The new paradigm of decision based on art. 20 of the LINDB: analysis of the text according to the theories of Richard Posner and Neil MacCormick*

O novo paradigma da decisão a partir do art. 20 da LINDB: análise do dispositivo segundo as teorias de Richard Posner e Neil MacCormick

*Francisco Sérgio Maia Alves***

ABSTRACT

This work aims to analyze art. 20 of the Law of Introduction to the Rules of Brazilian Law (LINDB), or Law No. 13.655/2018. To do so, it will be shown how legal values were excluded and reintroduced in legal practice

* Article received on May 25, 2019 and approved on July 10, 2019. DOI: http://dx.doi.org/10.12660/rda.v278.2019.80832.

* Centro Universitário de Brasília, Brasília, DF, Brasil. E-mail: fsergio.ma@gmail.com.
Master of law and public policy from UniCeub — Centro Universitário de Brasília. He holds a law degree from the Universidade Federal de Paraíba and a degree in aeronautical civil engineering from the Instituto Tecnológico de Aeronáutica. Federal auditor of external control and advisor to the minister at TCU.

and how this reintroduction raised concerns regarding the increase of discretion in the application of the law. The article will present pragmatic and consequentialist theories, in line with the doctrine of two of its main exponents, Richard Posner and Neil MacCormick. In order to meet the key objective of the article, the concepts of abstract legal values and practical consequences of the decision will be described in the context of art. 20 of the LINDB, concluding with a definition of the area in which the law is applied.

KEYWORDS

Abstract legal values — post-positivism — pragmatism — consequentialism — Law of Introduction to the rules of Brazilian Law

RESUMO

Para tanto, será mostrado como os valores jurídicos foram excluídos e novamente reintroduzidos na prática jurídica e como essa reintrodução gerou preocupações quanto ao aumento da discricionariedade da aplicação do direito. O artigo apresentará as teorias pragmática e consequencialista, segundo a doutrina de dois de seus principais expoentes, Richard Posner e Neil MacCormick. No afã de cumprir o objetivo central do artigo, serão delimitados os conceitos de valores jurídicos abstratos e consequências práticas da decisão, no contexto do art. 20 da LINDB, e, por fim, definido o espaço de aplicação do dispositivo.

PALAVRAS-CHAVE

Valores jurídicos abstratos — pós-positivismo — pragmatismo — consequencialismo — Lei de Introdução às Normas do Direito Brasileiro

Introduction

As stated in its summary, Law No. 13.655/2018 was intended to include in Decree-Law No. 4.657/1942, known as the Law of Introduction to the Rules of Brazilian Law (LINDB), provisions on legal certainty and efficiency in the creation and application of public law.

The norm was based on the assumption that the action of the various levels, in deciding cases involving this branch of law, eventually produced antagonistic, unfounded decisions that invaded the discretion of the administrator and caused him a recurring fear of being punished.

As stated by the advocates and some of the legal scholars who participated in the studies that supported the bill of law[1]-[2], the norm sought, among others, to remedy what is conventionally called the "pen blackout." The expression can be defined as an attitude of inertia of the public administrator, causing the state to be inactive and paralyzed, in view of the fear of asset liability and sanction by the control bodies.

According to Eduardo Jordão, the project is anti-romantic or anti-idealistic, so its main objective is to "introduce a good deal of pragmatism and contextualization in the interpretation of the norms of public law.[3]"

This pragmatic bias is found in what José Vicente dos Santos Mendonça calls the new style of administrative law. For him, this legal branch, like the old one, has four basic characteristics: "He is (i) close to American methods, (ii) pragmatist and empiricist, (iii) asystematic and unsystematic, and (iv) unbelieving in the centrality of law as the key to interpreting economic, political and social life[4]"

The aim of this paper is to analyze the pragmatism model introduced by art. 20 of the LINDB, as amended by Law No. 13.655/2018, according to the framework of Richard Posner and Neil MacCormick, two of the leading authors of the pragmatic adjudication theory.

To achieve the objectives of this paper, the concept of legal value shall be explored and its relationship with the idea of law will be examined. In the following, it will be shown how the legal values were excluded and later

---

1 The norm was based on studies and preliminary design prepared by professors Carlos Ari Sundfeld and Floriano de Azevedo Marques Neto, within the scope of the Sociedade Brasileira de Direito Público and Escola de Direito da Fundação Getulio Vargas.

2 MARQUES NETO, Floriano de Azevedo; FREITAS, Rafael Véras. *O artigo 28 da nova LINDB: um regime jurídico para o administrador honesto.* Consultor Jurídico, May *25, 2018.* Available at: <www.conjur.com.br/2018-mai-25/opiniao-lindb-regime-juridico-administrador-honesto>. Accessed on: Mar 29, 2019.

3 JORDÃO, Eduardo. Art. 22 da LINDB — acabou o romance: reforço do pragmatismo no direito público brasileiro. *Administrative Law Review,* Rio de Janeiro, pg. 63-92, Nov. 2018. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/77650>. Accessed on: Mar 29, 2019.

4 MENDONÇA, José Vicente Santos de. A verdadeira mudança de paradigmas do direito administrativo brasileiro: do estilo tradicional ao novo estilo. *Administrative Law Review,* Rio de Janeiro, v. 265, pg. 179-198, Jan. 2014. pg. 189. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/18916>. Accessed on: Mar 29, 2019.

reintroduced in the law, in the movements referred to as positivism and post-positivism. Completing the theoretical part of the paper, pragmatic and consequentialist theories of Richard Posner and Neil MacCormick will be presented.

The paper follows to its main part which is the determination of the feeling of art. 20 of the LINDB. In this effort, the concepts of abstract legal values and practical consequences of the decision will be delimited, in the context of the rule, and, finally, the scope of application of the provision shall be defined.

To fulfill the purpose of this paper, the deductive approach method will be adopted, starting from the general analysis of the object of the study, that is, the text of art. 20 of the LINDB, from the theoretical framework of legal pragmatism and consequentialism, to arrive at a new truth, which is the meaning and scope of the provision.

It is, therefore, a study that fits into the space of legal dogmatics as it seeks to promote a systematic analysis of a rule set out by Brazilian positive law, according to principles and concepts predetermined by the legal knowledge.

As for the research techniques, the bibliographic research will be basically used, due to the little jurisprudential production involving the application of the provision, due to the short time since its approval.

1. The legal values under the law

Legal value is the interest or good that a legal rule seeks to protect.[5] It is the purpose pursued by the normative provision, the interest or legal good that it seeks to promote.

Every legal rule carries a legal value. After all, state intervention in social relations through the creation of a legal rule is only justified when seeking to promote a community interest. The law, therefore, is the positivation of an end recognized by the legitimate authority for its elaboration.

Gustav Radbruch points out that the law, as a human work, can only be understood from its purpose or value. For the author, the law is a cultural

[5] SILVA, De Plácido e. *Vocabulário jurídico.* Rio de Janeiro: Forense, 2005. pg. 1459.

manifestation, a reality referred to as values, whose meaning is to be at the service of the value of justice.[6]

The association of the right with a value can also be found in the philosophy of St. Thomas Aquinas, which defines law "as an ordering of reason for the *common good*, promulgated by the chief who governs the community[7]" Immanuel Kant relates the right to the value of freedom by conceptualizing it as "the set of conditions by which the agency of one can come into agreement with the agency of the other according to a universal law of liberty.[8]"

Miguel Reale, in his well-known three-dimensional theory of law, also relates the right to the realization of a value. In his words:

> Wherever there is a legal phenomenon, there is always and necessarily an underlying fact, a value, which gives a certain meaning to that fact, inclining the action of men to achieve or preserve a certain purpose or objective; and, finally, a rule or norm that represents a relationship or measure that integrates one of those elements with the other, the fact or the value.[9]

For the author, the right is the realization of the idea of justice in the plurality of its historical duty, with the person as the source of all values.[10]

Based on the ideas of these thinkers, the law would be designed to secure certain values, such as the common good, freedom and justice. The legal scholars also usually list as purposes of the law to assure the social peace, the legal security, the prosperity and the happiness of the man; In short, there are many legal values sought by the legislation.

