no que concerne à interpretação e aplicação de normas de direito público e, muito particularmente, ao modo como, nessas operações interpretativas, se enformam certos princípios gerais de direito administrativo, a fim de se perceber analiticamente as mudanças e potencialidades feitas pela edição da recente norma.

PALAVRAS-CHAVE:

Interpretação do direito público — segurança jurídica — eficiência — responsabilidade do agente público — eficiência administrativa

Initial considerations

The need to organize the society runs through the perspective that the public authority should act within the limits of the law. It may be said that the Government, and before that, the law, are tools that establish commitments. The first one is backed by the second one to operate. Accordingly, the idea of law is associated with the idea of conduct, organization and legal certainty,[1] which are fundamental factors in the Government operation.

In order to promote consistency and coherence to the legal-positive rules of the Brazilian legislative system, Decree-Law No. 4.657/1942 was enacted, which was referred to as Introductory Law to the Civil Code. However, it is well known that said set of normative provisions governed the rules of other fields of law, other than only those arising out of the civil law. So, in 2010, in a quite coherent way, Law No. 12.376 modified, among other aspects, the title of the aforementioned decree-law, to: Introductory Law to the Rules of Brazilian Law.

Unlike the other legal rules, which have as their purpose — indirect (principle) or immediately (rules) — the human behavior, the purpose of the aforementioned act is the interpretation and application of the rules themselves. For that reason, they are rules and principles that may be deemed "rules on laws" or "law on the laws", because it addresses the sources of law, within the scope of effectiveness in terms of time and space, its applicability by the interpreter etc. More specifically, the introductory law to the Brazilian rules governs: the start of enforcement of the law; the term of effectiveness; the global effectiveness of the legal order; the mechanisms of integration of the rule in view of the gaps; the criteria of legal hermeneutic; the intertemporal law to ensure the stability of the positive legal system; the application of the international law; the civil acts carried out abroad by the Brazilian consular authorities etc.

In late April 2018, Law No. 13.655 was published, which was designed, generally speaking, to expand the normative provisions of Decree-Law No.

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[1] In that regard, Federico A. Castillo Blanco said that: "[...] *sin siguridad jurídica, podríamos decir para acabar la idea, puede resultar una quimera hablar con propriedad de Estado de Derecho"* (CASTILLO BLANCO, Federico A. *La protección de confianza en el derecho administrativo*. Madrid: Marcial Pons, 1998. pg. 63). Likewise, for Danilo Knijnik, "[...] the legal certainty is above all a subjacent value to any and all understanding of law" (KNIJNIK, Danilo. O princípio da segurança jurídica no direito administrativo e constitucional. *Revista do Tribunal de Contas do Estado do Rio Grande do Sul,* Porto Alegre, v. 13, pg. 148, 1994).

4.657/1942, especially in matters of legal certainty and efficiency in the creation and application of public law. In fact, it provided a relevant and intense exchange in the manner of applying the public law, especially in relation to the manner of rendering a controlling, judicial or administrative decision, and to the way as public law is interpreted.

In other words, this work aims at critically analyzing specific aspects of the modifications occurred in the legal scenario upon enactment of Law No. 13.655/2018, highlighting the limits and possibilities of the aforementioned legislative change. In an analytical and expositive manner, it aims at determining what can be expected from the change in the Introductory Law to the Rules of Brazilian Law. Said analysis is justified by the relevance of the matter, the intensity of the exchange, and the number of persons affected.

In other words, we wish, in a deductive and expositive manner, to understand how said law may affect performance of the administrative duties. More specifically, the purpose is, as regards the aspects relating to the application of the Introductory Law to the Rules of Brazilian Law (in the wording provided by Law No. 13.655/2018), to outline the possibilities of interpretation of rules of public law and, very specifically, to the manner as, in these interpretative operations, certain general principles of administrative law are conformed, in order to analytically notice the changes and potentialities resulting from the enactment of the recent rule.

1. The law teleology and purpose

In a completeness view, i.e., noticing the wording of the nine articles (*e.g.*, articles 20 to 30)[2] inserted in Decree-Law No. 4.657/1942 by Law No. 13.655/2018, it is possible to clearly understand the teleology of the act and its purpose. Even if other specific purposes are seen, it is possible to notice at least four parameters from which the act arises and what it intends:

(a) Reaching of three jurisdictions of addressees of its rules: administrative, controlling and judicial;

[2] We said nine articles, because article 25 has been vetoed in its entirety.

(b) Determination that the decisions rendered in these three jurisdictions not only take the following into account, but that the following be decisive:
  (b1) the actual consequences of the decision;
  (b2) the actual factors involving said decision, and its operationalization in the real world;
(c) Fixation of objective parameters of legal certainty, efficiency and citizen's participation in the decisions rendered, especially in the administrative jurisdiction;
(d) Increased relevance of the motivation of the administrative conducts, due to the increased argumentative burden that it imposed on the decisions related to the interpretation and review of administrative conducts, their consequences, the transition rules and accountability of public officials.

These paradigms expressly established in articles 20 to 30 dialogue with already established dogmatic and legal-positive assumptions. We explain: in the first aspect, said changes, which are further detailed below, come together with the application of the constitutional principles of the administrative law,[3] either implicit or explicit ones.[4] For that purpose, the provided changes intend to boost harmony between the political order and the social order, in order to enable the expectations of the collectivity to be complied with by the established powers, and to experience a Government in a dimension that is appropriate to the reality. Not so minimum that fails to appropriately meet the social needs, and not so big to become inefficient and expensive.

On the other part, the concerned act sharpens the debate on the matter of separation of powers as a consequence of the own redefinition of the

[3] About the movement of "constitutionalization of the rights", please see: BARCELLOS, Ana Paula de. Alguns parâmetros normativos para a ponderação constitucional. In: BARROSO, Luís Roberto (Org.). *A nova interpretação constitucional:* ponderação, direitos fundamentais e relações privadas. Rio de Janeiro: Renovar, 2003. pg. 49-118. The concerned movement is concerned about providing increased guarantees to the citizen (BINENBOJM, Gustavo. *Uma teoria do direito administrativo.* Direitos fundamentais, democracia e constituição. Rio de Janeiro: Renovar, 2008. pg. 24-25).

[4] By the way, this factor significantly changed the relationship between the public administration and the administrated parties. For an analysis of the new paradigms of the administrative law, especially as regards the centrality of the fundamental rights in said science, with a greater focus on the citizens, please see: MAFFINI, Rafael. Administração pública dialógica (proteção procedimental da confiança) em torno da súmula vinculante nº 3, do Supremo Tribunal Federal. *Revista de Direito Administrativo,* Rio de Janeiro, v. 253, pg. 159-172, Jan. 2010.

concept of democracy in the "legislative" and "constitutional States".[5] As seen, in addition to the democratic issue, the transaction from a model of legislative State to a constitutional State implies the re-reading of the myths of the "sovereignty of law" and "the wish of the majority". For that reason, the sovereignty of the Constitution ends up by establishing an equalitarian position among the powers, which are exercised based on and within the limits of the constitutional authorities. And that can be clearly seen in the determinations of how should the judicial and controlling decisions interpret the public law.

