Consequentialism and its recognition in the brazilian legal system: the duty to consider practical consequences in judicial review of Public Administration decisions[1]

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1 This article presents the updated and in-depth results of the research initially published in Matos and Alves (2024).

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ABSTRACT: This article presents a study on consequentialism as a moral theory and its growing application in Brazilian law, especially concerning decisions for the control of Public Administration, following its inclusion in the Introductory Law to the Norms of Brazilian Law (LINDB), the Administrative Improbity Law (LIA), and the Law on Bids and Administrative Contracts (LLCA). The research aims to analyze the possible impacts of this express positivization on the control of administrative activity, justified by the need to clarify the points surrounding the issue, the core of which is the elucidation of such consequences. To this end, a bibliographic research was conducted, with a phenomenological-hermeneutic approach and the use of the monographic method. As results, it is pointed out that the legislator's intention is to avoid control decisions disconnected from reality and their practical impacts, especially in the social and economic fields. It is concluded that the application of consequentialism is relevant, provided that its use is not based on subjective and rhetorical conjectures, but rather on effective and empirically-based data, a concern observed in recent legislative changes.

KEYWORDS: consequentialism; practical consequences of the decision; control of Public Administration; pragmatism; LINDB.

1. Introduction

This article presents the results of a study on consequentialism as a moral theory and its growing application in Law, especially in Brazil, with its inclusion in the Law of Introduction to the Norms of Brazilian Law (LINDB), the Law of Administrative Improbity (LIA), and the Law of Bidding and Contracts (LLC), establishing consequentialist parameters for decisions regarding the control of Public Administration.

Consequentialism is a moral theory, widely studied in philosophy, and has been frequently observed in judicial decisions, mainly due to the expansion of judicial power, not only in numerical terms (with the significant increase in judges and courts), but also through the progressive judicialization of social demands, which increasingly have a relevant moral, political, and religious impact, as well as on economic and social policies[2].

2 Regarding the increasing judicialization of politics and social relations, as well as judicial decisions with a high moral impact, see: Alves and Leal (2015).

If for utilitarians what matters is happiness and for natural law theorists the laws of nature, for consequentialists the primacy lies in the consequences of the subject's decision in the world in general. Thus, the influences and projections, beneficial or harmful, not only to the individuals but to society as a whole, arising from them, will weigh heavily.

In this sense, cognitive foundations, no longer merely confined to the procedural parties, begin to occupy a large space in judicial decisions to the detriment of legal foundations. This leads to judicial decisions that are predominantly concerned with the future, considering the possible consequences of the *decisum* in the real world.

The major issue that arises when using consequentialist arguments is that, faced with possible alternatives when analyzing the consequences of a decision, the judge will choose the one that will bring the "best impacts," those consequences most desirable for serving the collective interest. However, this cannot be done with a merely subjective purpose, without testing these possibilities, which demands a certain empiricism, using concrete data, which the judge often does not have.

This lack of concrete, empirically based foundations in judicial decisions analyzing their impacts leads to criticisms, present in Brazilian legal doctrine, of a subjectivism based on conjecture, with a departure from legal foundations, which would lead to judicial activism.

Nevertheless, in recent years, Brazilian legislators have begun to prioritize consequentialism not only in judicial decisions but also in administrative and oversight decisions, such as those originating from the courts of accounts, essentially with the changes made in 2018 to the LINDB, in 2021 to the LIA, and with the enactment of a new LLC also in 2021.

In this context, criteria were established that require a reasoned justification to demonstrate the necessity and suitability of the measures adopted among the possible alternatives, considering mainly the elements that will impact the social and economic fields, to which the State (represented by the Three Branches of Government) is not indifferent. Thus, the research is justified by the need to clarify important points surrounding the problem of the study, whose core is: what are the possible impacts on the control of Public Administration with the express insertion of consequentialism in Brazilian Law?

To find answers to the problem presented, a bibliographic research was carried out, using the phenomenological-hermeneutic method for the

approach, since, for this investigation, the study of the phenomenon is essential to reveal reality. In addition, the monographic method was used for procedural purposes.

The chapter is structured in two parts. The first presents a foundational discourse on consequentialism as a moral theory and its characteristics, highlighting the primacy of cognitive arguments over legal ones in decision-making and the study of their consequences. The second part analyzes the main provisions of the LINDB, the LIA, and the LLC that incorporated consequentialism as a parameter for observance in control decisions.

