The "Introduction to Brazilian Law" Statute and the extension of parameters control administrative discretion: the law in an age of consequentialism*

A Lei de Introdução às Normas do Direito Brasileiro e a ampliação dos parâmetros de controle dos atos administrativos discricionários: o direito na era do consequencialismo

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ABSTRACT

This paper explores the horizons of control of governmental acts, taking as starting point the new text of the "Introduction to Brazilian Law" Statute (LINDB, in Portuguese), passed in 2018. Methodologically, I build on materials regarding consequentialist philosophy to better understand the meaning of art. 20 of the legal text. I demonstrate that the new statute broadens the parameters of control, by definitely abandoning the idea of formal legality, to promote a substantive control of the acts, from a consequentialist approach. In this context, the LINDB includes commands to control the proper evaluation of abstract legal values and also of the consequences of the administrative decisions. The presence and truthfulness of this motives, as of any other motives, are verifiable by the authorities in charge of controlling public activities, by the Prosecution Office and by the Judiciary.

KEYWORDS

Introduction to Brazilian Law Statute (LINDB) — control of administrative acts — substantial control and consequentialism

RESUMO

Este texto explora os horizontes do controle dos atos administrativos a partir dos novos dispositivos da Lei de Introdução às Normas do Direito Brasileiro (LINDB), aprovados em 2018. A metodologia utilizada é a revisão literária interdisciplinar, partindo de textos de filosofia consequencialista como ferramenta de compreensão do teor do art. 20 da norma. Demonstrasse que a lei promove uma ampliação dos parâmetros de controle de legalidade, abandonando, em definitivo, a ideia de legalidade formal, para promover o controle de juridicidade. A LINDB passa a incluir o controle da avaliação apropriada de valores jurídicos abstratos por intermédio das consequências da decisão projetada, as quais devem compor, de modo expresso, a motivação da decisão, sob pena de nulidade. A existência e a veracidade das consequências avaliadas são sindicáveis pelos órgãos de controle, pelo Ministério Público e pelo Poder Judiciário.

PALAVRAS-CHAVE

Lei de Introdução às Normas do Direito Brasileiro (LINDB) — controle dos atos administrativos — juridicidade e consequencialismo

1. Proposal

In 2018, after a long time, the Introduction to Brazilian Law Statute (LINDB) was significantly changed. The rule, that remained practically unchanged since 1942, received, all at once, the addition of 11 new provisions, which added a theme that the diploma did not even adress until then: legal certainty in the editing of administrative acts. LINDB, which has always been an important diploma for private international law, civil law and legal hermeneutics, was integrated into the universe of administrative law as well.

The way in which this change was made is far from the most commendable. The law considered to be the most important one in Brazilian Law, *Lex Legum*, was changed in a formally legal, but democratically reprehensible scenario. The bill of law spent years forgotten in the Brazilian Congress, not discussed neither by congressmen, nor in public hearings, being approved in a rush in a final vote in the Chamber of Deputies, having not even been submitted to vote in the plenary. Congresswoman Erika Kokai appealed this approval, but it was knocked down by a leaders' agreement.[1]

Despite this reprehensible democratic deficit, which always deserves to be remembered, the fact is that the law now exists and needs to be interpreted and applied. It is also a fact that, although the approved text is the result of the work and intense defense of its content by a group of notorious professors of administrative law, some of the best in the country, the hermeneutic activity shall start from the approved legal text, not from the intentions or desires of those who idealized it. It is in this sense that we propose the following analysis. As it will be shown, the approved text significantly expands the legality control milestone of Brazilian public administration. The new LINDB text configures the deepest restriction on administrative discretion ever published in Brazil, vastly extending the administrative duties on motivation

[1] In the deputy's appeal, there was express criticism on the lack of discussions during the process, which is not consistent with the importance of the rule: "The process in final mode did not allow the necessary public discussions on the topic that is of interest not only to Public Administration, but also to the citizens, as those administered, to the control agencies, like the Audit Courts and the Controllerships, and to the Judiciary.

The proposed legislative change, however, is addressed not only to representatives of the Public Administration, but also to the administrative control agencies and the Judiciary in the task of regulatory application, in addition to reaching, as a corollary, the sphere of citizenship of those administered itself". Application submitted on November 1, 2017.

and planning of public activities by integrating a new element: the practical consequences of the decision.

2. Control of administrative acts: discretion as a "Trojan horse in the rule of law"

Discretion "is the Trojan horse within the rule of law". Hans Huber's sentence, recalled by García de Enterría and Fernandez,[2] denotes the importance of not losing sight of the risks of an uncontrollable administration. Discretion is the concept that allows hiding reprehensible behaviors and decisions from law control, greatest mark of the contemporary democratic State. That is why, in the last 150 years, a good part of the evolution of administrative law was due to the impulse to ensure an even broader control of public managers' acts, progressively reducing their scope of unappealability.

It is clear that, as pointed out by the same authors, administrative discretion is, in many cases, necessary. There is no management without choices and, if the law does not impose a solution to the case, the decision is up to the administrator. However, postmodern constitutionalism,[3] increasingly imbued with indeterminate legal concepts, makes several elements, which previously comprised the universe of discretionary choice, become part of the universe of the norm and, thus, they serve as a control parameter, not as a liberation one. Supremacy of public interest, good faith, probity, morality, efficiency, impersonality are concepts that, constitutionalized, affect all acts of public managers, although — to their understandable anguish — do not make it clear, *ex ante*, what type of conduct is demanded from the person entrusted with public affairs.

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[2] GARCÍA DE ENTERRÍA, Eduardo; FERNANDEZ, Tomás-Ramón. *Curso de direito administrativo*. Translation: José Alberto Froes Cal. São Paulo: Revista dos Tribunais, 2014. v. 1. Digital edition.

[3] See, for all, BARROSO, Luís Roberto. Neoconstitucionalismo e constitucionalização do direito (o triunfo tardio do direito constitucional no Brasil). *Administrative Law Review*, v. 240, pg. 1-42, 2005. The phenomenon is, however, worldwide. See, for example, EISGRUBER, Christopher L. Constitutional self-government and judicial review: a reply to five critics. *University of San Francisco Law Review*, v. 37, pg. 115 and following, 2002; RESNIK, Judith. Managerial Judges. *Harvard Law Review*, v. 96, n. 92, pg. 377 and following, 1982; CHEMERINSKY, Erwin. The Supreme Court. 1988 term-foreword: the vanishing constitution. *Harvard Law Review*, v. 103, pg. 43 and following, 1989; ELHAUGET, Einer R. Does interest group theory justify more intrusive judicial review? *The Yale Law Journal*, v. 101, pg. 31 and following, 1991.

