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Brazil's administrative justice system in a comparative context*

O sistema de justiça administrativa brasileira em uma perspectiva comparada

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Resumo

O texto contém uma análise descritiva de aspectos do processo administrativo, do sistema judicial e dos processos judiciais no sistema brasileiro de justiça administrativa. Os pontos fortes e fracos identificados pelo artigo servem como base para futuras pesquisas comparativas entre o sistema de justiça administrativa no Brasil, os sistemas que influenciaram o Brasil incluindo a Europa continental e os Estados Unidos e os sistemas que foram também influenciados em toda a Ibero-américa.

Palavras-chave: Direito Administrativo; autoridades administrativas; justiça administrativa; Direito Comparado.

Abstract

The text contains a descriptive analysis of aspects of administrative procedure, the judicial system and judicial processes within Brazil's system of administrative justice. The strengths and weaknesses the text identifies serve as a basis for future comparative research between the system of administrative justice in Brazil, the systems that influenced Brazil including continental Europe and the United States, and the systems that were likewise influenced throughout Ibero-America.

Keywords: Administrative Law; administrative authorities, administrative justice; Comparative Law.

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1 INTRODUCTION

It is timely that there be a new dialogue between the Brazilian and U.S. systems of administrative law and administrative litigation. There has been relatively minimal comparative scientific analysis involving Brazil and the United States on the topic. This dearth exists despite the fact that the Brazilian model of "judicial review" was largely influenced by the single civil jurisdictional system of the U.S. model, which replaced the French "model of jurisdictional dualism" present in Brazil since the beginning of the Brazilian republic in 1891.¹

With this study, I hope to engage in a descriptive and timely analysis of the Brazilian administrative justice system, focusing on administrative proceedings, organization of the Judiciary, and the judicial process as a whole. Furthermore the study takes a Rule of Law and effective judicial functioning perspective, as defined by European administrative law and reproduced in some Ibero-American models, to identify both positive and negative aspects of Brazil's administrative justice system. The descriptive analysis will serve as a basis for future comparative analysis with the U.S. system.

Initially, however, it is necessary to define the scope and context of the terminology used. The term "administrative litigation" refers to claims or appeals of a private citizen against the actions taken by an administrative authority. The term "administrative jurisdiction" describes the exercise of jurisdiction over administrative litigation, and "administrative court" refers to the state organs responsible for exercising jurisdiction over administrative issues.

2. ADMINISTRATIVE HEARINGS PRIOR TO JUDICIAL REVIEW

The principle of Rule of Law requires that administrative litigation be entrusted exclusively to a particular jurisdiction. The principle of effective judicial functioning (judicial review of administrative action) is not compromised by filing directly with an administrative authority prior to judicial review.² I refer here to the model of higher

¹ See SILVA, Ricardo Perlingeiro Mendes da; BLANKE, Hermann-Josef; SOMMERMAN, Karl-Peter. **Código de jurisdição administrativa: o modelo alemão**. Rio de Janeiro: Renovar, 2009.

² See FROMONT, Michel. **Droit administratif des Etats européens**. Paris: Presses Universitaires de France – puf, 2006, p.112-19

administrative authorities, and the model of independent administrative authority. Under the model of higher administrative authorities, parties, when denied a claim by an administrative authority, lodge an appeal to a superior authority. This approach, which requires the exhaustion of administrative remedies, is adopted in most countries, and particularly in Germany where adjudication within the administrative authority has automatic suspensive effects on proceedings in the Judiciary and is considered *a sine qua non* for filing suit.³ I also refer to the concept of independent administrative authorities wherein appeals are decided by public officials who, despite being appointed directly by the upper echelon of administrative authorities, perform their functions independently and are not subordinate to superiors. Examples include the English “administrative tribunals”, the “appeals committees” in Switzerland and the “independent administrative departments” (*unabhängige Verwaltungsenate*) in Austria.⁴

In Brazil, we find both models. In accordance with the principle of effective judicial functioning, parties can choose which model to use, without foreclosing the possibility of simultaneous filings for preliminary injunctive relief. The appeal before a higher administrative authority, not to be confused with prior claims (which gave rise to the appealable decision), is provided for in Brazilian administrative procedure law.⁵ The appeal before an independent administrative authority resembles, for example, appeals brought before the Brazilian Board of Tax Appeals (*Conselho Administrativo de Recursos Fiscais / CARF*),⁶ regulatory agencies,⁷ the Federal Audit Tribunal,⁸ and even the National Council of Justice (*Conselho Nacional de Justiça / CNJ*).⁹

³ See Verwaltungsgerichtsordnung [VwGO] [Administrative Jurisdiction Code], Jan. 21, 1960, Bundesgesetzblatt [BGBl. I] at 686, §§ 68, 80 (Ger.).

⁴ See generally FROMONT, Michel. **Droit administratif des Etats européens**. Paris: Presses Universitaires de France – puf, 2006.

⁵ See Lei No. 9.784, art. 56, de 29 de Janeiro de 1999, Diário Oficial da União [D.O.U] de 01.02.1999 (Braz.).

⁶ See *id.*

⁷ See, e.g., Lei No. 11.182, de 27 de Setembro de 2005, Diário Oficial da União [D.O.U] de 28.09.2005 (Braz.) (establishing the National Civil Aviation Agency); Lei No. 9.984, de 17 de Julho de 2000; Diário Oficial da União [D.O.U] de 18.07.2000 (Braz.) (establishing the National Water Agency); Lei No. 9.427, de 26 de Dezembro de 1996, Diário Oficial da União [D.O.U] de 27.12.1996 (Braz.) (establishing the National Electric Energy Agency); /Lei No. 9.478, de 6 de Agosto de 1997, Diário Oficial da União [D.O.U] de 07.08.1997 (Braz.) (establishing the National Oil, Natural Gas, and Biofuels Agency); Lei No. 12.351, de 22 de Dezembro de 2010, Diário Oficial da União [D.O.U] de 23.12.2010 (Braz.) (establishing the Social Fund which provides a source of funds for social and regional development, in the form of programs and projects in the areas of poverty alleviation and development); Lei No. 9.961, de 28 Janeiro de 2000, Diário Oficial da União [D.O.U] de 29.01.2000 (Braz.) (establishing the National Supplementary Health Agency); Lei No. 10.233, de 5 de Junho de 2001, Diário Oficial da União [D.O.U] de 06.06.2001 (Braz.) (establishing the National Road Transportation Agency); Lei No. 9.782, de 26 de Janeiro de 1999, Diário Oficial da União [D.O.U] de 27.01.1999 (Braz.) (establishing the National Sanitation Monitoring Agency). See also Lei No. 9.990, de 21 de Julho de 2000, Diário Oficial da União [D.O.U] de 22.07.2000 (Braz.) (extending the transitional period provided for Law 9.478).