If legal values represent the purpose behind the legal rules, they can be used as their interpretative vectors, especially when solving concrete problems by using analogy.

Although the reference to legal values in dispute settlement is not something of unanimous acceptance among the various law theorists, varying according to the schools of thought, it is undeniable that legal values condition the production and interpretation of the rules derived from it. However, the

---

6 RADBRUCH, Gustav. *Filosofia do direito.* São Paulo: Martins Fontes, 2004. pg. 47
7 AQUINO, Tomás de. *Suma teológica.* São Paulo: Loyola, 2005. v. 4, p. 527-528.
8 KANT, Immanuel. *A metafísica dos costumes.* Bauru: Edipro, 2003. pg. 76.
9 REALE, Miguel. Lições preliminares do direito. São Paulo: Saraiva, 2000. pg. 65.
10 Ibid., pg. 67.

difficulty of identifying the value underlying each legal rule and the extent of its meaning cannot be forgotten.

The use of values in dispute settlement dates back to the time before legal positivism, when the idea of law was not confused with the law posed by the state, but was broader. However, with the perception of the inability of the positive rule to discipline and foresee all concrete situations, the use of values became part of the legal adjudication activity, mainly through the principles.

However, it must be warned that legal values are not confused with principles. According to Humberto Ávila's lesson "[values] do not determine what should be, but what is best. [...] Instead of the deontological character of the principles, the values are only the axiological[11]"

The introduction of the principles in legal adjudication, verified with the movements of post-positivism and neoconstitutionalism, made the increase of discretion in the interpretation of the legal rules on which it is based. This problem is similar in the case of decisions based on the legal values.

2. From legal positivism to post positivism — the exclusion and reintroduction of values in the concretization of law

Until the late eighteenth century, there were two kinds of law: the natural and the positive. Based on the thinking of the seventeenth and eighteenth-century jusnaturalists, the first was a dictate of just reason, of divine origin and universal character, while the second was derived from civil power, that is, that which belongs to the state.

Norberto Bobbio sets out the distinction between these two kinds of law, according to the way it comes into our conscience. While natural law is revealed through reason, originating from the nature of things, positive law constitutes the declared will of a legislator.[12]

During the Middle Ages, natural law was considered superior to positive. However, with the formation of the modern state and the gradual dissolution of medieval society, the idea that natural and positive law are not

---

[11] ÁVILA, Humberto Bergmann. A distinção entre princípios e regras e a redefinição do dever de proporcionalidade. *Administrative Law Review,* Rio de Janeiro, v. 215, pg. 151-179, Jan./Mar. 1999. pg. 164-165.

[12] BOBBIO, Norberto. *O positivismo jurídico.* Lições de filosofia do direito. São Paulo: Ícone, 1995. pg. 21.

considered to be law in the same sense has come to prevail. At this moment, the movement called legal positivism emerges, according to which law is reduced to positive law.[13]

This conception altered the way in which disputes were resolved by the competent state authority. If before the judge extracted the rule of decision according to his own criteria of reason, interpreting the customs and using the equity, from then on, he was urged to solely apply the rules set by the State.

In the twentieth century, more precisely after World War II, movements called post-positivism and neoconstitutionalism challenged the order posed by positivism. From then on, the normative force of constitutions and principles was admitted. The principles would be the way in which not positive values in rules began to influence the legal decision.

According to Ricardo Fernandes and Guilherme Bicalho, jusphilosophical thinking called post-positivism constitutes the structural basis of current constitutional thinking, called neoconstitutionalism. This movement, which is philosophically structured on the pillars of post-positivism, has brought values back into the legal system, in the form of principles, in order to allow decision-making based on parameters of justice.[14]

Considered one of the classic authors of neoconstitutionalism, Robert Alexy admits the use of the "values of the collective or of determined circles", the "internal system of valuation of the legal system" and the "meaning of the legal system considered in its entirety" in the decision of difficult cases not covered by the system.[15-16]

Nonetheless, post-positivism and neoconstitutionalism have come under severe criticism for increasing the discretion of the judge and, consequently, the unpredictability of the law. According to supporters of this view, the practical use of values and principles has shaken expensive values of law such as legal certainty, democracy and the separation of powers.

For Thiago Magalhães Pires, the result of post-positivism has been "on the one hand, more constitution, more state, more judiciary, more indeterminate

---

13 Ibid., pg. 26.

14 FERNANDES, Ricardo Vieira de Carvalho; BICALHO, Guilherme Pereira Dolabella. Do positivismo ao pós-positivismo jurídico. O atual paradigma jusfilosófico constitucional. *Revista de Informação Legislativa,* Brasília, No. 48, v. 189, pg. 105-131, Jan-Mar. 2011. pg. 129.

15 ALEXY, Robert. *Teoria da argumentação jurídica:* a teoria do discurso racional como teoria da justificação jurídica. Rio de Janeiro: Forense, 2013. pg. 27-28.

16 Despite acknowledging the difficulty of extracting the valuation of the collective and those contained in the rules, Robert Alexy develops, in the mentioned work, a theory of legal argument that seeks to objectify the problem of valuations in difficult cases.

principles and terms, and, on the other, less respect for the law, less autonomy, less democracy and less safety[17]"

According to him, the use of open rules, such as principles and legal values, increases the chance of contradictory decisions in equal cases, which goes against the most elementary notion of justice.[18] In his view, post-positivism makes room for decisionism and for the issuance of decisions *contra legem*.[19]

Along the same lines, Eduardo Valory points out that the use of values in legal decision raises two major problems: the diversity of values desirable by legal operators and the self-legitimation of jurists as responsible for adapting written rules to what they consider to be ideal rules.[20]

Daniel Sarmento also offers objections to neoconstitutionalism. For him, this movement is anti-democratic, as it involves the transfer of the decision-making center from the Legislature to the Judiciary[21]; increases the chances of judicial discretion and legal uncertainty, especially in Brazilian judicial practice, due to the inadequate reasoning of decisions[22]; and restricts the choices of the people of each generation by promoting what they call "panconstitutionalization," that is, the idea that everything would be defined in the Constitution.[23]

It was precisely to placate this rapprochement of law and morality, the increased discretion of the judge, by using open constitutional rules and legal principles as decision criteria, that the movements that advocate the use of consequences in judicial adjudication emerged. The next topic will address the movement called legal pragmatism.

---

17 PIRES, Thiago Magalhães. Pós-positivismo sem trauma: o possível e indesejável no reencontro do direito com a moral. In: FELLET, André Luiz Fernandes; PAULA, Daniel Giotti de; NOVELINO, Marcelo (Org.). *As novas faces do ativismo judicial*. Salvador: Jus Podivm, 2011. pg. 37.

18 Ibid., pg. 40.

19 Ibid., pg. 41.

20 VALORY, Eduardo. Cinco minutos de positivismo jurídico. *RFD — Revista da Faculdade de Direito da Uerj,* s.l., No. 23, July 2013. Available at: <www.e-publicacoes.uerj.br/index.php/rfduerj/article/view/5472/4760>. Accessed on: April 27, 2019.

21 SARMENTO, Daniel. O neoconstitucionalismo no Brasil: riscos e possibilidades. In: FELLET, André Luiz Fernandes; PAULA, Daniel Giotti de; NOVELINO, Marcelo (Org.). *As novas faces do ativismo judicial*. Salvador: Jus Podivm, 2011. pg. 98.

