Legal certainty for public innovation: the new Brazilian Law's Introduction Act (Law No. 13.655 of 2018)*

Segurança jurídica para a inovação pública: a nova Lei de Introdução às Normas do Direito Brasileiro (Lei nº 13.655/2018)

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ABSTRACT

This paper tackles the recently enacted Law No. 13,655 of 2018, which changes the Brazilian Law's Introduction Act and gives it a new operational dimension: foster legal certainty and the quality of public decisions. This paper describes how academic production influenced the Law No. 13,655 of 2018's draft and its legislative history. The main argument is that the Law No. 13,655 of 2018 is a plan rule, enabling private entities and the State to design solutions with greater creativity for best problem-solving. In the

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public sphere, the Law legally protects honest public servants aiming at proving them comfort to decide and explore experimental public policies, contracts, licenses, permissions, among other manifestations. Therefore, the Law No. 13,655 of 2018 works for innovation in the State, such as the use of technologies and new administrative solutions.

KEYWORDS

Law No. 13,655 of 2018 — legal certainty — innovation — experimentalism — accountability — plan-rule

RESUMO

Este artigo busca apresentar uma leitura instrumental da recém-editada Lei no 13.655/2018, que altera a Lei de Introdução às Normas do Direito Brasileiro (LINDB) e lhe confere uma nova dimensão operacional: no âmbito público, para reforço da segurança jurídica e melhoria da qualidade das decisões públicas. O artigo analisa a agenda de pesquisa e produção acadêmica que incitou o processo legislativo que resultou na Lei no 13.655/2018, e também as alterações que o projeto sofreu no Congresso Nacional para demonstrar que a lei decorre de uma agenda voltada a viabilizar a inovação na administração pública. A tese central do texto é a de que a Lei no 13.655/2018 consiste em uma lei de planos, públicos e privados, que viabiliza o desenho de soluções jurídicas com maior criatividade e conforto decisório. No âmbito público, fundamentalmente a previsão de ônus aos controladores e a tutela do gestor público honesto permitem a definição mais efetiva de políticas públicas, contratos, licenças e permissões, entre outras manifestações. Desse modo, pela segurança jurídica, a Nova LINDB viabiliza a inovação pública na medida em que pavimenta o experimentalismo na administração pública, como a assimilação de novas tecnologias em suas atividades prestacionais e o emprego de mecanismos jurídicos atípicos.

PALAVRAS-CHAVE

Lei nº 13.655/2018 — segurança jurídica —inovação pública — controle — planos

1. Introduction: the new Law of Introduction to Brazilian Law Norms — Legal Certainty Law for Public Innovation

Right after the promulgation of the 1937 Constitution, a Commission to revise the Civil Code of 1916 (Law No. 3,071 of 1916), composed by professors Orozimbo Nonato, Filadelfo Azevedo — both ministers of the Federal Supreme Court (STF) — and Hannemann Guimarães, General Consultant of the Republic, was instituted in the Ministry of Justice.[1] The Draft Introduction Law, then accepted by the Minister of Justice, Alexandre Marcondes Filho, and submitted in full for presidential consideration,[2] resulted from the works of the Civil Code Commission. During the passage of the precepts of the Civil Code into a special law,[3] the Commission presented three important changes for the sake of *legal certainty*: (i) replacement of the progressive system by a single term of law enforcement throughout the national territory;[4] (ii) express provision of the reinstate a law, which had been omitted from the Code Civil; and (iii) replacement of national law by the legal jurisdiction,[5] thus solving a series of legal uncertainties in the application of national and foreign law, potentialized in the context of wars.

The Law of Introduction to the Brazilian Civil Code was published by Decree-Law No. 4,657, in 1942, and for a long time figured as the main law systematically studied in the first period of Law Schools in Brazil in the courses of introduction to civil law and introduction to study of Law. It was then

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1 See TENÓRIO, Oscar. *Lei de Introdução ao Código Civil Brasileiro (Decreto-Lei n. 4.657, de 4 de setembro de 1942)*. Rio de Janeiro: Jacinto, 1944. pg. VII e XII.

2 The second draft that resulted from the Civil Code Commission was related to the General Part of the Duties and Rights section.

3 The then current Civil Code was divided into three parts: Introduction, General Part and Special Particle The great merit of the draft would be to pass the Introduction of the Civil Code into a special law. At the time, the precepts included in the Introduction would not maintain a necessary relation with the Civil Code, so that it would be more efficient for the system that modifications of the text of the special law were independent of the transformations of the of civil law (Minutes of the Inaugural Meeting, April 13, 1940).

4 This means a change in favor of legal certainty in the application of the law, as it can be seen in the Explanatory Memorandum of Justice Minister Alexandre Marcondes Filho: "The proposed system [setting a single deadline for law enforcement across the national territory] *puts an end* to the doubts that arise from the successive system; moreover, it is more in line with the characteristics of generality and sovereignty inherent in the very law". We highlight.

5 "The difficulties that our judges struggle with about knowing and applying the varied foreign laws to family or succession, of subjects of other nations domiciled in Brazil happen daily. Often, the application of foreign law results in such situations of inequity that judges find themselves in the contingency of creating formulas in order to escape the exact fulfillment of the laws mentioned before".

called LIC or LICC (spelled "li-ki-ki" in the corridors of the Colleges). LICC historically developed a pedagogical role helping the law school freshman to get familiar with legal sources and bring the first information about legal reasoning on the subject of the application of law, in particular issues of terms, [6] validity[7] and effectiveness[8] of laws, interpretation,[9] as well as intertemporal law.[10] In the practical field, it has been operationalized in cases of application of foreign law in Brazil.[11]

As it can be seen, LICC comprehends a wide range topics wider than private relations ruled by the Civil Code. Its incidence it is transversal in law, even reaching public law. In 2010, Law No. 12,376 of 2010 changed its name

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6 See, for example, Article 6 of the LICC: "[The] law in force will have immediate and general effect, respecting the perfect juridical act, the vested right and the res judicata. (Wording given by Law No. 3,238 of 1957) Paragraph 1. A perfect juridical act is considered to have been consummated according to the law in force at the time in which it took place. (Included by Law No. 3,238 of 1957). Paragraph 2. Rights that its owner, or someone else, may exercise, such as those whose beginning of exercise has a fixed term, or a pre-established unalterable condition, at the discretion of another, are considered acquired rights. (Included by Law No. 3,238, of 1957). Paragraph 3. It is called res judicata or res judicata the decision judicial action that no longer admits appeals".

7 See, for example, Article 2 of LICC: "when not intended for temporary validity, the law will come into force until another one modifies or revokes it. Paragraph 1. The subsequent law revokes the former when it expressly declares it, when it is incompatible with it or when it fully regulates the matter dealt with in the previous law. Paragraph 2. The new law, which establishes general or alongside existing ones, does not revoke or modify the previous law. Paragraph 3. Unless if expressed otherwise, the repealed law is not restored because the repealing law has expired".

8 See, for example, Article 1 of LICC: "unless in case of contrary provision, the law begins to be in force in the country forty-five days after it is officially published. Paragraph 1. When admitted by the State, the mandatory application of Brazilian Law will begin 3 months after being officially published, for foreign people. (…) Paragraph 3. If, before the law comes into force, there is a new publication of its text which is intended for correction, the term of this article and of the preceding paragraphs shall begin to run from new publication. Paragraph 4. Corrections to the text of the law already in force are considered new law".

9 See Article 4 of LICC: "[when] the law is silent, the judge shall decide the case according to analogy, customs and general principles of law". See also Article 5 of LICC: "[in] the application of the law, the judge shall attend to the social ends to which it is directed and to the demands of the good common".

10 In 1952, Vicente Ráo publishes the first edition of the work *O Direito e a Vida dos Direitos*, which is, until today, a reference in the study of the Law of Introduction to the Civil Code. It is an interesting figure of Brazilian law: he went into exile in France shortly after the defeat of the Constitutionalist Revolution — which he had articulated in the Frente Única Paulista, a party that had helped to found —, returned in 1934 and helped to found USP, turning into a professor at Fadusp, drafted the National Security Law (Law No. 38 of 1935) as Minister of Justice, served institutionally in the repression of communists and, with the rise of the Estado Novo, he left the attributions and was dismissed from Fadusp because of demonstrations against the regime. In 1951 he became Minister of Foreign Affairs, which may have been decisive for his predilection to study the LICC.

11 See especially Articles 7 and 19 of LICC.

to Brazilian Law's Introduction Act (LINDB),[12] aligning the name to its broad incidence on law as a whole. In 2015, Senator Antônio Anastasia presented PLS No. 349 of 2015, initiating the legislative process that would culminate in Law 13,655 of 2018, the Law of Legal Certainty in Public Innovation (new LINDB).

This article seeks to present a reading of Law No. 13,655 of 2018 regarding to its functionality: *why a law of legal certainty in the relations with the Public Power?* This question certainly admits different answers depending on the legal perspective adopted. The article analyzes the agenda of research and academic production that prompted the legislative process that resulted in Law 13,655 of 2018, the changes that the project underwent in Congress to demonstrate that the law arises from an agenda aimed at enabling innovation in public administration. In this text, we argue that Law No. 13,655 of 2018 consists of a *law of plans*, public and private, which enables the design of legal solutions with greater creativity and decision-making comfort, thus working for *innovation in the public level*. This means that the set of the precepts of the law favors a scenario of greater predictability about public decisions and stability of the rules of the game, making it possible for individuals and public authorities to build plans that are more effective. We expected that the analysis contributes to a better understanding of Law No. 13,655 of 2018 and the recognition of its transformative potential.

2. Academy in the production of Law No. 13,655 of 2018

In the survey "Scarcity of resources, costs of rights and reserve of the possible in the Federal Supreme Court case law", Daniel Wang demonstrates empirically the *argumentative superficiality* in judicial decisions involving rights because judges practically do not pay attention to the scarcity of resources and the costs of the law.[13] The *lack of guidelines on the suitability of*

[12] Law no 12,376/2010 is a result of bill no 6,303, 2005, from the deputy at that time Celso Russomano, with the following justification: "[it is] acknowledged by doctrine and precedents that the Brazilian Law's Introduction Act comprehends a wider range of application than previously stated in its amendment. In order to refine country legislation, coincide with the law interpretation, that we present this bill counting on your support.

[13] WANG, Daniel. *Escassez de recursos, custos dos direitos e reserva do possível na jurisprudência do STF*. Monography presente to EFp in SBDP in 2006. Available at: <www.sbdp.org. br/arquivos/monografia/80_Daniel%20Wang.pdf>. Accessed on: 16 Apr. 2018. The work was later published in *Revista Direito GV* (v. 8, July/December, 2008).

judicial control of Cade's decisions was empirically verified in the collective research "Judicial review of Cade's decisions".[14] The problem *of the controller assuming administrative competence and exercising it de facto*, without outlining major concerns about the consequences of his actions, was well addressed by Eduardo Jordão, in a study on Federal Court of Accounts (TCU) intervention dynamics in unpublished bidding documents.[15] André Rosilho and Larissa Santiago Gebrim demonstrate empirically how the TCU's decisions on the validity of Petrobras' own bidding regime result more from predilections than from legal hermeneutics, given the Court's preference for the of Law No. 8,666 of 1993 despite the fact that the Federal Supreme Court has successively affirmed the constitutionality of Petrobras having specific rules for hiring.[16]

What do all these works have in common besides punctuating distortions in the control of public administration? They all arise from empirical and impartial research, most of which comes from Brazilian Society of Public Law (SBDP).[17] Law No. 13,655 of 2018 is not a maneuver from lawyers of companies

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[14] ALMEIDA, Fabricio Antônio Cardim de (Coord.). *Revisão judicial das decisões do Conselho Administrativo de Defesa Econômica (Cade).* Belo Horizonte: Fórum; SBDP, 2010.