⁸ See Lei No. 8.443, de 16 Julho de 1992, Diário Oficial da União [D.O.U] de 16.07.1992 (Braz.) (establishing the Federal Audit Tribunal).

⁹ See Lei No. 11.364, de 26 de October de 2006, Diário Oficial da União [D.O.U] de 27.10.2006 (Braz.).

3. THE ORGANIZATION OF ADMINISTRATIVE JURISDICTION

Administrative jurisdiction, which is independent of the administrative authority, is subject to the following structure: (1) administrative jurisdictions that issue advisory opinions and provide determinations in specific cases or controversies, such as the Councils of States that exercise the dual function of court of last resort and advisory board in France,¹⁰ the Netherlands,¹¹ Italy,¹² Greece,¹³ Belgium¹⁴ and Colombia;¹⁵ (2) administrative jurisdictions of an autonomous jurisdictional nature, such as the courts of last resort that deal exclusively with cases or controversies involving questions of public law found in Germany,¹⁶ Austria,¹⁷ Sweden¹⁸ and Portugal;¹⁹ (3) autonomous administrative courts in the first and second tiers that are, however, subject to a single court of last resort that deals with issues not only of public law, but also questions of private law, as seen in Spain,²⁰ Switzerland,²¹ Hungary²² and Mexico;²³ and (4) administrative courts with private jurisdiction, also known as a “unitary jurisdiction system,” that address questions of both public and private law, often through bodies specializing in administrative cases as is typical of common law systems in England,²⁴ Ireland,²⁵

¹⁰ See Code de Justice Administrative [C.J.A], art. 122-15 (Fr.); Code de Justice Administrative [C.J.A], art. 122-18 (Fr.); Code de Justice Administrative [C.J.A], art. 122-20 (Fr.).

¹¹ See Wet van 9 maart 1962, op de Raad van State [Law of March 9, 1962], art. 1 (Neth.).

¹² See Legge 27 Aprile 1982, n. 186 (It.).

¹³ See Diatagma (1973: 170) **Νομοθετικού διατάγματος [N] 170/1973** (Legislative Degree n° 170/1973, modified by Laws n° 702/1977 and n° 1.470/1984 and codified by Decree n° 18/1989).

¹⁴ See 1994 CONST. art. 160 (Belg.); Loi du Conseil d'Etat de Belgique [Law of the Council of State of Belgium] of Dec. 23, 1946.

¹⁵ See Constitución Política de Colombia [C.P.], art. 237; Ley No. 1437, Enero 18, 2011, *Diário Oficial* [D.O.] (Colom.).

¹⁶ See Verwaltungsgerichtsordnung [VwGO] [Administrative Justice Code], Jan. 21, 1960, *Bundesgesetzblatt* [BGBL] 1, as amended, §§ 49, 50 (Ger.).

¹⁷ See Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 1/1920, art. 130, ¶1.

¹⁸ See Regeringsformen [RF][Constitution] 11:8 (Swed.).

¹⁹ See CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA, art. 209(1)(b); Ley No. 4(a) de 19 de Fevereiro de 2003, *Procedures Code for the Administrative Courts*.

²⁰ See CONSTITUCIÓN ESPAÑOLA, art. 106(1), B.O.E. n. 311, Dec. 29, 1978 (Spain).

²¹ See BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR101, arts. 29a, 191, 191b (Switz.).

²² See 2011. Évi CLXI. törvény a bíróságok szervezetéről és igazgatásáról (Act CLXI of 2011 on the organization and administration of the courts) (Hung.).

²³ See Constitución Política de los Estados Unidos Mexicanos [C.P.], art. 94, *Diário Oficial de la Federación* [DO], 5 Febrero 1917 (Mex.). See also Ley Orgánica del Tribunal Federal de Justicia Fiscal y Administrativa [Organic Law of the Federal Court of Fiscal and Administrative Justice], *Diário Oficial de la Federación* [DO], 6 de Marzo de 2012 (Mex.).

²⁴ See ZILLER, JACQUES. *Administrations comparées. Les systèmes politico-administratifs de l'Europe des Douze*. Paris: Montchrestien, 1993.

²⁵ See generally FROMONT, Michel. *Droit administratif des Etats européens*. Paris: Presses Universitaires de France – puf, 2006.

Denmark,²⁶ but also found in Argentina,²⁷ Chile,²⁸ Costa Rica,²⁹ Peru,³⁰ and Venezuela.³¹

Interestingly, Brazil has known all four types of administrative structures in its history. What preceded the Brazilian Republic resembled administrative jurisdictions that operate in an advisory capacity as well as dealing with cases or controversies. This structure existed despite the fact that the Brazilian Empire's Council of State mirrored the first version of France's Council of State, with "justice retained" (*justice retenue*) in the hands of the Emperor and no true jurisdictional or delegated functions.³² Only with the approval of the 1891 constitution did Brazil adopt administrative jurisdictions. Brazil's administrative jurisdiction was, however, marked by the common law characteristic of courts that deal with questions of both public and private law. The "unitary jurisdiction", still prevalent today, is characterized by certain degrees of specialization in public law, as exemplified by the "*turmas*" or "*câmaras*"³³ in courts of appeal.³⁴ One could say that the organization of the federal courts of first and second tiers, which include administrative jurisdictions that cover federal administrative authorities,³⁵ resembles the Spanish and Swiss models. The federal courts of first and second tiers operate under a common court of last resort, which also deals with questions of private law — the Superior Court of Justice (*Superior Tribunal de Justiça* / STJ).³⁶ Brazil's electoral court's organization, however, is almost identical to the German and Portuguese models, with autonomous administrative jurisdiction that operates under a specific court of last resort: the Superior Electoral Court (*Tribunal Superior Eleitoral* / TSE).³⁷

²⁶ See generally ZILLER, Jacques. *Administrations comparées. Les systèmes politico-administratifs de l'Europe des Douze*. Paris: Montchrestien, 1993.

²⁷ See Art. 116, Constitución Nacional [Const. Nac.] (Arg.).

²⁸ See Código Orgánico de Tribunales (Judiciary Code) [Cod. Org. Trib.], art. 5 (Chile).