2. The "consequentialism" and the "realism" of interpretation of the public law

Article 20, main provision of Decree-Law No. 4.657/1942,[6] introduced, as seen, by Law No. 13.655/2018, eloquently orders the interpreter of the public law to "dialogue the reality", providing emphasis on the "practical consequences" of the decision. But there is more to this: said determination applies to the public manager, to anyone who carries out the control of the administrative activity, and to judges. Note that said legal principle does not prevent administrative decisions from being rendered based on abstract legal values. By the way, "abstract legal values" frequently consist of logical consequences of legitimate instruments used by the legislator when establishing rules of authorities, especially in the case of discretionary rules and rules containing undetermined legal concepts.[7] What is prevented is the use of said "abstract legal values" in a manner not committed to the practical consequences of the decision. In a trivial example, let us imagine a given decision that is taken because it is allegedly, according to the decision authority, most appropriate to the public interest, although the administrator

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5 Bruce Ackerman (The new separation of powers. *Harward Law Review*, v. 113, No. 3, pg. 640, Jan. 2000) says that the separation of powers has three ideals: to qualify democracy, to restrict the power in relation to freedom, and to enable professional specialization in this context.

6 Decree-Law No. 4.657/1942, article 20, main provision: "In the administrative, controlling and judicial jurisdictions, the decisions shall not be taken based on abstract legal values, without considering the practical consequences of such decisions".

7 About this matter, please see: GRAU, Eros. *O direito posto e o direito pressuposto.* São Paulo: Malheiros, 2003. pg. 200; SOUSA, António Francisco de. *Conceitos indeterminados no direito administrativo.* Coimbra: Almedina, 1994; and MORENO, Fernando Sainz. *Conceptos jurídicos, interpretation y discrecionalidad administrativa.* Madrid: Civitas, 1976.

fails to demonstrate the actual advantages or disadvantages of said decision, even taking into account a definition that is so hard to understand, such as the public interest.

These two paradigms ("realism" and "consequentialism") are also highlighted in the next two provisions (articles 21 and 22). The first provision — article 21 — establishes that every decision that annuls an act, agreement, arrangement, administrative proceeding shall "expressly indicate its legal and administrative consequences". But there is more: the aforementioned declaration of nullity shall equitably consider the burdens between the parties involved, deciding in a proportional manner— sole paragraph of article 21. Accordingly, it seems to be unavoidable to conclude that article 21 (main provision and sole paragraph) includes two welcome obligations to the public administration, upon the invalidation[8] of the administrative conducts: on the one part, it requires the legal consequences of the invalidation to be explicit, based on subjective (relativization in relation to who shall be subject to the effects of the invalidation), objective (relativization in relation to what will generate the invalidation), and time modulations (relativization in relation to when will the invalidation generate effects);[9] on the other part, it requires the solutions to be indicated in a proportional and equitable manner, in consideration for the general interests, as it is not possible to impose on affected public or private unfavorable consequences which, due to the peculiarities of the case, are abnormal or excessive.[10]

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[8] Even if the commented legal rule expressly addresses the decisions that may attribute the invalidation of administrative conducts, in other words, of discontinuation of administrative behaviors due to invalidities, it is appropriate to conclude that it is necessary to also consider as inclusive in relation to the forms of discontinuation of administrative conducts not directly related to situations of violation of the legal order. Accordingly, article 21 of Decree-Law No. 4.657/1942, as amended by Law No 13.655/2018, also applies, for example, to the cases of revocation, cancellation, forfeiture of administrative acts, and termination of public agreements, takeover of concession of public utilities and many other hypotheses in which the reversal of government conducts results from grounds not directly related to invalidity.

[9] Regarding the time modulation of invalidation of administrative government conducts in view of the good faith of third parties or addressees of the effects of invalidated administrative conducts, even with determination of future terms for beginning of their effects, please see: MAFFINI, Rafael. Modulação temporal *ín futurum* dos efeitos da anulação de condutas administrativas. *Revista de Direito Administrativo.* Rio de Janeiro, v. 244, pg. 231-247, Jan. 2007.

[10] For example, imagine an administrative agreement of concession of public utilities with a term of 10 years, the illegality of which acknowledged when eight years of the contractual term have elapsed, due to the inexistence or illegality of a prior bidding process. In this case, if there is a proven investment that is still pending amortization upon the agreement invalidation, the ready interruption of the agreement would give rise to abnormal and excessive loss to all involved parties. The granting authority (and, in indirect terms, the society) would suffer loss, because it would not be able to carry out a new bidding process in due time, and it would be compelled

On the other hand, article 22, main provision, addresses its prescription ability to the interpretation of the public law, which shall always weigh: the actual difficulties of the manager and the requirements of the public policies under his responsibility, in relation to the loss that the rights of the administrated parties may suffer. This "dialogue" is notoriously very complex. However, it is important to note the determination, even repetitive, that the reality, or better, the existing real and pragmatic factors should be always taken into account.

In that regard, the theories of budgetary limitation (based on the old maximum of "reserve of possible") resurface in relation to the maintenance of the "existential minimum", a dichotomy so frequently addressed when the judicialization of public policies was discussed. And, associated to this dichotomy, the discussion on the link to the budgetary acts returns to the scene. After all, both the "reserve of possible" and the budgetary obstacles are "real obstacles" to be considered in judicial, administrative or controlling decisions. Apparently, all these arguments that were not generating especially in the courts of appeal[11] gained normative power since Law No. 13.655/2018 came into force.

For that reason, the "evaluative choices",[12] because it is difficult to imagine that assets such as freedom and ownership may be seen in an abstract plan, but rather by means of choices. It is these "evaluative choices" that boost who decides on the application of the public law because, first of all, one or another public policy that protects or promotes said assets is chosen. However, since the enactment of the aforementioned law, these "choices" have parameters, which must be justifiably expressed, i.e., the rationale for decision must be

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to indemnify the concessionaire for the investments already made and not amortized. The concessionaire would also suffer abnormal and excessive losses, because it would not have its investments amortized, in addition to the fact that it would not be properly prepared for its demobilization, including in relation to the labor relationships with its employees. For that reason, and considering the particularities of each relevant case, it would not be unreasonable if the invalidation of such agreement established that its term of effectiveness would continue until expiry of the contractual term, even if it imposed obligations on the public authority to avoid said defect to occur again in any future bidding process or direct engagement.

11 STF, AgR in RE No. 559.646-PR, Reporting Justice Ellen Gracie, Second Panel, trial date June 7, 2011; STF, AgR in AI No. 734.487-PR, Reporting Justice Ellen Gracie, Second Panel, trial date August 3, 2010; STF, AgR in RE No. 367.432-PR, Reporting Justice Eros Grau, Second Panel, trial date April 20, 2010; STF, AgR in RE No. 410.715-SP, Reporting Justice Celso de Mello, Second Panel, trial date November 22, 2005; STF, RTJ 185/794-796, Reporting Justice Celso de Mello, Full Court.

12 Term created by Laurence H. Tribe and Michael C. Dorf *(On reading the constitution.* Cambridge: Harvard University Press, 1991. pg. 66).

clear, which means to put emphasis on the consequences of choosing one rather than another path, and how does it affect the reality of the public authority and the citizen.

Mentally, the exposition of the grounds in a legal decision must then follow a given method. Initially, the jurist (a) *understands* the reality, the essence of the things. In a second moment, he mentally formats an opinion, a (b) *proposition* about the reality, compared to what must be proposed to be decided. In a last stage, the jurist proposes to expose this mental proposition to the world, and does so by means of the (c) *definition.*

The Constitution does not say everything, because it is undetermined most of the times. And for certain cases, there is no "correct answer" *a priori.* But the interpretation will provide legitimacy and sustainability to such duty. Then, there should be a waiver of the choices of what we would like for what is socially fair and real — which is the teleology of Law No. 13.655/2018. At each time the jurist has to make *constitutional choices.* And these *choices* must be made considering the immediate and future consequences.

So, nowadays, the limit of these "choices" is given by the consequences and by the reality of the State. Let us see some examples of application of these assumptions. Whenever a person who has an income is allowed to receive medications at the expense of the Public Treasury, said attitude invariably results in subtraction of funds from who is really in need. If isonomy is the principle that seeks equal performance in view of equal parties, and unequal performance in view of unequal parties, so be it.