However, the simple indeterminacy of a legal concept does not imply a lack of normativity. The authors of administrative law have long realized that the control of administrative acts, in face of legality and constitutionality, also involves the implementation of indeterminate concepts that, to some extent, the Judiciary will elaborate *a posteriori*. As García de Enterría and Fernandez stated, "either good faith is present or not; either the price is fair or not; either probity lacked or not. *Tertium non datur*. This is the essence of the indeterminate legal concept: the indefiniteness of the statement does not mean indefiniteness of its applications".[4]

In this context, discretion is the autonomy granted to the administrator to seek, among a plurality of equally fair solutions, the one considered the most convenient and appropriate, a binomial immortalized by Hely Lopes Meireles.[5] If, in a given historical moment, this definition of the possible solutions, equally fair, passed only the evaluation of formal compatibility with legal commands, today it passes, inescapably, through a control of legality that also involves indeterminate concepts. Principles are no less binding just because they are more abstract. On the contrary, as Cármen Lúcia Antunes Rocha pointed out, on them "lies the essence of an order, its fundamental parameters, and guiders of the ordered system".[6]

Thus, it is undeniable that 1) indeterminate legal concepts represent a challenge for the public administrator and for the jurist; 2) when these concepts are embodied in the Constitution or in the law, they are endowed with normativity and, therefore, bind the management conduct; 3) operating in a system with such a profile increases the risk of public activity and hinders the work of agents who work based on the legal standard; 4) indeterminate concepts, since they are normative, can be implemented through jurisdictional action; and 5) the jurisdiction may invalidate administrative acts and impose sanctions on managers who unjustifiably move away from the dictates of the legal order, no matter if they are endowed with a greater or lesser degree of abstraction.

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4 Eduardo García de Enterría and Tomás-Ramón Fernandez, *Curso de direito administrativo*, op. cit.

5 "The administrative merit, therefore, is based on the evaluation of the reasons and on the choice of the object of the act, made by the Administration responsible for its practice, when authorized to decide on the convenience, opportunity, and justice of the act to be performed." MEIRELES, Hely Lopes. *Direito administrativo brasileiro*. 29. ed. São Paulo: Malheiros, 2004. pg. 153.

6 ROCHA, Cármen Lúcia Antunes. *Princípios constitucionais da administração pública*. Belo Horizonte: Del Rey, 1994.

In this complex and tumultuous scenario of administrative post-modernity, there is just one sure thing: "Public Administration is the activity of those who are not owners (…) because the holder of the managed interests is always the people, the collectivity as a whole, merely represented by the State".[7] Therefore, control is the essence of the administrative activity, and the ends, no matter how noble they may be, will never justify the means, and good intentions, no matter how good they may be, will continue to populate hell. The 1988 Constitution of the Federative Republic of Brazil chose, in its Article 5, XXXV, to submit all administrative acts that may cause injury or threat to the control of jurisdiction. In Brazil, the autonomous administrative jurisdiction system, which characterizes most continental European countries, has not been adopted. The Judicial Power, external to the administration, is responsible for giving the last word on more or less abstract legal values. Moreover, to prevent Judiciary from being an uncontrolled power, the deputies endowed with constituent powers havestructured a generous appeal system, which allows the same decision to be re-evaluated several times.

In short, the indeterminacy of an optimal solution for the case, clearly preset in the law, opens the possibility for choosing between equivalent solutions from the point of view of justice, of the parameters of good administration. In other words, the semantic opening of a legal concept is capable of creating a range of possible solutions, not of indiscriminately allowing any solution, nor of excluding the manager from the scope of controls, both internal (controllerships, audits) and external (Audit Courts, Prosecution Office, and Judiciary). Control of administrative acts, under the Rule of Law, is the rule, not the exception. The Trojan horse shall not be admitted within the walls of legality.

3. The revolution of administrative activity: control over consequences and Article 20 of LINDB

Historically, the production of administrative acts has focused on the compatibility of the act with the given legal order and with the factual reasons that led to its editing. To some extent, therefore, the act seeks to materialize

[7] DALLARI, Adilson Abreu. Controle compartilhado da administração da Justiça. *Rev. Jur.*, Brasília, v. 7, No. 73, pg. 1-17, 2005.

a future value, which is its purpose, guided by a given legal order, which it intends to implement, and motivated by past facts.

The first problem with this structure, already dealt with in the previous topic, is that the order to be achieved is sometimes composed of abstract rules, in relation to which several interpretations are admissible. It may be difficult to say whether the act is compatible with the existing law and, since the last word belongs to the jurisdiction, under Article 5, XXXV, of 1988 Constitution of the Federative Republic of Brazil, the interpretation of the content of the rule, control parameter, implies the definition of the validity or invalidity of the act *a posteriori*, at the moment in which it is questioned before the jurisdiction.

In this scenario, Article 20 of LINDB adds a new element, little considered until then: "In the administrative, controlling, and judicial spheres, decision shall not be made based on abstract legal values without considering its practical consequences". Thus, whenever the administration conduct, externalized in an act or a decision, is based on "abstract legal values", "the practical consequences of the decision" shall be taken into consideration. LINDB expressly intended to reduce the degree of abstraction of these legal values by integrating, in the analysis concerning their legality, the consequences that can be foreseen by their adoption. Somehow bending the arrow of time, LINDB turns the anticipation of future consequences into cause, into reason for adopting or not adopting an act, for which the legal order does not make the application hypotheses clear.

This disposition cannot receive a most timid adjective than revolutionary. It means that the public administrator is not allowed to make decisions based on abstract values without considering their practical consequences. Although it is difficult to define what an "abstract value"[8] is, there is no doubt that the most abstract value of the entire public law is, precisely, the supremacy of the public interest, from which the judgments of convenience and opportunity that make up the nucleus of the discretionary administrative acts derive. In the context of the various possible alternatives, defining that one which, once adopted, best accomplishes the public interest means, firstly, to define what public interest is. This is, inescapably, a concept of a very high degree of abstraction.

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[8] The difficulty is so great that Decree No. 9.830/2019, Article 3, item 1, which regulates the new provisions of LINDB, stated, in a reprehensible circularity of reasoning, that "For the purposes of the provisions of this Decree, abstract legal values are those provided for in legal norms with a high degree of indeterminacy and abstraction". That is, an abstract legal value is that which has a high degree of abstraction...

In such a context, the inescapable conclusion is that there shall no longer exist, in the Brazilian legal system, a discretionary act based solely on the administrator's prerogative of defining what public interest is, and then defining how that public interest is accomplished. LINDB expressly removed another significant piece of what was conventionally called the core of discretion: between two equally lawful options, it was up to the administrators to choose the one that reached the public interest, according to their conceptions. Now, between two equally lawful conceptions, the administrator shall investigate the practical consequences of adopting each one and exclude the one that implies less beneficial practical consequences to society, even if supported by legality.

The second conclusion is that the motivation of the discretionary administrative acts shall always contain a specific reasoning on the analysis of the practical consequences of the decision. Every discretionary administrative act is based on an abstract value — convenience and opportunity — so that all of them shall, according to LINDB, be valued in the light of their practical consequences. This valuation can only be considered existing if it is in the motivation of the act performed. It is not possible to foresee evaluation of consequences, nor to perform it *ex post*, only when the act is eventually questioned.

From this reasoning, the perception is that LINDB chose a parameter for the implementation of abstract values, contained in the legal system: the practical consequences of the decision. When facing an abstract value — which happens whenever a discretionary act should be practiced, given the judgment of convenience and opportunity —, the administrators shall project the possible practical consequences of that act into the future and, expressing, through motivation, the consequences that they see show that the act produced is the one that best fits the production of desirable social results, in the light of the expected consequences.

This conclusion immediately applies to the financial choices made by the administrator. Consider the recurring example of a mayor who needs to decide whether to apply public funds to build a portico —as the many built in recent years— or a nursery. In the abstract, both acts are lawful and were, until LINDB, included in the administrator's judgment of convenience and opportunity.

However, once the abstract value is considered based on consequences, it is easy to see that the portico is an illegal decision. Under no projection of consequences the convenience and opportunity of a portico can surpass

that of a nursery. Or, in other words, the practical consequences of building a nursery are, of course, more beneficial than those of building a portico,[9] so that, in the light of Article 20 of LINDB, building the portico would be illegal.