²⁹ See Constitución Política de la República de Costa Rica arts. 152e, 153 (Costa Rica); Ley Orgánica del Poder Judicial [Organic law of judicial power]/Lei No. 7.333 de 15 de Diciembre de 1997 (Costa Rica).

³⁰ See Art. 139, Constitución Política del Peru.

³¹ See Art. 259, Constitución de la República Bolivariana de Venezuela.

³² See SILVA, Ricardo Perlingeiro Mendes da; BLANKE, Hermann-Josef; SOMMERMAN, Karl-Peter. código de jurisdição administrativa: o modelo alemão. Rio de Janeiro: Renovar, 2009.

³³ *Turmas* and *câmaras* are subgroupings of second-tier courts and courts of last resort. Specialization below the appellate level are exemplified by the *Varas de Fazenda Pública*, which are single judge bodies that specialize in public law at the first-tier of state courts.

³⁴ See Poder Judiciário Tribunal Regional Federal da 2ª Região Regimento Interno [Rules of Procedures for the Federal Regional Court of the 2nd Region Bylaws], JOURNAL OF JUSTICE AND THE UNION, 9th ed., 3, Janeiro 2009, arts. 2(III), § 4º, and 13(III) (Braz.); Código de Organização e Divisão Judiciárias do Estado do Rio de Janeiro [Code for the Organization and Judicial Division of the State of Rio de Janeiro] [CODJERJ] de 27 de Abril de 2011, arts. 94(III), and 97.

³⁵ See Constituição Federal [C.F.] [Constitution] art. 109 (Braz.).

³⁶ See *Id.* at art. 105.

³⁷ See *Id.* at art. 118.

4 SCOPE OF ADMINISTRATIVE JURISDICTION

When examining the scope of administrative justice, first we must ask about its main principles and specific rules. Why should legislators treat the structure of courts responsible for administrative jurisdiction differently? Why should legislators be concerned with dealing specifically with judicial procedure in cases related to administrative justice? Indeed, the establishment of specialized jurisdictional courts ensures effective legal protection of citizens' rights and serves as a check on the legality of administrative authorities. The specialized jurisdictional courts do so by considering best practices as well as specific principles and rules of administrative justice. These specific principles and rules of administrative justice contemplate the vulnerability of citizens in relation to administrative authorities as well as the balance between public and private interests. Considering these values of specialized jurisdictional courts, what demands justify a standalone administrative justice system?

As a general rule, in Europe and Latin America, the following criteria define administrative jurisdiction: (1) administrative law cases (in which disputes may involve administrative authorities or private entities in the exercise of public functions, such as in France,³⁸ Spain,³⁹ Portugal,⁴⁰ Greece,⁴¹ Costa Rica,⁴² Peru, Venezuela,⁴³ Colombia,⁴⁴ and Argentina);⁴⁵ (2) cases concerning administrative acts or actions (not including questions of civil liability or administrative contracts, such as in Germany,⁴⁶ Austria⁴⁷ and Switzerland);⁴⁸ (3) cases limited to legitimate interests (excluding acquired rights, such as in Italy⁴⁹ and

³⁸ See Code de Justice Administrative [C.J.A], art. 211-1 (Fr.).

³⁹ See Ley No. 23 art. 1, de 7 de Julio de 1998 (Spain).

⁴⁰ See Lei No. 13 de 19 de Fevereiro de 2002, art. 4 (detailing the law of the administrative and tax courts).

⁴¹ See 1975 Syntagma [Syn.] [Constitution] 94e, 95 (Greece).

⁴² See Ley No. 8508/Código Procesal Contencioso-Administrativo [Administrative Code] de 22 de Junio de 2006], art. 1 available at: <http://www.tse.go.cr/pdf/normativa/codigoprocesalcontencioso.pdf> (Costa Rica).

⁴³ See Art. 259, Constitución de la República Bolivariana de Venezuela..

⁴⁴ See L. 1,437, Enero 18, 2011, Diario Oficial [D.O.] art. 2 (Colom.).

⁴⁵ See Código Procesal Contencioso Administrativo [Cod. Admin.] [Administrative Code] art. 1 (Buenos Aires, 1999) (Arg.).

⁴⁶ See Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Procedure], Jan. 21, 1960, Reichsgesetzblatt [RGBl I], v. 19.03.1991, § 40 available at: <http://www.buzer.de/gesetz/2431/index.htm> (Ger.).

⁴⁷ See FROMONT, Michel. **Droit administratif des Etats européens**. Paris: Presses Universitaires de France – puf, 2006, p. 147.

⁴⁸ See Bundesgesetz vom 17. Juni 2005 über das Bundesgericht (Bundesgerichtsgesetz BGG) [Federal Law of 17 June 2005 on the Federal Court (Federal Court Act, BGG)], June 17, 2005, SR 173.110, (Switz.); Bundesgesetz vom 20. Dezember 1968 über das Verwaltungsverfahren (Verwaltungsverfahrensgesetz, VwVG) [Federal Law of 20 December 1968 on administrative procedure (Administrative Procedure Act, VwVG)], Dec. 20, 1968, SR 172.021, art. 5 (Switz.).

⁴⁹ See Art. 103 Costituzione [Cost.].

Belgium);⁵⁰ and (4) cases involving public or private law (provided that administrative authorities have an interest in the case, such as in unitary jurisdiction systems in England, Ireland, Norway, Denmark,⁵¹ Chile⁵² and Mexico).⁵³

In this sense, the Brazilian system is also a hybrid. In general, consistent with Brazil's unitary jurisdiction system and regardless of the public or private nature of the case, the condition that the interest of administrative authorities is at stake gives rise to administrative jurisdiction. The condition that the interest of the administrative authority be in controversy justifies the jurisdiction of the *Varas de Fazenda Pública*⁵⁴ and federal courts. The same is true regarding the application of specific procedural rules as exemplified by the differentiated regime for enforcement of judgments against the administrative authorities (*precatório judicial*), the postponement of deadlines so that the administrative authority may defend itself, etc.⁵⁵

When it comes to legal proceedings concerning the writ of mandamus (*mandado de segurança*),⁵⁶ similar to the German system, Brazilian law has a longstanding tradition wherein the party challenging an administrative action, even if carried out by private entities exercising a public power, is forbidden from bringing a claim for compensation before the same judge.