Two difficulties arise immediately when one tries to define what is the stronghold of the existential minimum:

(a) what is the way of implementing, in a country of miserable people like Brazil, public policies that ensure the indispensable basics for dignified survival of the citizens;
(b) the beforehand impossibility to (aprioristically and theoretically) define the *minimum* to which each person is entitled, given that this definition only arises in the relevant case, *without disregarding the social macro perspective.*

The first limitation imposed consists of the impossibility to define the existence of a subjective right of a member of the society with a view of the relevant case not related to the immediate surroundings in which it is inserted. And it is crucial to analyze said need from a general perspective,

so that the interest of everyone is not sacrificed by an individual demand. Anyway, weighing the social cost of an individual concession, the fulfillment of which would frustrate the own idea of shared legal certainty. And it is crucial, based on the legal discipline of Law No. 13.655/2018, to insert the administrative, government or judicial act in a collective perspective that satisfies the common good rather than only an individual perspective.

Not unfrequently, there are administrative and legal decisions that, in view of an immutable and individualized perspective, seek to meet a specific demand presented, which may ultimately compromise the whole. The protection of the social interest loses when it focuses only on the individual protection.

It is obvious that it is not possible to demand unreasonable conducts from the public entities. Especially because the lack of resources "[...] substantiates a certain limitation upon the definition of the government obligation to act in view of a given reality, either in court or administratively".[13] The rights to provisions, such as the right to health, have a *cost*,[14] which delimitates its financial dependence, unsurmountable by the State itself.[15]

There is no way out other than focusing on a *pragmatic* reading of the fundamental rights. The careful construal of the judicial, controlling or administrative decisions should no longer ignore the reality in which it is inserted. The consideration of the limits in which we are should be weighed, "[...] repealing the embezzlement of resources of the public treasury, the megalomania in the individualized fulfillment of unreasonable demands, and the frequently criminal government idleness".[16]

Option implies sacrifice. There is no margin for escape. "In many situations, whatever the solution is (i.e., even if it is the best or the fairest or the one that serves the most), it is a tragic option".[17] The shortage of public resources requires sacrifices, preventing all expectations of the society from being resolved, *however indispensable they are.* Accordingly, the government

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13 CARVALHO, Raquel Melo Urbano de. *Curso de direito administrativo* — parte geral, intervenção do estado e estrutura da administração. Salvador: Juspodivm, 2008. pg. 604.

14 Please see the references made by Stephen Holmes and Cass R. Sunstein *(The cost of rights.* Nova York: Norton, 1999).

15 "In summary: the limitation of resources exists and is a contingency that cannot be ignored. The interpreter shall take it into account when affirming that some asset may be claimed in court, just like the judge when determining that it be provided by the Government" (STF, AgR in RE No. 410.715-SP, Reporting Justice Celso de Mello, 2nd Panel, DJU of February 3, 2006, p. 76).

16 Raquel Melo Urbano de Carvalho, Curso de direito administrativo, op. cit., pg. 611.

17 GALDINO, Flávio. *Introdução à teoria dos custos dos direitos* — direitos não nascem em árvores. Rio de Janeiro: Lumen Juris, 2005. pg. 159.

agents are required, regardless of their personal will, to make choices.[18] Choices that are frequently tragic.[19]

The State is constantly making options within the limit of a tight budget. Most choices are dramatic, because they cannot supply education and health to the same extent. But the levels of health and education provided *are identical to everyone,* although less than what they should provide. When the judge decides to supply a medication, a treatment, in short, to a single individual, the judge promotes inequality in a situation of identical parties.[20] In this "environment of tragedies" there is not even space for weighing values or for making commitments. There is only one choice, which will generate sacrifices, *but which must never generate inequalities.* The economic rationale must guide the choices, because it is what promotes reality.

The *costs* and the *real possibilities* must be considered. They deserve to appear in the limit of the decisions, under penalty of denying the reality and choosing, here in a literal tragedy, utopia. The use of the rule to provide unrestricted effectiveness of rights is a conduct that abstracts the side effects (consequences) of this extreme position is significantly harmful to the other members of the society. And a conduct that generates evil inequality among those who may seek justice, to the detriment of those who cannot.

A new legal movement should prevail, striving for consideration of the reality as a decisive factor, as the primary factor, putting aside the "normative" guidance, which reduces the one's own rights. The material impossibility completely destroys the carefree and uncommitted "normative guidance".

Cass Sunstein and Stephen Holmes, in a work that became a worldwide classic *(The cost of rights),* are peremptory: the rights may be solely provided where there is sufficient budget.[21] After all, "[...] taking the rights seriously means to take the shortage of public resources seriously".[22]

The choice of who is protected or of who is unprotected cannot be made on an individual basis, but rather in a collective manner, in this last case. The model

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[18] CALABRESI, Guido; BOBBIT, Philip. *Tragic choices* — the conflicts society confronts in the allocation of tragically scarce resources. New York; Londres: W. W. Norton & Company, 1978.

[19] The achievement of the social purposes must necessarily result in the sacrifice of other purposes. "Accordingly, in the event of conflict between affirmed rights that demand government provisions, a tragic option is unavoidable, meaning that one of them will not be fulfilled (at least to some extent)" (Flávio Galdino, *Introdução à teoria dos custos dos direitos,* op. cit., pg. 159).

[20] POSNER, Richard. *Frontiers of legal theory.* Cambridge: Harvard University Press, 2001. pg. 136.

[21] Stephen Holmes e Cass R. Sunstein, *The cost of rights,* op. cit., pg. 14-15.

[22] Flávio Galdino, *Introdução à teoria dos custos dos direitos,* op. cit., pg. 210.

of efficiency of a fundamental right cannot be seen from the viewpoint of the broadest possible distribution. It would be too simplistic, destroying the equality itself. *It should be seen from the following perspective: a fundamental right is efficient when, at the time it is implemented, it does not harm the well-being of the others.*[23]

3. Legal certainty and protection of trust

Besides, Law No. 13.655/2018 somehow resumes the paradigm of the legal certainty when the judicial, controlling or administrative decision "[...] establishes a new interpretation or guidance on a rule of undetermined content, imposing a new obligation or a new condition of law [...]" — article 23 of Decree-Law No. 4.657/1942. And article 24, in turn, focuses on the past effects of the interpretative changes, by establishing that "the review, in the administrative, controlling or judicial jurisdictions, regarding the validity of an administrative act, agreement, arrangement, proceeding or rule, the production of which has been already completed, will take into account the general guidance of the time, and the declaration situations fully established as invalid based on a subsequent change of general guidance is prohibited".[24]

We said "resumes" because this determination was already expressed in article 2, sole paragraph, item XIII of Law No. 9.784/1999 (Federal Administrative Proceeding Law), according to which "the administrative proceedings shall comply, among other things, with criteria of [...] interpretation of the administrative rule in such a manner as to best ensure compliance with the public purpose for which it is designed, it being understood that retroactive application of the new interpretation shall be prohibited".

However, the provisions of both laws have significant differences. The most eloquent difference lies on the fact that the amendment to the Introductory Law to the Rules of Brazilian Law establishes that the legal

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[23] This is the view of Vilfredo Pareto: the distribution of resources is shown to be efficient when it is possible to increase the utility of a person without reducing the utility of others. In that regard, the court decision is expected to ask whether the well-being of someone else is being reduced. Please see: FAGUNDES, Jorge. *Fundamentos econômicos das políticas de defesa da concorrência* — eficiência econômica e distribuição de renda em análise antitruste. São Paulo: Singular, 2003.