In another recent example, the President of Brazil, under the allegation of having to meet the fiscal targets in 2019, determined the contingency of the federal universities budget and other education expenses. This decision, which provoked protests and controversy, is still to be judged before the Federal Supreme Court, in the records of ADPF No. 595, proposed by the Brazilian Bar Association. The first question that shall be evaluated, in the light of the consequences, under the terms of LINDB, is whether there was any motivation that materialized the legal value of the financial managing atribution of the President of Brazil, in light of the practical consequences of the decision. The act that determines the contingency shall consider which are the effects of budgetary and financial limitations on the affected areas and if these effects would be less severe if such limitations occurred in other areas. For example, motivation should explain why contingency could not be applied to other areas, of less priority. We must emphasize: this is not to say that this decision, specifically, is wrong. Only that the judgment of its adoption can no longer, due to LINDB, be based only on the manager's convenience and opportunity (abstract values), and should, on the contrary, be motivated in the light of the practical consequences it implies.

Judging by the complaint of ADPF No. 595, this evaluation did not exist. According to the author,

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[9] The practical confirmation of this statement can be made by reading, for example, the Indication No. 930/2017, of the municipality of Macuco (RJ), through which a councilmember indicates to the Board of Directors the construction of a portico at the entrance of the municipality. The entire content of the reasoning is transcribed:

"The importance of this Project for our city, highlighting that the Municipality, due to its structure and development, already deserved a work of this magnitude, which will become a positive and characteristic highlight for the city of Macuco. The installation of the Portico and the Urbanization of the entrance to the city will bring, in addition to modernization, numerous benefits for all Macuco citizens. The portico gives the city a different emphasis, providing a more beautiful view, an entrance that attracts the attention of those who pass there.

The portal needs to be beautiful, to have the face of the city, keeping the identity of the municipality, and still be planned to be admired in the future. Macuco must and needs to invest in the visual appeal of the city, and a good start will be the portico.

The construction of a portico is a very important fact, above all, because it shows the importance of the transformations carried out in the city, thus contributing to raise the population's self-esteem, because the innovations carried out with intelligence and creativity show the love we have for our city". Available at: <http://cmmacuco.rj.gov.br/docs/indica/2017/930.pdf>. Accessed on: 27 Jun. 2019.

> The lack of reasoning in the contingency of resources allocated to Universities and Federal Institutes is evident. We do not know why universities were the main recipients of the measures, in a large proportion of their expenses. And, even worse, we do not know why the allocation of funds was made differently between one institution and another.

It is good to note that, even if there was any motivation, in observation of LINDB, the practical consequences of the decision and the possible alternative consequences shall be taken in account if the act were practiced otherwise.[10]

In summary, the duty to substantiate reasons for administrative decisions, which already derives from the republican principle, the principles and rules of administrative transparency and accountability, was added, by LINDB, to the duty to motivate taking into account the practical consequences of the decision. If the reasons for these consequences are lacking, the administrative act shall be considered invalid, since it is contrary to the text of the law.[11]

Thirdly and lastly, Article 20 of LINDB allows the control bodies to verify the existence of sufficient motivation regarding the practical consequences of the act, as well as of its possible alternatives. Since the moment in which the law incorporated the consideration of practical consequences as a concrete criterion for abstract values, not considering them means violating the law. The control, in this step, refers to legality, not to convenience, and, therefore, it is open to the Audit Courts, Prosecuting Office, and Judiciary.[12] Supporting a decision that does not consider the practical consequences of its adoption in the discretionary prerogative is illegal in Brazil. That is no small thing.

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[10] As for the specific case of the contingency of the education budget, it is worth noting that there are no rules in the budget guidelines law that establish not only the goals, but, above all, the constitutionally required priorities for the federal public administration (Article 165, item 2). These, in turn, shall guide the criteria to be adopted for the contingency of budgetary allocations and financial transactions, in order to harmonize the constitutional provisions that ensure administrative and financial autonomy to the Branches and agencies with power of self-government and to the universities (Articless 99 and 207). The lack of specific rules reinforces the need for detailed reasoning in order to decide on this issue.

[11] The Federal Supreme Court has already declared the invalidity of administrative decisions due to lack of reasoning on more than one occasion. See, for example, MS No. 25.763, report for judgement min. Gilmar Mendes, *DJ August 3*, 2015.

[12] We will deal with the way in which the consideration of consequences also affects control agencies in a subsequent topic.

4. Which consequences? A practical guide for the public administrator

Once consequences are chosen as a criterion for the achievement of abstract values, it is necessary to verify how this consideration could be made in order to provide the public administrator with a guide on how to behave, from now on, to comply with the legal text. It would be very negative if the consequences were evaluated only in an episodic, inconsistent way, without a concrete criterion for its operationalization.

This is not a very easy task, since there are several possible consequences and different ways of valuing them. For this reason, it may be useful to investigate the philosophical aspects of consequentialism, which can be used to guide the public manager in the task of building the motivation that LINDB demands from him.

Consequentialism is a general designation for a bundle of distinct philosophical conceptions that have in common the valuation of an action based on its results, not on the intrinsic quality of the acting. Consequentialist conceptions oppose to the deontological philosophical aspect, which argues, on the contrary, that the valuation or devaluation of actions is inherent and independent of its consequences.

The basic foundation of consequentialism lies in the notion that, since the past is immutable, only what makes the world better in the future can be considered good. The origin of consequentialism goes back to the utilitarianism of Bentham[13] and Mill.[14] Bentham formulated the well-known principle of greatest utility, according to which "the greatest happiness of the greatest number [of people] is the measure between right and wrong".[15] Thus, when it comes to the choice of standards, those that produce the best results will be valuable.

Subsequently, these conceptions were developed by dozens of thinkers, from different countries. Although it is not the purpose of this article to delve into the different consequentialist currents, it is worth considering that they

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[13] BENTHAM, Jeremy. *An introduction to the principles and morals and legislation*. South Carolina: CreateSpace Independent Publishing Platform, 2016.

[14] MILL, John Stuart. On liberty. In: ____. *The basic writings of John Stuart Mill*. Londres: Random House, 2002. pg. 3-122; MILL, John Stuart. *Utilitarismo*. Porto: Porto, 2005.

[15] "It is the greatest happiness of the greatest number that is the measure of right and wrong."

disagree both in the way of assessing the value of the consequences and in the type of consequence that should be considered relevant.

When LINDB deals with "practical consequences", it is certainly not referring to the legal consequences of the act. The norm is not distinguishing between licit or illicit acts, but between equally licit acts, in the abstract, but which cause better or worse empirical consequences when carried out. The first possibility is to conceive these consequences as the hedonistic utilitarianism, which considers as good the acts whose consequences maximize pleasure and minimize pain, does.[16] From the point of view of administrative activity, it is clear that this maximization shall be built by maximizing the welfare of the society impacted by the measure. The merit of this reading is to allow a comparison between the public policies potentially available in the light of the social result they may cause. It would be easy to note that a public education policy shall take precedence over the construction of a municipal portico.

The disadvantage of this reading is that it could prevent the implementation of policies for minorities, which more significantly depend on state support, but do not represent a group large enough to maximize social welfare. In order to justify policies for minorities, it would be necessary to conceive their protection as a way of favoring the majority as well, which will now live in a more egalitarian society. This construction would not be supported by classic utilitarian theories, for example.

