What happens to regulations when the law is repealed by new legislation? The case of Law no. 14.133/2021*

O que ocorre com os regulamentos quando a lei é revogada por uma nova legislação? O caso da Lei nº 14.133/2021

*Flávio Garcia Cabral***

ABSTRACT

The article investigates the situation of the administrative regulations in force when a new law appears that repeals the previous legislation that supported them. With the advent of the new Bidding Law (Law nº 14.133/2021), this debate is extremely current, since in the future there will be the replacement of past legislation on bidding. Thus, an attempt is made to discuss what happens to the old regulations when new legislation is enacted. It is a theme practically unexplored by Brazilian doctrine. For the realization of the article, the method of inductive approach is used, having descriptive and

* Article received on May 12, 2021 and approved on July 22, 2021. DOI: 10.12660/rda.v281.2022.85662.

** Escola de Direito do Ministério Público. Mato Grosso do Sul, Campo Grande, MS, Brasil. E-mail: flaviocabral_@hotmail.com. Postdoctoral fellow at PUC-PR. PHd in Administrative Law from PUC-SP. coordinator and postgraduate professor in public law at the Escola de Direito do Ministério Público em Mato Grosso do Sul (Edamp), National Treasury Attorney.

exploratory nature regarding the purposes and bibliographical as regards the means. In the end, it is concluded that, as a rule, with the advent of new legislation, the previous regulations are repealed. However, if the new law that repealed the previous one has the same material content as the predecessor (regardless of the nomenclature used), the old regulations can be applied to it until the new regulations appear.

KEYWORDS

regulations — revocation — reception — material content — new legislation

RESUMO

O artigo investiga qual a situação dos regulamentos administrativos vigentes quando surge uma nova lei que revoga a anterior legislação que os embasava. Com o advento da nova Lei de Licitações (Lei nº 14.133/2021), esse debate se mostra extremamente atual, uma vez que haverá futuramente a substituição das legislações passadas sobre licitações. Assim, busca-se discorrer sobre o que ocorre com os regulamentos antigos quando da edição de nova legislação. Trata-se de temática praticamente inexplorada pela doutrina brasileira. Para a realização do artigo, utiliza-se o método de abordagem indutivo, possuindo natureza descritiva e exploratória quanto aos fins e bibliográfica em relação aos meios. Ao final, conclui-se que, como regra, com o advento de uma nova legislação, os regulamentos anteriores ficam revogados. No entanto, se a nova lei que revogou a anterior possuir o mesmo conteúdo material da antecessora (independentemente da nomenclatura utilizada), os regulamentos antigos podem ser aplicados a ela até que surjam os novos regulamentos.

PALAVRAS-CHAVE

regulamentos — revogação — recepção — conteúdo material — nova legislação

Introduction

The law is, from a certain perspective, dynamic. Determining social and behavioural patterns, legal norms, according to the deontic model, are

continually updated. The repeal of old laws, acts and regulations, replaced by new legislation, is routine in the legal system.

There are various phenomena that imply the coexistent temporality of legal norms, allied to the need to reconcile the hierarchically arranged structure of law. What is the purpose of norms? When does new legislation emerge? This is a question jurists seek to theorise and explain.

However, there is an aspect in this context of normative substitutions that seems overlooked or ignored in Brazilian administrative doctrine. (There is almost no literature on the matter). What happens to administrative regulations when the law is repealed through new legislation? The question is prescient, especially with the advent of the new *Lei de Licitações* (Tendering Law) (Law 14.133/2021), which repeals previous legislation (Laws 8.666/1993, 10.520/2002 and 12.462/2011). What will happen to regulations bound up with those old legislations? Will they be revoked? Will they remain in effect until new regulations emerge? What is the legal basis for this to happen? And may these regulations be reconciled in light of article 193 of Law no. 14.133/2021, which requires coexistence, for two years, of all the aforementioned laws? These are some of the questions we discuss (through construction of a theory to explain this temporal regulatory phenomenon).

Thus, we first present possible effects on the old regulations with the passing of new legislation. Subsequently, we discuss the application of constitutional reception in the present case. In the third and fourth parts, the compatibility of the new legislation will be considered, and how this should occur, supplementing this analysis with the application of LINDB and administrative precedents. Finally, we study the implication of this theory for the case of the new *Lei de Licitações*.

1. What happens to regulations when the law is repealed and replaced by new legislation?

We often see the repeal or substantial modification of laws. This is typical of legislative activity, with the need for normative updates in the face of changing conditions.

These same laws, with respect to public administration, need structured regulation which allows for faithful implementation of the law, uniform application and practical operability. But what happens when a law, regulated

administratively by decree (or another normative act), is revoked? More precisely, what is the purpose of this regulation?[1]

Brazilian doctrine has not always given due attention to this aspect. Writings on this subject are rare.