22 Ibid., pg. 106.

23 Ibid., pg. 109.

3. Pragmatism and legal consequentialism

Before proceeding with the interpretation of art. 20 of the LINDB, it is possible to expose the legal theories of Richard Posner and Neil MacCormick, two of the main exponents of legal pragmatism and consequentialism. The purpose of this topic is to provide a theoretical framework for the analysis of the pragmatism model introduced by art. 20 of the LINDB, which will be the subject of topic 6.

3.1 Pragmatism and Richard Posner's Theory of Law

Among the celebrated authors of legal pragmatism, Richard Posner[24] assumes a prominent role due to its intense academic production and its willingness to debate with other equally important but divergent thinking authors such as Ronald Dworkin and Robert Alexy.

In his vast work, the author defends what he calls everyday pragmatism, which must be understood as "the willingness to base public decisions on facts and consequences, not on conceptualism and generalizations".[25]

The professor of the University of Chicago emphasizes the anti-formalist character of pragmatism by stating that the importance of a proposition lies neither in its correspondence with an ultimate, unknowable reality, nor in its *pedigree,* but in its consequences.[26]

---

[24] Richard Posner is an appeal court judge for the *7th* region and professor at the University of Chicago, being one of the leading exponents of American legal thinking. Throughout his academic life, he published several books and articles in which he essentially opposed the legal formalism and the use of moral theories in law. It is noteworthy that the author presented changes of understanding about the interconnection between law and economy and the use of efficiency as a criterion for judicial adjudication, having joined the current of legal pragmatism, after the publication in 1990 of his book. *The problems of jurisprudence* (SALAMA, Bruno Meyerhof. A história do declínio e queda do eficientismo na obra de Richard Posner. Available at: <https://works.bepress.com/bruno_ meyerhof_salama/35/>. Accessed on: Mar. 30, 2019). Even after his adherence to pragmatism, the author made minor changes in his legal theory, the result of intense debate with different authors, among which stands out Ronald Dworkin. This part of the work is based on the author's ideas formulated in the books *A problemática da teoria moral e jurídica* and *Direito, pragmatismo e democracia,* originally published in the United States in 1999 and 2003, respectively.

[25] POSNER, Richard A. *A problemática da teoria moral e jurídica.* São Paulo: WMF Martins Fontes, 2012. pg. 358.

[26] Id. *Direito, pragmatismo e democracia.* Rio de Janeiro: Forense, 2010. pg. 4.

The author differentiates the working method of the pragmatic judge from the positivist judge. According to him, the positivist judge begins and usually ends his activity with an examination of the jurisprudence, legislation, executive regulation and constitutional provisions. The pragmatist, in turn, has other priorities; he wants to find the decision that best meets present and future needs.

To fulfill this desiderate, he has no disinterest in jurisprudence and legislation, which function as sources, repositories of knowledge, and sometimes even wisdom, which will guide him in this task.[27] For the pragmatic judge, jurisprudence and legislation serve as a starting point for the decision-making process, which will also take into account the investigation of the consequences of possible alternatives for the solution of the particular case.

However, it should be noted that the kind of pragmatism proposed by Richard Posner takes into account not only the short-term and immediate consequences of the case under discussion, but also what it calls systemic consequences. Such consequences are associated with the duty of consistency and impartiality of respect for the legal norm. According to him:

> *The pragmatic judge does not deny the virtue of standard legal norms of generality, predictability and impartiality,* that generally favor an opposite approach to moving to the new legal controversies. He refuses to reify or sacrifice these virtues. *Dare to compare them to the adaptive virtues of the decision in this case in order to produce the best consequences* for the parties and other parties similarly detailed.[28] [emphasis added]

The key to Richard Posner's pragmatic theory, therefore, is the comparison of the short-term and immediate consequences of the proposed solution with its broader consequences, with regard to the eventual disruption it may generate to the values of coherence, generality, predictability and impartiality of the legal rule.

The author emphasizes the importance of preserving the impartiality and predictability of law by preaching respect for the common meanings of the normative text. According to him, "if judges in general did not interpret contracts and legal obligations according to the common meaning of the

---

[27] Richard A. Posner, *A problemática da teoria moral e jurídica,* op. cit., pg. 381-382.
[28] Id., *Direito, pragmatismo e democracia,* op. cit., pg. 9.

sentences that appear in these texts, the certainty of the legal obligation would be seriously impaired.[29]"

Therefore, in deciding a particular case, the judge will weigh all the specific and systemic circumstances, derived from the legal rules. This, then, is the way of acting of a pragmatic judge:

> A good pragmatic judge will try to weigh the good consequences of prompt adherence to the virtues of the rule of law, which advocate firmness, rather than the bad consequences of being tempted to innovate when faced with controversy that previous court decisions and canonical texts are not well adapted to solve.[30]

Thus, the pragmatic theory proposed by Richard Posner admits that the judge may, under certain circumstances, decide to adopt a formalist rhetoric for his judicial decisions. Put another way, it can incorporate formalism as a pragmatic strategy. Following are the University of Chicago professor's considerations:

> Is the decision according to the rule, therefore, not pragmatic? Not because the harm of ignoring the consequences in the particular case must be weighed against the gain by simplifying the investigation, minimizing judicial discretion, increasing the transparency of the law and making legal obligations more definitive.[31]

Thus, adherence to a rule, after consideration of all consequences and circumstances, may be the best procedure to follow in a particular case. For Richard Posner, "This is a pragmatic judgment, too, although not necessarily a consequentialist judgment.[32]"

Therefore, the positive rule was not removed from Richard Posner's normative framework. He only added other elements that, along with the orthodox sources of law, will be part of the instrumentality to be used by the judge in deciding concrete cases.

---

29 Ibid., pg. 48.
30 Ibid., p. 50.
31 Ibid., 53-54.
32 Ibid., pg. 54.

As seen, norms seek to honor and/or protect values, that is, they seek to remedy problems, negative consequences that existed before their introduction into the legal order. Thus, when one moves away from a positive rule in the name of a given immediate consequence that it can generate, one cannot forget that it immediately gives rise to the negative consequence that the positive rule seeks to avoid.

Such a circumstance, of course, must be weighed. It is not just the value of preserving the integrity of the system, that is, the negative systemic consequences, that must be taken into account. The specific negative consequences of non-impact of the standard must also be weighed against the immediate consequences that pragmatic adjudication sought to avoid or ensure.

However, it should be noted that the systemic approach to consequences proposed by Richard Posner's pragmatism has as its counterpart the increased complexity of the decision.[33] This aspect was emphasized by the author himself, who listed the following reasons for concern or dangers related to legal pragmatism:

a) lack of training of judges to enable them to go beyond the orthodox sources of law, that is, to analyze and absorb social science theories and data[34];

b) judgments based on intuitions, given the lack of critical mass of social science knowledge that the prudent judge can use to arrive at the decision that produces the best results.[35];

c) risk that courts will treat the legal system as a kind of plastic mass that can be used to fill awkward holes that exist in society's legal and political structure[36];

d) intellectual laziness of some judges, in motivating their decisions.[37]

Despite these problems, which could be overcome by the attitude of the judge who claims to be pragmatic, of using doubt as an investigation engine, Richard Posner understands that pragmatism is the best guide to improving

---

[33] In the same vein, Diego Arguelhes and Fernando Leal pointed out that "the price of complexity and sophistication [of pragmatism], however, is the difficulty of operationalization" (ARGUELHES, Diego Werneck; LEAL, Fernando Pragmatismo como [meta]teoria da decisão judicial: caracterização, estratégias e implicações. In: SARMENTO, Daniel; CRUZ, Álvaro Ricardo de Souza (Org.). *Filosofia e teoria constitucional contemporânea.* Rio de Janeiro: Lumen Juris, 2009. pg. 194).

[34] Richard A. Posner, *A problemática da teoria moral e jurídica,* op. cit., pg. 403.

[35] Ibid., pg. 404.

[36] Ibid., pg. 408.