[15] "The author recognizes TCU's efforts to guarantee legality, legitimacy and economy of the administrative action. In many cases, he shares his substantial understanding, according to which he believes that the Federal Court of Accounts options are superior to those of the Public Administration, in the sense of being more convenient for the realization of the public interest. Anyway, he also understands that it is not up to him or the TCU to make these decisions or interfere in the public administrator's options even before they are published. Although this interventionist solution can sometimes turn out to be substantially positive, it will always be negative from an institutional point of view." JORDÃO, Eduardo. TCU's intervention on public notices unpublished bidding - controller or administrator? *Revista Brasileira de Direito Público*, Belo Horizonte, v. 47, pg. 230, Oct./Dec. 2014.

[16] See ROSILHO, André; GERBIM, Larissa Santiago. *Política de contratações públicas da Petrobras: o que pensam o STF e o TCU?* Revista de Direito Público da Economia, Belo Horizonte, v. 50, Apr./Jun. 2015. See the authors: "in addition, the Minister stated that, regardless of the application of Law 8,666 / 93 to Petrobras and what the Constitution states in Paragraph 1 of its Article 173, the principles of public administration apply to the company (Article 37, *caput*, of the Federal Constitution). In light of the above mentioned, we ask: would it be implied, in the duty to observe such principles of public administration (among them that of economy and objective judgment), the obligation for Petrobras to disclose the estimate cost, with the composition of unit costs, regardless of the content of the simplified bidding procedure? In our view, the reasoning developed by the Minister is wrong. After all, the principle of economy and objective judgment does not arise from the duty to disclose cost estimation with the composition of unit costs. It is highly questionable that it is possible to extract some kind of precise and delimited normative solution from vague and abstract principles" (pg.71). It is worth mentioning that the authors also recognize that the FTS is a source of legal uncertainty because, at the time of the studies, the Court had not adopted a definitive decision in Plenary with force of a leading case yet. Ibid.

[17] Founded in 1993, the Sociedade Brasileira de Direito Público (SBDP) is dedicated to innovation in public right. The non-commercial institution's main values are intellectual freedom, full dedication of its members, not improvisation and deepening. In all the initiatives we develop,

that signed high-valued contracts with the public authorities to limit the scope of control, as it has been affirmed. The evaluation that the law hides between the lines a project to weaken the controlling institutions is not correct. It results from years of empirical research carried out by independent and autonomous students, from the most various institutions of higher education in São Paulo, in the program of the School of Public Training (EFp).[18] It also stems from empirical research developed at FGV Direito SP, part of which financed by public resources after winning extremely competitive selection processes promoted by the federal government. More recently, the Research Group on Public Administration Control (GPCAP)[19] has developed at USP Law School, with empirical research publicly debated on the control of regulatory agencies

we aim for sophistication, commitment and quality to contribute to the improvement of public management and its rights. The SBDP is chaired by professor Carlos Ari Sundfeld and vice-chaired by professors Floriano de Azevedo Marques Neto and Jacintho Arruda Câmara. Its major operating fronts focus on Escola de Formação Pública (EFp) (see note 6), in the Public Law Course, whose edition of 2018 is dedicated to legal experiments in public management, and *researches*. The contribution of SBDP for the construction of Brazilian public law is incalculable: high-level research for reflect about the paths of Brazilian development, training of professionals with exceptional qualifications that today occupy the most prestigious positions and legal occupations, training of professors who are leaders in research and teaching at leading universities, drafting of bills that are fundamental to institutional improvement and to fundamental guarantees are only punctual examples. Available at: <www.sbdp.org.br/>. Accessed on: April 17, 2018. The interplay between the SBDP and the teachers and researchers of the FGV Direito SP led to the creation of the Grupo Público, center of study, research and debates on the most relevant public law issues. Available at: <http://direitosp.fgv.br/groups/grupopublico>. Accessed on: April 17, 2018.

18 Created in 1998, the Public Training School (EFp) has the proposal to train leaders in Brazilian public law, that is, people with high analytical capacity for analysis of information and complex scenarios in order to critically assist in the construction of improvement measures in public law, whichever the position the student subsequently occupies. During the period of one year, students dedicate entirely to study and research, and must elaborate a monography of scientific initiation in that period on constitutional jurisdiction. This production, oriented and approved by a professor board, is of the utmost importance. Many of these works gave rise to reflections that, among other inputs, led to the design of the bill of law of Legal Certainty. Part of these works can be consulted in the work *Jurisdição constitucional no Brasil* (VOJVODIC, Adriana et al. São Paulo: Malheiros; SBDP, 2012).

19 Created in 2013 by professor Floriano de Azevedo Marques Neto, the Grupo de Pesquisa do Controle da Administração Pública (GPCAP) brings together undergraduate, master and doctorate students from USP Law School to study themes of control of public administration. Its main purpose is to understand the concrete scenario of the control, starting from qualified studies, in order to propose reflections and ways to improve public administration and control mechanics. In 2016, GPCAP created the project "Observatório do Controle da Administração Pública", with ongoing research on the control of regulatory agencies by the Federal Court of Accounts. Many of the research results, already discussed in academics spaces, seminars and congresses, gave rise to reflections on the Legal Security PL.

by TCU. This without considering all the technical production across Brazil[20] and the several academic debates on the topic.

Therefore, there is a solid line of research of *critical analysis of the control of public administration*. Analyzing the panorama of student production in this recent theme, the three major impasses that Law No. 13,655 of 2018 aims to address are empirically verified:

1. Principle in the control structure: research shows that controllers often consider the administrative decision valid or invalid based on indeterminate legal principles or concepts.[21] This is a decision-making

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[20] In the academic literature, the control agenda in this applied and critical perspective was recently enriched with the publication of fundamental works that help significantly in the understanding of the Legal Security PL. The collective work *Contratações públicas e seu controle* gathers articles on the current challenges to control, and of the control, for an efficient, guaranteeing and modern public procurement system. It is in this work that is the initial proposal of the bill of law of Legal Certainty is presented. See SUNDFELD, Carlos Ari (Org.). *Contratações públicas e seu controle*. São Paulo: Malheiros, 2013. In the work public administration, Odete Medauar presents updated systematization of control and institutions, outlining important assumptions for the research line. See MEDAUAR, Odete. *Controle da administração pública.* 3. ed. São Paulo: Revista dos Tribunais, 2014. In the work *Transformações do direito administrativo: consequencialismo e estratégias regulatórias* there are texts that specifically address to the bill of law of Legal Security and bring together student research of great value to the understanding the real functioning of public administration control in Brazil. See LEAL, Fernando; MENDONÇA, José Vicente Santos de (Org.). *Transformações do direito administrativo: consequencialismo e estratégias regulatórias.* Rio de Janeiro: FGV Direito Rio, 2016. IN the collective work *Controle da administração pública*, the most relevant articles of the discipline offered by the professors Marcos Augusto Perez e Rodrigo Pagani de Souza gattered with paper of professors tooutline an interesting panorama on the major topics under debate on the control of Public Administration. See PEREZ, Marcos Augusto; SOUZA, Rodrigo Pagani de (Coord.). *Controle da administração pública*. Belo Horizonte: Fórum, 2017. Among the recently published books relevant to the control agenda, see JORDÃO, Eduardo. *Controle judicial de uma administração complexa*. São Paulo: Malheiros, 2016; SAAD, Amauri Feres. *Do controle da administração pública.* São Paulo: Iasp, 2016; GUERRA, Sérgio. *Discricionariedade, regulação e reflexividade: uma nova teoria sobre as escolhas regulatórias.* 4. ed. Belo Horizonte: Fórum, 2017; e SUNDFELD, Carlos Ari; ROSILHO, André (Org.). Direito da regulação e políticas públicas. São Paulo: Malheiros, 2014.

[21] See ROSILHO, André Janjácomo. *Controle da administração pública pelo Tribunal de Contas da União*. Doctoral thesis — Faculdade de Direito, Universidade de São Paulo, São Paulo, 2016; GUAZELLI, Amanda Salis. *A busca da justiça distributiva no Judiciário por meio das relações contratuais: uma análise a partir dos planos de saúde*. Thesis (Master) — Faculdade de Direito, Universidade de São Paulo, São Paulo, 2013; JURKSAITIS, Guilherme Jardim. *Contratação direta.* Análise crítica do sistema e o caso dos serviços advocatícios. Thesis (Master) — Faculdade de Direito, Universidade de São Paulo, São Paulo, 2013; GABRIEL, Yasser Reis. *Procedimentos jurídicos para estruturação de concessão de infraestrutura e o desenvolvimento brasileiro.* Thesis (Master) — FGV Direito SP, São Paulo, 2016; RAMALHO, Bruno Araújo. O dever de "motivação administrativa" no contexto das escolhas regulatórias: uma análise da jurisprudência do Tribunal de Contas da União (TCU). In: LEAL, Fernando; MENDONÇA, José Vicente Santos de. *Transformações do direito administrativo*: consequencialismo e estratégias regulatórias. Rio de Janeiro: FGV Direito Rio, 2016.

process potentialized by the wide presence of principles in legal texts, and it is enough to mention the example of the Administrative Improbity Law, whose Article 11 typifies the acts of improbity that violate the "principles of the Public Administration".

2. *Motivation tends not to consider the concrete consequences of the controlling decision*: in general, the controllers adopt a deliberative view limited to the specific case — the casuistic one —, which does not consider the impacts of the specific decision, or of the decision set, on public management in terms of costs, time, legitimacy, effectiveness of the public policy and equality concerning other citizens.[22] In this sense, the control system is insensitive to obstacles and to the manager's real difficulties.
3. *The administrative decisions are merely provisional:* insofar that acts, contracts, administrative processes and major decisions on public policies are subject to very wide control — without clear limits on the suitability and intensity of control —, administrative decisions look similar to a "first attempt", whose final decision depends on the controller's approval.[23]

An important part of the Brazilian legal academy, therefore, is driven by ultimate desire to *understand the real functioning of management public control*. We are interested in studying the most varied manifestations legal for concrete: we want to know, for example, how institutions legal exercise their powers, how controlling laws are created, or how legal tools can favor more efficient control. This happen because we believe that academic research can

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[22] See MARINHO, Carolina Martins. *Justiciabilidade dos direitos sociais: análise de julgados do direito à educação sob o enfoque da capacidade institucional*. Thesis (Master) — Faculdade de Direito, Universidade de São Paulo, São Paulo, 2009; CORRÊA, Luiza Andrade. *A Judicialização da política pública de educação infantil no Tribunal de Justiça de São Paulo*. Thesis (Master) — Faculdade de Direito, Universidade de São Paulo, São Paulo, 2014; VASCONCELOS, Natalia Pires de. *Judiciário e orçamento público. Considerações sobre o impacto orçamentário de decisões judiciais.* Dissertação (mestrado) — Faculdade de Direito, Universidade de São Paulo, São Paulo, 2014; BRAGA, André de Castro Oliveira Pereira. *Normas abertas e regras no licenciamento ambiental.* Thesis (Master) — FGV Direito SP, São Paulo, 2010; KANAYAMA, Rodrigo Luís. *Direito, política e consenso: a escolha eficiente de políticas públicas.* Thesis (Master) — Faculdade de Direito, Universidade Federal do Paraná, Curitiba, 2012.