The first observation to be made is that, with repeal of a law, accompanying regulations will also be repealed. There will be a loss of the basis for validity of the regulation, leading to its extinction. In this light, Felipe Rotondo Tornaría argues that there is a loss of effectiveness of the regulation which deals with a law in this instance.[2]

The conclusion reached by Felix Moreau with respect to French law in 1902 is no different. Establishing that abrogation of a regulation results from the repeal of the law, tacitly or expressly, to which it is bound, means the regulation loses its legal basis and ceases to exist.[3]

Marcelo Caetano is instructive in this respect. From his perspective, as regulations are dependent on formal laws, it follows that, if a law is repealed or replaced, the validity of its supplementary regulations should terminate.[4]

However, Caetano maintains that this automatic loss of validity does not always occur. For him, if there is a long lapse between the enactment of the new law and its proper regulation, services and citizens cannot be deprived of procedural means and other regulatory measures. So, ideally the new law should expressly maintain the validity of the old regulation until new ones appear and, even where there is no express mention in the law, it will be necessary to observe the precepts of the old regulation in everything that does not contradict the new law.[5]

Hely Lopes Meirelles, one of the few Brazilian jurists to mention of the issue, holds that, if the new law addresses the same issue,[6] the old regulation

---

1 We consider here that a Decree is an act edited by the head of the Executive Power. It is a kind of administrative act in terms of form. Regulation is a kind of administrative act as to content. The normative instrument through which the regulation materializes is the Decree." (AULEY, J. M. A validade dos atos administrativos unilaterais. *Revista de Direito Administrativo*, v. 66, p. 49, 10 maio 1961.).

2 ROTONDO TORNARÍA, Felipe. *Manual de derecho administrativo*. 8. ed. Montevidéu: Tradinco, 2014. p. 67.

3 MOREAU, Felix. *Le reglement administratif: étude théorique et pratique de droit public francais* [1902]. Whitefish: Kessinger Publishing, 2009. p. 375.

4 CAETANO, Marcelo. *Princípios fundamentais do direito administrativo*. Rio de Janeiro: Forense, 1977. p. 103.

5 Ibid., p. 103-104.

6 Similarly, J. M. Auley: "In the event of a simple change in the law or basis of the regulation, the regulation retains, of course, its validity if it remains in compliance with the new rule.

would remain in force.[7] In a similar way, Hésio Fernandes Pinheiro pointed out "the prevalence of a regulatory precept that is within the scope of the Executive functions, even if the law is revoked."[8]

Similarly, the Superior Court of Justice, analysing penal legislation with norms in blank, in the judgement of Habeas Corpus no. 108.190, ruled that "since the repeal of the law is subject to another, which governs the same matter, the decree that regulated the first remains valid for the second, until issuance of a new decree, to avoid a legislative vacuum, unwanted by the legislator".

Note, therefore, that the sparse doctrine and jurisprudence on the matter, despite recognition that the repeal of the regulation accompanies the repeal of the law on which it was based, considers that the old regulation continues to regulate the terms of the new law, where compatible.

Although there is no express rule in Brazilian law in this regard, we find this approach clearly in foreign legal orders, for example, the Portuguese.

In Portuguese law, in article 145.2 of *Código de Processo Administrativo* (CPA), it is expressly stated that "Application expires with the repeal of the laws regulated, except insofar as they are compatible with the new law and as long as there is no new regulation thereof".

In this regard, Ana Raquel Gonçalves Moniz explains that "[...] after the revocation of the enabling law, the subsistence or expiry of respective regulations always presupposes concrete consideration of regulatory content and its compatibility with the new content of the substitute law". For the Portuguese jurist, if the enabling law is simply repealed, the principle is that all the respective regulations (executive, supplementary or independent) expire because they lack foundation. On the other hand, when the enabling law (or regulated laws) "is (are) repealed and replaced by (an)other, regulations expire if a normative contrariety is manifested between these and the new law, and may be maintained (until the issuance of new regulatory standards) to the extent that compatibility applies".[9]

---

7 MEIRELLES, Hely Lopes. *Direito administrativo brasileir*o. 35. ed. São Paulo: Malheiros Editores, 2009. p. 183.

8 PINHEIRO, Hésio Fernandes. Os regulamentos na técnica legislativa. *Revista de Direito Administrativo*, v. 61, 1960. p. 355.

9 MONIZ, Ana Raquel Gonçalves. O regulamento administrativo: uma perspectiva a partir do direito português. *Revista de Direito Público da Economia* — RDPE, Belo Horizonte, a. 16, n. 63, p. 66, jul./set. 2018.

The author adds that the basis for this insertion is a consequence of the principle of administrative efficiency and of taking advantage of acts (*hoc sensu*), as well as a way to prevent a vacuum in the legal system, which could hamper the application of the new legislation.

However, given that there is no positive legal rule in Brazilian law, what would be the basis of this practice in our legal system?

2. The possibility of automatically transposing the reception of laws in case of a new constitution, and the issuing of regulations with the emergence of a law that repeals the previous.

In relation to this idea, a significant foundation is that of constitutional reception.[10]

This is not something explicit. Although it may occur expressly, it is usually tacit. We are concerned, then, with a theory to explain a legal phenomenon.

According to Hans Kelsen, the Viennese Jurist, following a constitutional shift, "A large part of the laws enacted under the old Constitution remain, as they say, in force". To his mind, however, this expression is not correct. If these laws are to be considered in force under the new Constitution, it is only because they were brought into force therein, expressly or implicitly, by innovative government action. Thus, what exists is not a creation of an entirely new, but the shift of norms from one legal order to another.[11]

Reception occurs essentially for pragmatic reasons as, otherwise, there would be a legislative vacuum, which would take time to fill, since legislative collegiate deliberations are drawn out.

In the words of Hugo de Brito Machado, "reception is based on a very simple and practical reason. With a new Constitution, the previous legal system is destroyed, since its foundation of validity has been torn up." He points out that it is not "reasonable to elaborate the whole, which will have

---

[10] Analyzing the new Lei de Licitações (Law nº 14.133/2021) and regulations, Marçal Justen Filho sees that there is precisely be a parallel with the issue of constitutional reception. According to the author, "it is possible to change the basis of validity and the old norms remain in force to the extent that they are compatible with the new Constitution."

