

# The Age of the Primacy of Reality in Brazilian Administrative Law: The Role of Consequentialism and Contextualism

*La era de la primacía de la realidad en el  
Derecho Administrativo brasileño: el papel del  
consecuencialismo y del contextualismo*

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## 1. INITIAL CONSIDERATIONS

Although public managers act with diligence, zealotry and dedication, even if they are concerned with planning and prevention, they should be aware that all

administrative actions: a) must be preceded by the analysis of their practical consequences; and b) may be compromised by adverse circumstances, be them internal or external.

After virtually ignoring — for decades — the need of assessing the circumstances (previous and concomitant influential elements) and consequences (subsequent effects) involving Public Administration performance, Brazilian Administrative Law started valuing the primacy of reality, i.e., it became more attentive to facts and to the context it applies to.

By the way, the increased Administration detachment from the context the administered ones are inserted in has led Brazilian Law scholar Floriano de Azevedo Marques Neto to create the expression «autistic administrative act»:

This administrative act, taken by the internal angle of the administrative legal system and analyzed through the structural vector of public administration, will be herein called autistic administrative act. It will be done to highlight its main features, namely: the brutal deficit of communication with the cultural, social and economic environments; its absolute indifference towards the administered ones and the society that, ultimately, are both the recipients and the reason for the practice of these acts. The exacerbated autonomy of the administrative act, which presupposes that all elements necessary for its existence, validity and effectiveness lie inside the administrative legal system, generates absolute indifference towards the environment. It is what, at first, seeks to immunize the act of interferences from politics, economy and culture, but, in order to do so, it treats the administered ones as mere spectators and recipients of the act<sup>1</sup>.

It is worth emphasizing that the aforementioned Law scholar and Professor Carlos Ari Sundfeld have formed the commission accounting for preparing the text of Bill n. 349/2015, which turned into Law n. 13.655/2018, and for including articles 20 to 30 in the Act of Introduction to Brazilian Law Norms (LINDB - Lei de Introdução às Normas do Direito Brasileiro) in order to standardize Public Law application. These norms gave significant emphasis to consequentialism and contextualism, which are two of the three pragmatism features<sup>2</sup>.

1. MARQUES NETO, Floriano de Azevedo. 2012: «A superação do ato administrativo autista». In Odete Medauar and Vitor Rhein Schirato (coords.): Os caminhos do ato administrativo. São Paulo: Editora Revista dos Tribunais, 96.

2. It highlights the idea that LINDB was «strongly influenced by North American pragmatism and that its core (anti-foundationalism, consequentialism and contextualism) permeates all new provisions». (GODOI, Marcela Gonçalves. 2019: Do caráter pragmatista das disposições da Nova Lei de Introdução às Normas do Direito Brasileiro – LINDB e o impacto na gestão pública e na atuação dos órgãos de controle. Text published on 11/25<sup>th</sup>/2019 on Âmbito Jurídico website. Available at: <https://ambitojuridico.com.br/cadernos/direito-administrativo/do-carater-pragmatista-das-disposicoes-da-nova-lei-de-introducao-as-normas-do-direito-brasileiro-lindb-e-o-impacto-na-gestao-publica-e-na-atuacao-dos-orgaos-de-controle/>. Access on: July 04<sup>th</sup>, 2022).

## 2. CONSEQUENTIALISM IN BRAZILIAN ADMINISTRATIVE LAW

With respect to consequentialism, at first, it is worth emphasizing that Law is an argumentative practice, whose application demands coherence, consistency and analysis of consequences, according to Basile Christopoulos<sup>3</sup>.

Accordingly, it is worth highlighting the norms inserted in LINDB articles 20 and 21, which address consequentialism in Brazilian Administrative Law:

Art. 20. Decisions in the administrative, controlling and legal spheres shall not be made based on abstract legal values without taking into consideration their practical consequences.

Art. 21. Decisions invalidating a given act, contract, adjustment, process or administrative rule, in the administrative, controlling or legal spheres, must expressly indicate their legal and administrative consequences.