2. Consequentialism as a moral theory and the primacy of cognitive elements over normative ones

To analyze the evolution of consequentialism in Brazilian law, it is essential to study the main elements of this current of thought, especially regarding its epistemology. Consequentialism is a moral theory widely studied in philosophy and has become a relevant object of study due to the growing expansion of judicial power[3].

As a moral theory, consequentialism presents a notion of what is important to it, that is, what it aims to establish as a guiding principle for a subject's actions in the world. Thus, if in utilitarianism the individual should act seeking happiness and in natural law the individual should act seeking to fulfill the laws of nature, in consequentialism the individual should act taking into account the practical effects of their actions (Pettit, 1995, pp. 323-324).

In the context of judicial decision theory, Torres emphasizes that consequentialism considers the influences and projections of decisions in the real world, whether positive or negative, such as economic, social, and cultural ones, maintaining a constant tension between, on the one hand, values and principles and, on the other, factual reality (Torres, 2010, p. 20).

To illustrate, in the famous American case Müller *v.* Oregon, judged by the United States Supreme Court in 1908, Justice Louis Dembitz Brandeis presented a brief containing approximately two pages of reasoning based on

3 Hirschl (2023, p. 9) argues that, in addition to the quantitative dimension of the global expansion of "judicial power," with the ever-increasing number of judges and courts (not only national, but also regional and global), there is a substantive dimension to this growing "power," with the increasing judicial involvement in controversial matters, whether moral, political, or high-level political issues, in which decisions are often largely composed of essentially consequentialist arguments.

legal arguments and another 110 pages focused on the consequences of long working hours for women (Mendes, 2024, p. 221).

According to MacCormick (2006, p. 165), there are significant reasons to believe that judges should consider and evaluate the consequences of the various options available to them. In this way, they would take into account the consequences of adopting a specific decision for the parties involved, as well as for future decisions that would need to be made in similar cases (MacCormick, p. 133).

Consequentialist argumentation has an essentially evaluative character, as it examines the acceptability of consequences, weighing pros and cons, often under abstract values such as "justice," "common sense," "public interest," "convenience," or "practicality" (MacCormick, pp. 133-134).

On the other hand, consequentialism also has a subjective aspect. When evaluating the possible consequences of their decision, judges can assign different weights to various evaluative criteria, differing as to the degree of (in) justice or how (in)convenient the consequences of adopting or rejecting a particular alternative will be (MacCormick, p. 134). This can be based on arguments of principle, that is, those intrinsically linked to morality and ethics, of an eminently axiological character, or on those arising from the analysis of consequences, which can underpin this decision, intrinsic to politics, efficiency and teleology, aiming at the effectiveness of the decision in the real world (Gabardo; Souza, 2020, p. 101).

In both situations, the criteria may be useful or not, depending on the interpreter's behavior when applying them, resulting in hermeneutical indeterminacy. This occurs because, in the case of principle-based reasoning, the indeterminacy may arise from the capacity for abstraction, while in consequentialist reasoning, it arises from the risk of the unpredictability of the future (Gabardo; Souza, 2020, pp. 101-102).

Gabardo and Souza (2020, p. 102) indicate that both criteria may be useless if corrupted by the interpreter's subjectivity. Abboud (2019, p. 4) makes a similar warning when analyzing consequentialist judicial activism in Brazilian jurisprudence, highlighting the presence of arguments that represent a "true rhetorical subterfuge to replace current law with the interpreter's subjectivity."

Thus, "however desirable a given deliberation may be with regard to consequentialist grounds, it cannot be adopted if it is in contradiction with some valid and binding norm of the system" (MacCormick, 2006, p. 135). In other

words, "there are limits to the sphere of action of legitimate judicial activity: judges must do justice according to the law, not legislate for what seems to them to be an ideally just form of society" (MacCormick, p. 136).

Undoubtedly, "deciding with concern for the consequences is a potentially good measure for Brazilian law, as it draws the decision-maker's attention to the need to avoid making purely abstract decisions and, therefore, decisions disconnected from reality" (Dezan; Oliveira, 2022, p. 269), since "to affirm that law cannot be disconnected from reality is something that stems from the very understanding that the legal system is, to a certain extent, a product of local customs, practices and culture" (Barbosa, 2020, p. 13).