[11] KELSEN, Hans. *Teoria pura do direito*. 3. ed. Tradução de João Baptista Machado. São Paulo: Martins Fontes, 1987. p. 224.

the new Constitution as its basis for validity, as this would be impracticable, at least in the short space of time necessary to eliminate insecurity resulting from the huge absence of norms".[12]

Furthermore, as the original constituent power was, in theory, legally unlimited, there would now occur an implicit change in the foundational validity of the previous laws, legislation now having the new Constitution as its grounds of validity.

Following this line of thought, Jorge Miranda states that the subsistence of any norms previous to the new Constitution depends on a single requirement: that they are not inconsistent with it. The only judgement to be established is that of material conformity (or compatibility) with the new Constitution. No judgement should be made on these norms according to new norms of competence and form (valid only for the future), nor on content or competence according to the old constitutional norms. It does not matter what laws were materially, organically, or formally unconstitutional before the new Constitution. The main point is that they do not run contrary to this one. For Miranda (a Portuguese constitutionalist), this is not because the constitutional norm is reduced to a mere external limit of the legislative norm, whose disappearance restores it to full legal effect; nor because the exercise of constituent power at a certain moment consummates authority exercised at previous moments. It was, rather, that the practice of Constituent power reveals a new idea of law and represents a new system. Thus, "the Constitution does not validate, nor does it fail to validate; it simply disposes ex novo".[13]

Finally, acceptance of the phenomenon occurs because of its exceptionality. The emergence of new constitutional orders is not a routine matter. Reception is an exceptional phenomenon justifying an exceptional constitutional rupture.

Considering constitutional reception, we note that there are common points vis-a-vis the emergence of a new law and the validity of the old regulations. Indeed, because reception is not legally affirmative, but the theorization of a phenomenon, it should be possible, supposedly, to adapt this theorization to other related phenomena.

---

[12] MACHADO, Hugo de Brito. Teoria da recepção no direito intertemporal. *Interesse Público — IP*, Belo Horizonte, a. 17, n. 89, p. 21, jan./fev. 2015.

[13] MIRANDA, Jorge. *Manual de direito constitucional. Coimbra: Coimbra Editora*, 1988. t. II, p. 244, 255.

Furthermore, the rationale of avoiding the regulatory vacuum is strong. The absence of a regulation may make it impossible or difficult to apply new legislation.

However, there are sensitive differences between the two situations. First, the regulatory vacuum is not of the same magnitude as the legislative vacuum, especially since regulation does not require public debate and collegiate deliberation. Regulations are made by the Chief Executive in office. In theory, it is possible that regulations are made even after the enactment of a new law.

One of the justifications for the regulations is their celerity. According to Ana Raquel Gonçalves Moniz, the speed required for the construction of the legal system, as well as the technical complexity of the problems whose resolution depends on legal norms, "rarely accord with delays in the legislative procedure or the lack of specialisation of the Parliament".[14]

Furthermore, the repeal of laws is an extremely common phenomenon. Exceptionality is not proper to constitutional reception.

Finally, there is no exercise of the original constituent power to formalise the change in the possible basis of validity (we will see later the basis of validity of the regulations).

In this way, despite the existence of commonalities, there are differences that, in our opinion, are fundamental, so the issue is resolved, apparently, by automatic assumption of reception of regulations by the new law analogous to the phenomenon of constitutional reception.

What, then, is the logical-legal basis?

3. Basis of normative compatibility of material content[15] of the law

Understanding how an earlier regulation applies in new legislation means first grasping the function of the regulatory activity. Caio Tácito affirmed that "to regulate is not only to reproduce the law analytically, but to extend and complete it, according to its content, especially in the terms in which the law itself, expressly or implicitly, grants the regulatory sphere".[16]

---

[14] Ana Raquel Gonçalves Moniz, O regulamento administrativo: uma perspectiva a partir do direito português, op. cit., p. 34.

[15] I thank Professor Dafne Reichel Cabral for suggesting the nomenclature used in the theorization developed here and for the ideas shared regarding this chapter.

[16] TÁCITO, Caio. As delegações legislativas e o poder regulamentar. *Revista de Direito Administrativo*. v. 34, p. 473, 1953.

As a manifestation of Executive influence in the legal-normative world, with a primarily operational function, this prerogative lends itself to the application of the law, when it requires administrative action. Thus, the regulatory function is granted to the administrator to act *secundum* and *intra legem*.

According to Oswaldo Aranha Bandeira de Mello, "Executive regulations […] develop the legal texts for the sole purpose of application, taking into account the local or time peculiarities, the possibilities of execution and the circumstances of performance. Their precepts constitute technical rules for the proper execution of the law".[17]

Geraldo Ataliba, in a famous article on the subject, also adds that, according to the content of the law, "there may be no matter to be regulated. It would be the case that the faculty does not exist in certain cases, not due to a normative impediment [...], but due to the absence of assumptions that validated or justified its exercise".[18]

In light of this, despite the common precept that regulation belongs to the law, it would be more accurate to say that the regulation belongs to the content of the law. Although it may seem like a semantic game, there is an important difference in this distinction.

The law in the formal sense constitutes the legislative instrument conferred by the legal system to complement the Constitution, with innovation primarily in the legal order. That is to say, when referring to the law, one indicates the legal instrument, the legal "garment" which binds the text, allowing the construction of legal norms that translate rights and duties.