[37] Ibid., pg. 415.

judicial performance and thus the best normative as well as positive theory of the judicial role.[38]

Richard Posner's pragmatic theory, defended in one of his most recent books on the subject, admits the overcoming of the rule set when its observance leads to drastic consequences in so-called extreme or emergency cases.

For him, pragmatism is not merely a supplement to cases in which conventional adjudication material runs out. Pragmatic adjudication shall also apply to emergency cases, that is, situations where formalism leads to drastic consequences.[39] Thus, the plaintiff admits the overcoming of the rule set in exceptional cases.

3.2 Consequentialism in Neil MacCormick's theory of Law

Another relevant author in the discussion of the use of consequences in legal adjudication was Scottish philosopher Neil MacCormick.[40] He has an intense bibliographical production about the relations between law, morality and politics, and it is worth highlighting, in what concerns the present work, his theory of legal argumentation.

In his paper, the author highlights the importance of legal decisions as rules of conduct to be applied for the future. For him, the deliberations: "[...] do not report, but set behavioral patterns. They do not discover the consequences of certain conditions, but rather order which consequences will follow certain conditions. They do not present a world model, but present a model for the world[41]"

Thus, deciding is nothing more than setting standards of behavior, either for the recipient of the rule or for the judge. This aspect is relevant to understand the idea of "legal consequences", according to the theory of

---

38 Id., *Direito, pragmatismo e democracia,* op. cit., pg. 1.

39 Ibid., pg. 63-64.

40 Donald Neil MacCormick was born in Glasgow, Scotland on May 27, 1947 and died on April 5, 2009. He was a noted jurist who excelled in both academia and political career, having studied English philosophy and literature at the University of Glasgow and law at Oxford, where he was a student of Herbert LA Hart. He served for 36 years as *regius teacher* in *public law* and the *law of nature and nations* at the University of Edinburgh, Scotland (SILVA, Neimar Roberto de Souza e. Direito e argumentação jurídica em Neil MacCormick. *Legis Augustus,* Rio de Janeiro, v. 4, No. 2, pg. 29-41, Jul./Dec. 2013. pg. 32)

41 MACCORMICK, Neil. *Argumentação jurídica e teoria do direito.* São Paulo: Martins Fontes, 2009. pg. 132.

Neil MacCormick. For him, the legal consequences to be considered by the judge are not only the causal effects and the particular results of the decision. There are also the likely impacts that the decision will have on the people's behavior.[42]

Precisely for this reason, the model of justification of the legal decision based on consequences must consider the universalizing character of the proposed solution. This implies that the decision will not only serve as a criterion for the present case, but for all other analogues.[43]

According to Neil MacCormick, the argument used in the decision has an intrinsically evaluative character about the acceptability or unacceptability of these consequences, which presupposes, from the point of view of the person evaluating them, a certain amount of subjectivism.[44] For him, the limits to this subjectivity are the need to preserve the cohesion and coherence of the legal system.

In the first respect, Neil MacCormick points out that any deliberation, however desirable as it may be to consequentialist grounds, cannot be adopted if it is in contradiction with some valid and binding rule of the system.[45]

Regarding the duty of coherence, decisions shall not meet this aspect if they are not in accordance with any intelligible value or line of action of the legal system, that is, "they do not serve as a means of the social order, they do not involve the organization of intelligible and mutually compatible values[46]".

The pretense of cohesion of a judicial decision is even expected, if we are honoring a legal order that privileges rationality and legal certainty. However, as for consistency, it is understood that such an attribute can be difficult to achieve in practice, especially when dealing with cases involving unsurpassed moral dissent. The legal system honors numerous values, varied lines of action that may clash in certain contexts.

Neil MacCormick advocates the use of consequences when problems of interpretation of the rule arise. In his words, "when problems of interpretation arise, they can only be resolved by resorting to consequentialist arguments and/or principled arguments that involve both to each other an appeal to values conceived as essential to the law.[47]"

---

42 Ibid., pg. 139.
43 Ibid., pg. 137.
44 Ibid., pg. 133-134.
45 Ibid., pg. 135.
46 Ibid., pg. 136.
47 Ibid., pg. 277.

In deciding difficult cases, the judge must take the following path, in the words of Neil MacCormick:

> The addition of the principle or analogy, although necessary, is not sufficient to fully justify the decision. The deliberation that directly governs the case must be tested by consequentialist argumentation as well as by reasoning from the "coherence" involved in resorting to principle or analogy. And in exactly the same way [...] the test should be applied to check the cohesion. It must be shown that the decision in question does not contradict any established rule of law given a correct interpretation or explanation of such a rule in the light of public interest principles and policies.[48]

Neil MacCormick's theory is qualified by Walter Guandalini Júnior as integrator of subsumption and argumentation in the understanding and application of law.[49]

Thus, the Scottish author's opinion allows the use of consequences in judicial adjudication in difficult cases, but requires that the decision be consistent with the principles emanating from the legal order and does not contradict any other rule of the legal system. In other words, there is a clear overlap of the legal order over the consequences, since that is a criterion for assessing the appropriateness of the decision taken from it.

4. Criticism of legal pragmatism

Misabel Derzi and Thomas Bustamente oppose the use of economic analysis of law in legal argumentation. Although the authors' work has not dealt with legal pragmatism and consequentialism broadly, their conclusions can be extended to this theory, since they defend the idea of the rule of law, which presupposes a process of autonomization and differentiation of the legal system.[50]

---

48 Ibid., pg. 326.

49 GUANDALINI JR., Walter. Da subsunção à argumentação: perspectivas do raciocínio jurídico moderno. *Revista da Faculdade de Direito UFPR*, Curitiba, v. 54, pg. 160, Dec. 2011. Available at: <https://revistas.ufpr.br/direito/article/view/30734/19847>. Accessed on: Mar 29, 2019.

50 DERZI, Misabel de Abreu Machado; BUSTAMANTE, Thomas da Rosa de. A análise econômica de Posner e a ideia de estado de direito em Luhmann: breves considerações críticas. *Rev. Fac. Direito UFMG*, special n. in memory of prof. Washington Peluso, pg. 327-352, 2013. pg. 328.

In the mentioned study, the professors of the Universidade Federal de Minas Gerais allude to Niklas Luhmann's theory of systems and propose the operational closure of the law. For Misabel Derzi and Thomas Bustamente, although the law feeds on factors external to the environment, being cognitively and semantically open, it does so through a selection process, which converts external data into its own system, through the legislative process.[51]

Thus, the structural coupling between law and the political/economic environment occurs through filters managed by the legislator. This aspect conditions the performance of the judges, who, according to the authors, are not entitled to "directly [...] to reexamine the economic interests involved, guided by the maximization of wealth and, monocratically, to abandon the filter that the legislator has already used and, thus, rule out its choice[52]"

José Maria Arruda de Andrade also imposes reservations on the indiscriminate use of economic instruments by law. According to the author, the academic debate about the influence of other knowledge on the law seems to be made, often, between extreme positions, of pure and simple denial of this relationship, on the one hand, and of adopting another knowledge without further reflection on the risks of such an argumentative openness about the safety or operative consistency of the law.[53]

In an analysis of the use of economics by competition law, the author defends the use of economics in competition law as a guarantee of the arguments, as evidence of the allegations made, not as the legal basis of a decision.[54]

For José Maria Arruda de Andrade, if used in this way, economics shall contribute to the strengthening of contemporary legal positivism and legal certainty, not, on the contrary, to its insecurity.