In fact, the Brazilian *mandado de segurança* would deserve a chapter unto itself, given its apparent identity crisis. There are four reasons for this identity crisis. Firstly, the *mandado de segurança* is inspired by common law "writs," which nowadays have been replaced by "claims for judicial review."⁵⁷ The second reason is the *mandado de segurança's* roots in the Mexican concept of *amparo* (*juicio de amparo*), a procedure

⁵⁰ See FROMONT, Michel. **Droit administratif des Etats européens**. Paris: Presses Universitaires de France – puf, 2006, p. 150.

⁵¹ See *Id.* at 152-56.

⁵² See Cod. Org. Trib. art. 48 (Chile).

⁵³ See Ley Orgánica del Tribunal Federal de Justicia Fiscal y Administrativa [Organic Law of the Federal Court of Fiscal and Administrative Justice], *Diário Oficial de la Federación* [DO], 3 de Diciembre de 2007, art. 14 (Mex.).

⁵⁴ See CODJERJ, *supra* note 37.

⁵⁵ See Constituição Federal [C.F.] [Constitution] arts. 100, 109 (Braz.); Código de Processo Civil [C.P.C.] [Code of Civil Procedure], arts. 191, 730 (Braz.).

⁵⁶ See Lei No. 12.016, de 7 de Agosto de 2009, *DIÁRIO OFICIAL DA UNIÃO* [D.O.U.] de 10.08.2009 available at: http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2009/Lei/L12016.htm#art29 (Braz.).

⁵⁷ See FROMONT, Michel. **Droit administratif des Etats européens**. Paris: Presses Universitaires de France – puf, 2006. In the United States the common law writs have largely been replaced by statutory petitions for review. 24 C.J.S. *Criminal Law* § 2220 (2013). However, where the statute is silent suits for declaratory judgments and writs of injunctions must be used. See NEUMAN, Gerald L. **Habeas Corpus, Executive Detentions, and the Removal of Aliens**, 98 Colum. L. Rev. 961, 962 n.5, 1998. ("... the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.") Additionally, mandamus is available where "(1) the plaintiff has a clear right to relief, (2) the defendant a clear duty to act, and (3) no other adequate remedy exists." *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 767 (5th Cir. 2011). "In short, mandamus does not create or expand duties, but merely enforces clear, non-discretionary duties already in existence." *Id.*

whose applicability has been well established as constitutional. Thirdly, the *mandado de segurança*'s unmistakable similarity to the appeal against excessive power (*recours pour excès de pouvoir*), of French tradition from when that measure was limited to annulling administrative acts.⁵⁸ Lastly, the *mandado de segurança* is embedded, as it now stands, in a procedural and constitutional system wherein, regardless of the chosen judicial procedure, interested parties may pursue claims against administrative authorities.

5. JUDGES WHO EXERCISE ADMINISTRATIVE JURISDICTION

Public agents and judicial structures charged with protecting the interests subject to administrative jurisdiction should be assured of the inherent right of personal and institutional independence. To guarantee this independence judges should not be subject to transfer, should have life tenure (*vitaliciedade*), and their remuneration should be fair and adequate. Their selection, their career paths, and the mechanisms for disciplining these judges should be entrusted to a body that will not compromise a judge's independence. This oversight will avoid a vertical judicial structure marked by hierarchical subordination and careerism among the judges.⁵⁹ Moreover, the method of selecting judges should occur through an open, objective, and transparent process. Selection should be based on the candidate's technical skills and professional capacity.

These principles, which are specified in the Ibero-American Model Code for Administrative Processes (both within the Judiciary and within administrative authorities),⁶⁰ are partially incorporated in the Brazilian Constitution.

Under Brazilian law any Brazilian citizen with a law degree can participate in a public, competitive selection process for first-tier judges. Selection is based on the candidate's academic credentials and performance on civil service exams. These first-tier judges then advance to become second-tier judges through promotions based on merit or seniority. Throughout the judge's career, the judge has continuing education requirements, which must be satisfied at the nation's judicial schools. Some of the openings for second-tier judges are filled according to political criteria, by way of nominations by the Public Prosecutors' Office (*Ministério Público*) as well as peer associations such as The Brazilian Bar Association (*Ordem dos Advogados do Brasil / OAB*). These nominations are then forwarded to the courts, and reviewed by the head of the executive branch for final appointment. The appointment for a position on Brazil's Superior Court

⁵⁸ See *Id.* at 164-68.

⁵⁹ See generally ZAFFARONI, Eugenio Raúl. *Poder Judiciário: crise, acertos e desacertos*. São Paulo: Revista dos Tribunais, 1995.

⁶⁰ See Model Code for Administrative Processes Judicial and Extrajudicial for Ibero-America, arts. 26, 27, 28e, 29 (2012) [hereinafter Model Code for Administrative Processes] available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250852.

of Justice is subject to the additional requirement of congressional approval.⁶¹ In Brazil, there are no examples of lay judges sitting in administrative courts, except in the case of special courts (although the constitution, in art. 98, I, § 1, does make allowances for such judges, this is not yet reflected in the law).

The 1988 Constitution (Article. 96 II), gives the courts complete autonomy over the election of their governing bodies; the ability to develop bylaws; organize their departments, ancillary services and the courts that are tied to it; fill judicial vacancies in the respective jurisdictions; and fill positions necessary for the administration of the Judiciary. Further, administrative and financial autonomy is guaranteed by granting the courts the power to draw up their own budget proposals, within the limits established by the other branches of government, and in accordance with the Budget Guidelines Law (*Lei de Diretrizes Orçamentárias / LDO*).

In order to eliminate external influences, Art. 95 of the Constitution grants and at the same time limits judges' power.⁶² Provisions that promote the independence of judges include: lifetime appointments, which secure the judges position until the judge is 70 years old (except in cases of criminal convictions that are final); prohibitions on the removal or transfer of judges to other courts (except transfers based on a public interest as determined by a majority decision of the court where the judge sits, or the National Council of Justice); and lastly, the irreducibility of salaries.

Nonetheless, the effectiveness of these prerogatives granted to the Judiciary, both on an institutional and personal level, has been widely questioned. One such criticism is that the nature of the budget-making process means that the executive branch does in fact exert influence in allocating funds to the Judiciary. Another criticism is that the irreducibility of salaries is on a nominal basis and thus does not assure the preservation of real values. Internally, despite a general feeling amongst judges that they are fully independent, it is not ideal that second-tier judges hold disciplinary and selection powers over judges of the first-tier.⁶³ The first-tier judge's hierarchical subordination in disciplinary matters and the role of the second-tier judge in selecting first-tier judges at the beginning of first-tier judge's careers may leave citizens with the impression that there is a hierarchical and careerist structure that calls into question the independence and impartiality of the Judiciary. Impartiality questions could be raised, for example, in

⁶¹ See Constituição Federal [C.F.] [Constitution] art. 104 (Braz.).