[24] We note the authentic interpretation made by article 24, sole paragraph of Decree-Law No. 4.657/1942: "General instructions are understood as the interpretations and specifications contained in public acts of a general nature or in the majority administrative or judicial case law, as well as those adopted by repeated administrative practice of broad public knowledge".

certainty shall be maintained upon the change of the interpretation of the law, now also within the judicial and controlling scopes and at all federative levels.

Rather, Law No. 9.784/1999 initially reaches only the federal jurisdiction,[25] at least taking into account article 1 of said Law. Besides, said law is primarily addressed to the administrative jurisdiction, even when performed by the other Branches of Government, and even if it should be mandatorily complied with by the other branches as regards the administrative activity.

On the other part, while the administrative proceeding act has a focus on the past, i.e., it prohibits that the new interpretation be retroactive, Law No. 13.655/1948 focus on the future: this modification must be accompanied by a "transition regime". And article 24 ensure the maintenance of the constitutionally guaranteed *vested right*.[26] So, the flexibility of the forms must be balanced by the maintenance of the predictability and the legal certainty, in relation to the swiftness and efficiency of the administrative acts.

Accordingly, the decision that interprets the public law must consolidate the established legal interpretations, either based on the *ratio decidendi* or on the provision.[27] There is the imposition of an "obligation of coherence in the act of deciding", which consequently generates the regular appearance of subjective rights, in such a manner as to honor the principles of good faith and legal certainty.

Therefore, the legal rule contained in article 24 of Decree-Law No. 4.657/1942, amended by Act No. 13.655/2018, is commendable, to the extent that it prohibits retroactive application of interpretations that give rise to annulment of a given administrative conduct. As already said, the legal certainty cannot generate the petrification of the law or even of its interpretations.[28] This is why late professor Almiro do Couto e Silva said that "[...] the future can no longer be a perpetual prisoner of the past".[29] Thus, a new law or a new interpretation of the law will be welcome whenever such changes result from a demand for update of the legal system to the new demands of society.

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[25] Regarding the issue of application of Law No. 9.784/1999 in relation to the other federative entities, please see: HEINEN, Juliano; MAFFINI, Rafael; SPARAPANI, Priscilia. *Comentários à lei federal do processo administrativo* — Lei n° 9.784/1999. Porto Alegre: Livraria do Advogado, 2015. pg. 9-20.

[26] 1988 Constitution of the Federative Republic of Brazil, article 5, item XXXVI.

[27] GAMBOA, Jaime Orlando Santofino. *Lafuerza de los precedentes administrativos em el sistema jurídico dei derecho positivo colombiano.* Bogota: Universidad Extrenado de Colombia, 2010. pg. 65.

[28] MAFFINI, Rafael. *Princípio da proteção substancial da confiança no direito administrativo brasileiro.* Porto Alegre: Verbo Jurídico, 2006. pg. 28.

[29] COUTO E SILVA, Almiro. O princípio da segurança jurídica (proteção à confiança) no direito público brasileiro e o direito da administração pública de anular os seus próprios atos administrativos: o prazo decadencial do art. 54 da lei do processo administrativo da União (Lei n° 9.784/99). *Revista de Direito Administrativo.* Rio de Janeiro, No. 237, pg. 276, Jul./Sep. 2004.

However, the appearance of a new law or even a new interpretation of the law cannot generate the retroactive conclusion that certain behaviors of the public authority are contrary to the legal order — although they were not deemed as such upon its enactment — due to new interpretations or guidance.

This is why the innovations introduced by article 24 are commendable. Imagine, for example, cases of a public agreement entered into in connection with a bidding process that has a given procedural characteristic deemed lawful by the opinion of jurists and the case law at the time of its implementation. In this case, a subsequent change of interpretation, according to which said procedural characteristic would be legally inappropriate, could not lead to the conclusion that the concerned administrative agreement should be invalidated. This is the reason to establish, in article 24, that "[...]the review, in the administrative, controlling or judicial jurisdictions, regarding the validity of an administrative act, agreement, arrangement, proceeding or rule, the production of which has been already completed, will take into account the general guidance of the time, and the declaration of situations fully established as invalid, based on a subsequent change of general guidance is prohibited", defining as general instructions (article 24, sole paragraph) "[...] the interpretations and specifications contained in public acts of a general nature or in majority administrative or judicial case law, as well as those adopted by repeated administrative practice and of broad public knowledge".

The solution provided by the law discussed herein, as regards the dramatic effects generated by the interpretative changes on the public law in force, consisted of the determination of establishing the *transition rules.* Said legal procedure seeks to provide leveling in the stages of violation of rights, upon the removal of benefits, for example.[30] In other words, article 23 of Decree-Law No. 4.657/1942, as amended by Law No. 13.655/2018, was concerned with maintaining the effects of *legal certainty* and *protection of the legitimate trust:* the **stability of the legal relationships** and their **certainty, predictability, trust** etc. All these consequences of the legal procedure show its content and at the same time denote, as said, its effects.[31]

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[30] Most of them are examples presented by Judith Martins Costa (Almiro do Couto e Silva e a Re-significação do Princípio da Segurança Jurídica na relação entre o Estado e os cidadãos. In: ÁVILA, Humberto (Org.). *Fundamentos do estado de direito* — estudos em homenagem ao professor Almiro do Couto e Silva. São Paulo: Malheiros, 2005, pg. 123).

[31] Regarding the principle of legal certainty, please see, for all: ÁVILA, Humberto. *Segurança jurídica.* Entre permanência, mudança e realização no direito tributário. São Paulo: Malheiros, 2011.

Regarding the principle of protection of trust, please see: MAFFINI, Rafael. Princípio da proteção da confiança legítima. In: CAMPILONGO, Celso Fernandes; GONZAGA, Alvaro de Azevedo;

By the way, the concern with legal certainty is also expressed in article 30 of Decree-Law No. 4.657/1942, as amended by Law No. 13.655/2018, according to which the public authorities shall maximize it in the application of the rules concerning the public law, including by means of regulations, administrative precedents and answers to inquiries, instruments that "[...] will have a binding nature in relation to the body or entity for which they are designed, until subsequent review" (article 30, sole paragraph of Decree-Law No. 4.657/1942, as amended by Law No. 13.655/2018).

4. Participation and consensus

Articles 26,[32] 27[33] and 29,[34] each focused on its purpose, seek to provide progress to a **consensual public administration**[35] that, among other things,

FREIRE, André Luiz (Coord.). *Enciclopédia jurídica da PUC-SP.* Tomo: Direito administrativo e constitucional. Coordinated by Vidal Serrano Nunes Jr., Maurício Zockun, Carolina Zancaner Zockun and André Luiz Freire. São Paulo: Pontifícia Universidade Católica de São Paulo, 2017; CALMES, Sylvia. *Du principe de protection de la confiance légitime en droits allemand, communautaire et français.* Paris: Dalloz, 2001; BLANCO, Federico A. Castillo. *La protección de confianza en el derecho administrativo.* Madrid: Marcial Pons, 1998 e GARCÍA LUENGO, Javier. *El principio de protección de la confianza en el derecho administrativo.* Madrid: Civitas, 2002.

32 Decree-Law No. 4.657/1942, article 26: "In order to eliminate irregularity, legal uncertainty or litigious situation in the application of the public law, including in case of issue of a license, the administrative authority may, after hearing the judicial body and, as applicable, after carrying out a public inquiry, if there are reasons of relevant general interest, enter into a commitment with the interested parties, with due regard for the applicable law, which shall solely generate effects as from official publication thereof. Paragraph 1 The commitment referred to in the main provision of this article: I — shall seek a proportional, equitable, efficient legal solution that is compatible with the general interests; II — (VETOED); III — shall not provide permanent release of any duty or condition of a right acknowledged by general guidance; IV — shall clearly provide for the obligations of the parties, the term for compliance therewith, and the penalties applicable in case of noncompliance".