[23] See PIRES, Gabriel Lino de Paula. *Ministério Público e controle da administração pública*: enfoque sobre a atuação extrajudicial do Parquet. Thesis (Master) — Faculdade de Direito, Universidade de São Paulo, São Paulo, 2014; SAMPAIO, Mariana. *O Ministério Público do estado de São Paulo e o seu Plano Geral de Atuação*. Thesis (Master) — Escola de Administração de Empresas de São Paulo, Fundação Getúlio Vargas, São Paulo, 2017.

transform the way how we understand and work with the law. It is a tireless the task of mapping real problems and addressing legal solutions based on empirical — not based on personal impressions, preconceptions, stereotypes or the subjective appreciation of authorities.

3. Brief synthesis of the legislative history of Law nº 13,655 of 2018

In 2013 the collective work *"Contratações públicas e seu controle"* was published, containing several contributions on challenging topics in the field of bidding and administrative contracts. Its final chapter, by Carlos Ari Sundfeld and Floriano de Azevedo Marques Neto, contains a proposal for a legislative solution to minimize the scenario of insecurity and improve the legal quality of the decisions of administration and of the controllers. Five major guidelines structure the proposal: (1) preventing that concrete consequences are drawn from legal norms with a high degree of indeterminacy, superficially and without measuring the effects arising; (2) protecting the perfect legal acts, preventing that new interpretations at a future time lead to the review of public decisions or the liability of the managers who took it; (3) negotiated solutions can be more effective in a Pleiades of concrete cases; (4) the one who suffers the negative effects generated by the existence, delay or costs of proceedings must be compensated; and (5) regulations, the main source of rights and obligations, need to be edited after prior public consultation.[24] This is the genesis of Law No. 13,655 of 2018.

The idea received important support from Senator Antonio Anastasia, also professor of administrative law, and his advisor, Professor Flávio Unes.[25]

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[24] "We are witnessing a contradictory process: the more progress is made in the production of disciplinary norms on actions of the Administration, the more precarious legal certainty is. The more processes and controls grow, the greater the unpredictability and uncertainty. This can jeopardize the gains in economic, political and institutional stability built in the last years. Legal uncertainty is the gateway to violations of rights. Therefore, it is necessary to improve the instruments that ensure security and predictability, both in the action of the Public Power and in its relationship with individuals. Given this diagnosis, this text proposes measures to somehow neutralize important factors distortion of public legal decision-making, affecting its efficiency and legal certainty." SUNDFELD, Carlos Ari; NETO, Floriano de Azevedo Marques. Uma nova lei para aumentar a qualidade jurídica das decisões públicas e de seu controle. In: Carlos Ari Sundfeld, *Contratações públicas e seu controle*, op. cit., pg.278.

[25] Flávio Henrique Unes Pereira coordinated the work *Segurança jurídica e qualidade das decisões públicas. Desafios de uma sociedade democrática*, published by the Federal Senate in 2015. This can

The legislative process began on June 9, 2015, with the integral presentation of the academic proposal by professors Carlos Ari Sundfeld and Floriano de Azevedo Marques Neto at the Federal Senate.

> As a result, professors Carlos Ari Sundfeld and Floriano de Azevedo Marques Neto drafted a bill, which is now accepted, a result of broader research projects developed by researchers of the Brazilian Society of Public Law in partnership with the Law School of Fundação Getulio Vargas in São Paulo. The result of this work was published in the book "Contratações Públicas e Seu Controle, by Editora Malheiros, 2013. What inspires the proposal is precisely the perception that the challenges of the Government action demand that the activity of regulation and application of laws is subjected to new interpretive, procedural and control limits, to be followed by the federal, state and municipal government.[26]

Its legislative process went through the regular procedures of congressional houses in a republican and transparent way. During the legislative process of Law 13,655 of 2018, its text was initially enlarged and expanded.[27]

On November 19, 2015, a public hearing was held at the Commission of Constitution, Justice and Citizenship in the Senate (CCJ), and on March 9, 2016, Senator Simone Tebet presented a report voting in favor of the approval of PLS No. 349 of 2015 and of the amendment that brought occasional changes

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be considered the first compendium of articles on what would become the Law No. 13,655 of 2018, with the main purpose of explaining its precepts to parliamentarians and the society in general. Carlos Ari Sundfeld, Floriano de Azevedo Marques Neto, Egon Bockmann Moreira, Bruno Meyerhof Salama, Flávio Henrique Unes Pereira, Alexandre Santos de Aragão, Marilda de Paula Silveira, Juliana Bonacorsi de Palma, Marçal Justen Filho, Adilson Abreu Dallari, Maria Sylvia Zanella Di Piero, Marcos Perez and Fernando Dias Menezes de Almeida were part of the project.

26 According to the justification of the presentation of the PLS No. 3,489/2015 in the Federal Senate.

27 Amendment No. 1 to PLS 349/2015, authored by the author of the proposal, corrected an error in typing in Article 27, Paragraph 1, of the Law. In SF Opinion No. 22/2017, authored by the reporting senator Simone Tebet, a series of amendments were systematized and directed for approval, which ended up happening, and he highlight the following changes to the legal text: (i) inclusion of Article 30 with administrative self-binding measures to provide greater predictability in performance, especially through regulations, administrative overviews and responses to consultations; (ii) inclusion of dosimetry criteria in the application of administrative sanctions in Article 21; (iii) provision for the duty of reimbursement by the public agent of expenses with his judicial defense if unlawfulness is recognized in res judicata.

to the improvement of the text. On March 29, 2017, unanimously, the PLS was approved by CCJ-SF, without receiving any appeal. Approved by the Plenary of the Federal Senate on April 19, 2017, PLS No. 349 of 2015 was sent to the Chamber of Deputies, then named as bill of law No. 7,448 of 2017. In the Commission Constitution and Justice of the Chamber (CCJC), no amendments were made to the project, and on September 15, 2017 the reporting deputy Paulo Abi-Ackel presented his opinion on the constitutionality of the matter. The deputy Erika Kokay filed an appeal, which, its turn, was the object of a request of withdrawal, of collective initiative proposal (8,279 of 2018), approved on March 21, 2018. On April 5, by the Message 10 of 2018, the president of the Chamber of Deputies, deputy Rodrigo Maia, sent bill of law 7,448 of 2017 to the presidential sanction.

On the eve of the presidential sanction, however, representatives of control groups strongly rebelled against bill No. 13,655 of 2018.

In addition to opinion articles published in the media, the legal consulting body of TCU prepared a preliminary analysis of the proposal of a New LINDB in a critical, position, arguing, for example, that "by the proposal, the public agent can be negligent, reckless and unskilled, however nothing will happen to him, because he is exempt from liability"[28]. The consulting body of TCU further claimed that the text of the proposal would promote "casuistic interpretation" and would require "the most absolute exercise of futurology by the judge."[29] In the sequence, the consulting body of TCU presented its final opinion on the New LINDB Project, maintaining the critic; the "legal uncertainty and the inefficiency of the Public Administration are not problems that can be solved by creating interpretation criteria standards, especially when referring to criteria, due to their open texture, bringing a great potential to promote the opposite effect of the desired one, that is, more legal insecurity and inefficiency ".[30]

The Federal Prosecution Office (Ministério Público Federal) also expressed opposition to the proposal for the new LINDB, whose Joint Technical Note 1 of 2018 (Nota Técnica Conjunta 1/2018) defended its full veto and the reopening of the legislative process, although it had already been

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[28] Available at: <www.conjur.com.br/dl/analise-consultoria-juridica-tcu-lindb.pdf>. Accessed on: January 20, 2020.

[29] Ibid.

[30] Available at: <https://cdn.oantagonista.net/uploads/2018/04/PL-7448-2017-Inteiro-teor-Altera-LINDB-Parecer-Conjur-2018-04-20.pdf>. Accessed on: January 20, 2020.

approved in the two Congressional Houses.[31] Several entities joined to TCU and MPF: The National Council of Attorney-General of Accounts (CNPGC); the National Association of the Public Prosecutor Office Auditors (Ampcon); the National Association of the External Control Auditors of the Brazilian Courts of Accounts (ANTC); Association of Members of the Brazilian Courts of Accounts (Atricon); National Association of Ministers and Deputy Counselors of the Courts of Auditors (Audicon); Association of External Contral Audit of the Federal Court of Auditors (AUD-TCU); National College of Presidents of the Courts of Auditors; and the National Association of Labor Justice Magistrates (Anamatra). In the case of Anamatra, the association proposed the Adin after the edition of Law No. 13,655 of 2018.[32]

Fundamentally, the criticism of these institutions is formed by five arguments: (i) even though Law No. 13,655 of 2018 determines the burden of argumentation according to the principles-based reasoning, it uses undetermined legal principles and concepts itself; (ii) the precepts of Law No. 13,655 of 2018 are not aligned with the spirit of LINDB, so that this law is not the adequate area to receive it; (iii) Law No. 13,655 of 2018 aims, as its main purpose, to promote the weakening of the control system of public administration, threatening relevant mechanisms combating corruption such as administrative impropriety; (iv) the Law No. 13,655 of 2018 employs concepts that are not typical of the language of administrative law and therefore have no legal significance; and (v) the Law no 13,655 of 2018 is difficult to apply in practice and lacks *enforcement*.

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[31] As an example, we can the transcript of the MPF's commentary on Article 20 from the New LINDB, which imposes an exposure of the consequences when deciding on principles: "The device is of constitutionality at least doubtful. The CCJ's opinion, when referring to 'abstract legal values' explained: 'they can be understood as principles. The provision clearly discredits decision-making, including judicial ones, which are based on principles. It also imposes that, if so, the judge considers the practical consequences of it. Well, to deny the possibility of a decision based on principles is to refuse normative density of that source of law. As stated by Celso Antônio Bandeira de Mello, 'a principle it is, by definition, the core commandment of a system, its true foundation, a fundamental provision that radiates on different norms, composing their spirit and serving as criteria for their exact understanding and interpretation, precisely by defining the logic and rationality of the normative system, giving it its its harmonic meaning'. Hence correctly warns the author: 'violating a principle is much more serious than transgressing a legal rule'". Available at: <www.mpf.mp.br/atuacao-tematica/ccr5/notas-tecnicas/docs/Note% 20Technique% 201_2018.pdf>. Accessed on: January 20, 2020.

[32] It consists of the Adin No. 6,146/2019, which has as *amicci curiae* the Centro de Estudos de Direito Administrativo, Ambiental e Urbanístico — Cedau (Center of Studies of Administrative, Environmental and Urban Planning Law) and OAB.