Single paragraph. Decisions referred to in the caput of this article shall, whenever applicable, indicate the conditions for the regularization process yet to take place, in a proportional and equitable manner, and without prejudice to the general interests. They cannot impose on the affected subjects any abnormal or excessive burden or loss due to the specificity of each case.

Thus, art. 21 started to expressively demand something that was previously neglected, although it should be mandatory in this case, namely: at the time to make decisions, the Public Administration (as well as the control body) should take into account all the outcomes that could result from them. It started highlighting that administrative (and judicial) decisions cannot be detached from reality, and that they should not be only based on abstract legal values, without analyzing potential impacts resulting from them.

According to Marçal Justen Filho, «the purpose is to reduce decisions' subjectivism and superficiality, by imposing the duty of effectively analyzing the circumstances of concrete cases, such as analyzing different alternatives under a proportionality perspective»<sup>4</sup>.

According to the aforementioned professor, it is necessary differentiating the mechanistic perspective about the application of Law from the realistic one. The mechanistic perspective advocates that all solutions to be effectively adopted are already foreseen (although implicitly) in the general norms, so that the law enforcement activity would not involve any innovation by agents with decision-making power. On the other hand, the realistic perspective acknowledges that the norm is insufficient to cover all solutions to

3. CHRISTOPOULOS, Basile Georges. 2015: «Argumento consequentialista no Direito». Revista Eletrônica do Mestrado em Direito da UFAL, 2015, 6(3): 4-27, 9-11.

4. JUSTEN FILHO, Marçal. 2018: «Art. 20 da LINDB. Dever de transparência, concretude e proporcionalidade nas decisões públicas». Revista de Direito Administrativo, Edição Especial: Direito Público na Lei de Introdução às Normas de Direito Brasileiro – LINDB (Lei nº 13.655/2018), nov. 2018: 13-41, 15.

concrete cases; thus, administrative (or legal) authorities are the ones accounting for making the best choices. Therefore, this perspective would be «the most adequate to describe the Law application activity»<sup>5</sup>.

Before Law n. 13.655/2018 was published in a chapter of a book titled *Princípio é preguiça?* [Does principle mean laziness?], Carlos Ari Sundfeld stated that, «nowadays, we experience the so-called 'geleia geral' environment in Brazilian public law, wherein vague principles can justify any decision»<sup>6</sup>.

LINDB aims at correcting the proliferation of administrative and legal decisions that do not take into consideration their practical consequences in the lives of individuals and institutions. The aim is not to reduce the relevance of legal principles, but to stop them from being invoked in an abstract, rhetorical or empty way, without the proper and necessary contextualization with reality.

This requirement in Art. 20 is reinforced in Art. 21, according to which, any decision declaring the invalidity of a given act, contract, agreement, process or administrative rule «shall expressly indicate its legal and administrative consequences».

The aim is to avoid making irresponsible decisions that fail to carefully assess their effects, which are often devastating. It is worth emphasizing that the current Law on Administrative Tenders and Contracts (Law n. 14.133/2022), inspired by the spirit of LINDB, provides that the annulment of bids and contracts should only take place after assessing certain aspects (consequences) and effectively proving that their invalidation is a measure of public interest:

Art. 147. Once an irregularity is found in the bidding procedure, or in the contractual execution, whenever its remediation is not possible, the decision to suspend the contract execution, or to declare its nullity, will only be made upon prove that it is a measure of public interest, based on the evaluation of the following aspects, among others:

- I. economic and financial impacts deriving from delay in enjoying the benefits from the object of the contract;
- II. social, environmental and safety risks to the local population due to delay in enjoying benefits from the object of the contract;
- III. social and environmental motivation of the contract;
- IV. cost of deterioration or loss of executed installments;
- V. expenditure necessary for the preservation of facilities and previously performed services;
- VI. expenditure inherent to the demobilization and subsequent return to activities;
- VII. measures effectively adopted by the head of the agency or entity to remedy the indicated irregularities;
- VIII. total cost and stage of physical and financial execution of contracts, agreements, works or installments;

5. JUSTEN FILHO, Marçal. Op. cit., 16.

6. SUNDFELD, Carlos Ari. 2014: *Direito Administrativo para céticos*. 2.<sup>a</sup> São Paulo: ed. Malheiros, 205.

- IX. shutting down direct and indirect job positions due to downtime;
- X. cost of carrying out a new bid or signing a new contract;
- XI. opportunity cost of capital during the downtime period.