Another problem that could be opposed to classical consequentialism is that the maximization of the welfare of a certain social group may not be compatible with that of another segment of society when there is no criteria for the administrator to prioritize one of them. The administrator could also find it difficult to identify, in an increasingly complex world, which policies lead to greater social well-being.[17] Fourth, there may be social utility in policies that are not necessarily utility maximizing, but are still important. Consider, for example, the financing of a symphony orchestra. Finally, it may be that society does not know what concretizes its well-being or, even worse, intends to maximize it in wrong, illegal, or even absurd ways. The issue of the limits of the administrator's performance as a promoter of behaviors, not only as an

[16] See, for example, SUMNER, L. W. *Welfare, happiness, and ethics*. Oxford: Oxford University Press, 1996.

[17] These considerations were extensively made in VITORELLI, Edilson. *O devido processo legal coletivo: dos direitos aos litígios coletivos*. São Paulo: Revista dos Tribunais, 2016.

executor of the will of his represented, is controversial and still needs fully satisfactory answers.[18]

Considering these peculiarities of public policies, it is plausible to state that the public administrator could adopt the following types of consequentialism[19]: moderate (given that not only the consequences of the decision shall be taken into account), concrete (since it focuses on the concrete consequences of the decision, not just the desired ones), maximizing (given that it intends to evaluate the consequences as better or worse than the alternatives, not just as satisfactory or unsatisfactory), aggregate (since it considers the total consequences of the decision, the balance of positive and negative consequences, not only their fractions), non-egalitarian (since the impacts shall be considered by weighing the social groups on which they fall, especially the most vulnerable, not in a uniform way), and loss-averse[20] (consequences that impose losses on those administered should be considered more negative than those which impose the failure to obtain an equivalent benefit). These would be the criteria for assessing the consequences.

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[18] On this interesting topic, see PITKIN, Hanna Fenichel. *The concept of representation*. Berkeley: University of California Press, 1984. See also PENNOCK, J. Roland (Ed.). *Representation*. New York: Atherton Press, 1968; WHITE, Albert B. *Self-government at the kings command*: a study in the beginnings of English democracy. Minneapolis: The University of Minnesota Press, 1933; VOEGELIN, Eric. Representation and existence. In: HENNINGSEN, Manfred (Ed.). *The collected papers of Eric Voegelin*. vol. 5: Modernity without restraint. Missouri: University of Missouri Press, 2000. pg. 109-128; HIRST, Paul. *Representative democracy and its limits*. Cambridge: Polity, 1991.

[19] There is a wide controversy in philosophy about the extent to which a theory can be considered consequentialist, if it opens itself to the consideration of factors different from the consequences of the act. For this reason, there is a series of theories that are intermediate between pure consequentialism and deontology, which we call herein "moderate consequentialism", but which also express, to some extent, a moderate deontology. The intention herein is to claim, with this, the impossibility of adopting, in the legal scope, a purely consequentialist conception, according to which the most vile of acts could be justified if it had the best possible consequences. This would de-characterize the very notion of law. As realized by Dostoievski in the literature, there are acts that repel morality to such an extent that they cannot be considered acceptable for the consequences that derive from them, whichever they might be. We will resume this theme next. For an in-depth look at the subject, see SHELFFLER, Samuel. *Consequentialism and its critics*. London: Oxford University Press, 1988.

[20] The concept of aversion of loss is based on economic analysis. On the subject, see KAPLOW, Louis. Private versus social costs in bringing suit. *Journal of Legal Studies*, v. 15, pg. 371 and following, 1986; SHAVELL, Steven. *Foundations of economic analysis of law*. Cambridge: Harvard University Press, 2004; PARISI, Francisco. *The Oxford handbook of law and economics*. London: Oxford University Press, 2019. Vol. 3; POLINSKY, A. Mitchell; RUBINFELD, Daniel L. The deterrent effects of settlements and trials. *International Review of Law and Economics*, v. 8, pg. 109-116, 1981; POLINSKY, A. Mitchell; SHAVELL, Steven. Punitive damages: an economic analysis. *Harvard Law Review*, Vol. 111, No. 4, pg. 869-962, 1998.

If this list of consequences evaluation criteria is accepted, the consequences to be valued are yet to be defined. For the monist consequentialism, only one type of consequence — which can be pleasure, happiness, personal satisfaction, or well-being in several other aspects— is considered valuable. Pluralist consequentialism, for its turn, accepts that more than one type of good can be found in the outcome of actions.[21]

Did LINDB establish a monist consequentialism, which considers only one type of consequence, or a pluralist consequentialism, which considers the various consequences that can result from the same act? Furthermore, which would be the relevant practical consequences, whether one or several? Economic, social, political? And would they affect individuals (microconsequences) or the social group as a whole (macroconsequences)? Would they be long-term or short-term consequences?

Firstly, it does not seem that LINDB has established a monist consequentialism. The multifaceted aspect of public policies and activity, that affect the realities of several subjects, under various biases, cannot be reduced to a single kind of consequence. To say otherwise would mean to state that the Constitution only cares about the accomplishment of one value, what does not seem true, regardless of what that value is. The Constitution does not intend to guarantee even human dignity regardless of the social and economic cost of the provision necessary for this grant. However, is does not intend either to sacrifice the citizens' basic rights (and there is a strong disagreement concerning what basic rights are) in the name of economic considerations only. The Constitution is a complex normative text, which applies to an even more complex society, what will require more delicate responses than the prevalence of a single value. Therefore, there cannot be just a single type of consequence to be considered by the administrator in obedience to LINDB. It seems more appropriate to conclude that the Law intends to adopt a pluralist consequentialism, which accepts that more than one type of good can be found in the actions result.

If it is true that LINDB's consequentialism is pluralistic, it is necessary to outline a practical guide for the managers' motivation activity, so that they can discharge this complex duty and, at the same time, fulfill what the law requires. Although LINDB does not leave many clues on how this could be

[21] For a view of consequentialism that deals with consequences from the point of view of fulfilling duties (consequentialism of rights), see NOZICK, Robert. *Anarchy, State and utopia*. New York: Basic Books, 1974.

done, it is possible to suggest that the administrator should consider practical consequences in terms of, at least:

1) Microconsequences: related to the people who are the immediate addressees of the decision;

2) Macroconsequences: related to the social group that will be affected by the adoption of the measure, without being its addressee. This includes people who are excluded from the public policy and those who bear the costs of its implementation;

3) Temporal distribution: short, medium, and long term consequences, insofar as they are predictable, that is, "in the diligent exercise of his activity, he can discern before the merit and legal facts and grounds", as pointed out by Article 3, item 2, of Decree No. 9.830/2019;

4) Maximization of well-being in the light of alternatives: the way in which the act promotes the well-being of the social group and individuals affected in comparison with other acts that could be practiced;

5) Representation: the extent to which that act is desired by the social group affected by it;

6) Social distribution: sharing of consequences on the social groups affected by the decision, with special attention to vulnerable groups;[22]

7) Economics: consideration on the economic consequences of adopting or not adopting the decision given the available alternatives and material rights (especially those with constitutional status) of the social group affected by the act,[23] as well as the budget available for application.