Diego Arguelhes and Fernando Leal expose David Luban's critique of legal pragmatism as to his inability to reduce uncertainties in the settlement of controversies through the use of philosophical, moral and metaphysical conceptions. According to them, "what legal pragmatism has to offer a) is compatible with practically any philosophical position, and b) it is already

---

51 Ibid., pg. 350.
52 Ibid., pg. 351.
53 ANDRADE, José Maria de Arruda. *Economização do direito concorrencial.* São Paulo: Quartier Latin, 2014. pg. 18-19.
54 Ibid., pg. 190.

common ground — paved by 'professional judgment', we might say — between legal operators and theorists.[55]"

In the same vein, Mariah Ferreira and Evanilda Bustamante criticize Richard Posner's pragmatism because of his latent subjectivity. According to the authors,

> [...] each judge shall have its own conception of the common good and the best consequence of the judicial decision. Thus, the daily pragmatism defended by Posner seems to authorize (or validate) a latent subjectivity in the judicial decision-making process, and one of the great problems of this theory is that the author himself is not able to point out what such ends would be, which contrary to what it claims, creates legal uncertainty.[56]

Luis Fernando Schuartz points out that legal pragmatism may not contribute to stability in normative expectations and relative predictability of decisions, which are important values for economic agents.[57]

Another difficulty to be faced by legal pragmatism is the lack of data and information with statistical confidence so that the authority can define, with a minimum degree of certainty, which is the best decision for the case. According to Luis Fernando Schuartz, the problem is not in the consistency and robustness of the theories of economic analysis of law, "[...] but in the access to the information necessary to ensure decisions satisfy the conditions of adequacy imposed by such theories and concepts[58]"

The author also points out as an obstacle to this model of judicial adjudication in Brazil the supposed lack of institutional capacity of organizations, especially due to the lack of technically trained personnel,

---

55 Diego Werneck Arguelhes e Fernando Leal, pragmatismo como [meta]teoria da decisão judicial, op. cit., pg. 181.

56 BUSTAMANTE, Evanilda Nascimento de Godoi; FERREIRA, Mariah Brochado. Julgando pelas consequências: o pragmatismo cotidiano de Richard Posner e sua influência no processo de tomada de decisões judiciais. In: CONGRESSO INTERNACIONAL DE DIREITO CONSTITUCIONAL E FILOSOFIA POLÍTICA, I, 2015, Belo Horizonte. O funcionamento da corte constitucional. *Anais*... Belo Horizonte: Initia Via, 2015. v. 2, pg. 22-34. pg. 32.

57 SCHUARTZ, Luis Fernando. Consequencialismo jurídico, racionalidade decisória e malandragem. *Administrative Law Review*, Rio de Janeiro, v. 248, pgs. 130-158, May 2008. pg. 146. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/41531>. Accessed on: Feb 27, 2019.

58 Ibid., pg. 135.

pertinent information and readily available databases, besides the excessive work schedule.[59]

There are, also, authors who minimize the revolutionary character of pragmatic theory. Along these lines, Diego Arguelhes and Fernando Leal state that, "[...] if 'legal pragmatism' is just a kind of common sense provided with some vague philosophical pedigree, it has little to contribute to a relevant discussion about the judicial decision.[60]"

Thaís Nunes de Arruda also raises objections to legal pragmatism, which, in his view, involves the creation of public policies by the judge. For her, "[...] the pragmatist judge, rather than interpreting the existing law, considers the consequences of possible alternative decisions [...] is a judge concerned with intervening in reality, creating, with his decisions, true public policies.[61]"

For Luis Fernando Schuartz, consequence analysis may mean a discussion about ethical-political preferences or values.[62] According to him, "judgments guided in their own consequences are typically decisions under subjective uncertainty, and it is difficult in this field to move oneself to make use an expression of Niklas Luhmann, beyond the condition of exercises of imagination with legal force.[63]"

Among the authors who oppose legal pragmatism is the prominent role of Ronald Dworkin. He has several works in which he develops the idea of law as integrity and emits a frankly antagonistic dialogue with pragmatism, in particular with the theory of Richard Posner.

In short, he criticizes the difficulty that pragmatism imposes on the role of the judiciary and law itself in stabilizing social expectations. For Ronald Dworkin:

> The pragmatist takes a skeptical attitude to the assumption that we believe to be embodied in the concept of law: He denies that past political decisions alone offer any justification for whether or not to use the coercive power of the state. He finds the justification necessary for

---

59 Ibid., pg. 136.

60 Diego Werneck Arguelhes e Fernando Leal, pragmatismo como [meta]teoria da decisão judicial, op. cit., pg. 210.

61 ARRUDA, Thais Nunes de. *Como os juízes decidem os casos difíceis?* A guinada pragmática de Richard Posner e as críticas de Ronald Dworkin. Thesis (masters) - São Paulo: Universidade de São Paulo, 2011. pg. 62.

62 Luis Fernando Schuartz, Consequencialismo jurídico, racionalidade decisória e malandragem, op. cit., pg. 132-133.

63 Ibid., pg. 135

> coercion in justice, efficiency, or some other contemporary virtue of the coercive decision itself.[64]

In the author's view, pragmatism sins by increasing legal uncertainty, given the judges' differing conceptions of what is good for the future:

> Judges will certainly differ on which rule would indeed be better for the future without regard to the past. In some cases they will not agree on the likely consequences of a specific rule and in others because they have different conceptions of what a good community is.[65]

In another passage, Ronald Dworkin exposes his distrust of pragmatism's ability to fulfill its theoretical purpose. According to him, if the judges made a selection in the legislation, enforcing only the laws they passed, that would lead to the failure of the pragmatic goal, because instead of improving things, they would make them much worse.[66]

As is well known, the author defends the idea of law as integrity, in which the political principles approved by the legislature and the procedures provided for judgments are respected and fully applied when deciding a dispute. In his words, "integrity, more than any superstition of elegance, is the life of law as we know it.[67]"

At times, the criticisms of pragmatism seem to be overreacting to other rhetorical exaggerations by the pragmatic authors themselves. Of course, no judge should act as an articulator of public policy, nor disregard the letter of the law in the name of its moral predilections.

Although such a stance may occur in reality, in our view, this is far from being a rule, either in everyday practice or in pragmatic theory. Finally, as highlighted in the previous chapter, both Richard Posner and Neil MacCormick argue that the rules set forth are also part of the instrumentality used by the judge, and the latter author imposes the duty of cohesion and coherence of the decision taken from consequences.

Moreover, it is possible to infer from many passages of authors considered pragmatic that the use of consequences and contextual circumstances for legal

---

64 DWORKIN, Ronald. *O império da lei*. São Paulo: Martins Fontes, 2003. pg. 185.
65 Ibid., pg. 185-186.
66 Ibid., pg. 187.
67 Ibid., pg. 203.

adjudication should occur only when the judge faces difficult cases, that is, when, in the judge's conception, the tooling is offered by legal formalism.

In any event, the difficulty of eliminating legal uncertainty in areas of indetermination of law must be recognized. The use of consequences may not be able to make legal tendering more objective given the complexity of making predictions, choosing the best consequences and thus setting the ideal norm for the future.

On the basis of this idea, the risk that the consequentialist approach brought by LINDB shall have a merely rhetorical effect on administrative and judicial decisions is not negligible. If so, the provisions will have little effect in reducing uncertainty and providing more legal certainty, which, as seen, were the intended objectives of the legislative amendment.

5. The interpretation of art. 20 of the LINDB

Having overcome the presentation of the theoretical framework of pragmatic and consequentialist theories, as well as the criticisms addressed to it, it is appropriate to enter the main objective of this work, namely the interpretation of art. 20 of the LINDB.

Following is the wording of the provision:

> Art. 20. At the administrative, controlling and judicial levels, it will not be decided based on abstract legal values without considering the practical consequences of the decision.
> Sole paragraph. The motivation shall demonstrate the necessity and adequacy of the imposed measure or the invalidation of an act, contract, adjustment, process or administrative rule, including in view of possible alternatives.

As we have seen, the provision expressly introduces the use of consequences in judicial adjudication in the national court system. However, the use of this source is limited to situations in which the decision criteria are abstract legal values, in line with the next topic.

5.1 Abstract legal values

In Brazil, legal values are not sources of law formally recognized by the legal system. So much so that art. 4 of the LINDB states that "when the law is silent, the judge shall decide the case according to analogy, customs and general principles of law."