Single paragraph. If the downtime or annulment does not prove to be a measure of public interest, the public authority shall keep the contract and solve the irregularity through compensation for losses and damages, without prejudice to the determination of accountability and applicable penalties.

Art. 148. The declaration of administrative contract nullity shall require prior analysis of the public interest involved in it, pursuant to art. 147 of this Law, and it shall operate retroactively to stop the legal effects that should be ordinarily produced by the contract and to deconstitute the ones already produced.

§ 1 If it is not possible returning to the previous factual situation, contract nullity shall be resolved through compensation for losses and damages, without prejudice to the determination of accountability and applicable penalties.

§ 2 By declaring contract nullity, the authority, in order to guarantee the continuity of the administrative activity, may decide that it will only be effective in the future, in order to sign a new contract, for a period-of-time up to 6 (six) months, which can be extended only once.

If, before, the application of the norm was mostly linked to the idea of subsumption, i.e., when the concrete case fits the legal norm in the abstract (if there is legality defect, the administrative act must be annulled); however, everything will depend on the in-depth analysis of practical consequences from the eventual invalidation or maintenance of the act.

It is clear that the introduced changes were not immune to criticism. Thus, «the purpose of Article 20 is noble, but, curiously, it intends to curb the rhetorical use of more abstract norms and it does so by using terms that are also quite abstract, such as ‘abstract legal values’, ‘practical consequences’, ‘need and adequacy of the measure’ and ‘possible alternatives’».

As it turns out, Art. 20, under the pretext of fighting the legal uncertainty generated by decisions made based on abstract values (valuing strong legal pragmatism), runs the risk of generating decisions that also lead to legal uncertainty, such as not to annul an administrative contract for a public work whose bidding was proved to be fraudulent, on the grounds that many jobs will be closed; or not to invalidate a public tender for doctors, whose tests’ application presented serious issues (such as template leaking), under the justification that society needs such positions to be filled soon.

Irene Patrícia Nohara addressed innovations made by LINDB and, after diagnosing issues in Public Law application in Brazil, she acknowledged the need of stopping excesses, disproportions and imbalances in controls; she accurately stated that:

However, based on the technical analysis of LINDB’s provisions, which assumingly equate «legal security and efficiency issues in the development and application of public

law», it is possible noticing that, despite an accurate diagnosis, the THERAPY, i.e., the SOLUTION presented in terms of legislative innovations mainly comprises «SOLUBLEMS», i.e., solutions that are far from solving the diagnosed problems. On the contrary, they are «SOLUBLEMS» because they do not fail to produce new problems, given the same imprecision, decisionism and insecurity, among other quite problematic and speculative points deriving from the analysis of the new LINDB normative text...<sup>7</sup>.

The doctrine suggests adopting weak consequentialism to help solving this issue. Thus, according to Luís Fernando Schuartz, based on the strong consequentialism theory, decision-making justification is primarily and fundamentally based on consequences. On the other hand, based on the weak consequentialism theory, consequences have a residual reasoning nature and they are analyzed when conventional techniques do not define a given response, or equivalent, to the other techniques that give normative meaning to the legal text<sup>8</sup>.

### 3. CONTEXTUALISM IN BRAZILIAN ADMINISTRATIVE LAW

The primacy of reality in LINDB is not only highlighted by valuing consequentialism. The aforementioned legal institute, in its Art. 22, also emphasizes contextualism (circumstantialism):

Art. 22. The interpretation of norms on public management shall take into consideration the real obstacles and difficulties faced by managers, as well as requirements of public policies under their responsibility, without prejudice to the rights of the administered ones.

§ 1 Decisions about the regularity of conduct or the validity of a given act, contract, adjustment, administrative process or rule shall take into consideration the practical circumstances that have imposed, limited or conditioned the agent's action.

§ 2 The application of sanctions shall take into consideration the nature and seriousness of the committed offense, the damages to the public administration, the aggravating or mitigating circumstances and the agent's background.