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[22] As we can perceive, the proposed analytical list adopts Kaldor-Hicks' concept of efficiency, according to which an action (in the case of the text, a public policy) is considered efficient if its effects imply reallocations that improve the situation of some people, even if they worsen that of others, admitting, therefore, a utility compensation. This concept is less demanding than Pareto's improvement, which requires that the situation of a person is improved without making others' worse. See, for example, POSNER, Richard. *Economic analysis of law*. 3. ed. Aspen: Wolters Kluwer, 1986. pg. 32-33. However, it is necessary to emphasize, as stated in the text, that the social distribution of consequences is fundamental for the analysis of public policies. Policies that make poor people's lives worse and improve those of the rich will be very difficult to justify using this indicator, even if the deterioration is small and the improvement is great.

[23] It is worth noting that none of the criteria points to compliance with legal or constitutional rules. Its is just that fulfilling the norm is a deontological criterion, not a consequentialist one. Consequentialism is to assess how the rule should be met, from the potential consequences of such compliance. The following topic will discuss the possibility of breaking the rule due to the assessment of the act consequences. For the time being, it must be assumed that the practice of the act, unrelated to its consequences, would, in the abstract, be lawful.

These seven spheres of consequences seem to compose a scheme compatible with LINDB's interpretation in the light of constitutional provisions. A scheme, admittedly, reasonably complex. However, we need to consider that these issues are easily motivated and verifiable in most administrative acts. In general, the criteria for the achievement of abstract values are clear, so that they will not bring greater difficulties to motivation. Imagine, for example, the choice to invest more resources in basic education than those legally determined. Following the previous guide:

1) Microconsequences: students in schools benefit;

2) Macroconsequences: society benefits from the improvement of educational indicators and qualification of individuals;

3) Temporal distribution: in the short, medium, and long term, investments in education are beneficial for individuals directly affected by it and for society;

4) Maximization of well-being in the light of alternatives: education promotes the well-being of society by improving its qualification, which brings gains in income, sociability, political awareness, health, and crime reduction.[24] There are no good alternatives for producing this result;

5) Representation: education is one of the greatest demands of Brazilian society;

6) Social distribution: investment in public education directly benefits especially the poorest;

7) Economics: the cost of education is comparatively low, in relation to other public policies.

On the other hand, we must compare the result of the same analysis when considering the construction of a municipal portico:

1) Microconsequences: no one is directly benefited;

2) Macroconsequences: the social group does not earn direct benefits from the work;

3) Temporal distribution: there are no relevant short, medium, or long term benefits;

4) Maximization of well-being in the light of alternatives: several other public policies most necessary and protected by the Constitution could be implemented with the same sum. For example, the purchase of medicines or school supplies;

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[24] These data have already been collected scientifically. See BEHRMAN, J.; STACEY, N. (Ed.). *The social benefits of education*. Ann Arbor: University of Michigan Press, 1997.

5) Representation: it is unlikely that a significant number of citizens would approve the construction of a portico;

6) Social distribution: a portico, although peripherally benefiting someone, has more potential to benefit the wealthy people than the poorest;

7) Economics: the cost of a portico is comparatively high in relation to the few benefits it brings.

These two examples show that the public manager would have no difficulty in using the consequentialist scheme outlined here to justify socially relevant proposals. On the other hand, for reprehensible policies, the scheme provides a clear answer. The act is illegal since the abstract value it performs (administrator's convenience and opportunity) has consequences that are not justifiable. Thus, in many cases, a parameterized consequentialist analysis makes evident what everyone instinctively knows: although the two examples deal with compatible discretionary administrative decisions, from the traditional point of view, with the analysis of convenience and opportunity, the allocation of resources higher than the minimum in education is fully justifiable, while the construction of a portico is not. This means that, between these two applications, equally discretionary, the second is illegal, because it violates Article 20 of LINDB.

In summary, in the first step there is a survey of a universe of consequences to be evaluated: microconsequences, macroconsequences, temporal distribution of consequences, maximization of well-being in the light of alternatives, representatition, social distribution, and economic consequences. Each of the elements of this universe shall be evaluated using the proposed analytical criteria, namely a moderate, concrete, maximizing, aggregate, non-egalitarian, and loss-averse consequentialism. This is the verification of consequences that LINDB requires from the administrator.[25] In graphical terms, it can be represented as follows:

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[25] This article circulated as a draft among several academics for criticisms and suggestions. Among them, the text was presented to Professor Gregório Assagra de Almeida, who is also a prosecutor at the Prosecution Office of Minas Gerais State (MPMG). Professor Gregório submitted this text to the Internal Affairs Department of the MPMG, which incorporated the conclusions presented herein to some of the statements made by it, addressed to all Minas Gerais prosecutors, concerning the guidelines to be observed by members regarding the application of the Law No. 13.655, of April 25, 2018. (Notice CGMP 02, of March 30, 2020, *Diário Oficial Eletrônico do MPMG* of March 31, 2020). The following stands out:

"Statement 7. In assessing the practical consequences of the decision at the administrative, controlling, and judicial levels referred to in Article 20 of the Introduction to Brazilian Law Statute (LINDB), in addition to the economic aspects of public management, the interests related to the defense of human rights and fundamental rights must be considered, especially

Table 1

Criteria for consequentialist administrative decisions

Universe of consequences to be evaluated	**Criteria for analyzing each element of the expected consequences universe**	
1. Microconsequences	Consequentialism: Moderate Concrete Maximizing Aggregate Non-egalitarian Loss-averse	Administrative act practice
2. Macroconsequences		
3 Temporal distribution		
4. Maximization of well-being in the light of alternatives		
5. Representation		
6. Social distribution		
7. Economy		

Source: Elaborated by the author

The problem will be more complex in situations where responses to some of the items indicate positive consequences and to others, negative ones. For example, public policies can be very important, but very expensive, as is the

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regarding the promotion of the human person, the protection of life, physical integrity, freedom, and equality.

Statement 8. The indication of the consequences of the decision provided for in Article 20 of the Introduction to Brazilian Statute (LINDB) must be explicit, multiple in the various aspects of the decision consequences, and contemporary to the production of the administrative act, under penalty of invalidation.

Statement 9. Article 20 of the Introduction to Brazilian Law Statute (LINDB) cannot be interpreted in a way to make the construction of a retroactive motivation possible, intending to validate the illegal act due to the practical consequences generated.

Statement 10. Article 20 of the Introduction to Brazilian Law Statute (LINDB) imposed on the managers the duty to analyze the practical consequences of their acts, and, in not doing so when the factual context is clear in demonstrating that the consequences contraindicate the decision, they may be held responsible.

Statement 12. Article 20 of the Introduction to Brazilian Law Statute (LINDB) incorporated the consideration of the practical consequences of the act as a concrete criterion of abstract legal values; thus, the control to be exercised over the act and discretion of the manager are both of legality and constitutionality, according to the analysis of aspects such as motivation, reasonableness, proportionality, and misuse of power". The author thanks Professor Gregório for spreading the text.

case in providing high-cost medicines not incorporated into SUS (Brazilian's Unified Health System), based only on the (abstract) right to health. Or they may be important for minority groups, but undesirable for the majority, as is the case of the implementation of affirmative action policies not provided for by law, but based on the (abstract) value of material equality. That is to say, there is a contradiction in consequences.

In such cases, the administrator's task will be to motivate, expressly, on what grounds positive consequences prevail over negative ones. If the net result of the policy and decision is positive, that is, if it generates more well-being than social unrest, when considering the set of those affected and the distribution of the consequences, it shall be carried out. If the final result is negative, it will be forbidden. Of course, there is no objective measurer for this type of weight. It shall be demonstrated technically, in each case, according to the peculiarities of the public policies to be developed.