Therefore, regulation is not essentially a formal instrument (the law), but the matter or material content thereof. The regulations serve to regulate the content of laws.

Formerly, in the light of the 1946 Constitution, the possibility, albeit exceptionally, of implementing regulations (non-autonomously) prior to the law was defended, where there was a delay by the Legislative and the legal interests in question were sensitive to the population.[19] In this sense, Carlos Medeiros Silva explained that,

---

[17] BANDEIRA DE MELLO, Oswaldo Aranha. *Princípios gerais de direito administrativo*. 3. ed. São Paulo: Malheiros, 2010. v. I, p. 368.

[18] ATALIBA, Geraldo. Decreto regulamentar no sistema brasileiro. *Revista de Direito Administrativo*, v. 97, p. 24, 1969.

[19] Rafael Carvalho Rezende Oliveira points out, in the same light, the existence of need, which would be produced in an emergency situation (state of administrative need). He adds that in Argentina, for example, despite the differences of doctrine, acceptance of these regulations has prevailed. (OLIVEIRA, Rafael Carvalho Rezende. *Curso de direito administrativo*. 9. ed. Rio de Janeiro: Método, 2021. p. 233.).

> [...] even though the regulation as a rule presupposes a law to which it is expressly bound, the doctrine recognizes that the opposite may occur. Even without a previous law and in the face of legislative inertia, the regulatory power may be exercised, in the relevant interests, whose guardianship the Executive ensures. So, it happens in cases of defence of public order and security, when the absence of general precepts, emanating from the Legislative or the Executive, create challenges to the authorities or the population, aggravating the situation or encouraging subversion. Also, in terms of internal organisation and functioning of public services, it is generally accepted that the regulatory powers can be exercised with a certain freedom of movement, especially in the case of new services, since they do not aggravate previously budgeted expenses.[20]

Although it is currently impossible, from the perspective of the Constitution of 1988, to consider this solution, since the prior existence of a law is essential (article 84, item IV, of the Federal Constitution of 1988), this previous doctrinal construction serves to demonstrate the idea of regulation is much more linked to the regulated matter than the instrument itself, the formal document in which this matter appears.

Summarising the line of reasoning, the foundations of regulatory validity should be read as the material content of law "X", not simply law "X" itself. This indicates that the staggered legality of regulations occurs primarily in relation to the normative content of laws, not only in terms of their form.

It is true, however, that, as autonomous regulations are not instituted in Brazilian law, except for the exceptions of article 84, VI, lines "a" and "b", of the Constitution, regulations do not innovate primarily in the legal order. The material content to be regulated must be expressed by the instrument of laws in a formal sense. Hence, with revocation of a law, without the passing of another in its place, there is, as a rule, implicit repeal of the regulation, since, although it regulates the material content, this must be instituted formally. In the absence of the law, there is no way to regulate the content, opening the door to widespread existence of autonomous regulations.

However, when a new law maintains the same material content, there is no revocation of the normative source of validity of the regulation (the material content that lacks regulation continues to exist, albeit under the guise

---

[20] SILVA, Carlos Medeiros. O poder regulamentar e sua extensão. *Revista de Direito Administrativo*, v. 20, p. 3, 1950.

of a different law). Likewise, in this case, the necessary formality of binding this content (the law) still exists, albeit under a different heading.

In other words, it is up to the regulation to deal with the content of law "X" (the existence of law as a vehicle for linking this content is essential). Where the content of a "Y" law is in accord, the regulation continues to be in force, since there is no extinction of its validity (the material expressed by means of a law), only transposition to a different legislative vehicle.

It should be remembered, with respect to Geraldo Ataliba's techings, that the law is a necessary and irreplaceable condition of regulation. But mere existence is not sufficient for the exercise of the regulatory function. The law entails and requires complementation, and must be analysed with regard to the limit of its extent and content.[21]

Note, legal construction involving regulations and law is only possible at the infra-constitutional, infra-legal level, as coexistence and frequent alternation of laws is possible. Meanwhile, simultaneous constitutional orders may not exist. There can only be a single Constitution at any one time. Therefore, although laws may complement the material content of the formal instrument of the Constitution, as there is only one foundational text, the solution is the phenomenon of normative reception, as discussed above.

In summary, justification for allowing the maintenance of the validity of old regulations in the face of new laws is, in the light of the role of regulations, the theorization of the normative compatibility of the regulation with the material content of the law.

However, one caveat is appropriate — compatibility with material content regardless of the nomenclature given to the institutes. That is to say, it is not enough to use the same names, but, with evidently different legal regimes,[22] affirm the same content. For example, it cannot be said that the elements of competition in Law no. 8.666/1993 have exactly the same material content as that of Law no. 14.133/2021. Although they may have some areas of agreement, they are not equivalent.

---

[21] Geraldo Ataliba, Decreto regulamentar no sistema brasileiro, op. cit., p. 26-27.

[22] Sometimes you may even be faced with administrative counterfeiting. According to Ricardo Marcondes Martins, "administrative counterfeiting consists of the use of a concept in relation to a situation incompatible with the legal regime associated with it. In it, reference, denotation or intended extension are incompatible with the meaning, connotation or intension. There is not, in counterfeiting, merely wrong use: a fraud occurs, the use of the wrong concept has the effect of masking, disguising, hiding the correct concept and the respective legal regime." (MARTINS, Ricardo Marcondes. Teoria das contrafações administrativas. A&C — *Revista de Direito Administrativo & Constitucional*, Belo Horizonte, a. 16, n. 64, p. 143, abr./jun. 2016).