Nevertheless, legal values may eventually be invoked as a decision criterion, especially in the interpretation of open content standards and in non-standard situations, that is, in the integration of gaps.

Among the abstract values that can be listed as underlying the legal order (justice, freedom, social peace, common good), most of them are either rarely invoked as a decision criteria because of their high degree of abstraction, or have already been incorporated, a legal principle (legal certainty, due process of law, right to a full defense and adversarial system, good faith).

It is not for any other reason that Tiago Gagliano Pinto Alberto points out that instead of "abstract legal values", it would rather have been that "the law had mentioned 'indeterminate legal concepts', 'general clauses', 'principles', or some expression that can be scanned and examined at an acceptable ontological-normative level[68]"

Problems of the indetermination of the language of law and the impossibility of foreseeing the facts subject to the rule have, to a certain extent, shifted the transfer of the role of defining the meaning of the rules to the authority in charge of settling disputes.

Considering that legal values underlie rules and principles, as already seen, it is understood that they are explicitly or implicitly invoked in decisions of cases situated in areas of indetermination of law, either by the absence of a rule or by the vagueness of its terms.

With this, we are of the opinion that art. 20 of the LINDB applies when the decision is based on indeterminate concepts, whether those arising from legal principles[69], general clauses and legal values, whether extracted

---

[68] ALBERTO, Tiago Gagliano Pinto. A nova (?!) decisão judicial e o dilema dos prisioneiros: o art. 20, caput, da LINDB. *Migalhas,* May 8, 2018. Available at: <www.migalhas.com.br/dePeso/16,MI279546,21048-A+nova+decisao+judicial+e+o+dilema+dos+prisioneiros+o+art+20+caput+da>. Accessed on: Apr 20, 2019.

[69] In the same sense, Marçal Justen Filho interprets the article as applicable to decisions based on principles (JUSTEN FILHO, Marçal. Art. 20 of the LINDB - duty of transparency, concreteness and proportionality in public decisions. *Administrative Law Review,* Rio de Janeiro, pg. 13-41, Nov. 2018. pg. 15. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/77648%22>. Accessed on: Mar. 29, 2019).

from rules with a high degree of vagueness in view of inaccuracies in their text.[70]

The provision represents a milestone in decision theory in Brazilian law by expressly including consequentialism as a criterion for adjudication in the administrative, controlling and judicial spheres.

It is included in the context of refining the legal argument of decisions taken in areas of indetermination arising from the opening of the normative text. The normative text seems to seek to neutralize the phenomena of neoconstitutionalism and principiologism, specifically in the spaces left open by the legal system.

Art. 20 of the LINDB, therefore, is introduced as an attempt to increase rationality and reduce the discretionary authority of courts and other authorities in the interpretation of abstract legal values and indeterminate concepts.

The provision introduced an argumentation of a second system in the theory of decision in force in the Brazilian legal system, when the syllogism is not sufficient for the solution of the case. It is, therefore, a way of deciding used in situations of genuine uncertainty when the correct answer is not found on the basis of first order reasons.

However, care must be taken that the appeal to consequences, vague and unproven prognoses replaces the earlier appeal to abstract principles and values, as seen in the previous chapter. The fear is that the use of consequences shall serve as a rhetorical device to veil the moral preferences of the decision maker. In order to avoid this risk, the judge must seek to rely on hard data and demonstrate the need and appropriateness of the solution on the grounds of his decision.

The provision changed the theory of judicial and administrative adjudication, or at least expressed the intuitively prevailing judicial practice of also considering the consequences of the deliberation to be adopted, in situations contained in areas of a lack of determination of the law.

After all, in the precise words of Marçal Justen Filho, "every decision based on general and abstract norms presupposes a weighting process inextricably related to the existing phatic universe.[71]", which imposes, as a logical consequence, the evaluation of the possible consequences of alternative decisions.

---

[70] In a close sense, Marçal Justen Filho points out that the aforementioned provision relates to decisions based on principles and values of abstract dimension (Ibid., pg. 15).

[71] Ibid., pg. 23.

The consequentialism proposed in art. 20 of the LINDB seems to be less broad than the one posited by Richard Posner's theory, since the provision admits the assessment of consequences only in cases where the decision criteria has abstract legal values — indeterminate principles and concepts, in our interpretation —, unlike the author, who accepts consequentialist adjudication even when there is a legal rule, if its application leads to drastic consequences.

In an interpretation contrary to the sense of art. 20 of the LINDB, there is no room for the use of consequences in the rule's certainty zones, even if their incidence leads to drastic consequences. Herein lies, therefore, the difference of consequentialism introduced by the provision of the one defended by Richard Posner.

The provision seems to suggest that the assessment of the consequences begins after the attempt to extract the valid rule to resolve the case ends, that is, after the effort to interpret the available law. At the end of this hermeneutic process, if the only decision criteria is abstract legal values or indeterminate concepts, that is, when the case still remains in the zone of indetermination of law, the authority must use consequentialist analysis as a decision criterion.

Thus, the consequentialism of art. 20 of the LINDB seems to be in line with Neil MacCormick's theory, which provides for the use of second-order justification, including consequence assessment, to solve difficult cases not covered by the syllogism of legal rules.

5.2 Practical consequences of the decision

At this point, it is necessary to discuss what would be the practical consequences of the decision to be considered in the adjudication proposed by the provision. In other words, the question is: what kind of consequences should be considered in the decision, according to art. 20 from LINDB?

According to Marçal Justen Filho, the prediction of the practical effects of the decision is indispensable to determine the compatibility of the choice made with the abstract value invoked.[72] In the author's words, the provision

[72] Ibid., pg. 29.

requires the authority to formulate a projection of the possible scenarios resulting from the decision taken.[73]

It is important to note that the fact that the rule required consideration of the consequences of possible solutions to the case does not imply that the authority is omniscient of reality and, moreover, the ability to predict all future events that will follow from its decision.

In this sense, Marçal Justen Filho points out that "the requirement of art. 20 does not imply demanding the ability of the authority to predict what is unpredictable or to know aspects that cannot be assessed from reality. That is, a superhuman condition is not imposed on authority.[74]"

For the plaintiff, the provision only requires the judge to take into account the political, social and economic relevance of the decisions it will take[75], which implies the adhesion of the legal scholar to the thesis of the broad opening of the right to *outputs* provided by other social sciences outside the law, that is, the coupling of the legal system to other systems through the adjudication activity promoted by the judge.[76]

Basile Christopoulos addressed the issue at work regarding the use of consequentialist arguments in Federal Supreme Court rulings in controlling the constitutionality of budget rules.

The author used Neil MacCormick's theoretical framework, but went beyond the kind of consequentialism accepted by the Scottish author in arguing "the possibility of classifying as economic consequence the economic and social consequences that are effectively *predictable and reflect* on the fact analyzed, *provided they are protected by legal rules*[77]" (emphasis added).

Thus, the author only admits the use of consequences that have been internalized by the legal system, that is, that have been recognized by valid rules, thus becoming what he calls legal consequences.[78]

---

[73] Ibid.

[74] Ibid., pg. 30.

[75] Ibid.

[76] As seen, Misabel Derzi and Thomas Bustamente, as critics of pragmatism, argue that the structural coupling between law and the political/economic environment must take place through filters managed by the legislature.

[77] CHRISTOPOULOS, Basile. *Controle de constitucionalidade de normas orçamentárias:* o uso de argumentos consequencialistas nas decisões do Supremo Tribunal Federal. Dissertation (Doctorate in Economic and Financial Law) - Faculty of Law, Universidade de São Paulo, São Paulo, 2014. pg. 88.

[78] The meaning of the term "legal consequence" is different from that used by Neil MacCormick in the passage of his work referenced in footnote 60.