⁶² The following prohibitions apply to judges: I. They may not hold other offices or exercise other functions, even if on their own time, except when teaching; II. Give the perception, in any shape or form, that they will benefit in any manner from a claim, or that they will receive fees or contributions of any type from any individual or from public or private entities; III. Participation in partisan political activities; IV. For a period of three years after retirement or resignation, they may not exercise any advocacy role at the court where they previously sat. See Constituição Federal [C.F.] [Constitution] art. 95 (Braz.).

⁶³ See generally ZAFFARONI, Eugenio Raúl. Poder Judiciário: **crise, acertos e desacertos**. São Paulo: Revista dos Tribunais, 1995, *supra* note 62.

a case where a first-tier judge exercises jurisdiction over the legality of administrative acts of a second-tier court to which he or she is tied, or in a case where the first-tier judge may decide questions that impact interests of members of the same court.

6. THE NEED FOR COUNSEL IN ADMINISTRATIVE COURTS

The presence of a lawyer in administrative courts is a necessity and it should be considered a duty of the state to guarantee adequate counsel. This is true for administrative authorities themselves, which need professional legal representation. The complexity of public law cases make lawyers in administrative courts necessary. To fulfill the state's duty to guarantee adequate counsel, the state must provide the benefit of free legal assistance to those who are unable to afford a lawyer.⁶⁴

In Brazil, although the presence of a lawyer is optional only in small claims courts (*juizados especiais de pequenas causas*), in practice, a party to a case always has access to counsel, even if that counsel is an employee of the Judiciary itself. Free legal services (lawyer's fees and expenses) have been widely available and effectively used in administrative jurisdictions.⁶⁵

7. COGNIZABLE CLAIMS AND THE SCOPE OF JUDICIAL REVIEW

Administrative jurisdiction will have to be full in the sense being capable of fully implementing individual rights, as alleged, and therefore to correspond, if necessary, to a declaration, annulment, order to do or not do something, to pay, including by means of emergency judicial decisions, or forced execution.⁶⁶ Effective judicial functioning and Rule of Law depend on this extensive authority limited only by the principle that the Judiciary cannot impose upon administrative authorities obligations to act, to apply punitive or coercive fines (civil or criminal contempt of court), or even expropriate or impose liens on non-essential public assets.⁶⁷ Effective administrative jurisdiction must be conditioned on being in the public interest, properly alleged and proven, so

⁶⁴ See Model Code for Administrative Processes *supra* note 63, at arts. 32, 33 and 34. The duty of the state to provide counsel in the United States is far more limited. In *Turner v. Rogers*, 131 S. Ct. 2507 (2011), the Supreme Court held that "the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)(emphasis in original)." 131 S. Ct. at 2520. In determining whether the appointment of counsel is mandated by the Sixth Amendment in civil proceedings, courts consider "(1) the nature of 'the private interest that will be affected,' (2) the comparative risk of an 'erroneous deprivation' of that interest with and without 'additional or substitute procedural safeguards,' and (3) the nature and magnitude of any countervailing interest in not providing 'additional or substitute procedural requirement[s].'" *Id.* at 2518-19 (citation and internal quotation marks omitted).

⁶⁵ See Constituição Federal [Constitution] art. 5, LXXIV (Braz.); Lei No. 1.060, de 5 de Fevereiro de 1950, D.O.U. de 13.02.1950 (Braz.).

⁶⁶ See Model Code for Administrative Processes *supra* note 63, Explanatory Memorandum.

⁶⁷ See *Id.*

long as guarantees of due process are observed and compensatory means to the interested party are provided.

In this regard, Brazilian law has evolved considerably. The Code of Civil Procedure, applicable to administrative jurisdictions, permits filing any kind of claim against administrative authorities. Additionally, under Brazilian law, courts can issue emergency relief through preliminary injunctions and, where necessary, payment of a sum in cash consistent with Supreme Federal Tribunal (*Supremo Tribunal Federal / STF*) precedents.⁶⁸ The greatest difficulty, however, lies in the practice of administrative authorities not complying with enforcement measures. They avoid compliance simply by alleging that emergency relief is against the public interest, asking for suspension of the preliminary order (*suspensão de liminar*) or suspension of the judgment (*suspensão de sentença*), which do not allow for any opposition to be filed.⁶⁹ Such allegations do not comply with the rules of adversarial proceedings.

The notion that certain public acts are excluded from judicial review is still present in the culture of some systems. There is no longer, however, justification for a special category of such acts that is different from the rest of those emanating from administrative authorities.⁷⁰ It is undeniably a myth that judicial review of political content of public acts is impossible. The issue deserves to be revisited from the perspective of fundamental principles of the role of administrative jurisdiction, in parallel with that of constitutional jurisdiction.

The civil law tradition of judges serving as a “mouthpiece of the law” (*Bouche de la Loi*) is no more than a rhetorical flourish in Brazil.⁷¹ Constant litigation in various spheres of the Brazilian Judiciary regarding whether administrative acts fall within the authority granted by the administrative authority's governing statute, or conform to the Brazilian Constitution's social policy requirements, particularly healthcare policy, exemplifies that no act emanating from the public sector can be considered immune from judicial review.⁷²

Judicial review of administrative acts should cover not only questions of the form and content of the administrative act in question, but also administrative discretionary

⁶⁸ See S.T.F.-2, AI 59.7182, Relator: Cezar Peluzo, 6.11.2006 available at: <http://redir.stf.jus.br/paginadornpub/paginador.jsp?docTP=AC&docID=390282> (Braz.).

⁶⁹ See Lei No. 8.437, de 30 Junho de 1992, art. 4, D.O.U. de 01.07.1990 (Braz.).

⁷⁰ See WOLFF, Hans J.; BACHOF, Otto; STÖBER, Rolf. **Direito administrativo**. Lisboa: Fundação Calouste Gulbenkian, 2006. See also ENTERRÍA, Eduardo García de. **La lucha contra las inmunidades del poder**. 3d ed. Madrid: Civitas, 1995.