33 Decree-Law No. 4.657/1942, article 27: "The decision of the proceeding in the administrative, controlling or judicial jurisdictions may impose a compensation for undue benefits or abnormal or unfair losses resulting from the proceeding or from the conduct of those involved. Paragraph 1 The decision on the compensation shall be reasoned, and the parties shall be previously heard about its suitability, form and, should this be the case, amount. Paragraph 2 In order to prevent or regulate the compensation, a procedural commitment may be entered into by the involved parties".

34 Decree-Law No. 4.657/1942, article 29: "In any body or Branch, the enactment of normative acts by any administrative authority, except for those of mere internal organization, may be preceded by a public inquiry for statement of interested parties, preferably by electronic means, which shall be taken into account in such decision. Paragraph 1 The call notice shall contain a draft of the normative act and set the term and other conditions of the public inquiry, with due regard for specific legal and regulatory rules, if any".

35 Or it may be also referred to as "arranged public administration", *"soft administration"* etc.

is characterized by the adoption of agreements, partnerships and many other forms of pacts connecting the Government to the civil society, for fulfillment of the public needs.[36]

Then, the consensus ideal should also reach the public administration, to the extent that it is possible to develop in this matter, leaving the "authoritarian public administration" behind.[37] And in this respect, the expansion of the legal business made by the public authority with the citizen becomes more relevant: a phenomenon that praises consented relationships to the detriment of prescribed ones. By the way, the hierarchy tends to be replaced with the internal agreements made between bodies or entities of the organic administrative structure.[38] Thus, it is crucial to create spaces for participation in the administrative choices, in what may be regarded as a result of the concept of "dialogical public administration".[39]

On the other part, article 29 encourages participation of the citizens in the construction of the decision of normative or administrative acts in each branch of government. Note that the modern concept of democracy[40] requires broad participation of the citizens, promoting the legitimacy of administrative decisions. And this legitimacy should be seen at several levels

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[36] GAUDIN, Jean-Pierre. *Gouverner par contrat:* l'action publique en question. Paris: Presses de Sciences Politiques, 1999. pg. 14.

[37] ESTORNINHO, Maria João. *A fuga para o direito privado.* Contributo para o estudo da atividade privada na administração pública. Coimbra: Almedina, 1999. pg. 42 *et seq.*

[38] An example is the *management agreement,* to qualify a given body or entity as an executive agency, as provided for by article 37, paragraph 8 of the 1988 Constitution of the Federative Republic of Brazil.

[39] Regarding the idea of "dialogic public administration", please see: Rafael Maffini, Administração pública dialógica (proteção procedimental da confiança) em torno da súmula vinculante n° 3, do Supremo Tribunal Federal, op. cit., especially to highlight that "Among the numerous components of such modern reading of the Administrative Law, we note one aspect that, *ultima ratio,* is designed to expand the role of the citizens in the legal-administrative relationships. In fact, in the perspective being overcome, the citizen (or administrated party) is shown to be either completely irrelevant for the theoretical interpretation of the Administrative Law or to appear as a mere addressee of the public administration, in other words, someone that merely 'suffers' the administrative duties. Regarding the citizen position in the theory of the modern Administrative Law, a new paradigm is sought in which, other than obviously being the addressee of the public administration, the citizens are placed as important players in the scenario of legal-administrative relationships, and they will have, jointly with the Government, the aspiration of building the decision-making processes that affect them and the society as a whole. This is a consequence of the principle of participation, which will be placed at a relevant level in the horizon of paradigms tending to modernize and rationalize the Administrative Law". Please also see: FREITAS, Juarez. *Discricionariedade administrativa e o direito fundamental à boa administração pública.* São Paulo: Malheiros, 2007.

[40] We may say that democracy may be conceived as a moral project of collective self-government, where harmony between public and private spaces is sought Gustavo (Binenbojm, *Uma teoria do direito administrativo,* op. cit., pg. 50).

of the administrative action,[41] such as in the access, in the decision, in the performance[42] and in its outcome. The increase in the transparency levels of the public authorities and the establishment of administration procedures are connected with this perspective.

5. Responsibility of the public authorities and agents acting in advisory duties

It is necessary to have clarity in the definition of responsibilities arising from the legal-administrative relationship between the administration and the administrated parties. Said clarity must be understood both in legal and jurisdictional terms. The current article 28 of Decree-Law No. 4.657/1942 establishes that "government employees shall be personally liable for their decisions or technical opinions in case of willful misconduct or gross error". It seems that this provision introduces another dogmatic element (of a subjective nature and substantiated by the principle of culpability) in the accountability for *administrative decisions* or *technical opinions*.

So, let us analyze the matter in two moments. Regarding the *administrative decisions* rendered by the public authorities,[43] the provision makes an alignment with the understanding concerning the accountability of the public officials for *acts of misconduct.* We explain: in order for a penalty regulated by Law No. 8.429/1992 to be imposed, there should be *bad faith or dishonesty by the perpetrator of the act.* Note, in that regard, that it is indispensable that there is true "qualified illegality" here, i.e., the perpetrator must be aware that he is performing the conducts that are typified and punished by the Administrative Misconduct Act.[44]

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41 The 1988 Constitution of the Federative Republic of Brazil contains several provisions praising the democratization of the public administration, such as the obligation of transparency (article 5, item XXXIII); the right to report irregularities to the Accounting Courts (article 74, paragraph 2); the democratic management of the social security (article 194, item VII); and of health (article 198, item III); and of the public education (article 206, item VI). DI PIETRO, Maria Sylvia Zanella. *Direito administrativo.* São Paulo: Atlas, 2015. pg. 39.

42 The associative partnerships are of interest here. These agreements generate good economic and civic gains (this last case concerns the citizen's consideration about the Government duties).

43 Reminding that "[public] authority", according to the authentic interpretation provided by article 1, paragraph 2, item III of Act No. 9.784/1999, represents "the civil servant or government employee vested in decision-making power.". This provision was addressed in: Juliano Heinen, Rafael Maffini and Priscilia Sparapani, *Comentários à lei federal do processo administrativo,* op. cit., pg. 20.

44 Superior Court of Justice (STJ), Newsletter No. 540. Please also see: MAFFINI, Rafael. The strict liability in the application of Law 8.429/1992 is inadmissible, as it requires the presence

This is why it is understood that the act of administrative misconduct requires bad faith (subjective element), i.e., the presence of dishonesty or disloyalty by the defendant.[45] In summary, the mere noncompliance with the law is not necessarily characterized as administrative misconduct.[46] And said understanding was extended to other punitive spheres by the provisions of article 28 of Decree-Law No. 4.657/1942, as amended by Law No. 13.655/2018. Thus, the liability of the public authorities and managers will only be admitted if the administrative decision rendered indicates willful misconduct or gross error, as evidence of mere irregularity or illegality of the act is not sufficient for that purpose.[47]

Accordingly, in terms of accountability for administrative misconduct, article 28 of Decree-Law No. 4.657/1942, as amended by Law No. 13.655/2018, does not bring any significant novelty, given that willful misconduct or gross fault has been always required for such liability, which, at least in accordance with the interpretative standards found so far in the opinion of jurists and in the case law, is similar to the idea of gross error.