In any case, it is understood, in line with the theories of Richard Posner and Neil MacCormick, that the decision-making body, in the administrative, controlling and judicial spheres, must investigate the mediate and systemic consequences of the decisions it makes, that is, it must evaluate not only the consequences for the parties as well as the consequences of the decision as an ideal norm, which will serve as the society's standard of conduct and model for deciding future cases.

In addition, the parties need to subsidize the decision-making authority with information and technical elements that enable the various possible consequences of possible decisions to be assessed if the cause of action is for abstract values and indeterminate concepts.

Finally, as is ceded in civil procedural law, the burden of proof rests with the plaintiff, as to the constitutive fact of his right, and the defendant, as to the existence of an impeding, amending or the extinguishing fact of the plaintiff (art. 373 of Code of Civil Procedure (CPC)). Such a rule imposes the duty of the parties to present the evidence with which they intend to demonstrate the truth of the alleged facts.

In the case of the administrative and controlling sphere, it is incumbent upon the investigating body to bring similar elements of fact which are necessary for the assessment of consequences, if the cause of the request is likewise abstract values and indeterminate concepts. With this, the decision-making authority shall be able to adopt the best decision, in the light of the criteria established in art. 20 of the LINDB.

5.3 The scope of application of art. 20 of the LINDB

Another issue to be defined is whether decisions in the administrative, controlling and judicial spheres can draw on abstract legal values when there is a legal rule applicable to the case, and therefore decide solely on the practical consequences of the decision.

Art. 20 of LINDB absolutely imposed the overcoming of deontology by consequentialism. As can be seen from the simple reading of the legal text, the use of consequences, as an additional source available to the judge, is only possible if the authority relies on abstract legal values to decide, or, as seen in topic 5.1, if the case enter the zone of indetermination of law by the use of vague and indeterminate principles and other concepts. This, therefore, is the scope of application of art. 20 of the LINDB.

The provision introduces a new form of control of acts performed by management. This is because the administrative activity and, therefore, the control over it have as their beacons a normative order loaded with open concepts and abstract values, such as the public interest.

Moreover, an even broader notion of the principle of legality now exists, now called the principle of legality. According to Diogo de Figueiredo Moreira Neto: "The principle of legality corresponds to what was stated as a 'principle of legality', if taken in a broad sense, that is, not restricted to mere submission to the law, as a product of legislative sources, but of reverence to the whole legal order[79]".

Thus, even if there is a legal rule, its impact on a specific case, for purposes of invalidating an act, contract, adjustment, process or administrative rule, may be impacted by the existence of other abstract principles and values provided for in the normative order, such as the public interest. Thus, it will be up to the authority, in its day to day operation, to interpret the public interest, to apply it to the hypotheses of living reality.[80]

Following the standard of rationality advocated by Gerson dos Santos Sicca for the application of indeterminate concepts, the administrative authority, when interpreting the statement of the rule, must identify the assumptions of fact and law, value them and reach the final decision after confronting all the relevant aspects.[81]

With the advent of art. 20 of the LINDB, in addition to this weighting activity, the administrative authority and control bodies should address the practical consequences of the decision when examining the legality of administrative acts for purposes of invalidation of the act.

The article introduces a consequentialism of means, not ends. It suggests that if the decision criteria is an abstract value, either by the indeterminacy of the rule or by its absence, the interpreter should choose the decision that best suits this value.

---

[79] MOREIRA NETO, Diogo de Figueiredo. *Curso de direito administrativo:* parte introdutória, parte geral e parte especial. Rio de Janeiro: Forense, 2009. pg. 85.

[80] BORGES, Alice Gonzalez. Interesse público: um conceito a determinar. *Administrative Law Review,* Rio de Janeiro, v. 205, pg. 109-116, Jul./Sep. 1996. pg. 109.

[81] SICCA, Gerson dos Santos. Conceitos Indeterminados no direito administrativo e discricionariedade: limites da vinculação do administrador no estado democrático de direito. *AGU Magazine,* sl, pg. 14, Dec. 2005. Available at: <https://seer.agu.gov.br/index.php/AGU/article/view/500>. Accessed on: Apr. 4, 2019.

However, the provision does not resolve which value to choose in the areas of indetermination of entitlement. Finally, in Hart's precise words, "we can rationally discover and discuss what means are appropriate for a particular purpose, but the ends are not amenable to rational discovery or debate.[82]"

In any event, it is for the decision-making authority to motivate the chosen option. This aspect is important to enable decision control, not only by the courts themselves, but also by the legal community.[83]

6. Conclusions

This paper had as its main objective to interpret art. 20 of the LINDB, which established the duty of the administrative, controlling and judicial authority to consider the practical consequences of the decision when deciding on the basis of abstract legal values.

The reintroduction of values and the recognition of the normative force of principles in legal adjudication, with the post-positivist and neo-constitutionalist movements, increased the discretion in the interpretation of legal rules settled.

It was precisely in this context that Law No. 13.655/2018 was adopted, which included several provisions in the LINDB, with the purpose of increasing legal certainty and predictability of decisions involving public law. This research focused on the interpretation of the new art. 20, which explicitly introduced pragmatism in the solution of cases involving this branch of law.

The use of the consequences as a decision criteria should occur when we are faced with more than one valid solution within the system, either because of the absence of a rule or because of its vagueness. Where the decision is based on abstract values, principles and other vague and undetermined concepts, that is, in areas of indetermination of law, the authority should assess the consequences of possible remedies.

---

[82] HART, Herbert Lionel Adolphus. O positivismo e a separação entre o direito e a moral. In: _. *Ensaios sobre teoria e filosofia do direito*. Rio de Janeiro: Elsevier, 2010. pg. 91.

[83] CHRISTOPOULOS, Basile. Judiciário não pode ser refém das consequências de suas decisões. *Consultor Jurídico,* June 22, 2017. Available at: <www.conjur.com.br/2017-jun-22/basile-christopoulos-juiz-nao-refem-consequencialismo>. Accessed on: Mar. 28, 2019.

The provision cannot be interpreted to allow the text to deviate from the law by reason of the negative consequences that the solution advocated by the rule may entail. What the article seems to suggest is that, with two solutions deduced from the legal system, the decision that generates the best consequences must be made.

To do so, one must inquire into the mediate and systemic consequences of possible solutions. It is necessary to evaluate not only the consequences for the parties involved in the case, but also for the community, as the recipient of the decision as the ideal rule, as the standard of conduct of society and model for deciding future cases.

The parties and the investigating body, in the case of proceedings in the administrative and controlling spheres, shall bring the information and evidence necessary for the authority to verify consequences if the cause of the request is abstract values and undetermined concepts.

Finally, the responsible authority should ground the chosen option, so as to allow control of the decision, not only by the courts themselves, but also by the legal community.

Acting according to these characteristics, the novel provision may contribute to the refinement of case law theory involving public law.

References

ALBERTO, Tiago Gagliano Pinto. A nova (?!) decisão judicial e o dilema dos prisioneiros: o art. 20, caput, da LINDB. *Migalhas,* May 8, 2018. Available at: <www.migalhas.com.br/dePeso/16,MI279546,21048-A+nova+decisao+judicial+e+o+dilema+dos+prisioneiros+o+art+20+caput+da>. Accessed on: Apr. 20, 2019.

ALEXY, Robert. *Teoria da argumentação jurídica:* a teoria do discurso racional como teoria da justificação jurídica. Rio de Janeiro: Forense, 2013.

ANDRADE, José Maria de Arruda. *Economização do direito concorrencial.* São Paulo: Quartier Latin, 2014.

AQUINO, Tomás de. *Suma teológica.* São Paulo: Loyola, 2005. v. 4.

ARGUELHES, Diego Werneck; LEAL, Fernando. Pragmatismo como [meta] teoria da decisão judicial: caracterização, estratégias e implicações. *In:*

SARMENTO, Daniel; CRUZ, Álvaro Ricardo de Souza (Org.). *Filosofia e teoria constitucional contemporânea.* Rio de Janeiro: Lumen Juris, 2009.