Thus, we reiterate that the identity of the content must refer to the applied regime, not only to the *nomen juris* presented by the legislator.

4. Compatibility of the old regulation and the new law

As seen, it is possible to make the old regulation compatible with the new law. However, some points must be noted.

First, if there is only repeal of the law that founded the old regulation, without replacing it with another, it is not possible to talk about maintaining the validity of administrative regulation. The regulation is also repealed.

Second, there is no reversion of administrative regulations (the prohibition of article 2, § 3, of LINDB also applies in relation to regulations). Thus, with the repeal of the supporting law, in lieu of, and without interruption of continuity, the enactment of a new law with the same content, and in case of a delay in passing of an applicable new law, a return to the validity of the old, repealed regulation is impossible.

Third, it is possible to apply the old regulation in the new law, provided the content is the same — albeit in part — as the previous. Thus, it is not possible for the old regulation to continue in force when the new law: a) deals with a matter irreconcilable with the old law; and/or b) requires regulation to address new issues not addressed in the previous regulation.

An example may clarify this situation. The *Sistema de Registro de Preços* (SRP) provided for in Law no. 8.666/1993, article 15, was regulated by Decree 7.892, of 23/1/2013. The new *Lei de Licitações* (Law No. 14.133/2021) also deals with the SRP in its article 84. However, note that, according to the new Legislation, it is possible that the term of the *Ata de Registro Preços* will be one year, extendable for another year (in the old law, extension beyond one year was not possible).

Article 12 of the Decree (in line with the provisions of article 15, § 3, III, of Law no. 8.666, 1993) stipulates that the maximum term is 12 months. Thus, there is material incompatibility between the old Decree and the new legislation, which makes it impossible to maintain, at least in this regard, the old regulation regarding the new law.

The incompatibility of the new law with previous regulations occasions a phenomenon that extinguishes administrative acts, known as decay or expiry. This phenomenon may be understood in terms of a supervening invalidity,

since the act[23] contradicts the existing order as a result of changes in factual or juridical circumstances (such as the enactment of a new law with content contrary to the prior administrative activity).[24]

In this scenario, the previous regulation will expire, due to the advent of new legislation that makes the previous administrative provisions incompatible.

On expiry, according to the reference work on the subject, by Fábio Mauro de Medeiros, expiry becomes mandatory, unless there is legal provision to the contrary, a) when the revoked law that previously supported the legal act regulated the original law, vis-a-vis a precariousness regime; b) when extinction of a legal institution, formerly referred to as a perpetual legal institution (for example, slavery; when slavery was abolished, there was no need to talk about acquired associated rights); and c) with regard to a criminal law that typifies behaviour formerly permitted under administrative law.[25]

This is another reinforcement allowing application of old regulation to new legislation, as there are no such circumstances among cases labelled mandatory forfeiture.

Further, with regard to the SRP, addressing the second hypothesis, i.e., that the new law requires regulation of a matter not dealt with in the old regulation, the innovation of Law No. 14,133/2021 serves as an example.

The new law states that the SRP can also be used for public works, an issue not provided for in the old law. Thus, Decree no. 7.892/2013 does not mention the SRP vis-a-vis public works, as it is a fresh matter presented in the new law, which, accordingly, makes it impossible to apply the decree in this respect.

---

[23] For many authors, the statute of limitations is restricted to the extinction of concrete administrative procedural acts, thus not including regulations. However, this restriction occurs because these authors work with the concept of administrative act in the strict sense, excluding general and abstract acts. On the other hand, including this category (general and abstract acts, such as regulations) in the conceptualization of administrative acts, there is no obstacle to applying the instrument of expiry to the concept of regulations. After all, in the event of a later law whose content is incompatible with the previous regulation, what form of extinction would apply to the regulation? Among the typologies of extinction of administrative acts existing in the doctrine (invalidation, revocation, cassation, overthrow, fulfilment of its effects, loss of the object or of the subject and expiry), it seems clear to us that in this situation it is a case of expiry. In this sense, is the terminology used in Portuguese doctrine, as seen throughout the text.

[24] MARTINS, Ricardo Marcondes. *Tratado de direito administrativo: ato administrativo e procedimento administrativo*. 2. ed. São Paulo: Thomson Reuters, 2019. p. 337-338.

[25] MEDEIROS, Fábio Mauro de. *Extinção do ato administrativo em razão da mudança de lei — decaimento*. Belo Horizonte: Fórum, 2009. p. 133 e ss.

5. Additional argument: application of LINDB and the theory of administrative precedents[26]

Although the logical-legal foundations, as already explained, may legitimise application of old regulations to the new law, it is worth adding another argument, which leads to the same outcome, but strengthens the possibility of this application.

It seems that, in addition to the construction already covered, legal suitability for the present case may be found in applying the *Lei de Introdução às Normas do Direito Brasileiro* (Law of Introduction to the Norms of Brazilian Law) (LINDB) (Decree-Law no. 4.657/1942) and the administrative precedents.

The application of LINDB (*Lei de Introdução ao Código Civil* — LICC, at the time), as a reposit of general rules, was suggested by Hésio Fernandes Pinheiro, to tackle a similar problem in light of the Constitution of 1946: "The validity of the law conditioned, vaguely and uniquely, to the construction of regulation, without setting any deadline for this, nor when the law enters into force, is applicable by extension to the rules of the *Lei de Introdução ao Código Civil* ".[27]

Indeed, considering LINDB, especially article 30.[28] which incorporates, albeit implicitly, precedents and standardisation in public administration, we may affirm the need for management to act in accordance with administrative precedents and judicial proceedings in the same regard.[29]

Administrative precedent should be understood as "the legal norm taken from a previous administrative decision, valid and in accordance with the public interest, which, after deciding a specific case, must be observed in future and similar cases by the Public Administration".[30]

---

[26] I would like to thank Professor Carolina Zancaner Zockun for the shared ideas regarding this chapter.