In reaction to the uprising against the text of the new LINDB, a group of lawyers presented an opinion in response to TCU's Legal Consultancy, arguing not only the constitutionality and the validity of its precepts, but its usefulness for public governance as well, considering that it enables the best practices on public administration control ever applied in the Brazil and internationally.[33] On April 23, 2018, TCU promoted the event "Public Dialogue — discussion of the Bill of Law (PL) 7,448 of 2017", with the participation of publicists and representatives from different bodies and public and private institutions to debate the proposal for the new LINDB. Again, the points of view were reaffirmed, some favorable, some contrary to the text of the new LINDB.[34]

The president at that time, Michel Temer, vetoed seven normative sets of the bill of law of the new LINDB that provided for: (i) negotiation of the transition regime;[35] (ii) declaratory action of validity;[36] (iii) establishment of a

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[33] The opinion is signed by Floriano de Azevedo Marques Neto, Carlos Ari Sundfeld, Adilson Abreu Dallari, Maria Sylvia Zanella Di Pietro, Odete Medauar, Marçal Justen Filho, Roque Carrazza, Gustavo Binenbojm, Fernando Dias Menezes de Almeida, Fernando Facury Scaff, Jacintho Arruda Câmara, Egon Bockmann Moreira, José Vicente Santos de Mendonça, Marcos Augusto Perez, Flávia Piovesan, Paulo Modesto, André Janjácomo Rosilho and Eduardo Ferreira Jordan. Available at: <www.conjur.com.br/dl/parecer-juristas-rebatem-criticas.pdf>. Accessed on: January, 20. 2020. In parallel, I sought to contribute to the article "A proposta de Lei da Segurança Jurídica na gestão e do controle públicos e as pesquisas acadêmicas". Available at: <www.sbdp.org.br/wp/wp-content/uploads/2019 /06/LINDB.pdf>. Accessed on: January 20, 2020.

[34] For a complete transcript of the event, see TCU. *Discussão do Projeto de Lei 7,448 / 2017*. Main conclusions of public dialogue held by TCU on April 23, 2018 in Brasília, 2018. Available at: <https://portal.tcu.gov.br/data/files/CD/E3/51/19/E151F6107AD96FE6F18818A8/Discussao_projeto_lei_7.448_2017.pdf>. Accessed on: January 20, 2020. To full event, see <www.youtube.com/watch?v=1OUTMNaHr_c&t=12925s>.

[35] Article 23, sole paragraph, of bill 7,448 / 2017. The reasons for the veto are: "the *caput* of the article imposes the obligation to establish a transition regime in administrative, controlling or court decisions that provides for a change of understanding in rule of indeterminate content when indispensable for its enforcement, however, the sole paragraph brings a subjective right of the citizen. Thus, the device reduces the cogent force of the rule itself and must be vetoed in order to guarantee the legal certainty of such decisions". The Ministries of Planning, of Development and Management, of Finances and of Transparency, besides the Office of the Federal Controller General and the Office of the General Counsel for the Federal Government.

[36] Article 25 of bill No. 7,448 of 2017. The reasons for the veto are: "the declaratory action provided for by the rule, whose sentence will be effective for everyone and might rule on price and values, may result in an excessive unjustified judicial demand, considering the scope of suitability for the filing of the action for 'reasons of legal certainty of general interest', which, in practice, may contribute to greater legal uncertainty. Furthermore, there is an omission regarding the effectiveness of administrative or control decisions prior to the filling of the declaratory validity action, insofar as the judicial action may become an instrument for the mere postponement or modification of these resolutions and may also represent a violation to the Constitutional Principle of Independence and Harmony between the Powers". They manifested themselves favorable to this veto the Ministries of Justice, Finances, Transparency

commitment that has as its objects sanctions and credits;[37] (iv) establishment of commitment in voluntary jurisdiction to exclude the personal liability of the public agent for fault in the commitment;[38] (v) the legal details of what does not constitute a gross fault[39] (vi) the obligation of publication, preferably through electronic means, of the contributions and their analysis according to the normative act;[40] and (vii) legal support to the public agent in the defense of the conduct practiced in the regular exercise of competences.[41]

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and Office of the Federal Controller General and the Office of the General Counsel for the Federal Government.

37 Article 26, Paragraph 1, II, of bill No. 7,448 of 2017. The reasons for the veto are: "the signing of a commitment with the interested parties, an administrative instrument provided for in the *caput* of the article, may not, in respect of the principle of legal reserve, transact regarding sanctions and credits relative to the past and imputed due to law. Furthermore, it could represent an undue stimulus for non-compliance with the respective sanctions when someone would aim at a later transaction". The Ministry of Finance expressed their support for this veto, together with the Ministry of Transparency and the Office of the Federal Controller General and the Office of the General Counsel for the Federal Government.

38 Article 26, Paragraph 2, of bill No. 7,448 of 2017. The reasons for the veto are: "a judicial authorization for signing an administrative commitment to exclude the personal liability of the public agent violates the Constitutional Principle of Independence and Harmony between the Powers, by preventing the appreciation of the administrative and control level". The Ministry of Transparency and Controllership has expressed itself in favor of this veto. - Office of the Federal Controller General and the Office of the General Counsel for the Federal Government.

39 Article 28, Paragraph 1, of bill No. 7,448 of 2017. The reasons for the veto are the following: "the search for the pacification of understanding is essential for legal certainty. The proposed device admits the disregard of the public agent's responsibility for a decision or an opinion based on jurisprudential or doctrinal interpretation not pacified or even representing of a minority. Thus, the proposal attributes discretion to the administrator to act based on his conviction, which translates into legal uncertainty". The Ministry of Transparency, the Office of the Federal Controller General and the Office of the General Counsel for the Federal Government expressed themselves favorably to this veto.

40 Article 29, Paragraph 2, of bill No. 7,448 of 2017. These are the reasons for the veto are the following: "the command of the provision to make the publication of contributions originating from public consultations that precede the edition of normative acts are meritorious. Nevertheless, the extent of this mandatory publication of the respective analyzes, and at the same time as the issue of the respective normative act, could render the systematic extremely slow and inefficient by the bodies or Powers, or even delay its implementation, colliding with the public interest and thus we recommend the veto of the paragraph". The Ministry of Transparency, the Office of the Federal Controller General and the Office of the General Counsel for the Federal Government manifested themselves favorable to this veto.

41 Article 28, Paragraphs 2 and 3, of bill No. 7,448 of 2017. The reasons for the veto are the following ones: "the provisions create subjective rights for the public agent to obtain support and defense by the entity, in any level, from an act or conduct practiced in the regular exercise of its powers, including defense expenses. As it is shown, it characterizes non-exclusivity of the public advocacy body in the provision, making the body able to impose on each entity undue financial expenditures without limiting the hypothesis of occurrence of such supports or specifying the responsible for them, which could generate significant burdens, especially for subnational entities". The Ministries of Justice and Transparency, as well as the Office of the Federal Controller General and the Office of the General Counsel for the Federal Government expressed their veto to this provision.

We can group these vetoes into three categories according to the order of concern that they express: a) distrust in administrative consensus; b) favorable vetoes to the control of the Court of Auditors; and c) a reading of the efficiency in vetoes. Regardless of the reasons for the veto, it is simply an opinion of the head of the public administration branch that does not adhere to the law and therefore has no practical implication on its interpretation and application. What happens is that the interpretation of the legal text stands out from its process — this is what allows the constant updating in legislation in the light of concrete scenarios, economic and social circumstances, as well as institutional realities. Since it is legally practicable to build a solution, although subject to a presidential veto, it will be legitimate. Thus, it is possible to execute commitments involving: administrative sanctions, past credits, regime of legal transition and personal liability of the public agent for fault of consent in the consensus. It is so because Article 26, generic permit to the conclusion of agreements in the administrative level, does not bring any material restriction on the negotiable object.

A lot of the criticism made in the context of the legislative process of the new LINDB came from a poor understanding of its content, possibly because its critics read it through a lens of preconceptions and mistrust. There was also a fear that the controlling institutions would lose their broad decision-making space built since the promulgation of the Constitution Federal, which gave them unprecedented prerogatives. Controlling laws that survived, authored by the controllers themselves, consolidated the scenario of *institutional disharmony*: the almost inexistence of legal discipline on how to evaluate the legality of acts, contracts and administrative processes that led to fateful examples of subversion of legal certainty and would now be disciplined by the new LINDB.

It was certainly an initial estrangement, which was not confirmed: the new LINDB is operationalized in the legal practice.

In a simple consultation of judgments within the scope of the TCU, in 41 judgments there were arguments based on the new LINDB.[42] Within the scope of the Federal Supreme Court, in seven judgments the new LINDB was invoked,

[42] In that sense, VALIATI, Thiago Priess. *A aplicação da LINDB pelas esferas controladora e judicial*. Jota, February 22, 2019. Available at: <www.jota.info/opiniao-e-analise/artigos/aplicacaoda-lindb-pelas-esferas-controladora-e-judicial-22022019>. Accessed on: April 7, 2020.

notably its Articles 20[43] and 24.[44] In one of the most emblematic cases, Article 20 was mentioned in the summary as a prerequisite for consequential analysis.[45] In this case, it was recognized *a quo* that the benefit of the accompanying aid provided for in Article 45 of the Social Security Benefits Act (Law No. 8,213 of 1991) for disability pensioners to beneficiaries in general based on the principles of human dignity, equality and social rights. The Brazilian Supreme Federal Court was sensitive to the consequentialist argument based on the extent of the benefit in consonance with legal hermeneutics, not to the law, would lead to an expense of R$ 7.15 billion, according to calculations made by the Ministry of Finance. Unanimously, the Court suspended individual and collective lawsuits over the extension of the accompanying aid, corresponding to 25% of the retirement amount for invalidity.

In the academic field, productions about the new LINDB are growing. Among the most outstanding works are the special edition of the *Administrative Law Review* on the new LINDB, with articles commenting each precept of the law,[46] the book *Comentários à Lei Nº 13.655 de 2018*, by Floriano de Azevedo Marques Neto and Rafael Véras de Freitas,[47] as well as the two volumes of the work *Lei de Introdução ao Direito brasileiro — anotada*, of 2019, organized

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[43] See Direct Action of Unconstitutionality No. 5,938, judged *en banc* court on May 29, 2019, reporting judge: Minister Alexandre de Moraes. In this case, the full *banc* decided for the unconstitutionality of the expression "when presenting a health certificate, issued by a doctor trusted by the woman, who recommends the withdrawn", included in the Consolidation of Labor Laws after the 2017 reform in Article 394-A, which provides for the employee's work in unhealthy activities. Minister Luiz Fux established the constitutionality test based on Article 20 of the LINDB, estimating whether the removal of the final part of the contested provisions promoted, or not, greater protection for women. See also AR AgRg No. 2,693, judged by the Plenary on August 31, 2018, reporting judge: Minister Rosa Weber. In this case, the Federal Supreme Court established an understanding in the sense that the advent of Law No. 13,655 of 2018 is not a sufficient legal basis for the rescission of res judicata.

[44] See Writ of Mandamus No. 29.998, judged by the First Panel on May 28, 2019, reporting judge: minister Marco Aurelio; Writ of Mandamus No. 30,294, judged by the First Panel on May 28, 2019, reporting judge: minister Alexandre de Moraes; Writ of Mandamus No. 30,059, judged by the First Panel on March 19, 2019. reporting judge: minister Alexandre de Moraes; and Writ of Mandamus No. 29,323, judged by the First Panel on 12 February 2019, reporting judge: minister Alexandre de Moraes.

[45] This is the Petition to Grant the Suspensive Effect to an Extraordinary Appeal - AgRg in Pet No. 8,002, judged by the First Panel of the STF on March 12, 2019, reporting judge: minister Luiz Fux.

[46] Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/issue/view/4255>. Accessed on: January 20, 2020.