ARRUDA, Thais Nunes de. *Como os juízes decidem os casos difíceis?* A guinada pragmática de Richard Posner e as críticas de Ronald Dworkin. Thesis (Master) — Universidade de São Paulo, São Paulo, 2011.

ÁVILA, Humberto Bergmann. A distinção entre princípios e regras e a redefinição do dever de proporcionalidade. *Administrative Law Review,* Rio de Janeiro, v, 215, pg. 151-179, Jan./Mar. 1999.

BOBBIO, Norberto. *O positivismo jurídico.* Lições de filosofia do direito. São Paulo: Ícone, 1995.

BORGES, Alice Gonzalez. Interesse público: um conceito a determinar. *Administrative Law Review,* Rio de Janeiro, v. 205, pg. 109-116, Jul./Sep. 1996.

BUSTAMANTE, Evanilda Nascimento de Godoi; FERREIRA, Mariah Brochado. Julgando pelas consequências: o pragmatismo cotidiano de Richard Posner e sua influência no processo de tomada de decisões judiciais. *In:* CONGRESSO INTERNACIONAL DE DIREITO CONSTITUCIONAL E FILOSOFIA POLÍTICA, I, 2015, Belo Horizonte. O Funcionamento da Corte Constitucional. *Anais...* Belo Horizonte: Initia Via, 2015. v. 2, pg. 22-34.

CHRISTOPOULOS, Basile. *Controle de constitucionalidade de normas orçamentárias:* o uso de argumentos consequencialistas nas decisões do Supremo Tribunal Federal. Disseration (Doctorate in Economic and Financial Law) — Faculty of Law, Universidade de São Paulo, São Paulo, 2014.

CHRISTOPOULOS, Basile. Judiciário não pode ser refém das consequências de suas decisões. *Consultor Jurídico,* June 22, 2017. Available at: <www.conjur.com.br/2017-jun-22/basile-christopoulos-juiz-nao-refem-consequencialismo>. Accessed on: Mar. 28, 2019.

DERZI, Misabel de Abreu Machado; BUSTAMANTE, Thomas da Rosa de. A análise econômica de Posner e a ideia de estado de direito em Luhmann: breves considerações críticas. *Rev. Fac. Direito UFMG,* special n. in memory of prof. Washington Peluso, pg. 327-352, 2013.

DWORKIN, Ronald. *O império da lei.* São Paulo: Martins Fontes, 2003.

FERNANDES, Ricardo Vieira de Carvalho; BICALHO, Guilherme Pereira Dolabella. Do positivismo ao pós-positivismo jurídico. O atual paradigma

jusfilosófico constitucional. *Revista de Informação Legislativa,* Brasília, v. 48, No. 189, pg. 105-31, Jan./Mar. 2011.

GUANDALINI JR., Walter. Da subsunção à argumentação: perspectivas do raciocínio jurídico moderno. *Revista da Faculdade de Direito UFPR,* Curitiba, v. 54, Dec. 2011. Available at: <https://revistas.ufpr.br/direito/article/view/30734/19847>. Accessed on: Mar. 29, 2019.

HART, Herbert Lionel Adolphus. O positivismo e a separação entre o direito e a moral. In: __. *Ensaios sobre teoria e filosofia do direito.* Rio de Janeiro: Elsevier, 2010. pg. 53-78.

JORDÃO, Eduardo. Art. 22 da LINDB — acabou o romance: reforço do pragmatismo no direito público brasileiro. *Administrative Law Review,* Rio de Janeiro, ed. esp., pg. 63-92, Nov. 2018. ISSN 2238-5177. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/77650>. Accessed on: Mar. 29, 2019.

JUSTEN FILHO, Marçal. Art. 20 da LINDB — dever de transparência, concretude e proporcionalidade nas decisões publicas. *Administrative Law Review,* Rio de Janeiro, ed. esp., pg. 13-41, Nov. 2018. ISSN 2238-5177. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/77648%22>. Accessed on: Mar. 29, 2019.

KANT, Immanuel. *A metafísica dos costumes.* Bauru: Edipro, 2003.

MACCORMICK, Neil. *Argumentação jurídica e teoria do direito.* São Paulo: Martins Fontes, 2009.

___. *Retórica e o estado de direito.* Rio de Janeiro: Elsevier, 2008.

MARQUES NETO, Floriano de Azevedo Marques Neto; FREITAS, Rafael Véras. O artigo 28 da nova LINDB: um regime jurídico para o administrador honesto. *Consultor Jurídico,* May 25, 2018. Available at: <www.conjur.com.br/2018-mai-25/opiniao-lindb-regime-juridico-administrador-honesto>. Accessed on: Mar. 29, 2019.

MENDONÇA, José Vicente Santos de. A verdadeira mudança de paradigmas do direito administrativo brasileiro: do estilo tradicional ao novo estilo. *Administrative Law Review,* Rio de Janeiro, v. 265, pg. 179-198, Jan. 2014. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/18916>. Accessed on: Mar. 29, 2019.

MOREIRA NETO, Diogo de Figueiredo. *Curso de direito administrativo:* parte introdutória, parte geral e parte especial. Rio de Janeiro: Forense, 2009.

PIRES, Thiago Magalhães. Pós-positivismo sem trauma: o possível e indesejável no reencontro do direito com a moral. In: FELLET, André Luiz Fernandes; PAULA, Daniel Giotti de; NOVELINO, Marcelo (Org.). *As novas faces do ativismo judicial.* Salvador: Jus Podivm, 2011. pg. 29-72.

POSNER, Richard A. *A problemática da teoria moral e jurídica.* São Paulo: WMF Martins Fontes, 2012.

___. *Direito, pragmatismo e democracia.* Rio de Janeiro: Forense, 2010.

RADBRUCH, Gustav. *Filosofia do direito.* São Paulo: Martins Fontes, 2004.

REALE, Miguel. *Lições preliminares do direito.* São Paulo: Saraiva, 2000.

SALAMA, Bruno Meyerhof. *A história do declínio e queda do eficientismo na obra de Richard Posner.* Available at: <https://works.bepress.com/bruno_meyerhof_salama/35/>. Accessed on: Mar. 30, 2019.

SARMENTO, Daniel. O neoconstitucionalismo no Brasil: riscos e possibilidades. *In:* FELLET, André Luiz Fernandes; PAULA, Daniel Giotti de; NOVELINO, Marcelo (Org.). *As novas faces do ativismo judicial.* Salvador: Jus Podivm, 2011. pg. 73-114.

SCHUARTZ, Luis Fernando. Consequencialismo jurídico, racionalidade decisória e malandragem. *Administrative Law Review,* Rio de Janeiro, v. 248, pg. 130-158, May 2008. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/41531>. Accessed on: Feb. 27, 2019.

SICCA, Gerson dos Santos. Conceitos indeterminados no direito administrativo e discricionariedade: limites da vinculação do administrador no estado democrático de direito. *Revista da AGU,* s.l., Dec. 2005. Available at: <https://seer.agu.gov.br/index.php/AGU/article/view/500>. Accessed on: Apr. 4, 2019.

SILVA, De Plácido e. *Vocabulário jurídico.* Rio de Janeiro: Forense, 2005.

SILVA, Neimar Roberto de Souza e. Direito e argumentação jurídica em Neil MacCormick. *Legis Augustus,* Rio de Janeiro, v. 4, No. 2, pg. 29-41, Jul./Dec. 2013.

VALORY, Eduardo. Cinco Minutos de Positivismo Jurídico. *RFD — Revista da Faculdade de Direito da Uerj,* s.l., No. 23, July 2013. Available at: <www.e-publicacoes.uerj.br/index.php/rfduerj/article/view/5472/4760>. Accessed on: Apr. 27, 2019.