[27] Hésio Fernandes Pinheiro, Os regulamentos na técnica legislativa, op. cit., p. 353.

[28] Art. 30. Public authorities must act to increase legal certainty in the application of the rules, including through regulations, administrative precedents and responses to queries. Single paragraph. The instruments provided for in the introduction of this article will be binding in relation to the body or entity to which they are intended, until further review.

[29] Regarding article 30, Egon Bockmann Moreira and Paula Pessoa Pereira summarize clearly: "For a more accurate understanding, it is enough that we become aware of the meaning of Art. 30: it prescribes legal norms arising from non-legislative sources that must be compulsorily complied with by administrative bodies and entities, as a condition of validity of future decisions that examine similar cases and rules. After all, it determines respect for precedents, including through immediate applicability to regulations, summaries and consultations" (MOREIRA, Egon Bockmann; PEREIRA, Paula Pessoa. Art. 30 da LINDB — o dever público de incrementar a segurança jurídica. *Revista de Direito Administrativo*, p. 269, 23 nov. 2018.).

[30] OLIVEIRA, Rafael Carvalho Rezende. *Precedentes no direito administrativo.* Rio de Janeiro: Forense, 2018. p. 87.

Analyzing the protection of social rights, Daniel Wunder Hachem[31] defends the binding of administration to precedents relating to social rights. Even outside the orbit of social rights, it is fully possible to adopt such premises, in particular regarding compatibility with the legal system and in so far as reiteration of related decisions fosters a degree of certainty and public confidence in administrative practice.

Furthermore, it is vital to remember that one of the primary functions of regulations is to standardize administrative action, preventing inconsistencies in the execution of laws. Thus, allowing non-equitable performance, as result of a regulatory lacunas, would mean violating the rights of those administered.

This question of the application of administrative precedents, even where regulation is no longer in force, emerges from the fact that in the normative revocation there is a logical indeterminacy.[32] Even if there is an express intention to repeal only rule "Y", revocation may not be successful, since the same normative construction could be established through other utterances — including through administrative precedents.

Thus, the legal norm representing the administrative precedent continues to exist even with eventual repeal of the normative text of the law and regulation, in the face of a new law with the same material content.

6. The new Bidding Law and its coexistence with previous Laws no. 8.666/1993, 10.520/2002 and 12.462/2011

Everything that has been presented so far shows that, with the passing of new law and repeal of its predecessor, with the same content material, allows for the old regulation to be applied,[33] until a new regulatory act is issued.

---

[31] HACHEM, Daniel Wunder. Vinculação da administração pública aos precedentes administrativos e judiciais: mecanismo de tutela igualitária dos direitos sociais. A&C — *Revista de Direito Administrativo & Constitucional*, Belo Horizonte, a. 15, n. 59, p. 63-91, jan./mar. 2015.

[32] SAUCA, José María. Cuestiones lógicas en la derogación de las normas. BÉFDP, México, n. 79, 2004. p. 15.

[33] In relation to the new Lei de Licitações, defending the application of Decree nº 2.295/1997 to regulate the hypothesis of dismissal involving a question of national security, provided for both in Law nº 8.666/1993 and in the new law, see CABRAL, Flávio Garcia. Comentários ao artigo 75. In: SARAI, Leandro (Org.). *Tratado da nova Lei de Licitações e Contratos Administrativos — Lei nº 14.133/21*: comentada por advogados públicos. Salvador: Juspodivm, 2021. p. 921.

In relation to the new *Lei de Licitações*, when Laws 8.666/1993, 10.520/2002 and 12.462/2011 were repealed (recalling that article 193, item II, of Law no. 14.133/2021 maintained the validity of previous legislation for two years),[34] the issue was resolved. With its revocation, and, still, without fresh regulations, those in force, compatible with the content of the new legislation, held sway.

But, then, the question arises: could the same regulation serve two different laws simultaneously?

Note, this is a different issue from that already addressed. Here, we are talking about two laws, simultaneously in force, and the possibility of a single regulation serving both.

In this regard, it should be noted that the *Câmara Nacional de Modelos de Licitações e Contratos Administrativos* took a stand on the impossibility[35] of applying the previous regulations. Opinion No. 00002/2021/CNMLC/CGU/AGU stated that reception of regulations of Laws no. 8.666/1993, 10.520/2002 or 12.462/2011 in Law no. 14.133/2021 was not possible, while all these laws remained in force, regardless of merit or compatibility, except for the possibility of issuing a normative act, by the competent authority, ratifying the use of the regulation under the new legislation.

The main thesis of the opinion rests on the idea of legal certainty,[36] since, according to its underwriters, "the possibility of using previous regulations at the time of application of Law No. 14.133, while Laws 8,666/93, No. 10,520/02 and 12.462/11 were still in force, could mean normative chaos".

Contrary to the aforementioned opinion, it is understood there is no legal obstacle to the application of previous regulations, even in the case of the simultaneous validity of laws on public bids.

---

[34] 4 Art. 193. The following are hereby revoked: I — arts. 89 to 108 of Law No. 8,666, of June 21, 1993, on the date of publication of this Law; II — Law No. 8.666, of June 21, 1993, Law No. 10.520, of July 17 of 2002, and arts. 1 to 47-A of Law No. 12.462, of August 4, 2011, after 2 (two) years of the official publication of this Law.