Pure administrative discretion, that is, the situation in which the administrator's judgment of convenience and opportunity still exists, is the one in which there is more than one option of action with the same consequences net result. For example, if the municipality has the resources to build only one nursery in two possible benefited neighborhoods and the conditions of the two are the same (proximity to alternative nursery, number of children served, cost of the work, socioeconomic standard of the benefited group, etc.), as shown by the motivation in the administrative process, the public manager may choose the construction site.

As it can be seen, LINDB imposed a considerable burden on the public administrator, but this burden is far from being unachievable. On the contrary, well considered, the consequences can serve as a guide for the good administrative activity, as well as a justification for those exceptional situations in which the manager needs to take measures that, although controversial, have clearly positive social consequences. For example, the possibility of forced entry into closed properties to carry out policies to combat the mosquito that transmits arboviruses (*dengue* and others) is clearly justified from the point of view of the consequences because it brings a greater social benefit than the simple guarantee of right to property.

Yet, the right to property is a constitutional guarantee. Could the evaluation of the consequences serve to disregard strict legality and even constitutionally provided rights?

5. Should consequences prevail over strict legality?

Establishing the parameters through which the practical consequences of a decision shall integrate administrative activity inevitably leads to the questioning of its limits. If the consequentialist analysis is now expressly supported by law, would it be able, under certain circumstances, to keep away the application of other rules applicable in the case?

In several situations, the law itself already makes this judgment expressly. Several modalities of bidding waiver are justified precisely because the consequences of bidding would be more serious than those of not bidding (for example, in emergency cases). The question is whether LINDB would justify making this judgment in other situations in which the legal text does not contain an express provision in this sense.

This debate reflects the divergence, with no solution in the field of philosophy, between consequentialism and deontology. Philippa Foot masterfully illustrated the debate with her "trolley dilemma": should the driver divert a runaway trolley to kill one person instead of killing five? Most tend to answer yes. Yet. what if the person is a viewer, could he or she throw another viewer on the tracks so that, with the death, the person would prevent the other five people from dying? And could a doctor kill a healthy patient to save the lives of five people who needed transplants? [26] And if any of the victims are known to the agent, does it make a difference? From the point of view of the consequences, all these acts generate one death instead of five. However, few people would agree that the conducts would be equally acceptable.

Although this discussion is heated among philosophers, extensive behavioral studies have shown[27] that moderate deontology (or moderate consequentialism), a middle ground between deontology and consequentialism, is the position that most corresponds to the moral beliefs prevalent in Western

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[26] FOOT, Philippa. The problem of abortion and the doctrine of the double effect. In: ____. *Virtues and vices*. Oxford: Basil Blackwell, 1978. See also FOOT, Philippa. *Moral dilemmas*: and other topics in moral philosophy. Londres: Clarendon Press, 2003; THOMSON, Judith. Killing, letting die, and the trolley problem. *The Monist*, Vol. 59, pg. 204-217, 1976. THOMSON, Judith. The trolley problem. *Yale Law Journal*, Vol. 94, pg. 1395-1415, 1985; UNGER, Peter. *Living high and letting die*. Oxford: Oxford University Press, 1996.

[27] BARTELS, Daniel M. et al. Moral judgment and decision making. In: G. KEREN, G.; WU, G. (Ed.). *Blackwell reader of judgment and decision making*. Malden: Blackwell, 2014. In the same sense, BARON, Jonathan; SPRANCA, Mark. Protected values. *Organizational Behavior and Human Decision Processes*, Vol. 70, No. 1, pg. 1-16, 1997.

society.[28] This means that most people are willing to accept certain bad acts that have positive consequences, but not very bad ones, even if they have positive consequences. The majority of the subjects surveyed and the majority of philosophers reject both absolute consequentialism and absolute deontology.[29]

This majority view among citizens can also indicate the appropriate way to understand the consequentialism proposed by LINDB. On the one hand, Article 20 certainly does not impose that the consequences shall always prevail over commands and legal duties. They shall always be considered, but they can be disregarded in the light of other considerations, including those related to the intrinsic devaluation of the conduct to reach the result. This devaluation may arise, for example, from the prohibition of the conduct by a specific, non-abstract norm, or from the moral disgust that it causes.

On the other hand, it also seems reasonable to support that LINDB can provide a consequentialist argument to disregard explicit legal norms, that is, to allow that prohibited conduct, which results in good outcomes, is considered acceptable. This situation will need to be justified in the light of the case circumstances. The argumentative burden, of course, is on the manager. Faced with the need to practice a prohibited conduct in order to achieve socially positive consequences, the public administrator shall show how the desired consequences are valuable enough to remove the legislator's judgment of devaluation, made in the abstract, from which the prohibition of conduct resulted, in light of the concrete consequences foreseen for the case.

It is true that such an analysis involves a considerable amount of uncertainty. There is no prior formula that allows defining which consequences are valuable enough to disregard expressed norms, which ones are the norms that can be disregarded, and to what extent this disregard can occur. For this

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[28] LANTERI, Alessandro; CHELINI, Chiora; RIZZELLO, Salvatore. An experimental investigation of emotions and reasoning in the trolley problem. *Journal of Business Ethics*, Vol. 83, pg. 789-804, 2008. The authors conducted a survey with 62 participants and found major differences between how people appreciate the dilemma of the trolley in its basic version, when it comes to changing the direction of the vehicle, and in its modified version, that proposes to throw a viewer on the tracks to stop the trolley. If people were adept of pure consequentialism, the results should be the same, regardless of conduct. However, in the simple version of the problem, 24% of the participants answered that changing the direction of the lever would be morally mandatory, a number that totaled 87%, when adding those who stated that such conduct would be morally acceptable. When the example was to throw a viewer, the percentage dropped to less than 5% among those who considered it mandatory, and to 46% among those who considered it acceptable.

[29] ZAMIR, Eyal; TEICHMAN, Doron. *Behavioral law and economics*. Londres: Oxford University Press, 2018. Specially chapter 4.

reason, LINDB expands the margin of uncertainty in the legal system, perhaps in search of decisions more related to the case circumstances. Anyway, in any case there will be a limit, to be defined *a posteriori*, of conduct reprehensibility, beyond which it cannot be rehabilitated due to the consequences it implies.

6. Syndicability of the consequences analysis

The indication of the consequences of the decision, in observance of Article 20 of LINDB, shall appear on the motivation of the administrative acts. This consideration cannot be implied, nor can it be subsequent to the drafting of the act. On the contrary, it shall be explicit and contemporary to its execution. The more relevant or influencing the administrative act to be performed is on the social group, the more detailed the considerations about the consequences shall be. Likewise, the motivation shall also be more detailed the more abstract the legal value the act intends to achieve is. Supremacy of the public interest, convenience and opportunity are highly abstract legal concepts, so that discretionary administrative acts will always demand greater reasoning about the consequences predicted by the manager.

The non-indication of the consequences is equivalent to lack of motivation, which, as already mentioned, results in the invalidity of the administrative act. As the Superior Court of Justice clearly stated, "Motivation is the written statement of the reasons that gave rise to the practice of the act; it is part of the form of the administrative act; its absence causes the nullity of the act due to defect of form".[30] There is no doubt, therefore, that the motivation shall be expressed and that its absence makes the act invalid.