§ 3 Sanctions applied to the agent shall be based on the dosimetry of other sanctions of similar nature and on those related to the same fact.

Thus, according to the legislation, the interpretation and application of Administrative Law must take into consideration the real obstacles and difficulties faced by

7. NOHARA, Irene Patrícia. 2023: «'Solublemas' da LINDB ao Direito Público», text published at Irene Nohara's website. Available at <https://direitoadm.com.br/tag/lindb/>. Access on: July 03<sup>rd</sup>, 2022.

8. SCHUARTZ, Luís Fernando. 2008: «Consequencialismo jurídico, racionalidade decisória e malandragem». Revista de Direito Administrativo, 2008, 248: 130-158, 131.

managers, requirements of public policies under their responsibility, and the practical circumstances that have imposed, limited or conditioned the agent's action.

According to Fabrício Motta and Irene Patrícia Nohara, changes implemented in LINDB enabled a new vocabulary that started to guide debates about the interpretation of Public Law. LINDB terms, such as Administrative Law of Fear, «blackout of pens», consequentialism, principle of «deference», «finished-work engineers» and «solublems», were incorporated to the administrative doctrine.

According to the aforementioned authors, primacy of reality represents the «need of interpreting the normative text, as well as public management requirements, from the perspective of real difficulties faced by managers and of requirements of public policies under their responsibility, which shall be investigated at the time to regulate the situation, i.e., the practical circumstances that have imposed, limited or conditioned the agent's action»<sup>9</sup>.

Emerson Gabardo and Pablo Ademir de Souza, in an article about LINDB, have stated — based on the book *A Samba for Sherlock*, by Jô Soares — that «Sherlock Holmes acting in England is one person, whereas Sherlock Holmes acting in Brazil is someone else. The same individual, who follows the same methods in different cultural environments, can get to different outcomes — he can be a hero or an idiot»<sup>10</sup>.

Thus, it is undeniable that no matter how well-prepared or well-intentioned the public administrator is, the circumstances surrounding its performance are a decisive factor. Context, in its complexity and dynamism, plays fundamental role in administrative action, whether in its success or failure.

The complexity of the administrative action context involves legal, political, cultural, financial, structural, motivational, historical, geographic, geopolitical circumstances, among others, whereas its dynamism can change each one of these factors.

External factors, such as global economic crises, pandemics, climate issues or wars, as well as internal factors, such as public service strikes, inadequate salary policies, contests that are never held or insufficient tax collection, can also influence this context.

All these circumstances have considerable impact on public management. In some cases, prevention must be adopted when the risks involved in this process can be predicted, whereas in others, the precautionary principle must be adopted when a given issue is likely to take place.

9. MOTTA, Fabrício and NOHARA, Irene Patrícia. 2019: LINDB no Direito Público. Lei 13.655/2018. São Paulo: Thomson Reuters Revista dos Tribunais, 24.

10. GABARDO, Emerson and SOUZA, Pablo Ademir de. 2020: «O consequencialismo e a LINDB: a cientificidade das previsões quanto às consequências práticas das decisões». Revista de Direito Administrativo & Constitucional, 2020: 115, nota de rodapé n.º 81.

## 4. THE LACK-OF-PERSONNEL ISSUE IN PUBLIC ADMINISTRATION

Among several contexts capable of influencing and affecting administrative action, it is worth emphasizing the personnel issue. Oftentimes, public administrators feel alone and abandoned to fate. At the time Graciliano Ramos was mayor of Palmeira dos Índios County, he stated that «few employees remain among those I met in January, last year: those who did politics and those who did nothing have left»<sup>11</sup>.

The number of employees is not the problem in other contexts: quality is the lacking element. Public Administration's performance efficiency depends on several factors, which range from adequate administrative organization to the adoption of planning culture, from sufficient material resources to the qualification of human resources. However, it is worth emphasizing that, oftentimes, the organizational and functional mapping of public administrations only reflects the most abstract features and conceals material attributes essential to the administrative life, whose spectral image is that of a living world whose essence lies on human beings<sup>12</sup>.