[47] NETO, Floriano de Azevedo Marques; FREITAS, Rafael Véras de. *Comentários à Lei 13.655/2018*. Belo Horizonte: Forum, 2019.

by Alexandre Jorge Carneiro da Cunha Filho, Rafael Hamze Issa and Rafael Wallbach Schwind.[48]

On June 10, 2019, Decree No. 9,830 of 2019 was issued for disciplining the application of LINDB at the federal level. Among the innovations is the provision of the management adjustment term (TAG), through which public agents and internal control bodies sign a commitment to correct the detected faults, to improve procedures and to ensure continuity of action administrative.

4. Assumptions of Law No. 13,655 of 2018

There is a lot to debate about the content of the Articles of the New LINDB and with great quality,.[49] In this part I intend to present the *assumptions of the*

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[48] See CUNHA FILHO, Alexandre Jorge Carneiro da; ISSA, Rafael Hamze; SCHWIND, Rafael Wallbach. *Lei de Introdução às Normas do Direito Brasileiro* - Anotada. São Paulo: Latin Quarter, 2019. 2 v.

[49] See PEREZ, Marcos Augusto. *Cenário é desolador, mas houve uma boa notícia para o direito administrativo*.

Available at: <www.conjur.com.br/2018-jan-04/cenario-desolador-houve-boanoticia-direito-administrativo>; ALBERTO, Marco Antônio Moraes; MENDES, Conrado Hübner. *Por que uma lei contra o arbítrio estatal?* Available at: <www.jota.info/opiniao-e-analise/artigos/por-que-uma-lei-contra-o-arbitrio-estatal-12042018>; MOREIRA, Egon Bockmann. *A nova Lei de Introdução e o Prestígio ao Controle Externo Eficiente.* Available at: <www.gazetadopovo.com.br/justica/colunistas/egon-bockmann-moreira/a-nova-lei-de-introducaoe-o-prestigio-ao-controle-externo-eficiente-6133bodkb8lvvkj4hc1knle4o>; FERRAZ, Sérgio; SAAD, Amauri Feres. *Controle externo não está ameaçado pelo PL 7.448/2017*. Available at: <www.conjur.com.br/2018-abr-13/opiniao-controle-externo-nao-ameacado-pl-74482017>; MODESTO, Paulo. *Fake News institucional: a crítica vazia ao projeto de lei 7.448/2017*. Available at: <www.direitodoestado.com.br/colunistas/paulo-modesto/fake-news-institucionala-critica-vazia-ao-projeto-de-lei-7488-2017>; PESSÔA, Samuel. *Nova Lei de Introdução às Normas do Direito*. Available at: <www1.folha.uol.com.br/colunas/samuelpessoa/2018/04/nova-lei-de-introducao-as-normas-do-direito.shtml>; MACEDO, Fausto. *Novo salvacionismo.* Available at: <http://politica.estadao.com.br/blogs/fausto-macedo/novo-salvacionismo/>; KANAYAMA, Ricardo A. *Por que o PL 7.448/2017 vai trazer segurança jurídica na aplicação da Lei de Improbidade Administrativa?* Available at: <www.conjur.com.br/2018-abr-13/sejambem-vindas-mudancas-lindb-sociedade-brasileira-agradece>; ARAGÃO, Alexandre Santos. *Alterações na LINDB modernizam relações dos cidadãos com Estado.* Available at: <www.conjur.com.br/2018-abr-13/alexandre-aragao-alteracoes-lindb-modernizam-relacoes-estado>; FREITAS, Rafael Véras de. *O artigo 28 do PL 7.448/2017 e a responsabilidade administrativa.* Available at: <www.conjur.com.br/2018-abr-18/rafael-freitas-pl-74482017-responsabilidadeadministrativa>; ISSA, Rafael Hamze. *Aprovação do PL 7.448/2017 representará uma importante melhora institucional.* Available at: <www.conjur.com.br/2018-abr-16/rafael-issa-pl-744817-representa-melhora-institucional>; JUSTEN FILHO, Marçal. *PL 7.448/2017 e sua Importância para o direito brasileiro.* Available at: <www.jota.info/opiniao-e-analise/colunas/coluna-dojusten/pl-7448-2017-e-sua-importancia-para-o-direito-brasileiro-18042018>; SCAFF, Fernando Facury. *Quem controla o controlador?*

New LINDB, that is, the set of ideas that give identity to the proposal according to my reading of the precepts.

4.1 The public administration interprets — and its interpretation counts

Public administration is the greatest interpreter of law. The truth of this statement does no rely on the sense of an interpretive *ultimate ratio*, but on the extension of the public administration and its multiple attributions. The bureaucracy extension and the amount of public functions that the legislator imposes to the public administration is unparalleled, so that the administrative function is only residually definable. To administer is not to apply the law voluntarily, regardless of prevision in law. *To administer is to interpret* judicial norms for applying them in concrete cases. To administer is to interpret norms for application in specific cases. Especially in the Brazilian case, where the laws directed to the public administration are not very detailed and full of legal indeterminacy, interpretation is a task inseparable from implementation.

The primary school teacher interprets the basic curriculum to build a class closer to the regional reality of its students. The doctor makes tragic decisions considering the scarcity scenario that undermines public health. Anvisa collegiate interprets the text of the law to determine if the hookah is a smoke product for regulation purposes. Ibama analyzes whether it issues an environmental license for a given development project based on the interpretation of undetermined legal concepts such as "effectively or potentially polluting" and "environmental degradation". The Social Security

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Considerações sobre as alterações da LINDB. Available at: <www.conjur.com.br/2018-abr-17/quem-controla-controlador-notas-alteracoes-lindb>; APPY, Bernard; NETO, Floriano de Azevedo Marques. *Segurança jurídica.* Available at: <http://economia.estadao.com.br/noticias/geral,seguranca-juridica,70002271134>. An important document that explains the bill of law of Legal Certainty with technical arguments is the opinion which approaches the comments made by the Controlling body of TCU to the bill of law No. 7,448 of 2017, signed by Floriano de Azevedo Marques Neto, Carlos Ari Sundfeld, Adilson Abreu Dallari, Ives Gandra da Silva Martins, Maria Sylvia Zanella Di Pietro, Odete Medauar, Paulo Henrique dos Santos Lucon, Marçal Justen Filho, Roque Carrazza, Gustavo Binenbojm, Fernando Dias Menezes de Almeida, Alexandre Santos de Aragão, Fernando Facury Scaff, Jacintho Arruda Câmara, Vera Cristina Caspari Monteiro, Egon Bockmann Moreira, José Vicente Santos de Mendonça, Marcos Augusto Perez, Flavia Piovesa, Paulo Modesto, André Janjácomo Rosilho, Eduardo Ferreira Jordão, Vitor Rhein Schirato and Carlos Eduardo Bergamini Cunha. Available at: <www.sbdp.org.br/wp/wp-content/uploads/2018/04/Parecer-apoio-ao-PL-7.448-17.pdf>. Accessed on: April 19, 2018.

expert interprets the norms to grant, or not, benefits of social security. The public manager interprets Law 8,666 of 1993 to consider if a given situation is a hypothesis of bidding waiver.

By enacting a law, the Congress creates competences for public administration, which, in its turn, needs to interpret the text of the law and all other correlated norms so that it can execute them. It is natural for the *interpretation command* to be primarily addressed to the public manager, not the controller. What happens is that the primary competence of implementing the law lies with the public administration, which has preference concerning interpretation. In a democratic state of law, public administration is presumed to be in a better technique and routine position to interpret public norms. This is the basis of deference theories, which that defend that the controller shall respect the decision.[50] In Brazil, the most widespread theory is that of the no-controllable administrative merit, according to which the content of the administrative decision cannot be reviewed by the controller.[51]

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[50] *Deference tests* are common in administrative law systems. In the case of States United, for example, the basic deference test was signed in *Skidmore v. Swift* (323 U.S. 134 1944), in which the measure of judicial deference to administrative decisions corresponds to the "weight" they present depending on the quality of the justification presented. More famous is the *Chevron* deference test (*Chevron U.S.A., Inc. v Natural Resources Defense Council*, 467 U.S. 837 1984). The precedent aims to provide guidelines for judicial control of administrative decisions by evaluating whether the interpretation of the law by the public administration deserves deference. *Chevron*'s deference decision was obtained after the interpretation given by the Agency went through judicial scrutiny in two phases: (i) is the text of the law clear and unambiguous? (*Chevron step-1*) and (ii) has the administration constructed an intelligible interpretation of the law? (*Chevron step-2*). In 2001, the Supreme Court established in *Mead* that *Chevron'*s deference would apply only to administrative decisions "with force of law" (*Chevron step-0*), which basically corresponds to legal norms resulting from the normative process. In this sense, *Chevron*'s deference would not apply to cases in which the public administration interpreted "great laws", that is, laws of general application, in all bureaucracy. Nor would this deference apply to interpretations of precepts that did not correspond to the "scope of administrative jurisdiction" (*City of Arlington v. FCC*, 569 U.S. 11- 1545 2013). For all cases in which the *Chevron* deference test does not apply, the *Skidmore* deference test does. There is a vast literature on deference to interpretation given by public administration to laws. See JORDÃO, Eduardo. *Entre o prêt-à-porter e a alta costura: procedimentos de determinação da intensidade do controle judicial no direito comparado*. Revista Brasileira de Direito Público, Belo Horizonte, V. 52, January/March, 2016.

[51] Recently the Federal Supreme Court decided in Extraordinary Appeal No. 632.853 that the merits of administrative decisions cannot be revised unless if they are absolutely contrary to the law or to the corresponding administrative process. This construction, as well as international experiences, recognizes that the public administration interprets the normative texts and does so preferably, because: (i) the law expressly confers decision-making powers to the administrative authority, not to the public authority, and (ii) the administrative authority is in a better interpretive position, given the thematic specialization - by thematic training or routine work in mass with the subject. Administrative interpretation should not be ignored, but rather understood and treated as deserving of institutional dialogue.

For no other reason, Article 22, *caput*, of the new LINDB determines that real obstacles and difficulties of the manager, and public policies demand in their charge shall be considered in the interpretation of public management. This is the proper interpretation way of the administrative level. The administrative competence can move to the controlling level when the reviewer puts himself in the manager's position. In this case, deciding on the manager's place, he *shall take the competence entirely*, and not half of the part that favors him most (prerogatives and formation of the decision content). This is happens because a decision-making is markedly affected by a series of variables that characterize the institutional functioning in which the competent authority is allocated. Thus, the factual circumstances of public management that affect the administrative interpretation shall also be considered by the controller.

In practice, the duty to consider the obstacles and real difficulties of the manager and the demands of public policies is a *command to sensitize the controller* about the reality of the Brazilian public bureaucracy: these elements, in fact, shall not be ignored, but contemplated in legal hermeneutics, which is not pure. This point is particularly relevant when we consider that public administration is the main State institution responsible for guaranteeing fundamental rights. More than any other institution of State, it is the administration that interacts directly with citizens and, through the provision of public services, implements public policies it its charge. It is not uncommon for *tragic decisions* to occur, in which the manager needs to make difficult choices when facing a dramatic structural framework, such as lack of staff or public resources.

The new LINDB recognizes that public administration interprets and gives "weight" to this interpretation. "*Superficial and light*" arguments — based on abstract legal values or with insufficient motivation —cannot, therefore, rule out administrative interpretation. Insofar as only a "heavy" controlling decision can hold off the administrative interpretation, the new LINDB provides for argumentative burden to the controller.