[35] On the other hand, admitting the application of past regulations, the Attorney General's Office — of the Federal District, through Legal Opinion No. 235/2021 — PGDF/PGCONS, concluded: "4. Pre-existing infra-legal regulations can serve the provisions of the Law no. 14.133/2021, provided they are not contrary to the legal norm".

[36] It is clear, contrary to the cited opinion, that legal certainty would be compromised by the absence of regulations. Furthermore, as seen in the prior topic, to apply the previous regulations, as regards what is materially compatible, represents the idea of binding administrative precedents, in view of article 30 of the LINDB, which precisely aimed at protecting legal certainty. Thus, invoking legal certainty, this indefinite legal term is too broad and imprecise to prohibit the application of the previous regulations.

Theoretically, although not so commonly in practice,[37] it is entirely possible for the same regulation to serve two or more laws simultaneously. Imagine the case, for example, of simultaneous or quasi-simultaneous ratification of an "A" law dealing with the legal regime of

public servants and a "B" law concerned exclusively with the process of disciplinary administration of these servers. There is no marker or theory that prevents, in regulating both laws, the Executive Power adopting a single regulation, given the grounds of simultaneous validity.

Consider another hypothetical scenario: Law "A" deals with price registration, with a "Z" regulation which details what the figure in the registry would be. Subsequently, law "B" appears, concerning contractual sanctions of the SRP, without mentioning anything in its text about what the SRP would be. A third law, "C", deals with the budgetary contributions to pay the public contracts, expressly including contracts arising from the SRP. In this context, the "Z" regulation would serve to facilitate the execution of the three laws, since by complementing and clarifying what the SRP would be and how it would work, faithful execution of all three laws would be permitted.

Thus, as discussed, considering that the regulation is about the material content of laws and not about the formal structure, there would be no logical-legal obstacle for the same regulation with respect to two or more laws at the same time.

The biggest problem with the new legislation is that it prohibits, in article 191.[38] that, for a period of two years, coexistence of the legislations. Either it fully applies the past legislation, or it applies the new law in full.

In this light, would application of the past regulation in the new law violate article 191?

As seen so far, the role of regulations is to complement/explain the material content of the law. Based on this, the same regulation may deal with the same material content provided for in more than one law simultaneously.

---

[37] Although the rule is a decree regulating a single law, there are several cases of decrees that end up regulating two or more laws — for, example, Decree No. 10.593/2020, which regulates Laws No. 12.340/2010 and 12.608/2012; Decree No. 10.571/2020, which regulates Laws No. 8.112/1990 and 8.429/1992; or even Decree No. 5.296/2004, which regulates Laws No. 10.048/2000 and 10,098/2000.

[38] Art. 191. Until the term referred to in item II of the introduction of art. 193, the Administration may choose to tender or contract directly in accordance with this Law or in accordance with the laws mentioned in the aforementioned item. The option chosen must be expressly indicated in the public notice or in the notice or instrument of direct contracting, with application of this Law alongside those mentioned in the previous item.

The point is that the regulation is not exclusively linked to a certain law in a formal sense, but to its material content.

In the case where the new Bidding Law repeats the content of its predecessor, the regulation of the latter will be applicable to the former, until fresh regulations are created for the new legislation. This does not imply that there will be a combined application of the laws, since the regulation, as said, is linked to material content, not necessarily to the law itself.

Furthermore, enforcing the regulation is not the same as enforcing the law. It assists application, but should not be confused with it. In fact, Gerald Ataliba wrote some time ago that the so-called regulatory is the Constitutional powers of the Chief Executive, to furnish "instruments necessary for the faithful fulfilment of the legal will, providing measures to establish conditions for this. Its role is to facilitate enforcement of the law, specify it in a practicable way and, above all, accommodate the administrative apparatus, to implement it effectively".[39]

Note that regulation, according to Ataliba, "facilitates the enforcement of the law", but does not represent the law itself. Thus, using regulation for the application of a new law (which is possible, as seen) does not necessarily mean applying the previous law that gave rise to the regulation.

However, despite the possibility of juridical application of old regulations, the safer solution is the passing of the new regulations,[40] though they may reproduce past regulations, in the light of the new legislation. However, although this is the most appropriate practical solution, it is misleading to say, absolutely, the old regulations may not be applied to the new law.

Conclusion

Administrative regulations were extensively covered in pre-1988 doctrine. This topic was reinvigorated with the Constitution of 1988, in particular with regard to ascertaining whether there would be autonomous regulations in the legal system. In recent times, the biggest debate about the

[39] Geraldo Ataliba, Decreto regulamentar no sistema brasileiro, op. cit., p. 23.

[40] It should be noted that, for new regulations, which also refer to new legislative acts, where there was previously no regulatory act dealing with that question, the delay of the Executive can cause ineffectiveness of the law. In these cases, as highlighted by Juliano Heinen, correction of Executive inertia may be done via a writ of injunction (HEINEN, Juliano. *Curso de direito administrativo*. Salvador: Juspodivm, 2020. p. 559).

normative power of the State has focused on its application and limits with regard to regulatory agencies. In the midst of these studies, the question of the temporal relationship with the advent of new legislation, so dear to the theory of law, remained in the background, not drawing further reflection from jurists.