However, there are risks to adopting consequentialism, including its strategic use to decide according to the decision-maker's personal preferences, the difficulty in identifying practical consequences, and the absence of objective criteria for deciding which practical consequence should prevail among the possible ones (Dezan; Oliveira, 2022, p. 269).

The importance of what MacCormick (2006, p. 137) calls "second-order justification" is growing, which involves two elements that complement each other: consequentialist argumentation (in the strict sense), which is intrinsically evaluative, and argumentation that tests possible decisions, verifying their cohesion and coherence with the existing legal system.

This is because, adopted in isolation, the consequentialist argument can prove misleading from a strictly utilitarian perspective. Such a model would tend to justify the decision considered "best" among the available alternatives, without taking into account the cumulative or concurrent effects that may result from it. MacCormick (2006, p. 147) warns that proper consequentialist evaluation requires not only the comparison of results, but also the use of value criteria and the testing of possible alternatives, in order to assess their compatibility with notions such as "justice," "common sense," "public benefit," and "convenience."

The fact is that, to a large extent, criticisms of consequentialism are associated with the subjectivism of the decision-maker when evaluating and testing possible alternatives. Alvim, for example, questions: "what does a judge do when projecting the effects of the decision onto the real world, denying an injunction because of the danger of reverse harm?" The author explains that "this projection cannot be the result of intuition or the subjectivism of the one who decides" (Alvim, 2020).

Therefore, when analyzing (evaluating and testing) the practical consequences of a decision, "empirical data and serious studies are needed so that the impact of a decision can be estimated, and thus legitimately influence how it is made" (Alvim, 2020).

Therefore, it is possible to affirm that "the consequence inherent in the idea of consequentialism, as seems evident, carries within it a sense of empiricism," insofar as it becomes plausible to evaluate possible alternatives without a degree of empirical certainty (Brandão; Farah, 2020, p. 835). Thus, it is correct to affirm that consequentialist reasoning approaches pragmatism insofar as pragmatism is marked by consequentialism[1] and empiricism (Brandão; Farah, 2020, p. 836).

In our view, a decision based on consequentialist arguments must have a foundation that supports it, supported by data, which have two purposes inherent to consequentialism: to demonstrate a past or present circumstance in order to assist in the decision of the case under analysis, and to assist in making future decisions, guiding the direction in which they should occur in light of indicative data (Brandão; Farah, 2020, p. 836).

Inevitably, in consequentialism, the judge ceases to merely submit to the principle of *iura novit curia,* under which it would be up to the parties to demonstrate the facts and apply the law accordingly, and begins to bring factual elements to the decision (prognostics), unrelated to the relationship between the parties, establishing himself as a "social engineer". The major problem that arises, however, is the unpredictability of these decisions, since the prognostic elements refer to the future, are varied and often associated with knowledge that the judge does not possess (Campos, 2020).

The fact is that consequentialism is based on the primacy of cognitive elements (facts) over normative ones (law), and is becoming increasingly present in judicial decisions, especially in the face of the complexity and constant social change, which obliges the law to deal with and take into account technical and social demands (Campos, 2020).

If consequentialism is inevitable in the Brazilian system, as foreseen in the *heading* of article 20 of the Law of Introduction to the Norms of Brazilian Law (LINDB), it is at the same time necessary to establish decision-making parameters, with the justification of the reasons for deciding in the face of possible

1 Gabardo and Souza (2021, p. 102) highlight that "the discussion regarding the practical consequences of a given action or decision is also called pragmatism, and is studied in the field of moral philosophy. Consequentialism, in this context, is conceived as the characteristic of the 'pragmatist matrix' that prioritizes the consequences of the act, theory, or concept."

alternatives, such as the criteria of necessity and adequacy, as determined by the sole paragraph of that article.

Following the amendment to the LINDB (Law of Introduction to the Norms of Brazilian Law), consequentialism became part of the Brazilian legal system. It began to guide both judicial and administrative and control decisions, such as decisions issued by the courts of accounts, and is also present in the Law on Administrative Improbity and the Law on Bidding, a normative evolution that will be studied in the next section.

3. The normative evolution of consequentialist approaches in the oversight of Public Administration

Following the international trend of adopting a consequentialist perspective, as demonstrated in the previous section, Brazilian administrative law has witnessed a series of legislative initiatives in this direction, through the enactment of regulations with direct impacts on public procurement, as will be shown below.