⁷¹ See generally SADEK, Maria Tereza. Judiciário e arena pública: um olhar a partir da ciência política. In: GRINOVER, Ada Pellegrini; WATANABE, Kazuo (coord). **O controle jurisdicional das políticas públicas**. Rio de Janeiro: Renovar, 2011.

⁷² See S.T.F., AR.SL . No. 47 (STA No. 175), Relator: Justice Gilmar Mendes, 17.03.2010, DIÁRIO DA JUSTIÇA [D.J.], 30.4.2010 available at: <http://redir.stf.jus.br/paginadornpub/paginador.jsp?docTP=AC&docID=610254> (Braz.).

powers when the exercise of such power exceeds limits allowable by law. Such an abuse of discretionary powers occurs where its exercise diverges from the administrative authority's purpose or offends fundamental rights or principles, such as equality, legal certainty, legitimate expectations, proportionality and reasonableness.⁷³

Above all, in this context, what is expected of the administrative authority is ethical behavior consistent with the Rule of Law, with emphasis on the respect for fundamental rights, following the principles of administrative law, among which the following are highlighted: the principle of legality, the principles of proportionality and reasonableness, the principle of equal treatment, the principles of legal certainty and legitimate expectations, and the principle of due process (fair hearing and adversarial proceedings).

8. THE PRINCIPLE OF LEGALITY

The principle of legality contemplates the submission of the administrative authority to the requirements of law. The inclusion of the principle of legality in administrative procedure laws reinforces the supremacy of the law. As stated in the Peruvian law of administrative procedures: "Administrative authorities should act with respect for the Constitution, enacted law, and general legal principles, within the powers allocated to administrative authorities, and in accordance with the purposes for which [those powers] were conferred."⁷⁴

Moreover, it is important to emphasize that administrative authorities must ensure not only the legality or constitutionality of their actions, but also that such actions conform to international conventions to which Brazil is a party. Consistent with this need to emphasize administrative actions' conformity with international conventions, administrative authorities may face situations where they are authorized to disobey legislation or administrative rules that the administrative authority considers contrary to international convention or unconstitutional, but which would normally bind the administrative authority. This authorization to disobey legislation or administrative rules is subject to the caveat that the administrative authority does not violate the principle of hierarchical subordination. The principle of hierarchical subordination means that controlling authorities must be looked to for any declaration of unconstitutionality or non-conformity with any international convention.⁷⁵ In the absence of explicit legisla-

⁷³ See Model Code for Administrative Processes *supra* note 63, at art. 25.

⁷⁴ See Ley del Procedimiento Administrativo General/ No. 27.444, de 10 de Abril de 2001, art. IV, 1.1. The original Spanish quotation reads "*Las autoridades administrativas deben actuar con respeto a la Constitución, la ley y al derecho, dentro de las facultades que le estén atribuidas y de acuerdo con los fines para los que les fueron conferidas.*" ["Administrative authorities should act with respect for the Constitution, the law and the right, within the powers that are allocated in accordance with the purposes for which they were conferred"].

⁷⁵ Henrique Miranda Savonitti points to the doctrinal controversy in Brazil over the possibility of administrative authorities simply refusing to enforce unconstitutional laws or administrative rules. In favor: Carlos Maximiliano; Francisco Campos, José Celso de Mello Filho; Caius Tacitus; Manoel Gonçalves Ferreira Filho; Miguel Reale; Hely Lopes Meirelles. Cons: Celso Antonio Bandeira de Mello, Gilmar Ferreira Mendes; Zeno Veloso (MIRANDA,

tive or constitutional provisions, it is the duty of the administrative authority to effectively apply for a decision on questions of unconstitutionality or non-conformity with international conventions and not to refrain from doing so in the hope that there will be some national or international legal intervention.

Concerning the absence of national legislation on determinations of conformity or non-conformity with international conventions, the Inter-American Court of Human Rights ruled, *litteris*:

Regarding Judicial practices, the case law of this Court has recognized that judges and domestic courts are subject to the Rule of Law and, therefore, are obliged to apply the provisions of existing law. However, when a State has ratified an international treaty such as the American Convention, its judges, as part of the state apparatus, will also be subjected to it, which obliges them to ensure that the effects of its provisions are not affected by the application of laws contrary to its objective and purpose, which from the start would lack any legal effect.

In other words, the Judiciary must exercise - ex officio - a control of the meaning of a convention, considering internal standards and the American Convention, obviously keeping in mind the appropriate competencies and corresponding procedural regulations. In this task, the Judiciary should take into account not only the Treaty but also its interpretation by the Inter-American Court, the final arbiter of the aforementioned Convention.

Thus, it is necessary that the interpretations of a constitutional and legal nature regarding the material and personal competency of military jurisdiction in Mexico are appropriate vis-à-vis the principles established in the jurisprudence of this Court, which have been reiterated in this case. In this light, this Court does not consider it necessary to order the modification of the normative content that regulates Article 13 of the Political Constitution of the United Mexican States.⁷⁶

9. THE PRINCIPLES OF PROPORTIONALITY AND REASONABLENESS

Brazilian legal doctrine views the principles of reasonableness and proportionality as a single concept. According to Bandeira de Mello:

Strictly speaking, the principle of proportionality is simply a facet of the principle of reasonableness. It deserves special consideration in order to have a better understanding

Henrique Savonitti. Bids and contracts. Brasília: National School of Public Administration, 2004. I believe there is no controversy, however, concerning the possibility of bringing a claim of unconstitutionality before the appropriate organ that has jurisdiction to assert unconstitutionality before the Brazilian Supreme.

⁷⁶ See *Radilla Pacheco vs. Mexico*, Preliminary Objections, Merits, Reparations and Costs. Inter-Am. Ct. H.R. (ser. C) No. 209 (Nov. 23, 2009) available at: http://www.tc.gob.pe/corte_interamericana/seriec_209_esp.pdf.

*the specific problems that may arise under the guise of the disproportionality of an act. This will help us identify possible judicial remedies based on proportionality. Since it is a specific aspect of the principle of reasonableness, it is understood that its constitutional roots are the same.*⁷⁷

Although both principles are referred to in Art. 2 of Law No. 9.784/98, only proportionality is mentioned explicitly, in the following terms: “an alignment between means and ends, wherein obligations, restrictions, and sanctions greater than strictly necessary to meet the public interest are prohibited.” (Article 2, VI). Note that the principle of proportionality, in the legislation, is tied to “public interest,” and will naturally be used alongside the principles of equality, good faith and protection of legitimate expectations when exercised by a discretionary administrative power.