In this article, we sought to fill this considerable gap, in terms of its theoretical and practical relevance. Thus, we may point to the following conclusions:

a) As a rule, with the advent of new legislation,[41] previous regulations are revoked.
b) If the new law that revoked the previous one has the same content (regardless of the nomenclature used), the old regulations may apply until new regulations are instituted.
c) Application of the old regulations will not be possible where the new law has content which is incompatible with the old law or requires regulation of an issue not raised by the previous law.
d) It is not possible to reprise the old regulations, if they are revoked.
e) The same regulation can be applied simultaneously to more than one law.
f) the regulation aims to deal with the material content of the law, not its formal aspects.
g) the logical-legal basis to support the previous premises is theorization of the normative compatibility of the regulation with the material content of the law. This construction is reinforced by the application of LINDB and administrative precedents.
h) with regard to the normative acts regulating the new Bidding Law, the old regulations may be used as well as other related normative acts, where the content (regardless of the nomenclature) of the new law is the same as the old (Laws nos. 8.666/1993, 10,520/2002 and 12.462/2011).

[41] Although we have considered throughout the analysis only regulations, especially those bound by decree, the premises are applicable to other normative acts issued by the public administration, as in normative instructions.

References

ATALIBA, Geraldo. Decreto regulamentar no sistema brasileiro. *Revista de Direito Administrativo*, v. 97, p. 21-33, 1969.

AULEY, J. M. A validade dos atos administrativos unilaterais. *Revista de Direito Administrativo,* v. 66, p. 34-61, 10 maio 1961.

BANDEIRA DE MELLO, Oswaldo Aranha. *Princípios gerais de direito administrativo*. 3. ed. São Paulo: Malheiros, 2010. v. I.

CABRAL, Flávio Garcia. Comentários ao artigo 75. In: SARAI, Leandro (Org.). *Tratado da nova Lei de Licitações e Contratos Administrativos — Lei no 14.133/21*: comentada por advogados públicos. Salvador: Juspodivm, 2021. p. 900-928.

CAETANO, Marcelo. *Princípios fundamentais do direito administrativo*. Rio de Janeiro: Forense, 1977.

HACHEM, Daniel Wunder. Vinculação da administração pública aos precedentes administrativos e judiciais: mecanismo de tutela igualitária dos direitos sociais. A&C — *Revista de Direito Administrativo & Constitucional*, Belo Horizonte, a. 15, n. 59, p. 63-91, jan./mar. 2015.

HEINEN, Juliano. *Curso de direito administrativo*. Salvador: Juspodivm, 2020.

JUSTEN FILHO. *Comentários à Lei de Licitações e Contratações Administrativas*. São Paulo: Thomson Reuters, 2021.

KELSEN, Hans. *Teoria pura do direito*. 3. ed. Tradução de João Baptista Machado. São Paulo: Martins Fontes, 1987.

MACHADO, Hugo de Brito. Teoria da recepção no direito intertemporal. *Interesse Público* — IP, Belo Horizonte, a. 17, n. 89, p. 15-24, jan./fev. 2015.

MARTINS, Ricardo Marcondes. Teoria das contrafações administrativas. A&C — *Revista de Direito Administrativo & Constitucional*, Belo Horizonte, a. 16, n. 64, p. 115-148, abr./jun. 2016.

MARTINS, Ricardo Marcondes. *Tratado de direito administrativo: ato administrativo e procedimento administrativo*. 2. ed. São Paulo: Thomson Reuters, 2019.

MEDEIROS, Fábio Mauro de. *Extinção do ato administrativo em razão da mudança de lei — decaimento*. Belo Horizonte: Fórum, 2009.

MEIRELLES, Hely Lopes. *Direito administrativo brasileiro*. 35. ed. São Paulo: Malheiros Editores, 2009.

MIRANDA, Jorge. *Manual de direito constitucional*. Coimbra: Coimbra Editora, 1988. t. II.

MONIZ, Ana Raquel Gonçalves. O regulamento administrativo: uma perspetiva a partir do direito português. *Revista de Direito Público da Economia* — RDPE, Belo Horizonte, a. 16, n. 63, p. 33-88, jul./set. 2018.

MOREAU, Felix. *Le reglement administratif: étude théorique et pratique de droit public francais* [1902]. Whitefish: Kessinger Publishing, 2009.

MOREIRA, Egon Bockmann; PEREIRA, Paula Pessoa. Art. 30 da LINDB — o dever público de incrementar a segurança jurídica. *Revista de Direito Administrativo*, ed. esp., p. 243-274, 23 nov. 2018.

OLIVEIRA, Rafael Carvalho Rezende. *Curso de direito administrativo*. 9. ed. Rio de Janeiro: Método, 2021.

OLIVEIRA, Rafael Carvalho Rezende. *Precedentes no direito administrativo*. Rio de Janeiro: Forense, 2018.

PINHEIRO, Hesio Fernandes. Os regulamentos na técnica legislativa. *Revista de Direito Administrativo,* v. 61, p. 346-359, 1960.

ROTONDO TORNARÍA, Felipe. *Manual de derecho administrativo*. 8. Ed. Montevidéu: Tradinco, 2014.

SAUCA, José María. *Cuestiones lógicas en la derogación de las normas*. BÉFDP, México, n. 79, p. 15-76, 2004.

SILVA, Carlos Medeiros. O poder regulamentar e sua extensão. *Revista de Direito Administrativo*, v. 20, p. 1-5, 1950.

TÁCITO, Caio. As delegações legislativas e o poder regulamentar. *Revista de Direito Administrativo*, v. 34, p. 471-473, 1953.