Initially, Law 13,655/2018 brought about profound changes to the Law of Introduction to the Norms of Brazilian Law (LINDB), with significant impacts on the system of control of Public Administration. The modifications were based, among other reasons, on the need to guarantee legal certainty to public managers in decision-making (Hohmann; Coelho, 2020, p. 2).

The new LINDB was closely linked to discussions that had been taking place regarding an important phenomenon in administrative reality: the "paralysis of the pens" (Carvalho, 2019), which consists of administrative paralysis, considered by Valgas (Santos, 2020, p. 329) as one of the strategies for avoiding accountability adopted by public agents in the face of a hypertrophied and dysfunctional administrative control system.

This context of expanding the means and intensity of control over administrative activity has been widely discussed in legal scholarship. The increased scope of control, intensified in both means and intensity since the post-redemocratization period, is seen as a kind of reaction to its reduction in the preceding period (Marques Neto; Palma, 2017, p. 21).

Several factors explain this expansion of control mechanisms from the 1990s onwards, including: the administrative reform promoted by Constitutional Amendment 19/1998, which aimed to establish managerial administration

based on results; the public-private cooperation movement, accentuated in that decade in order to attract private investment to enable public services and infrastructure, which also developed mechanisms for controlling and regulating such activities; and the constitutionalization of administrative activity, which resulted in principle-based control.

Regarding the effects of the constitutionalization of administrative activity, Marques Neto and Freitas (2019) highlight that, "based on this doctrinal foundation, the understanding that there is no longer any absolute administrative discretion, guided by the concepts of convenience and opportunity, has been defended." This means that administrative activity is bound by legality, in the broad sense, encompassing not only rules but also principles, a notion driven, for example, by neoconstitutionalism, the effectiveness of constitutional norms, and the theory of principles, which broadened the scope of judicial control (Marques Neto; Freitas, 2019).

From this amplification of the means and intensity of control, undesirable effects arose that impacted Brazilian administrative activity, among them what Valgas called "strategies of evading accountability." Of particular note is administrative paralysis (or "pen paralysis"), which consists of the public agent's conduct of simply not performing their duties in high-risk situations, which in the Brazilian case is "much higher than in other countries," a situation that stems from "dysfunctional external control" (Santos, 2020, p. 327).

In light of this, the changes promoted by Law 13,655/2018 brought about changes aimed at guaranteeing greater legal certainty and efficiency for public decision-makers in order to minimize the adoption of strategies to evade accountability, notably administrative paralysis, so as to avoid the risks inherent in the performance of administrative activity (Marques Neto; Freitas, 2018).

In this context, articles 20, 21, and 22 of the LINDB (Law of Introduction to the Norms of Brazilian Law) are key mechanisms for implementing consequentialism in administrative reality, since they oblige the various controlling bodies to look at reality and consider the practical impacts of decisions based on abstract legal values.

Thus, given the high degree of abstraction of the principles and the difficulties of their application, the legislator established, in article 20, criteria that must be observed in all decision-making spheres when based on abstract legal values, in order to avoid abstract decisions disconnected from their consequences (Carvalho; Rocha, 2023, p. 289).

Following the path of consequentialism and in contrast to the classical doctrine of nullities, according to which the verification of nullity always results in the undoing of the act or contract (Matos, 2022b, pp. 8-22), Article 21 provides that possible alternative measures imposed or invalidation of acts, contracts, agreements, processes or administrative norms must be evaluated.

Along the same lines, there is a clear opposition to formalism in the sole paragraph of the same article, which establishes the need for the regularization of any flawed situation to occur in a proportional and equitable manner, advantageous to the general interests, prohibiting the imposition of abnormal or excessive burdens or losses, thus allowing a kind of transitional regime to the new situation.

Finally, Article 22 proclaims the duty to "consider the real obstacles and difficulties faced by the manager and the demands of public policies" when interpreting rules concerning public management, as well as the practical circumstances that determined or conditioned the decision on the regularity of conduct or the validity of an act, contract, agreement, process, or administrative rule, emphasizing pragmatism here.

Despite the unprecedented nature of the legal provisions in question, consequentialism is not new to the Brazilian system, as it was already present in Brazilian jurisprudence, which already embraced the so-called "theory of the accomplished fact," according to which an administrative act tainted by a defect should not always be annulled and undone *ab initio,* but rather weighed in each case, considering the practical consequences or the cost/benefit of invalidation for the public interest[2].