However, the same can't be said about the other cases of personal-employee accountability against public officials in which the accountability is usually based, at least until Law No. 13.655/2018, on willful misconduct or fault, generically considered and regardless of its intensity or nature. We explain: within the scope of civil liability[48] or administrative liability *stricto*

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of willful misconduct in the cases of articles 9 and 11 (which forbid unfair enrichment and violation of the administrative principles, respectively) and at least fault, as provided for by article 10, which punishes acts of improbity due to damage to the public treasury. In: DI PIETRO, Maria Sylvia Zanella; NOHARA, Irene Patrícia (Coord.). *Teses jurídicas dos tribunais superiores*. São Paulo: Revista dos Tribunais, 2017. v. 2, t. 2, pg. 29-50.

45 STJ, Newsletter No. 461. It is interesting to note that the STJ has already stated that: "It should be pointed out that the administrative misconduct seeks to achieve the dishonest administrator who acts in bad faith, rather than the unskilled one" (STJ, AREsp. No. 285.402, reporting justice Benedito Gonçalves, judged on February 3, 2015).

46 OSÓRIO, Fábio Medina. *Improbidade administrativa.* Porto Alegre: Síntese, 1998. pg. 129.

47 STJ, Newsletter No. 259 — the punishment for act of misconduct requires proof of bad faith of the accused government employee.

48 Regarding the nature of the civil liability of government employees, remember the provisions of article 37, paragraph 6 of the Federal Constitution, according to which "[...] the legal entities of public law and those of private law providing public utilities shall be liable for the damages caused by their agents, in such capacity, to any third parties, being ensured the right of recourse against the party in charge in case of willful misconduct or fault". Furthermore, at the federal level, it is necessary to consider the provisions of article 122 of Law No. 8.112/90 ("Article 122. The civil liability results from an act or omission of willful misconduct or fault, resulting in loss to the public treasury or to third parties. Paragraph 1 The indemnification for a loss intentionally caused to the public treasury shall be solely settled as provided for by article 46, in the absence of other assets that ensure the debit enforcement by judicial means. Paragraph 2 In case of damage caused to third parties, the government employee shall be liable to the Public Treasury, in an action for reimbursement. Paragraph 3 The obligation to

sensu, applying the principle of culpability, in such a manner that these types of accountability would only be possible in the event of proof of willful misconduct or fault. In relation to the cases of civil or administrative liability due to willful conducts, article 28 of Decree-Law No. 4.657/1942, as amended by Law No. 13.655/2018, does not provide any innovation. But, in relation to the cases of civil or administrative liability of public officials due to faulty conducts, the Brazilian legal system is relevantly amended by article 28 of Decree-Law No. 4.657/1942, as amended by Law No. 13.655/2018. This is so because, as from the enactment of said legal rule, it is no longer possible to consider personal accountability of public officials in cases of decisions or technical opinions culpably mistaken, inappropriate, or even contrary to the law, unless it is characterized as a gross error. Accordingly, the public officials should no longer be held personally accountable for conducts that theoretically give rise to civil indemnity or administrative penalties if there is, in the case, any type of fault other than one that could be classified as gross error. Said change is especially relevant in relation to the accountability of public officials by Accounting Courts, given that, although it is not usual to affirm that it is a strict liability, it is usual to address accountability to managers, simply due to the occurrence of certain behaviors, without proper investigation of culpability. Now, upon introduction of article 28 of Decree-Law No. 4.657/1942, as amended by Law No. 13.655/2018, even in relation to the accountability imposed by the Accounting Courts, the public officials can only be personally held liable if the occurrence of fault or gross error is completely demonstrated, as the mere indication of alleged violations or the mere indication of fault (recklessness, malpractice or negligence) that does not characterize gross error is no longer sufficient.

Finally, regarding the accountability of public officials for their decisions, article 28 of Decree-Law No. 4.657/1942, as amended by Law No. 13.655/2018, which requires willful misconduct or gross error for personal accountability of public officials, should be interpreted combined with other rules, especially dosimetry rules, which are established in article 22 of the same Law. Accordingly, for purposes of accountability of the government employee,[49] it is necessary: a)

compensate the damage is extended to the successors and shall be enforced against them, up to the limit of the amount of the inheritance received").

[49] Said interpretative parameters contained in article 22 of Decree-Law No. 4.657/1942, as amended by Law No. 13.655/2018, should also apply in case of other types of accountability, although not addressed to public officials, in addition to being applicable in relation to the review of administrative conducts.

to consider the practical circumstances that imposed, limited or conditioned the employee's action (article 22, paragraph 1); b) in case of imposition of penalties, to consider the nature and severity of the violation committed, the damages arising therefrom for the public administration, the aggravating or mitigating circumstances, and the employee's background (article 22, paragraph 2); c) to consider the penalties imposed on the employee in the calculation of the other penalties of same nature and related to the same fact.

Regarding the "technical opinions" — the second case addressed by the provision—, an end (or at least a more objective legal parameter) is put in the decision on the liability of opinion givers *(e.g.,* public lawyers, engineers etc. who act in the advisory duties of the manager).[50] Three important precedents of the Federal Supreme Court have addressed this issue: MS No. 24.073-DF, MS No. 24.584-DF and MS No. 24.631-DF. In a brief summary, in the first case the Federal Accounting Court (TCU) sought to hold a lawyer of Petrobras S/A jointly liable with the public administrator who performed the administrative act based on the technical note. This legal proceeding discussed whether the public lawyer who issued an opinion could be held liable by the Federal Accounting Court for the opinion stated. When the supreme court judged MS No. 24.073-3/DF, it understood that the opinion is not an administrative act, but rather a mere opinion — corroborating the theory presented in this work. Another basis used on that occasion was supported by the inviolability of the statements of lawyers, a right provided for by article 2, paragraph 3 of Law No. 8.906/1994 ("Lawyer Statute"), as a corollary of professional intangibility. Accordingly, by deciding on the issue, the Supreme Court concluded that the opinion writer is not liable. i.e., that the joint liability sought was not characterized.

The second case (MS No. 24.584-DF) discussed whether the opinion writer, who, by the way, was a member of the public law practice, was required to attend the TCU to provide information. Right before the trial, justice Joaquim Barbosa opens the divergence, affirming that, for resolution of the issue, it would be necessary to classify the opinion in three types: *optional, mandatory and binding.* The judge understands that there is joint liability in the last case, and the obligation to account, especially in view

[50] Regarding the liability of opinion writers, please see: HEINEN, Juliano. Impossibilidade de responsabilização dos advogados públicos no exercício da função consultiva. *A&C. Revista de Direito Administrativo & Constitucional,* Belo Horizonte, v. 14, pg. 167-191, 2014.

of the provisions of article 38, sole paragraph of Law No. 8.666/1993,[51] the hypothesis of the case records. And this classification of the types of opinions, linking them to the existence of liability or non-liability of the opinion writer, was even clearer in the trial of MS No. 24.631-DF. Once again, justice Joaquim Barbosa, based on the opinion of jurist René Chapus, firstly established the difference between the three types of opinions, as previously presented. And he concluded that there is liability of the advisor in case of *binding opinion*,[52] an opinion that was seconded by a majority of the other justices. Accordingly, in a more detailed analysis in that regard, it is concluded that the Supreme Court decided that:

(a) in case the opinion is *optional,* in other words, whenever it is prepared at the discretion of the public administrator for the purpose of clarifying a situation and to receive technical aids, although without being mandatory, it is not possible to think about accountability of the opinion writer. The opinion is not attached to the administrative act to be performed and it is not binding upon the government agent. This person is free to act or not to act in accordance with the terms of the opinion;
(b) in case of a *mandatory* opinion, the public administrator is not bound by the contents of the opinion either. Anyway, he may act against what is provided in the technical opinion. What is indispensable is the existence of the opinion, i.e., it must be rendered as an indispensable phase of the proceeding;
(c) however, in the event of *binding* opinions, the Federal Supreme Court (STF) adopted a different understanding. It decided, in MS No. 24.631-DF, that there is *joint liability* between the opinion writer and the administrator, because the administrator's decision is bound by the opinion of the opinion writer.[53]

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[51] Act No. 8.666/1993, article 38 [...] Sole paragraph. The drafts of bid notices of bidding process, and those of the agreements, contracts, conventions or covenants shall be previously examined and approved by the legal advisory of the Administration.