The question then becomes whether the motivation on the consequences, when present, is syndicable by the control bodies, the Prosecution Office and the Judiciary. The answer is certainly positive. The case law has already established that the reasons that determine the administrative act are verifiable, as to their veracity and pertinence of the facts and legal bases that support them. As stated by the Superior Court of Justice, "According to the theory of determining reasons, the Administration, when adopting certain reasons for the practice of the administrative act, even if of a discretionary

[30] RMS 55.732/PE, Report minister Assusete Magalhães, Second panel, judged on May 23, 2019, *DJe 30 May*, 2019.

nature, is bound by them".[31] As a fact, this foundation has already been used as a reason for deciding on the judgment of two special repetitive appeals,[32] so that it is undoubtedly a binding precedent, pursuant to Article 927, III, of the Code of Civil Procedure.

Therefore, under Article 20 of LINDB, public administrators are obliged to motivate their acts, especially the discretionary ones (since they are always based on abstract legal values, namely, convenience and opportunity), and, in so doing, they are linked to the motivation expressed, which can be questioned and analyzed at the jurisdictional sphere. The inadequate or unsubstantiated motivation constitutes a legality defect, a conclusion that the Superior Court of Justice also clearly reached, asserting that "The administrator is linked to the reasons put forward as a basis for the practice of the administrative act, whether bound or discretionary, configuring a legality defect— which justifies the Judiciary control — if they are nonexistent or untrue, as well as if there is no logical adequacy between the reasons explained and the result achieved, taking into account the theory of determining reasons".[33]

Thus, Article 20 of LINDB is not liable to enable the construction of a retroactive consequentialist motivation which intends to validate the prohibited act due to the positive consequences generated by it if they were not considered and integrated to the motivation at the time the act was practiced.

7. Could managers be penalized for not taking into account the consequences of their activity?

If the motivation is mandatory and verifiable by the courts, it is worth inquiring about the possibility that the public manager who practices a discretionary act, without adequate motivation as to the possible consequences of his performance, is personally penalized.

The unavoidable conclusion is positive. As already shown, the Superior Court of Justice understands that the absence or inadequacy of motivation constitutes a legal defect of the act. Therefore, anyone who acts in this

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31 RMS No. 20,565/MG, Fifth panel, report minister Arnaldo Esteves Lima, judged on March 15, 2007, *DJ 21 May, 2007*.

32 They are, REsp No. 1498719/PR, report minister Og Fernandes, judged on November 8, 2017, *DJe 21 November 2017* and REsp No. 1487139/PR, report ninister Og Fernandes, judged on November 8, 2017, *DJe* 21 November 2017

33 MS Mp; 13.948-DF, report minister Sebastião Reis Júnior, judged on September 26, 2012.

way practices an illegal act. Public servant who acts illegally violates the duty provided for in Article 116, III, of Law No. 8,112 of 1990, which finds correspondents in all other statutes of public servants in the country, given the simplicity of the rule it contains: it is the duty of the public servant "to observe the legal and regulatory rules". For the federal civil servant governed by Law No. 8,112 of 1990, the punishment for this conduct is the warning (Article 129), followed by suspension of up to 90 days in case of reiteration (Article 130). Other public officials shall be punished in accordance with their respective statutes.

The omission of motivation and analysis of the consequences, in very serious cases, can even imply the imposition of penalty for administrative misconduct. This is so because Article 11 of Law No. 8,429 of 1992, capitulates as an act of misconduct any action or omission that violates the duties of legality. It is evident that not all illegality constitute an act of misconduct, as already established by the Superior Court of Justice. "It is essential to its classification that the illegal act has its origin in dishonest, cunning conduct, denoting the lack of probity of the public agent".[34]

However, on *contrario sensu*, if the motivation regarding the consequences is omitted or falsified in situations where these clearly predictable consequences would contraindicate the practice of the act, there is no denying the imposition of penalty on the manager. It is the case, to continue in the example already mentioned, of a poor municipality that directs resources from its budget to the performance of voluptuous events, concerts of popular artists, rodeos, parties, instead of using them in policies of health, education, combat of child mortality etc. The same would apply to a parliamentarian who, being able to direct budgetary amendments to activities that meet the public interest, does so without taking into account the practical consequences of his allocative choice.[35]

In this circumstance, deliberate blindness cannot serve as a shield for the dishonest managers. LINDB imposed them the duty to analyze the practical consequences of their actions. If they fail to do so out of carelessness, they will practice an illegality. In not doing so because the factual context clearly shows that the consequences contraindicate the decision, they will practice an act of administrative misconduct.

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[34] AgInt on AREsp No. 1274653/RS, report minister Assusete Magalhães, judged on November 13, 2018, *DJe* November 21, 2018.

[35] 35 As widely reported in the press: "In Ceará, parliamentary amendment paid for Wesley Safadão's show". *Veja*, Jan 7. 2018. Available at: <https://veja.abril.com.br/politica/no-cearaemenda-parliament-pagou-show-de-wesley-safadao/>. Accessed on: 12 Nov. 2019.

8. The effects of Article 20 on control bodies, Prosecution Office and the Judiciary

Article 20 of LINDB, in addition to imposing on the administrator the duty described in the previous items, also determines the "controlling and judicial" spheres to take into account practical consequences of the decision when deciding on abstract values basis.

This is a call for judges, members of the Prosecution Office and control bodies (Audit Courts and internal controls of the Branches) to guide their own decisions and their assessment of the acts performed by the public manager not only by strict legality, but also by the practical consequences of the decision. As Marçal Justen Filho expressed with enviable precision, a mechanistic conception of the application of law, as if all the circumstances of reality were previously contained in legal norms, cannot be adopted.[36] The consequences of the practice of any legal act or the adoption of any judicial decision shall guide the adoption of the act itself, since, to some extent, the decisions produce the rights (as Americans say, *remedies precede rights*).

This conclusion has undeniable consequences for judicial action in several aspects of intervention on public policies, such as the granting of medicines, the determination of enrollment of children in nurseries, the imposition of public works, or budgetary commitments. Such analysis is not relevant to the present article and, to some extent, it has already been done at another time.[37] What matters here is to establish to what extent Article 20 of LINDB focuses on the activity of the justice system when dealing with the act performed by the administrator to validate or invalidate it.

In this context, it seems sure that the Audit Courts, the Prosecution Office, and the Judiciary are bound to also consider, in their examination of administrative acts legality, the practical consequences of the decision taken by the manager. In addition, depending on the circumstances of the case, they can and shall consider lawful conducts that, despite being illegal, generate consequences whose benefits overrule compliance with the regulation,

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[36] JUSTEN FILHO, Marçal. Art. 20 of the LINDB — dever de transparência, concretude e proporcionalidade nas decisões públicas. *Revista do Direito Administrativo*, sp. ed. LINDB, pg. 13-41, 2018.

[37] See VITORELLI, Edilson. *O devido processo legal coletivo*: dos direitos aos litígios coletivos. São Paulo: Revista dos Tribunais, 2016; VITORELLI, Edilson. Levando os conceitos a sério: processo estrutural, processo coletivo, processo estratégico e suas diferenças. *Revista de Processo*, CoVol. 284, pg. 333 and following, 2018

specially, as also stated in Article 20 of LINDB, in its sole paragraph, "in the face of possible alternatives". In other words, if the alternatives available to the administrator, in the specific situation, would have the potential to generate worse consequences than those verified, the act shall be considered in accordance with the legal system, even if contrary to a legal text. The consequences, we must reaffirm, became part of the legality evaluation of administrative acts.