Despite the acceptance of jurisprudence, the consequentialism of the LINDB (Law of Introduction to the Norms of Brazilian Law) has been the subject of criticism, such as that defended by Souza, to the effect that the control bodies would have "extreme difficulty in carrying out the supervisory activities, as well as in deciding on the measures imposed on the subjects who are affected by the results and consequences of an irregular and/or improper act" (Souza, 2018, p. 128).

However, work coordinated by a public group from FGV Direito/SP demonstrates that several guidelines contained in the LINDB have been assimilated

2 In this sense, the Appeal in Mandamus (RMS) No. 14,017, judged by the STF (Federal Supreme Court), established the prestige of weighing the practical consequences arising from the annulment or maintenance of certain administrative acts, to the detriment of strict legality. BRAZIL. Federal Supreme Court. Appeal in Mandamus (RMS) No. 14,017. Rapporteur: Justice Evandro Lins e Silva. Brasília, October 11, 1966.

in different decisions of the Federal Court of Accounts, which denotes that the norm has been causing a cultural shift towards a control with a consequentialist bias (Sundfeld, 2021).

Another important insertion of consequentialism into the Brazilian legal system occurred in Law 8,429/1992, the Law of Administrative Improbity (LIA), resulting from popular revolt against corruption, partly associated with the scandal known as the "Dwarfs of the Budget". At that time, the law established harsh measures against improper acts, such as the suspension of political rights, the loss of public office, heavy fines, precautionary asset freezes, and prohibition from contracting with the Public Administration.

However, despite the severity of its sanctions, the conduct foreseen in the LIA (Law of Administrative Improbity) contains open-ended classifications, which can allow for considerable discretion in its application. In this sense, the provision for improbity due to damage in the negligent modality, as well as improbity due to violation of principles of Public Administration, has been a source of criticism, due to an alleged lack of objectivity in its prescriptions.

To make matters worse, lawsuits for administrative misconduct have multiplied in the reality of public action in the country, often lacking factual basis and legal foundation, and with no major consequences for their authors, which has generated a situation of almost trivializing this important tool for controlling Public Administration.

According to Valgas, in an analysis of the conduct foreseen in the Law of Administrative Improbity, it will be noticeable that any public agent who orders expenses, however honest he may be, would hardly escape unscathed from the imputation of improper conduct (Santos, 2020, p. 175).

In this context, accused of exacerbating the so-called "dysfunctional" administrative control, the LIA (Law of Administrative Improbity) underwent substantial changes through Law 14,230/2021, establishing new regulations to combat impropriety, one of its objectives being to reduce the "paralysis of decision-making" and the insecurity of public managers in decision-making. Among the various changes made to the law, those relevant to the subject of this work are those that have given an undeniable consequentialist bias to actions for administrative impropriety, as we will see below.

Article 17-C, included by Law 14,230/2021, indicates specific requirements that must be observed by judges in their rulings, among them, the provision in item II: "to consider the practical consequences of the decision, whenever

deciding based on abstract legal values". This item even coincides, from a literal point of view, with Article 20 of the LINDB (Law of Introduction to the Norms of Brazilian Law), inserted by Law 13,655/2018.

The provision expresses the legislator's concern about the repercussions for the economy and jobs, resulting from the potential jeopardizing of business activities due to convictions for misconduct. On this point, Mudrovitsch and Nóbrega (2022) argue that, regarding the consequentialism contained in the provision, it aligns with the changes made to the LINDB (Law of Introduction to the Norms of Brazilian Law), requiring the judge to "take into account the impacts of their decision, which is positive, especially when considering such currently relevant concepts as the social function of companies and the need to ensure that, even when punishing them, the importance of their continuity is not often ignored."

One can also infer a consequentialist bias, close to pragmatism, from item III of the aforementioned article 17-C of Law 14,230/2021, which determines that the judge, in the sentence, must consider the real obstacles and difficulties of the manager, as well as the demands of the public policies under his responsibility and the practical circumstances that have imposed, limited or conditioned the agent's action.