Argumentative burden shall not to be confused with prohibitions. The controller can make the decision he believes to be the most correct, but in order to do it validly, he will have to demonstrate the elements of the reasoning employed according to what the law specifies. The argumentative burden that Law No. 13,655 of 2018 features fit into two blocks of argumentative scenarios:

i) Decision based on abstract legal values

a) The burden of arguing for the *practical* consequence. These are the cases where the controller does not rely on rules, but on principles or undetermined legal concepts to extract concrete commands without explicit normative provision. The theory of implicit powers is located here as well. Controllers may continue to decide based on public administration principles, but will have to consider the practical consequences of their decision.[52]

b) Burden of motivating in a qualified manner, also in the event in which the decision is made based on abstract legal values, including invalidation. A qualified motivation presents, according to Law No. 13,655 of 2018, the following elements: (1) the suitability of the controlling measure — *does it fit in the specific case*?; (2) the identification of alternatives — *which are the possibilities of solution in the specific case?*; and (3) the measurement of the need — in comparison, *is it the least harmful* possibility? This is the explicitness of the proportionality test with the adaptation of its phases to the context of the control of administrative action.[53]

ii) Decision to invalidate the administrative action

a) The burden of *arguing for legal and administrative consequences*, in the event of invalidation of an administrative act, contract, adjustment, process or rule. As it involves the deconstruction of an administrative action, the new LINDB brings a greater subjection to the controller, who shall expose both the legal effects of their decision regarding the impact on public management.

b) Burden of *constructing a method for overcoming irregularities* that is proportional, equitable and not imposing any prejudice to general interests. According to the law, the simple declaration of invalidity makes the controlling decision invalid when the concrete situation

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[52] On the definition of practical consequences and its operationalization in the light of the new LINDB, see MENDONÇA, José Vicente Santos de. Art. 21 da LINDB. Indicando consequências e regularizando atos e negócios. *Administrative Law Review*, edição especial: Direito Público na Lei de Introdução às Normas do Direito Brasileiro — LINDB (Lei nº 13.655/2018), Rio de Janeiro, November, 2018. passim.

[53] See JUSTEN FILHO, Marçal. Art. 20 da LINDB. Dever de transparência, concretude e proporcionalidade nas decisões públicas. *Administrative Law Review*, edição especial: Direito Público na Lei de Introdução às Normas do Direito Brasileiro — LINDB (Lei nº 13.655/2018), Rio de Janeiro, p. 30-33, November, 2018.

allows the controller to point out how the stated validity defect can be overcome, or, in other words, what are the conditions for regularization to take place in a proportional, equitable way and without imposing any prejudice to general interests.

c) Burden of *prohibition against disproportionality* according to the terms of the sole paragraph of Article 21: impediment to the imposition of abnormal or excessive burdens or losses, considering the specifics of the concrete case. Insofar as the duty of proportionality stems from various legal texts and the Constitution itself, we reaffirm that the new LINDB does not limit the control activity, but creates the burden to consider the duty of proportionality in the parameters therein defined instead.

iii) Decision about the regularity of a conduct or validity of an administrative act, contract, adjustment, process or rule

a) The burden of considering the practical circumstances that have imposed, limited or conditioned the agent's action, according to Article 22, *caput*, of the New LINDB, so that all difficulties faced in public management shall be weighed by the controller.

Regarding the burdens presented in Law 13,655 of 2018, some considerations deserve reflection. Firstly, the burden is also based on undetermined legal concepts, which was understood by critics as a contradiction: how to constrain principled and fluid reasoning based on equally vague and superficial guidelines? The new LINDB is not contrary to principles or indeterminate legal concepts, but it puts in perspective *the way* they are employed. Considering the complexity of public management and the natural impossibility of foreseeing all concrete circumstances, turning to indeterminacy is fundamental.[54] Furthermore, LINDB, which has an imprecise writing technique because it consists on a "superlaw" that will

[54] For example of Article 22, according to which the practical circumstances that have imposed, limited or conditioned on the agent's action shall be considered in the analysis of the regularity of behavior or validity of administrative action. Among the practical circumstances, we can consider the scarcity of resources, the absence of interpretative guidance or the jurisprudential divergence on the matter in question, the excess of demand and the unfeasibility of a general service, the absence of the necessary authorization from another public department, the lack of public servants due to adherence to a voluntary dismissal plan, etc. As a typical issue of the complexity of public administration, the examples are so diverse and peculiar that it is impossible to define all practical circumstances in advance.

have wide application, will cover these precepts, One can see, for example, Article 5 of LINDB: "in the application of the law, the judge will attend to the social purposes that it addresses to and to the demands of the common good". What a wording difference is there between the text of Law 13,655 of 2018 and LINDB's Article 5?

A second reflection corresponds to the logic of the argumentative burden: why does the Law 13,655 of 2018 create this order of subjection to controllers? The concern here is in the fact, empirically verified, that the controller often assumes administrative competence. The displacement of the competence from the administrative level to the controlling level implies the transfer not only of decision-making powers and their prerogatives, but also of all the obligations that affect the public manager. All burdens previously listed are operationalized in public management. When the controllers put themselves in the position of manager to review the content of the administrative act, contract, adjustment, process or rule, it is opportune that they are in the exact position of the public manager. Otherwise, society loses: administrative action can be deconstructed without the same gravity of its construction or the qualified interpretation of the manager is replaced by the controller without the same characteristics of technicality and application that made the legislator to originally assign competence and preference in interpretation to the administration. To sum up, Brazil needs decisions of weight.

Articles 20, 21 and 22 of the Legal Security Law shall be read as *deference tests*. If faced with a public service concession the controller is unable to state expressly its legal and administrative consequences or cannot indicate the conditions so that regularization occurs in a proportional and equitable manner and without injuring general interests, then he shall not invalidate, ask for its invalidation or celebrate a conduct adjustment. If the controller cannot observe the argumentative burden, administrative interpretation deserves deference and administrative action must be preserved.[55]

[55] "Instead of imposing, in this case, the legal reading and interpretation that he would do himself in this context of indeterminacy, the controller shall then consider the existence of a reasonableness, or a range of reasonable interpretations, all of which are lawful. In other words, Article 22 of the LINDB imposes that, in a context of real legal indeterminacy, the controller limits his actions to evaluating the reasonableness of the interpretative choice made by the public administrator. The controller, therefore, shall give deference to this reasonable interpretative choice of public administration, even if it does not correspond to the specific interpretive choice that the agent (controller) would do, if it was up to him to interpret it in first hand. That means that Article 22 can be understood as a specific normative foundation,

4.2 Trust in the honest public manager to innovate in management public

Here is a central assumption in Law 13,655 of 2018: *the manager needs greater security to decide*.

It is not new that scholars of bureaucracy and administrative law point to a framework of *decision paralysis* in the public level. Public managers must decide, but do not want to sign acts and contracts. They fear being personally held responsible because the controller had a distinct interpretation from theirs and, therefore, considered the decision as an *illegal act*. They fear having to face administrative inquiries, being questioned, providing clarifications, being constrained to sign terms of management adjustment or terms of conduct adjustment, appearing in the passive pole of public civil actions of administrative impropriety, becoming constraining authorities, dealing with disciplinary administrative proceedings, failing to live up to the benefits of the category and being retaliated among peers.

The risk to which public managers are exposed is high. If an act of yours is considered irregular — by rules or principles —, controllers can apply one or more of the following legal consequences, depending on the concrete case:

1. Loss of assets or values;
2. Full compensation for the damage;
3. Loss of post in the public office;
4. Suspension of political rights;
5. Fine;
6. Disqualification for occupying a position as commission agent or in a post of confidence;
7. Warning;
8. Suspension;
9. Resignation;
10. Dismissal from the position as commission agent or civil servant.

The list of sanctions is not only rigid, but it is taken as a fact that legal stimulus for controllers to pay attention to the dosimetry are low. Therefore, for example, the TCU may apply the sanction of disqualification for occupying a post as a commission agent or in a trust function if the absolute majority

in our law system, for the adoption of judicial deference (or, more broadly, deference of the controller) to reasonable interpretations of the public administration."

of its members consider as "serious the infraction committed".[56] The Law of Administrative Improbity, in its turn, determines as decision parameters only "the extent of the damage" and the "patrimonial advantage obtained by the agent".[57] The Law of Public Civil Action does not bring any dosimetry criteria.

And which public manager is subject to that range of sanctions that can be discretionarily applied by the controller? *Any manager*. Here stands the fundamental error in the liability of public agents: honest and dishonest agents, agents who committed irregularities imbued with bad faith, agents who ended up committing an irregularity believing to be better looking out for the public interest, in short, everyone is under the same liability rule. *The legislation does not protect the honest public manager*.

Honest public managers, who I dare to affirm to be the majority group in the public administration, are constrained to take innovative decisions or decisions that contradict controlling guidelines simply because they disagree with the interpretation given by the controllers. One can explain this behavior by the *dissuasive effect* caused by legislation that does not differentiate the intention in administrative action. Noting cases where their peers were held responsible because the controller understood that their activity was irregular, despite being an *honest mistake*, the manager in good faith changes the behavior as a survival strategy in the civil public service.

The Legal Certainty Law is not concerned with the manager in bad faith. For this manager, a whole control legislation was built. The law is interested, in fact, in the good faith manager, whose honest behavior is not protected by the law and ends up receiving the same legal treatment as the malicious one. On the one hand, there is the component of justice for honest citizens that works in a public administration and seeks to exercise its competences within the legality and in the most efficient way possible. However, the purposes of protecting the honest public agent go far beyond the person of the manager.

The first focus of attention corresponds to the *proper functioning of the public administration*. The way in which the law provides for the liability of managers directly impacts the public decisions. The entire decision-making process becomes more bureaucratic, costly, time-consuming and complex. The decision-making authority needs to "build a legal certainty" and, in order to do that, will contact various bodies with requests for analysis, opinions and other documents, even in the case of simpler decisions. Opinions and

[56] See Article 60 of Law No. 8,443 of 1992.
[57] See Article 12, sole paragraph, of Law No. 8,429 of 1992.

technical petitions, in their turn, tend to limit themselves to indicating what behavior is expected from the controller considering the decision to be taken. *The public management is guided by the controller*, when, in fact, it should be oriented towards the construction of faster, more creative and more efficient solutions based on the literature and the documents that managers consider most appropriate.

Still, without the protection of honest managers, the public administration will not be able to *attract good staff*. Empirical studies show that posts occupied in the low and medium bureaucratic levels are shifting: as soon as their servers are approved in a civil service entrance examination promoted by the controllers, the executive branch is absent.[58] The attraction of good staff happens not only due to the remuneration, but also due to decision-making comfort.