[52] He bases his opinion on the opinion of jurists of the aforementioned French author. The latter establishes that the administrative act is null and void, due to a defect of jurisdiction, in case of non-respect for the opinion that has a binding characteristic, of *avis conforme,* given that, as a result, the perfection of the act is not complied with (STF, MS No. 24.631-DF).

[53] "CONSTITUTIONAL. ADMINISTRATIVE. EXTERNAL CONTROL. AUDIT BY THE TCU. LIABILITY OF ATTORNEY-IN-FACT OF AGENCY DUE TO ISSUE OF TECHNICAL-LEGAL EXPERT OPINION OF AN OPINION NATURE. WRIT GRANTED. I. Consequences of the legal-administrative nature of the legal opinion: (i) when the inquiry is optional, the authority is not bound by the opinion rendered, and its decision-making power is not modified by

Accordingly, the opinion writer ends up deciding at the same level as the public administrator, thus characterizing, as seen, a true *complex administrative act*.[54]

This discussion, as may be well seen by the contents of the summaries presented, arose when the Federal Accounting Court (TCU) hold the opinion writers jointly liable with the administrators and imposed penalties on them. Although (and more curiously) the TCU itself gives priority to the case law that establishes that it is not possible to talk about liability of the opinion writer when the work is substantiated, it defends a legal theory that is at least acceptable, bases itself on a parameter of case law and opinion of jurists etc.[55]

Note that the opinions represent a specialized analysis on a given matter, deepening specific issues of the proceeding and providing, as a rule, alternatives to the public administrator.[56] And if that is true, even the "mandatory opinion", whether favorable or contrary to the understanding of the public administrators, does not compel them to follow the path outlined in the inquiry. And if the public administrators wish to perform the act as

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the statement of the advisory body; (ii) when the inquiry is mandatory, the administrative authority is bound to issue the act such as it is submitted to the advisory, with favorable or contrary opinion, and in case it wishes to perform the act in any manner other than as presented to the advisory, it shall submit it to a new opinion; (iii) when the law provides for the obligation to decide in the light of a binding opinion, such statement of a legal nature is no longer a mere opinion, and the administrator cannot decide differently from the terms of the conclusion of the opinion or not to decide. II. In these case records, the opinion issued by the petitioner did not have a binding nature. Its approval by the hierarchical superior does not distort its nature of opinion or makes it part of a subsequent administrative act that could result in damage to the public treasury, but rather merely incorporates its statement of reasons to the act. III. External control: It is appropriate to conclude that the accountability of the opinion writer in light of a broad relationship of causality between his opinion and the administrative act that resulted in damage to the public treasury is abusive. Except upon proof of fault or gross error, submitted to the proper disciplinary or jurisdictional administrative jurisdiction, it is not appropriate to hold public lawyers liable for the contents of their opinion of a mere nature of opinion." (STF, MS 24.631-DF, reporting justice Joaquim Barbosa, Full Court, judged on August 9, 2007).

The following precedent should be also seen: "PUBLIC LAWYER — LIABILITY — ARTICLE 38 OF LAW No. 8.666/93 — FEDERAL ACCOUNTING COURT — CLARIFICATIONS. As article 38 of Law No. 8.666/93 establishes that the statement of the legal advisory regarding bid notices of a bidding process, agreements, contracts, conventions and covenants is not restricted to a mere opinion, and affects the approval, or not, the refusal to answer the call notice of the Federal Accounting Court to provide clarifications is not appropriate" (STF, MS 24.584-DF, Reporting Justice Marco Aurélio, Full Court, judged on August 9, 2007).

54 Specifically in the case of bidding processes, where the opinion of the legal advisory of the body carrying out the bidding process is mandatory, the vote of the reporting justice was backed by the opinion of jurists of Marçal Justen Filho *(Comentários à lei de licitações e contratos administrativos.* São Paulo: Dialética, 2002. pg. 367-368).

55 TCU, Appellate Decision No. 1.427/2003, 1st Chamber.

56 FRIER, Pierre-Laurent; PETIT, Jacques. *Précis de droit administratif* Paris: Montchrestien, 2010. p. 283.

stated in the original proposal, they should not necessarily submit it to a new opinion — an understanding that is close to the normative provisions of article 28, analyzed herein. Therefore, no possibility of accountability of experts who acts in their advisor capacity is seen, given that their opinion is not binding and, therefore, they enable the public administrator to act with the freedom to either accept or not accept the legal solution provided.

Even when the opinions have a *binding nature,"*[57] in other words, when the administrator is bound by the contents of the technical opinion, we may conclude that, if the opinion maintains the nature of opinion, and any other act provides a binding nature to it, only such other act will have the prescriptive specificity, but never the opinion. This one, as said, will maintain the statement scope, especially because the public authority can or cannot give a binding power to the opinion— there is, in this case, a true margin of option in that regard. In this specific case, no possibility of accountability is seen, except in the event of willful misconduct or fraud of the opinion writer.

In case the inquiry is readily binding (*per se,* by itself), the provisions of article 133 of the Code of Civil Procedure and of article 630 of the Code of Criminal Procedure must apply to the case, enabling only the liability of the public agent who renders a legal opinion when it is evidenced that such agent has acted with willful misconduct, fraud or gross error. Accordingly, article 28 is quite consistent with the proposed systematic interpretation.

In case it is understood that a binding opinion would generate a prescription, i.e., a standard of conduct, we would be handling an act of normative nature — although this last concept is seen herein in a broad manner. Thus, this kind of inquiry ends up by being translated as a true act that generates effects on the must-be. And if that is true, in our opinion, the same difficulties involved in punishing an individual who legislates would apply to this type.

6. Administrative efficiency

What the law in force analyzed herein seeks are the means to align the constitutional wording to the reality of an underprivileged country and the

[57] Regarding the classification of the opinions adopted by the STF, please see: CHAPUS, René. *Droit administratif géneral*. Paris: Montchrestien, 2001. t. 1, pg. 444 *et seq*.

instruments of public action that, once in place, lead to the greater possible effectiveness of the social policies. Said alignment should not take place exclusively in the Judicial Branch, not even on the margin of the strict control of legality, much less with invasion of the exercise of discretion, ultimately making the Judicial Branch a "mere stamper of political decisions".[58]

The public administration is currently a complex organization. In addition to being in charge of typical Government activities, it operates, directly or indirectly, in the financial, agricultural, industrial, economic and other industries. In these days, unlike in the past, the approach of the administration and its relationship with the society implies the need to incorporate its structure and activity, i.e., it frequently operates by means of typical instruments of a private company, such as the profit of the services, assessment of their costs etc. For that purpose, the contemporary public administration is required to count on the technical skills of the employees. Obviously, it should be more advanced, more specialized, more varied. The society claims effectiveness in the Government actions,[59] to the same extent as said efficiency is seen in other sectors of the society. That raises attention to the study on how to rebuild, again and again, the administrative organization and its *modus operandi*. And if that is true, said reconstruction depends on the dogmatic review of the administrative law itself.