In this regard, it is important to mention the recent decision of the 3rd Public Treasury Court of São Paulo, which condemned the Public Prosecutor's Office for bad faith litigation (São Paulo, 2021) precisely for having ignored the circumstances and practical difficulties that surrounded the manager when purchasing hospital equipment at prices higher than the market price during the Covid-19 pandemic, considering prices from previous periods, ignoring the demand, the urgency and the volume of oxygen consumed[3].

Finally, among the legislative innovations that incorporate consequentialism into the Brazilian legal system is Law 14,133/2021, the LLC, which presents an expanded list of principles compared to the previous law governing the matter (Law 8,666/1993) and expressly mandates compliance with the provisions of the LINDB (Law of Introduction to the Norms of Brazilian Law).

Beyond this provision at the end of Article 5 of Law 14,133/2021, the legislative choice was to imbue the control of public procurement with consequentialism, in line with the amendments to the LINDB (Law of Introduction to

3 The judge also stated that the Public Prosecutor's Office could not have ignored the pandemic and accused everyone who did not "fit into its parallel universe," that is, one detached from pragmatism.

the Norms of Brazilian Law) and the LIA (Law of Administrative Improbity). Throughout the law, several provisions indicate the adoption of the objectives that guided the amendments to the LINDB in 2018, in order to provide greater legal certainty to managers and adopt a consequentialist view of control, so as to reduce the phenomenon of the "paralysis of decision-making." Thus, it is possible to say that Law 14,133/2021 was born under the parameters of the LINDB. (Matos, 2022a).

Thus, several provisions of the new bidding law point to a consequentialist control or one guided by the new LINDB. In this sense, item III of article 12 of the LLC tends towards consequentialism, by prioritizing content over form, since it determines that simple formal nonconformities do not immediately lead to the disqualification of a bidder, unless they compromise the verification of their qualification or the content of their proposal.

Along the same consequentialist lines, Article 170 stipulates that the supervisory body must adopt criteria of opportunity, materiality, relevance, and risk, as well as the duty to consider "the reasons presented by those responsible" and "the results obtained from the contract," in order to take into account the practical results of the contract.

The same consequentialist tone is adopted in Article 174, which states that the annulment or suspension of contract execution are measures to be taken only if it is not possible to remedy irregularities in the bidding process or the contract, and even then, only if they constitute measures that best serve the public interest.

The provision also stipulates that, before the annulment or suspension of a contract, an analysis of various practical aspects must be carried out, such as the economic and financial impacts; the social, environmental and safety risks to the local population; the social and environmental motivation of the contract; the cost of deterioration or loss of the portions already executed, as well as the expense necessary for the preservation of the facilities and services already executed[4].

Thus, if it is determined that the suspension or annulment of the contract does not serve the public interest, the sole paragraph of article 147 provides the solution: the Administration "must opt for the continuation of the contract and the resolution of the irregularity through compensation for losses

4 Regarding the matter, Flávio Germano de Sena Teixeira Júnior and Marcos Nóbrega (2021) argue that the LLC embodies a kind of "functional legality," by establishing the obligation to analyze no less than 11 (eleven) requirements set forth in article 146 before actually deciding on the suspension or annulment of contracts.

and damages”. Furthermore, the alternative solution will be given “without prejudice to the investigation of liability and the application of applicable penalties”.

Regarding the scope of the declaration of contract nullity, Article 148 stipulates that it will operate retroactively. However, paragraph 2 of the article authorizes the modulation of the contractual nullity, so that it only takes effect for a future time, in order to avoid the paralysis of essential services until a new contract is finalized, constituting a “modulation of effects,” as operationalized in actions of concentrated control of constitutionality. Once again, we are faced with the primacy of the practical consequences that the immediate annulment of the contract may bring to the continuity of services to the population.

This same line of reasoning, which values the results and efficiency of administrative action, can be observed in important decisions of the Federal Supreme Court. A notable example is the judgment of Direct Action of Unconstitutionality (ADI) 4,645, reported by Justice Luiz Fux, judged on September 12, 2023, which aimed to analyze the constitutionality of several provisions of Law 12,462/2011, which instituted the Differentiated Regime for Public Procurement (RDC). The law, initially created to expedite the works for major sporting events, such as the 2014 World Cup and the 2016 Olympics, made the regime of Law 8,666/1993 more flexible.