Finally, the protection of the honest public manager makes experimentalism in the public administration possible.[59] Once certain about not being held responsible, unless by fraud or gross error, the public manager can *innovate* in public management. The legislative power trusted the public administration with powers because it is in the best position to exercise them in the most efficient way possible. Inside the parameters of legality, the public manager has full autonomy to bring innovative legal solutions, which must be properly motivated. Thus, the manager can write a new contractual clause, establish innovative methods for implementing public policies[60] or give certain entities powers that they did not have originally, but recent transformations justify their being allocated to them. In innovation, the error is expected, as

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[58] *See FONTAINHA, Fernando de Castro et al. Processos seletivos para contratação de servidores públicos: Brasil, o país dos concursos? Rio de Janeiro: FGV Direito Rio, 2014. According, particularly, to the cases relative to INSS and the Ministry of Health related on pg. 72 and the following ones.*

[59] By the theory of experimental governance ("XG"), which has Charles Sabel as its greatest supporter, public decisions are designed to solve concrete problems, but there is not a lot of clarity and information to enable a complete understanding of the specific cases presented. Thus, the experimentalist governance proposes a method of construction of the decision based on three assumptions: (1) *learning process* - the decision is built along a process of interaction and exchange of information between its recipients along implementation. It is in the concrete experience that information comes to light and problems can be more easily diagnosed to be improved; (2) *decision adaptation* - decisions shall be adapted according to the characteristics of the recipient; and (3) *better position to decide* - institutions may be in a better position to decide depending on the context in which they are inserted. See SABEL, Charles; SIMON, William. Minimalism and experimentalism in the administrative state. *Geo. L. J.*, v. 100, 2011.

[60] O Laboratório de Políticas Públicas da Fundação Getulio Vargas (LAB FGV), guided by graduation students, has dedicated itself to the creation of alternatives of public innovation. Available at: <http://labfgv.com.br>. Accessed on: April 19, 2018.

long as it is not gross, as this is how problems are identified and addressed. Furthermore, public management is improved.

The new LINDB was built with the honest public manager in mind. It is a starting point diametrically opposed to those of the control laws — to a large extent, the rigor of the texts is justified by the fact that they have been written with the dishonest agent in mind. The law must reward honesty behaviors as a stimulus to maintain the ethical standard in public management. This law is a first step in this sense by making the necessary dissociation between honest and dishonest public managers; for the former ones, the whole control system is fully verified in order for the manager to be personally held responsible. Basically, the protection of the honest public manager is based on two fronts: (i) depositing trust in the person of the manager — for this reason the manager will not be *personally responsible*, but the action may be corrected (reward) and (ii) checking security so that the manager effectively decides in the best possible way in its technical evaluation, being able to innovate in public management and even opposing to opinions of controllers, as long as the action is motivated.

The proposal presented is the personal liability of the public agent for technical decisions or opinions only in the case of intent or gross fault (Article 28). Yet, would the control be connived with the fault? Unreasonable or reckless managers would benefit from the Legal Certainty Law? No. In case of "gross fault", the public agent will be personally liable. Any supported irregularities (in doctrine and in former courts decisions, even if minority) does not constitute a gross error. Every decision or technical opinion that reflects general guidance, recognized among manager's peers and their technical community, does not constitute a gross fault. Every decision based on a reasonable interpretation, even if later it is not accepted in the controlling level, does not constitute a gross error.[61]

[61] In a specific study on the liability of the public administrator for irregularities or illegality committed unintentionally, see. DIONISIO, Pedro de Hollanda. *O direito ao erro do administrador público no Brasil.* Rio de Janeiro, GZ, 2019. The author presents the following criteria in the analysis of the manager's "fault" tolerance, which would not give rise to the corresponding liability: (i) retrospective analysis, getting similar to a case study in which legal regime, context and real factors integrate this analysis; and (ii) verification of parameters for determination of serious fault based on the degree of diligence required by the position held, which are: urgency of the decision to be taken, importance of the decision and presence of factual circumstances that have limited the specific administrative action. Ibid., pg.130-153.

The Legal Certainty Law is based on the dosimetry criteria provided for in Article 128 of the Public Servants Statute[62] (Law No. 8,112 of 1990) in order to establish a *minimum dosimetry* in the application of sanctions. Any accountability decision shall necessarily consider the nature and the seriousness of the infraction, the damage that it may cause to the administration, aggravating or mitigating circumstances, as well as the background of the agent.

4.3 The functioning of public administration can count on greater legal certainty for managers, citizens and controllers

The Legal Certainty Law provided for a series of mechanisms to promoting legal certainty, seeking to ensure predictability, stability and the legitimate trust of citizens in public administration:

1. *Transition regime for new interpretation or orientation*. The same logic in *vacatio legis*, also present among the regulations, will be applied to decisions that establish new interpretations or orientations that affect rights or create constraints simply because they *have normative structure*. Insofar as the consequences of liability can be followed by the non-application of these new understandings, the transition regime proves to be fundamental for the recipient to promote what is necessary to fulfill them. Moreover, the institute is inspired by *the modulation of effects* in unconstitutional actions as expressly provided for in the Law of Direct Action of Unconstitutionality[63] (Law No. 9,868 of 1999) and in extensive case law of the Supreme Court.[64]
2. *Linking to the general guidelines of the time for reviewing of validity*. Article 24 of the new LINDB is based on a very traditional legal intertemporal

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[62] So states the text of Article 128 of Law 8,112 / 90: "in the application of penalties, the nature and seriousness of the offense committed, the damage that it may cause to the public service, aggravating or mitigating circumstances and functional antecedents will be considered".

[63] So states the text of Article 27 of Law No. 9,868 of 1999: "declare the unconstitutionality of a law or normative act, and, considering *reasons of legal certainty* or exceptional social interest, may the Supreme Federal Court, by a two-thirds majority of its members, limit the effects of that declaration or decide that it will only be effective after its transit in res judicata or any other time that may be fixed ". We highlight.

[64] See BEICKER, Flávio. *O STF e a dimensão temporal de suas decisões. A modulação de efeitos e a tese da nulidade dos atos normativos inconstitucionais*. In: Adriana Vojvodic et al., Jurisdição constitucional no Brasil, op. cit.

right: *tempus regit actum*. The normative framework is dynamic, is under continuous construction, and responds to the contingencies of its time. A set of precepts may apply to the same fact, as well as and general guidelines[65] at an initial moment (t0) and another set markedly different at a later moment (t1). It is expected that legal norms and guidelines change over time, as this is a direct reflection of the greater flow of available information, the accumulated experience from specific cases and characteristics of the time. Law No. 13,655 of 2018 deals exactly with a perfect, valid and effective act practiced at the initial moment (t0). Could it be controlled at a later moment (t1) considering the new norms and guidelines that survived, producing *ex tunc* effects? [66] That is what is under discussion. The law only expresses what the rule in law already is: administrative acts, contracts, adjustments, processes and rules that are perfect and effective are ruled by the law of their time in any circumstance, either if it consists in elaboration, control or deconstruction. The moment to establish the set of standards and guidelines is the same for all future situations and corresponds to the one in that *perfection* took place, in other words, the moment when the production of administrative acts, contracts, adjustments, processes and legal norms have been completed. In fact, this is the legal determination of Article 5, XXXVI, of the Constitution of the Federative Republic of Brazil: "the law shall not injure the vested right, the perfect juridical act and the res judicata".[67] For sure, the law is established in its material sense, as it can be seen from reading the norm of legality in Article 5, of the Constitution. This prevents that administrative consolidated decisions are reviewed in the face

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[65] The bill of law defines general guidelines as "the interpretations and specifications contained in general public acts or in judicial or administrative case laws, and those adopted by repeated administrative practice and of broad public knowledge" (Article 24, sole paragraph).

[66] About Article 24 of the New LINDB, according to CÂMARA, Jacintho Arruda. *Irretroatividade de nova orientação geral para anular deliberações administrativas. Administrative Law Review*, edição especial: Direito Público na Lei de Introdução às Normas do Direito Brasileiro — LINDB (Lei nº 13,655/2018), Rio de Janeiro, November, 2018, passim.

[67] The Direct Action of Unconstitutionality assures legal certainty in relation to the effects of the precautionary measures, considering the deleterious effects of the immediate application of this decision by the Federal Supreme Court. Therefore, the precautionary measure has *ex nunc* effects, unless the Court considers that, in the specific case, retroactive efficacy must be assured (Article 11, Paragraph 1, Law No. 9,868 of 1999). In any case, the *ex tunc* effects are exceptional. Yet, this is the rule for declaring constitutionality; when the declaration of validity is questioned, it is even more certain that the effects are not retroactive in order to guarantee legal certainty.

of the change composition of an administrative collegiate body, for instance.[68]

4.4 The quality of public decisions can be better, favoring legal certainty

In addition to measures that directly concern legal certainty, Law No. 13.655 of 2018 presents measures to improve the quality of public decisions taken by the administration or by the controllers of a general way. At the end, they also work towards a scenario of greater predictability and certainty in the public level.

a) *Generic permit to the agreements.* The agreements signed between public authorities and individuals[69] have developed significantly since their first regulations in the environmental and competitive level still in the 1990s. Today, there are many examples of it: *substitution agreements* for or sanctioning process or sanctioning through commitments (notably investment ones); *integrative agreements*, through which the content of the final unilateral decision by the public administration is negotiated; *procedural agreements*, analogous to the figure of the procedural juristic act provided for in the new Civil Procedure Code; *collaboration agreements*, aimed at obtaining evidence and information that improve punitive processes, such as the leniency agreement;

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[68] For no other reason do administrative laws limit the right to review acts illegal measures to guarantee legal certainty. At the federal level, Article 54 of Law No. 9,784 of 1999 provides for the loss of the procedural right to review illegal acts within five years, as long as that they result in favorable effects to the corresponding recipients and there is no bad faith. This is the peaceful case law in the Federal Supreme Court (see Extraordinary Appeal No. 636.553 / RS), and the Precedent nº 473 / STF should be read under the guidance of the Federal Supreme Court. The construction of the loss of procedural right to review of illegal acts by the public administration had a great contribution from Almiro do Couto e Silva. Cf., by the author, *O princípio da segurança jurídica (proteção à confiança) no direito público brasileiro e o direito da administração de anular seus próprios atos administrativos: o prazo decadencial do art. 54 da Lei do Processo Administrativo da União (Lei 9.784/99*), 2004. Available at: <www.direitodoestado.com.br/bibliotecavirtual_detail.asp?cod=624>. Accessed on: 16 Apr. 2018. About the legislative, jurisprudential and doctrinal history of the decadential term for the annulment of invalid acts by the Administration, See PINTO, Henrique Motta. *Introdução ao caso preservação de ato administrativo inválido*. In: SUNDFELD, Carlos Ari; MONTEIRO, Vera. *Introdução ao direito administrativo.* São Paulo: Saraiva; SBDP, 2008.

[69] See PALMA, Juliana Bonacorsi de. *Sanção e acordo na administração pública.* São Paulo: Malheiros; SBDP, 2015.

termination of contracts agreements, such as those recently disciplined in the Rebidding Law (Law No. 13.448 of 2017) etc. The New LINDB does not address all agreements; it is restricted to creating a generic legal provision instead so that the Direct and Indirect Public Administration of any of the federate entities conclude integrative and substitute agreements, as well as any other commitment for solving dispute. [70] It is simply a matter of giving more suitable legal treatment to the generic legal provision already existing in the Public Civil Action Law, in its Article 5, Paragraph 6,[71] bringing greater security to managers on the legal viability of the consensus in its public office and security to individuals about the clauses negotiated.