It should be noticed that, overall, Brazilian society's idea about professionals who work in the public sector does not correspond to reality. Thus, for example, although it is often said that civil servants earn good money, this factor actually depends on their federative level and power. In this case, municipal public servants who work in the Executive Branch are the ones with the lowest wage, which are often lower than the ones paid in the private initiative — almost 60 % of municipal servants earn less than R\$2,500.00 (two thousand and five hundred reais)<sup>13</sup>.

What is the level of quality of these municipal servants? According to IPEA, the least qualified public servants are observed in municipalities<sup>14</sup>. However, it is worth emphasizing that municipal public servants are the ones who provide several of the most necessary public services provided to society, such as health and education services.

Thus, there is direct association between the efficient provision of public services (mainly of social ones) and the conditions provided by the Public Power to its servants. Therefore, it is worth highlighting, in this context, the need of focusing on motivating and training professionals who work in the public sector, since this factor has been neglected in Brazil.

11. RAMOS, Graciliano. 1929: Relatório I, published in Diário Oficial de Alagoas.

12. GUERRERO, Omar. 1998: El funcionario, el diplomático y el juez. Las experiencias en la formación profesional del servicio público en el mundo. Mexico: Instituto Nacional de Administración Pública, 47.

13. IPEA – Instituto de Pesquisa Econômica Aplicada. Distribuição de remuneração nos níveis federativos. Available at: <https://www.ipea.gov.br/atlasestado/consulta/119>. Access on: May 21<sup>st</sup>, 2022.

14. IPEA – Instituto de Pesquisa Econômica Aplicada. Total de vínculos por nível de escolaridade, Poder e nível federativo. Available at: <https://www.ipea.gov.br/atlasestado/consulta/93>. Access on: May 21<sup>st</sup>, 2022.



In fact, this issue is not exclusive to our country. Catalan Law scholar Carles Ramió addressed the Spanish reality and highlighted that one of the biggest issues observed in that Iberian country lies on lack of motivation by public servants. Thus, «la cuestión es que la mayoría de los empleados públicos acceden, bastante jóvenes, con entusiasmo profesional y vocación de servicio público. Pero este entusiasmo y vocación debe mantenerse durante muchísimos años (entre 35 y 40) hasta el momento de la jubilación. Y eso es complicado»<sup>15</sup> [«the issue lies on the fact that most public employees start working, at a quite young age, with professional enthusiasm and call for public service. However, such enthusiasm and call must be nourished for several years (from 35 to 40 years) until retirement time; and that is complicated»].

Motivation and training are two significantly interconnected realities: one leads to the other, and vice versa. Therefore, one of the keys to maintain public servants' motivation lies on the need of effectively training them to help improving their skills and abilities, to enable them to efficiently perform their functions, to ascend in their career and, consequently, to earn higher wages.

There is no doubt that the national legal system imposes a duty on every public manager, namely: promoting public servants' training, which is an essential administrative measure to implement the principle of efficiency (Federal Constitution, art. 37, caput), since it enables increasing state agents' professionalization level. Thus, it should be noticed that, in this context, the Brazilian Federal Constitution — in its Art. 39, paragraph 2 (provision inserted from EC 19/98, onwards) — expressively determines that public entities shall implement public policies focused on training and qualifying public servants, based on the maintenance of government schools.

Public Administrations have neglected this constitutional duty for a long period-of-time. Overall, several administrations simply turned a blind eye to the need of qualifying those who mostly account for the success or failure of state actions, namely: public servants.

Nowadays, the new law on administrative bidding and contracts (Law n. 14.133/2021), in its Art. 173, provides on the legal duty, according to which, «Courts of Accounts shall, through their schools of accounts, promote training events for permanent servants and for public employees assigned to carry out essential functions for the execution of this Law, such as face-to-face and distance courses, learning networks, as well as seminars and conferences on public procurement».

Better-qualified public servants favor the context surrounding administrative action, due to their technique, planning skills and professionalism. Furthermore, they exponentially increase the likelihood of having positive outcomes arising from their administrative performance.

15. RAMIÓ, Carles. 2016: La renovación de la función pública. Estrategias para frenar la corrupción política en España. Barcelona: Editorial Catarata, 73.