10. THE PRINCIPLE OF EQUAL TREATMENT

The Judiciary should respect the principle of equal treatment, that requires like treatment for those in like circumstances. Certain legal instruments are rooted in this principle, for example: class actions, binding precedents, and model proceedings (*Musterverfahren*)⁷⁸. These instruments help guarantee broad access to justice, the reduction of redundant lawsuits, and the merging of cases that deal with the same legal questions. Nonetheless, when referring to public law cases, where administrative behaviors or actions of general applicability are in question, equal treatment arising from judicial proceedings is doubly necessary. This is principally by reason of the duty of the administrative authority to treat equally those affected by non-adjudicatory actions taken by the administrative authority.⁷⁹

It would be contrary to the principle of equal treatment if administrative action of general applicability had a different impact on some only because others were willing to go to court. Such a situation would ensure that the Judiciary’s decisions would contribute to a break with the principle of equal treatment. At the same time, however, the principle of equal treatment should not deter recognition of individual rights. The Judiciary cannot be associated with an outcome that defeats the principle of equal treatment. On the other hand the principle of equal treatment cannot be used to justify the denial of individual rights. Indeed, granting a citizen a right that could also be

⁷⁷ See MELLO, Celso Antônio Bandeira de. **Curso de Direito Administrativo**. São Paulo: Malheiros, 2006, p. 107-08.

⁷⁸ See VwGO, Jan. 21, 1960, BGBl 686, § 93a available at: http://www.gesetze-im-internet.de/vwgo/_93a.html (Ger.).

⁷⁹ See generally PERLINGEIRO, Ricardo. **O princípio da isonomia na tutela judicial individual e coletiva, e em outros meios de solução de conflitos, junto ao SUS e aos planos privados de saúde**. IN: NOBRE, Milton; SILVA, Ricardo Dias (coord.). *O Conselho Nacional de Justiça e os desafios da efetivação do direito à saúde*. Belo Horizonte: Fórum, 2011, p. 229-441 (2011) (discussing the principle of equal protection before the law in individual and collective legal cases, and other means of conflict resolution, before the SUS and private health plans).

extended to all who were in the same situation, without actually doing so, undermines the idea of equal treatment. The error, however, lies in an administrative authority not extending this benefit, not in the Judiciary's recognition of the right.⁸⁰

One of the greatest challenges of contemporary administrative law is the lack of uniformity of administrative decisions pertaining to interested parties that find themselves in the same factual circumstances. This situation encourages redundant claims, particularly in the Judiciary, and potentially undermines legal certainty. Some systems in Europe have found it hard to apply the principle of equal treatment to administrative decisions, and few studies exist on the subject.⁸¹

According to the Model Administrative Procedures Code for Ibero-America, the concept of equal protection before the law pertaining to administrative authorities should be such that when:

...the underlying issue in an individual claim concerns the legal effects of administrative action of general applicability, the outcome of the conflict must now address the interest of the community that this action effects, and therefore the solution must come from a single administrative decision, with erga omnes effect.⁸²

Therefore, legal agreements involving administrative rules or actions of general scope necessarily affect all those who find themselves in the same factual circumstances, even though they might not have participated in these agreements.⁸³

11. PRINCIPLES OF LEGAL CERTAINTY AND LEGITIMATE EXPECTATIONS

The principle of legal certainty should serve as a check on administrative authorities' powers of self-governance. The annulment of administrative decisions or rules that are beneficial to citizens, but are of an illegal nature, can occur within the administrative authority itself. In such a procedure the administrative authority repeals a rule or decision after providing an adequate avenue for appeal in fulfillment of due process rights of citizens impacted by the repeal. Both subjective and objective considerations are taken into account in determining the propriety of repealing an invalid act. The

⁸⁰ See TRF-2, No. 201102010109190, Relator: Judge Ricardo Perlingeiro, 13.2.2012 (Braz.).

⁸¹ See FROMONT, Michel. *Droit administratif des Etats européens* [Administrative Law of the European states] 253-56, (2006) (stating "L'existence du principe d'égalité dans le droit administratif ne fait l'objet d'aucune hésitation dans les divers pays étudiés. Certes le droit britannique a longtemps préféré parler de rationalité et de cohérence plutôt que d'égalité, même si les solutions concrètes étaient pratiquement les mêmes; mais depuis une vingtaine d'années, le principe d'égalité est ouvertement appliqué par le juge britannique." ["The existence of the principle of equality in administrative law been no hesitation in the various countries studied. Although the law has long preferred to speak British rationality and consistency rather than equality, even if concrete solutions were almost the same, but the last twenty years, the principle of equality is applied openly by British judges"]).

⁸² See Model Code for Administrative Processes *supra* note 63, at art. 5.

⁸³ See Model Code for Administrative Processes *supra* note 63, at arts. 19e, 20.

objective consideration is a fixed statute of limitation within which administrative authorities may repeal invalid, but beneficial, acts. The statute of limitation, however, is not a limit in cases where the administrative act is in bad-faith. The subjective consideration is that an administrative authority may repeal an invalid, but beneficial act when such a repeal would no longer constitute a breach of trust of interested parties.⁸⁴

The principle of legitimate expectations, coupled with the subjective element of good-faith, based on fundamental rights, and derived from legal certainty and the Rule of Law, are factors that guide German legislation, according to which:

*An unlawful administrative act which provides for a one-time or continuing payment of money or a divisible material benefit, or which is a prerequisite for these, may not be withdrawn so far as the beneficiary has relied upon the continued existence of the administrative act and his reliance deserves protection relative to the public interest in a withdrawal. Reliance is in general deserving of protection when the beneficiary has utilized the contributions made or has made financial arrangements which he can no longer cancel, or can cancel only by suffering a disadvantage which cannot reasonably be asked of him.*⁸⁵

In addition to the previously mentioned cases, once the invalid act is repealed based on public interest considerations there should be an assessment of damages that result from the harm caused by the interested party's trust in government institutions.⁸⁶ Intentional misconduct, duress, corruption, knowledge of invalidity of acts (bad-faith), gross negligence by the interested party, or by basing the act on inaccurate or incomplete facts may harm trust in Government.⁸⁷ As such, when validation is based on the lapse of time (e.g. One year from the date of notice of the invalid act), concern over trust in Government is less relevant. However, there are exceptions that remain in cases of intentional misconduct, duress or corruption.⁸⁸

For Forsthoff, under German law, only two situations are possible when undoing administrative acts: cancellation (invalidating an act that has harmful effects) and revocation (invalidating an act generating favorable effects). In principle, a fully voluntary, or "free" revocation is never appropriate, except in cases where the illegal act is contrary to basic concepts of justice, such as in cases of willful misconduct or when revocation is based on changed circumstances of fact and law.⁸⁹

⁸⁴ *Id.*

⁸⁵ See *Verwaltungsverfahrensgesetz [VwVfG]* [German Administrative Procedures Act], May 25, 1976, § 48(2) (Ger.).