However, we should add an important caveat. The argumentative burden of showing these circumstances is on the manager responsible for the act. They do not need to be perceived by the judge, the Prosecution Office, or internal or external control bodies, when not provoked. The administrator shall show that, at the time the act was performed, the possible alternatives were considered and, among them, the one that, according to the information available at the time, would bring the best results, was chosen. In the judicial sphere, specifically, the consequences to be considered by the judge are, therefore, those submitted to him, "on which there was an effective contradiction (...) such consequences shall be previously discussed with the parties".[38] It is also true that the consequences, even when considered, may not be enough to remove the conduct's illegality, if it implies a very high degree of reproachableness. The worst of acts, emphasis on it, cannot be justified by the best of consequences.

In summary, when assessing the consequences, the justice system should not behave as "a know-it-all" who punishes the public manager for consequences that, at the time the act was performed, were unpredictable. It shall be taken into account, as mentioned in LINDB's Article 22, item 1, o "the practical circumstances that have imposed, limited, or conditioned the agent's action", as well as "the real difficulties of the manager and the requirements of the public policies he is in charge of" (Article 22 of the LINDB). However, consideration of such circumstances depends on their demonstration (that is, presentation and proof) by the managers themselves. They shall present evidence that the alternatives were properly considered and that the conduct adopted was justified, in light of the foreseen consequences in case possible alternatives had been adopted.

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[38] DIDIER JR., Fredie; ALEXANDRIA, Rafael. Dever judicial de considerar as consequências práticas da decisão: interpretando o art. 20 da Lei de Introdução às Normas do Direito Brasileiro. *A&C* — Administrative Law Review e Constitucional, Vol. 75, pg. 143-160, 2019.

9. The preventive role of the Prosecution Office and control bodies in the application of LINDB

Finally, it is necessary to make a point on the preventive role of the control bodies and the Prosecution Office in the proper application of LINDB by Brazilian public managers. As already seen, the rule imposes a deep change in Brazilian public management culture and, more than punishing those administrators who do not pay attention to the change, it is important to clarify and alert them, in order to obtain more qualified acts, the proper consideration of the consequences and, in the end, the construction of a more qualified public management, which produces more beneficial social results for the citizen.

To this end, it is important that the internal audit bodies act in a preventive way, adopting the managers' needs as a premise of the inspection initiatives. This should result in an inspection plan consistent with the objective of managing and reducing risks in public management. Until the internal control bodies do not prioritize management assessment (assurance) and support for external control activities, especially with regard to preventive auditing and account certification, the tendency will be to increase failures and irregularities in public management. Preventive control can significantly collaborate for the manager to start analyzing the consequences of administrative acts before deciding.

Likewise, the Audit Court, supported by Article 71 of the Major Law, and the Prosecution Office, exercising the powers provided for in Article 6, XX, of the Complementary Law No. 75/1993, may issue recommendations and warnings to the managers, according to the case, in the sense that the absence of adequate motivation concerning the analysis of the practical consequences of administrative acts, including in view of possible alternatives, constitutes illegality and, in serious circumstances, may constitute an act of administrative misconduct.[39]

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[39] This suggestion was incorporated by the General Internal Affairs Department of the Prosecution Office of Minas Gerais, in the set of statements already mentioned herein, presented in Notice CGMP No. 02, of March 30, 2020, *Diário Oficial Eletrônico do MPMG* of March 31, 2020: "Statement 5 To prioritize and carry out preventive action, a fundamental guarantee of the citizen and the duty of control bodies, the Prosecution Office, based on article 129, II, of the 1988 Constitution of the Federative Republic of Brazil and its Organic Laws, may issue recommendations and warnings to managers, according to the case, in the sense that the lack of adequate motivation on the analyzis of the practical consequences of administrative

These recommendations and warnings can even use the practical guide detailed in item 4, above, to give the manager specific guidance on which consequences to consider, how to evaluate them, and the need to produce consistent and contemporary motivation to the act practice. This will allow the unwary manager of small municipalities, who often does not have an adequate management assessment by the internal control body, to be separated from the dishonest managers, who intends to hide behind the consequences of their acts to justify illegalities, ignoring these same consequences when they contraindicate a performance that is of their own interest.

10. Conclusion

The Introduction to Brazilian Law Statute, as amended in 2018, created a new milestone for Brazilian public administration. This creation may have been inadvertent, since the project, by choice of its supporters, was approved in a hurry, without the democratic discussion that would be appropriate. However, inadvertent or not, the law exists and there is no doubt that it requires deep changes in the behavior of the Brazilian public manager.

The purpose of this article was to analyze only the provisions related to consequentialism, with the determination that the decision's practical consequences, when based on abstract legal values, are considered. LINDB expressly intended to reduce the degree of abstraction of these legal values by means of the integration, in the analysis concerning their legality, of the consequences that can be foreseen by their adoption. As if bonding the arrow of time, LINDB turns the anticipation of the future consequences into the cause for the adoption or non-adoption of an act, in relation to which the legal order does not make the application hypotheses clear.

Thus, Article 20 of LINDB created a legal obligation to motivate, based on the consequences, all acts reasoned on abstract legal values. Since any discretionary administrative act is based on convenience, opportunity and the supremacy of the public interest, highly abstract values, it is appropriate to conclude that LINDB requires that all discretionary administrative acts

acts, including in view of the possible alternatives, constitutes illegality and, in more serious circumstances, may constitute an act of administrative improbity".

are motivated, in view of their reasonably anticipated consequences and the possible alternatives to their adoption.

In this context, it is essential that the public administrator pays attention to the production of administrative acts with adequate and contemporary motivation to their production, which meet the dictates of this consequential analysis. Since LINDB does not say what kind of "practical consequences" it wants to have analyzed, a guide for the manager is proposed, which starts from a consequentialism that is moderate, concrete, maximizing, aggregate, non-egalitarian, and loss-averse. This proposal emphasizes that not only the consequences determine the value of an act, focuses on the concrete consequences of the decision — not just the desired ones —,prioritizes the consequences according to the alternatives, considers that the value of the act is given by the balance of positive and negative consequences, evaluating the differences between the social groups on which the consequences fall, and considering the imposition of losses more serious than the failure to obtain gains.

To achieve this goal, from a practical point of view, we suggeste that the analysis carried out by the manager focuses on a wide spectrum of consequences, reflecting the complexity of public policies and the values protected by the constitutional text. Microconsequences, macroconsequences, temporal distribution of consequences, maximization of well-being in the light of alternatives, representation, social distribution, and economic consequences should be evaluated.

Finally, we argue that, if this assessment is carried out by the manager, it can, in certain circumstances, justify the departure from strict legality in the name of producing valuable social results. In addition, if the manager is able to present these circumstances to the control bodies, the Prosecution Office, and the Judiciary, these agents shall take into account the practical consequences of the decision and the possible alternatives in the legality control of the administrative acts and in the application of penalties to the administrator. It may happen that the consequences do not prevail as a criterion that justifies the act, but if they are presented, they shall be considered.

Properly applied, the new articles of LINDB represent the birth certificate of a new paradigm of public management, which implies the expansion of legality control, the restriction of discretion, and the performance of an administrative activity guided by good results and responsibility in producing significant social outcomes. In summary, a truly efficient administration, as proposed by Article 37 of the 1988 Constitution of the Federative Republic of Brazil.

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