7. The relevance of motivation

In all aspects previously noted in these first lines on the changes introduced by Law No. 13.655/2018 in the Introductory Law to the Rules of Brazilian Law, a common aspect is seen, i.e., the obvious relevance of the principle of motivation. In fact, given that the decision-making scope of the (administrative, controlling or judicial) authorities has been undeniably expanded as regards the interpretation, review, establishment of practical effects etc., it is also undeniable that there is a need for said authorities to carry out their duties in such a manner as to appropriately comply with the argumentative burden of justification of their decision-making processes.

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[58] FREIRE JÚNIOR, Américo Bedê. *O controle judicial das políticas públicas*. São Paulo: Revista dos Tribunais, 2005. pg. 86.

[59] Expression seen in *broad sense*.

As an example, we mention article 20, sole paragraph of Decree-Law No. 4.657/1942, as amended by Law No. 13.655/2018, which establishes that decisions taking into account abstract legal values and considering the practical consequences of the decision should be motivated by demonstration of the "[...] need and adequacy of the imposed measure or the invalidation of any administrative act, agreement, arrangement, proceeding or rule, including in view of the possible alternatives." We also note the provisions in article 21 of Decree-Law No. 4.657/1942, as amended by Law No. 13.655/2018, which establishes the need for express indication of the legal and administrative consequences of the decisions of invalidation of administrative conducts, while article 21, sole paragraph, provides for the need for indication of the "[...] conditions for the regularization to take place in a proportional and equitable manner and without prejudice to the general interests, and that it is not possible to impose on the affected individuals burdens or losses that, due to the peculiarities of the case, are abnormal or excessive".

The obligation to motivate leads the administration to explain in writing the reasons of its decision.[60] The presentation of the reasons significantly improves the transparency, the control and the democratic standard of the administrative duties. That enables a better understanding of the administrative role.[61] Upon adoption of a democratic standard (article 1, main provision of the 1988 Constitution of the Federative Republic of Brazil) by the Brazilian Government, the motivation of the acts performed became inherent in the administrative role. It is a matter of fulfilling an agenda that is necessarily focused on the obligation of transparency and, of course, of implementation of fundamental rights and guarantees, such as broad defense, the right to adversary proceeding, the right to access to public information etc.

The motivation may be regarded, in summary, as the specification of the facts and grounds that supported performance of the act.[62] And the manner as the administrative body explains the reasons why it has made a given decision, in the same line as a judge presents to those under his or her

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[60] The *principle of motivation* is linked to the *principle of decision,* but is not confused with it, to the extent that the second one imposes the obligation for the public authority to make a statement on all matters under its jurisdiction that are submitted to it by the administrated parties (article 9 of the Portuguese Code of Administrative Procedure). AMORIM, João Pacheco de; GONÇALVES, Pedro Costa; OLIVEIRA, Mário Esteves de. *Código do procedimento administrativo comentado.* Coimbra: Almedina, 2006. pg. 125-131.

[61] Pierre-Laurent Frier e Jacques Petit, *Précis de droit administratif,* op. cit., pg. 314.

[62] CARVALHO FILHO, José dos Santos. *Manual de direito administrativo.* São Paulo: Atlas, 2012. pg. 973.

jurisdiction the reasons why the judgment has a given result. Based on this context, the administrated party may have clear knowledge about the content of the administrative decision and exert some kind of control over it. Thus, it can check the compatibility of the factual and legal reasons presented in the administrative decision in relation to the reality and the applicable legal system, respectively. Not unfrequently, the lack of motivation hides practices of deviation of purpose. So, the statement of reasons ends up by minimizing these unlawful practices.

In fact, even if no rule addressed this matter, the principle of motivation would be a typical implicit principle derived from the due process of law — article 5, LIV of the 1988 Constitution of the Federative Republic of Brazil. Tomás-Ramón Fernández,[63] in an interesting study, points out that the motivation rules out the discretionary act of arbitrariness. For the author, what lacks an explanation of reasons would fall in the arbitrary field.

The contents of a motivation must be completed by the factual and legal reasons.[64] However, the detailing of each one will depend on numerous factors and is mediated by the reasonability. It will be the relevant case that will validate the need for the decision to be more or less detailed.[65] The administrative act that denies, limits or affects rights or interests of the administrated party must explicitly, clearly and consistently indicate the factual and legal reasons on which it is based (article 50, main provision and its items, and paragraph 1 of Law No. 9.784/1999). The mere invocation of the clause of public interest or the generic indication of the cause of the act does not meet said requirement.[66]

Conclusions

The relevance of Law No. 13.655/2018 to the Brazilian public law is undeniable. In fact, it does not have all virtues disclosed by those who paid

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[63] FERNÁNDEZ, Tomás-Ramón. *Arbitrariedad y discrecionalidad.* Madrid: Civitas, 1991. pg. 107. Same construal: "[...] *la falta de fundamentación implica no sólo vicio de forma sino también y principalmente, vicio de arbitrariedad, que como tal determina normalmente la nulidad del acto"* (GORDDILO, Augustin. *Tratado de derecho administrativo.* Buenos Aires: F.D.A., 2004. t. 3, pg. X-17).

[64] Such as provided for by article 3 of the French Act of July 11, 1979.

[65] Brief decisions are admitted in certain cases, provided that their reasons can be understood (CE, June 11, 1982, *Min. De l'Intérieur/Rezzouk).*

[66] STJ, MS No. 9.944-DF, reporting justice Teori Albino Zavascki, 1st Section, judged on May 25, 2005.

effusive compliments to it, as if it were able to launch the democratic state based on the rule of law in Brazil. Nor does it contain all defects raised by those who found mechanisms of impunity in it. By the way, the science does not coexist well with said level of passion. Thus, generally speaking, it seems that it is a welcome Law, especially in relation to the aspirations expressed in its summary, namely, to provide increased legal certainty and efficiency in the creation and application of the public law. It is incumbent upon everyone who is scientifically concerned with the public law to seek to accurately understand its rules. For that purpose, this paper presents an initial and prospective analysis of the effects of Law No. 13.655/2018 on the Brazilian law, from which the following considerations are extracted:

- The purpose of the interpreter should be: to achieve the social reality and to modify it as regards the imperfections presented. The interpretation that should be carried out cannot be confused in any event whatsoever with the arbitrary exercise of the power to make decisions and choices, because they should be linked, as already pointed out, to the fundamental principles and to the human rights.
- We should consider that, if there were no shortage of assets, there would be no reason for savings. But said shortage does exist, which results in a conflict between values (assets). The question that should be asked is: how to solve the consideration? Jurists usually find answers in the void of *proportionality,* in the vacuum of *consideration,* in the metaphysical *reasonability.* However, the legal position is too wide in such terms, given that it is not the matter of consideration, of proportionality or of reasonability, but rather and ultimately of a mere *option.* Jurists do choose between two values: either they protects the life of a single individual, to the detriment of allocating resources to many, or they choose the collectivity to the detriment of the subjective right of a single individual. The option is placed with no further ornaments, naked. Accordingly, the decision to be made should take into account: (a) the inequality caused; (b) the economic consequences generated, which are extremely harmful to the other members of the society.
- Exactly for that reason, it is not possible to consider the public law as a mere "system of legal protection" of the citizen, but rather much more as a law of the administrative organization and of promotion of social development and well-being. For that reason, the administrative law should focus on the citizen, rather than on the authority.

- Understanding the things leads to their representation, whatever they are. Especially because the concepts are not something stated, but rather something thought; in other words, they are a mental representation of the essence of things. Accordingly, the *proposition* allocated in the motivation of the legal acts is nothing more than an opinion on the things, is nothing more than the representation the judge or the members of the Accounting Courts make of the reality.
- The success of Law No. 13.655/2018, as regards the achievement of a state of legal certainty and efficiency in the creation and application of the public law, will be more significant to the extent that the administrative, controlling and judicial authorities appropriately motivate their decisions.

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