Thus, agreements can be signed to eliminate irregularities (adjustment terms or management contracts for regularization of an irregular situation within a *compliance* schedule, for example), legal uncertainty (commitments made on order to make environmental licenses possible, for instance) or litigation situations (commitment term to replace sanctioning processes with a commitment to invest, for example). To this end, the bill of law requires a prior hearing from the legal body — its Attorneys' Offices. It also requires public consultation depending on the specific situation. It is always possible that agreed commitments go beyond the limits of the agreements and affect interests of third parties, modifying the urban organization of a location, or determining criteria for benefits and public improvements. The conclusion of the agreement may also have its legitimacy questioned by public interest entities or by the locality. In all these cases, public consultation is recommended. The text of the law was purposely opened so that the chances of conducting public consultation would not be limited *ex ante*, and so that if they left other relevant new situations aside, not disciplined in law, helpless. The settlement of agreements must be based on reasons of relevant general interest, keeping away all the reasons of interest between the parties, which characterizes misuse

[70] With this precept, Brazil gets closer to the most advanced experiences with administrative consensus that have generic permits to sign agreements, as in Italy (Legge 241/1990, Article 11), Spain (Ley 39/2015, Article 86), Portugal (Law 4/2015, Article 57), among others.

[71] So states the text of Article 5, Paragraph 6, of the Public Class Action Law (Law No. 7,347 of 1985): "the public bodies which are legitimate parties may make a commitment from the interested parties to adjust their conduct to legal requirements, through agreements, which will be effective as an extrajudicial enforcement order".

of the purpose. Finally, Law No. 13,655 of 2018 safeguards the *in-kind agreements*, defined in special laws and regulations, very common in the regulatory level, which must be observed.

b) *Juridical administrative process*. In an empirical analysis, it was found that "Brazil is the country of the regulations"[72] due to the amount of regulations comparing the one of laws and because of the fact that rights and individuals guarantees are effectively disciplined in the regulatory level. However, the normative production by the administration is not related with the idea of process, as are so many other activities like inspection, sanctioning, expropriation, etc. Not for another reason the expression "issued" is used to express the act of regulatory production: "the minister issued the ordinance". The new LINDB faces this problem, an authoritarian legacy, in order to establish the *minimum normative process* in the administrative production of standards: public consultations. This instrument, especially in the electronic format, has proved to be the most relevant and useful one for enabling interested parties to comment on the content of the norm in formation and, thus, enabling the public power to qualify its final decision. On the other hand, interested parties will not be surprised by a merely *issued* administrative norm, bringing greater legal certainty to the regulatory discipline of rights and duties.

c) *Advertising of administrative and controlling interpretations*. The new LINDB provides for the *duty* of public authorities (administrative and controlling ones) to create mechanisms to increase legal certainty in the application of the norms. For example, it presents three alternatives: editing regulations, administrative precedent (restatements of case law) and responses to consultancies. They have in common the concern about *organizing* and *publicizing* the interpretation that administrative and controlling bodies base themselves when deciding. By making the *rules of the game* explicit, there is greater security to align behaviors and decision making insofar as the systematization of the interpretation ends up providing clear guidelines for lawful or illegal behavior. That is why it is essential that administrative and controlling bodies revisit the interpretations that justified their various decision acts and clearly

[72] See PALMA, Juliana Bonacorsi de. *Atividade normativa da administração pública*. Estudo do processo administrativo normativo. Doctoral thesis — Faculdade de Direito, Universidade de São Paulo, São Paulo, 2014. pg. 20 and following ones.

show society, the market and other government instances the order of understanding adopted among regulations, overviews and responses to consultations, in addition to other similar instruments that can be created internally for this purpose.[73]

The sole paragraph of Article 30 explains the *self-binding* of the public administration and the controllers in relation to the acts of guidance that they issue. In the case of the regulation, the duty of observance is as it consists of an authentic norm. In other cases, however, self-binding is a logical consequence of the normative nature that they present, although they are not formally normative. Summulas (restatements of case law) and responses to public consultations generate an expectation of behavior that needs to be protected in order to guarantee the legitimate confidence and legal certainty, avoiding casuist decisions and arbitrariness. These are *normative precedents*.[74] For them, the law creates a special regime characterized (i) by *the duty of general observance*, mainly by authorities in the institution where they were issued, and (ii) by the *special rite for loss of the binding character*: considering that these are decisions of relative stability and that they justify third parties' behaviors, such as legal norms, they will no longer be bound only by a new act of equal or greater status, in which a specific motivation for the reasons of the change of understanding and the corresponding transition regime is presented, under the terms of Article 23. This rule makes the command in Article 2, sole paragraph, of the Federal Law on Administrative Procedure explicit, which prohibits the application of retroactive interpretation.[75]

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[73] *Executive Order* 13,563 of 2011, issued during the Obama administration, determines Agencies to perform a retrospective analysis of the rules, in order to provide clarity to society on the behavioral guidelines to be followed. To this end, standards must be analyzed in matter of effectiveness — checking if they are current, effective and if they discipline the subject sufficiently — to define whether to be maintained, modified, simplified, expanded or revoked.

[74] See LUVIZOTTO, Juliana Cristina. *Os precedentes administrativos e a vinculação da atividade administrativa.* Thesis (Master) — Faculdade de Direito, Universidade de São Paulo, São Paulo, 2016.

[75] So states the text of Article 2, sole paragraph, XIII: "interpretation of the administrative norm in the way that best guarantees the attendance of the public end to which it is directed; the application retroactive interpretation is prohibited".

5. Law 13,655 of 2018: a project on plans

Legal uncertainty is a fact of reality: it can never be defeated. Legal uncertainty is also a state of feeling and is subjectively valued. It is impossible to establish a metric insofar as the choice of legal uncertainty scenarios is political matter. Due to its various negative consequences, the law has historically looked for methods to face it. Perhaps the most widespread strategy for dealing with legal uncertainty is the codification or the creation of maximalist laws, hoping that legal discipline will provide predictability and uniformity to actions. Yet, legal certainty by normative means is limited. Especially in the current scenario of cyclical changes catalyzed by new technologies, there will never be full regulation of all the concrete situations and, besides that, the pace of normative production is too slow. For this reason, the new LINDB fundamentally focus in the behavior of public agents, controllers and people who interact with the government.

Demystifying Law No. 13,655 of 2018, we note that it is not a conspiracy of lawyers hired by service concessionaires to limit the control. The law does not create any mechanism for the public administration to evade control and in most of its precepts it clarifies, deepens and generalizes already ongoing experiences in public administration. The new LINDB is recognized as a project to improve legal certainty and the quality of public decisions. However, legal certainty is not an end in itself — after all, what does the new LINDB consist in?

The new LINDB intends to be a *metanorm* in the relations with the public administration, so that individuals can make their plans and, in its turn, the law also designs institutional articulation plans to reach public purposes.[76]

If someone wants to start a business, this person needs to plan it. Certainly, the business starter will note the dependency on public authorizations to start the activities and, to obtain them, this person will have to adjust the business plan to the legal norms that regulate the activity. With the legal certainty measures provided for in law, the business starter will be greater security over the set of rules and guidelines that discipline the activity (Article 30, *caput*). Nor will this person face the risk that the request for authorization is denied by the competent authority "for reasons of public interest", not

[76] The reflections here presented find a philosophical substrate in Scott Shapior's theory of plans. See *Legality*. Cambridge: Harvard University Press, 2011.

knowing what to do to adjust the planning and making the business possible (Article 20). This person will not be in a position in which the request is denied on equal terms of a competitor who obtained the authorization either (Article 30, sole paragraph). It will it be possible to sign an agreement in order to make authorization possible, as long as committing to meet the targets agreed with the authority within a schedule of investments and *compliance* (Article 28). Years after the business was in operation, the businessman will not be surprised by the revocation of his authorization because the new composition of the collegiate understands that the requirements were not fully satisfied (Article 24). If a new interpretation about the limit of a chemical component of the product emerges, there will be a transition regime for this businessman to adapt the business without affecting jobs, investments or even the life of the company (Article 23). Likewise, it will be possible to present the person's point of view on the proposed norm under discussion in the government that negatively impacts the activity (reducing the profits of making technological innovation more difficult, for example), helping, thus, to build a higher quality regulation.

If these legal certainty measures are not foreseen, perhaps the best plan is to *give up the plan*. Or, if someone wants to insist on the plan, the person should internalize bureaucratic problems, administrative and judicial disputes, as well as corruption offers to minimize these problems. The final cost will be passed on to the consumer.

Laws are also plan.[77] In order to satisfy a certain public purpose, the legislator can clearly determine the path. Yet, most frequently the legislator uses abstract formulas and delegates competences to those who have certain characteristics that put them in the best position to make decisions. If the law gives an administrative body the power to model concession contracts and establishes the manner in which a given public service shall be provided, there is a clear subversion of the original legislative plan when the controller makes the decision to model the concession himself, even if partially.[78] Legal uncertainty is exactly in this subversion: when the administration level provided by law is not respected, there is uncertainty: (i) about who shall

[77] Ibid., pg. 127.

[78] Ibid., pg. 347. This dynamic, entitled by the philosopher "*God's-eye view*", is founded on self-perception of public agents (in the original, "*legal officials*") as deserving of trust, while those who have received legal competence lack trust. The *God's-eye view* subverts the original plan established by law, being a symptom of a legal distrust system. Considering this scenario, the "meta-interpreters" are asked to determine who should be trusted to do what.

decide; (ii) about the rules according to which the decision shall be made; (iii) about what will be decided; (iv) about the time that the decision will last; and (v) about the order of impact of the decision. All of this makes the system unpredictable, unstable, incalculable and of uncertain consequences. However, the worst consequence is the impossibility of *making institutional articulation plans* — any legal attempt to establish the level of the manager will be frustrated at the end of the day.[79]

In my opinion, which is not the one expressed on Law 13,655 of 2018, it would be entirely reasonable for LINDB to adopt precepts that would outline with greater clarity the manager space and controller space, with the provision of institutes already internationally identified. For example, we can mention the determination of administration reserves, more intense deference tests, rules of institutional articulation, establishment of a clear moment from which the control of the process or act would be suitable, liability of controllers etc. The new LINDB was extremely prudent and did not make any prediction in this regard.

The new LINDB overcomes the issue I raise — administration space and control — to focus on the final result: coherence, transparency and greater information flow so that public actions are more predictable and stable. For this reason, there is such an emphasis on qualified motivation. The argumentative burdens are not constraints to controllers, but rather answers that shall be provided depending on the type of decision that will be taken — by anyone, manager or controller. These are the burdens that allow institutional dialogue and concrete addressing through behavior adjustment, normative change, review of acts, procedures and contracts etc. Ignore the administrative interpretation is not the intention. The law assumes that the competence originally assigned to the administration ends up moving to the controllers and that they shall observe the level of reasoning that this competence requires. For this reason, controllers are urged to consider management variables in their motivation, such as the manager's real obstacles and difficulties, and the public policy requirements under their responsibility. Therefore, we can correctly state that the Law 13,655 of 2018 reinforces and qualifies the control.

On the other hand, the new LINDB trusts the honest public manager to innovate, correcting historical injustice of putting under the same liability legal norms honest and dishonest public officials. This measure is fundamental

[79] This is the case in the case of judicialization of health, whose legislative attempts have been, to a greater or lesser extent, frustrated at the end of the day.

so that managers make plans in the public administration too: public policy implementation plans, public hiring plans, plans for normative production, plans for analysis of impact etc. In other words, bringing protection measures and stimuli to honesty in the public administration, the honest public agent can handle the administrative discretion with a greater comfort to decide. Hence, the public administration works more efficiently, creatively and always attracting good staff.

This is a fundamental project to improve Brazilian development. May the new LINDB not perish from misunderstanding or the use of non-republican lenses in reading it — we all want a better Brazil.

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