In delivering his vote, the rapporteur rejected the allegations of unconstitutionality and based his decision on arguments with a clear consequentialist bias. The minister highlighted that studies indicated gains in efficiency and rationality in the RDC model when compared to the general bidding regime. In his analysis, he considered that mechanisms such as integrated contracting and confidential budgeting were reasonable because they contributed, in practice, to the realization of the principle of efficiency, by allowing for faster and less costly bidding processes for the Public Administration, demonstrating a clear concern with the practical consequences and results of the rule in the real world.

Reinforcing this perspective, the ruling itself highlights the duty of self-restraint of the Judiciary in complex matters, emphasizing the importance of analyzing the practical consequences of the decision. As stated by the rapporteur, the Judiciary should not substitute the judgment of convenience and opportunity of the legislator or the administrator, and should act when there is “clear violation of a constitutional right or principle, without

disregarding, in the control process, the cost and benefit of a given solution." This passage demonstrates the Supreme Court's fine-tuned alignment with the pragmatic logic introduced by the Introductory Law to the Brazilian Civil Code (LINDB), by conditioning judicial control on a consideration of the real impacts of invalidating public acts[5].

4. Conclusion

As seen, consequentialism is a moral theory, and its increasing use in law can be observed, especially in Brazil, with its inclusion in the Law of Introduction to the Norms of Brazilian Law (LINDB), the Law of Administrative Improbity (LIA), and the Law of Bidding and Contracts (LLC), establishing consequentialist parameters for decisions controlling Public Administration.

For those who advocate the use of consequentialist principles, the primary focus is on the consequences of the decision in the world at large. Thus, the influences and projections, beneficial or harmful, not only to the parties involved but to society as a whole, such as those of a social and economic nature, will weigh heavily.

Consequently, cognitive foundations, no longer merely confined to the procedural parties, come to occupy a large decisional space, to the detriment of legal foundations, which leads to judicial decisions predominantly concerned with the future, given the possible consequences of the *decisum* in the real world.

One of the concerns regarding the use of consequentialist reasoning is that it may not be done for purely subjective purposes, without testing the possibilities, which requires the use of empirical data that the judge often does not have access to.

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5 It is important to transcribe a passage from the summary of the aforementioned judgment: "1. Judicial intervention in the choices of the other branches of government demands, for its full justification, more than mere rhetorical imputations and vague grounds, otherwise the Judiciary, under the pretext of protecting the constitutional order, would excessively reduce the spaces for discretion, innovation, and experimentation inherent to the legislator and administrator. 2. The Federal Supreme Court, when faced with examining the constitutionality of decisions of the National Congress that impact public policies and that, *primu ictu oculi*, do not conflict with the constitutional text, must, mindful of the practical consequences of its decision, resist the temptation to adhere to theoretical views that are out of step with the reality of the Brazilian Public Administration, in line with the orientation now contained in Article 20, *main paragraph*, of the Law of Introduction to the Norms of Brazilian Law, which affirms this pragmatic-consequentialist aspect of the judicial function by determining that 'in the administrative, controlling, and judicial spheres, decisions shall not be based on abstract legal values without considering the practical consequences of the decision." (Brazil, 2023).

In amending the LINDB (Law of Introduction to the Norms of Brazilian Law), the legislator was concerned with and sought to mitigate subjectivism, determining, in the sole paragraph of article 20, that the decision in all spheres must be reasoned, demonstrating the grounds that led to the necessity and adequacy of the measure, including among the possible alternatives.

It is certain that this motivated observation aims to prevent control decisions from being detached from practical impacts, especially in the social and economic fields to which the State (through its Three Branches of Government) is not indifferent, such as the abandonment of public works and the closure of jobs.

In this sense, it is possible to observe, in the Law of Administrative Impropriety, the legislator's concern with the social function of the company and with the possible social and economic impacts of decisions, which have a sanctioning character.

Similarly, in the Bidding and Contracts Law, this care is observed, mainly regarding the suspension and annulment of contracts, prioritizing the continuity of their execution, even in the face of situations of irreparable nullities, if the invalidation impacts, among other factors, the delay in the enjoyment of the object, the closure of jobs, and the cost of demobilization and subsequent return to contractual execution.

Finally, among the results found in this research, which aimed to elucidate the possible impacts on the control of Public Administration of the express insertion of consequentialism in Brazilian Law, it must be stated that the legislator's purpose is to prevent decisions disconnected from reality, which proves relevant if merely rhetorical foundations, based on subjective conjectures, without support in effective and empirical data, are not used.

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