⁸⁶ See *Id.* at § 48(3).

⁸⁷ See *Id.* at §§ 48(2)48(3).

⁸⁸ See *Id.* at § 48(4).

⁸⁹ See FORSTHOFF, Ernst. *Lehrbuch des Verwaltungsrechts*. München: Beck, 1958.

In French administrative law, the principle of legal certainty is associated with the principles of non-retroactivity and respect for acquired rights (legally intertwined concepts). In cases of changes to a stable, yet illegal, status quo the French administrative authority reconciles the principles of legal certainty with the "obligation to restore a situation according to the law." French administrative law does so by allowing *contra legem* "rights" to be undone, but only as long as the statute of limitation for such changes has not expired.⁹⁰ This is the objective logic of French law.

In British law, legal certainty is related to the protection of legitimate expectations. The governing philosophy being that administrative authorities should not mislead interested parties. When dealing with cases of illegal acts that create a status quo, however, English law can be more severe than French law by precluding the possibility of *contra legem* rights.⁹¹ European administrative law, however, which increasingly influences European national systems, gives preference to the principle of legitimate expectation as conceived of in Germany.⁹²

Brazilian Law No. 9.784/99, partially contradicting Precedent No. 473 of the Supreme Federal Tribunal ("The administrative authority may annul its own acts, when riddled with flaws that make them illegal, because rights do not originate from them . . ."), incorporated into law the French objective conception of legal certainty, along with German subjectivity, and the principle of legitimate expectations. This hybridization occurred in two regards: (1) A statute of limitation that precludes administrative authorities from annulling acts with favorable effects after five years (except in cases of bad-faith); and (2) the possibility of validation of acts with flaws that do not result in harm to the public interest or to parties with an interest in the case.

The absence of bad-faith (equivalent to the absence of willful misconduct) and the expiration of the statute of limitations justify the validation of acts with favorable effects that are contrary to law and designated as voidable. This rule is set out in art. 54 of Law No. 9.784/99 which states that, "The right of the administrative authority to annul administrative acts which have favorable effects for the beneficiaries fails five years from the date the acts were enacted, unless bad-faith can be proven"). The Brazilian rule is consistent with the German treatment of the subject (VwVfG, § 48, number 4).

Under the provisions of art. 55 of Law No. 9.784/99 ("In decisions where there is no evidence of harm to the public interest or to third parties, acts that have repairable flaws can be validated by the administrative authority itself"), the validation of illegal acts always depends on the absence of harm to the public interest. It should be

⁹⁰ See FROMONT, Michel. *Droit administratif des Etats européens*. Paris: Presses Universitaires de France – puf, 2006, p. 261-69.

⁹¹ See *Id.* at 268.

⁹² See SIRINELLI, Jean. *Les transformations du droit administratif par le droit de l'Union Européenne*. Paris: LGDJ, 2011, p. 499.

emphasized that the public interest should not be confused with the interests of the administrative authority. Despite this lack of clarity in the law, however, the validation should be limited to when it is necessary to serve the interest of those who rely upon the act based on the interested party's trust in Government. The interested party's trust is evident when, given the circumstances, a reasonable person would believe in the stability of the administrative act. As a result, the Brazilian rule has a direct relationship with the principle of legitimate expectations as conceived in the German tradition (Vw-VfG, § 48, numbers 2 and 3).

With respect to the protection of acquired rights as a barrier to revocation of administrative acts in art. 53 of Law No. 9.784/99, it seems clear that, under normal conditions, administrative authorities do not revoke legal acts that create rights. The legal provision only makes sense if "revocation" is understood according to the German perspective in which the term "revocation" applies to the undoing of an illegal acts that have favorable effects. Therefore, the only barrier to revocation of administrative acts would be "acquired rights" that arose from the favorable effects.⁹³ The above-mentioned provision could also be interpreted, in the French tradition that emphasizes the existence of two categories of administrative decisions, those that generate rights and those that do not generate rights (such as those resulting from police powers). Only regarding the latter can subsequent events lead to the annulment of the act.⁹⁴

In this context, I find acceptable the interpretation in Brazil that, so long as there is no harm to the public interest, favorable effects of invalid acts should be safeguarded and unfavorable effects terminated. Additionally, there must be compensation for damages caused by a reliance on administrative acts based on trust placed in an administrative authority. Ultimately, if there is no willful misconduct, and the five years statute of limitations expired, not only is the favorable status quo preserved, the unlawful administrative act is validated.

12. THE PRINCIPLE OF DUE PROCESS (FAIR HEARING AND ADVERSARIAL PROCEEDINGS)

Administrative hearings must come first, in order to elaborate the specific and restrictive effects of an administrative act on rights and interests. It is important to note that the possibility of a fair administrative appeal (*a posteriori*) challenging the administrative act does not eliminate the duty of holding administrative hearings prior to the implementation of the act. The prior administrative hearing is one of the constituent elements of the administrative act.

In that respect, the requirement of a fair hearing and adversarial proceedings in administrative process must include not only the right to be heard (i.e., one's "day in

⁹³ See FORSTHOFF, Ernst. *Lehrbuch des Verwaltungsrechts*. München: Beck, 1958, p. 359 - 363.

⁹⁴ See FORSTHOFF, Ernst. *Lehrbuch des Verwaltungsrechts*. München: Beck, 1958, p. 266.

court") or the right to produce evidence, but above all other rights, the right to have a well-founded decision rendered in public that considers the findings of fact and law raised by the parties.⁹⁵ In this sense, the jurisprudence of the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) has influenced the Supreme Federal Tribunal. Therefore, the requirement of a fair hearing and adversarial proceeding involves not only the right to express oneself and the right to information, but also the individual's right to see a court address their arguments.⁹⁶

What seems obvious, is currently the subject of much resistance on the part of Brazilian administrative authorities themselves. I will use as examples two model cases that are referenced frequently in Brazilian courts. One involves individual administrative acts, the other relates to general administrative acts.

12.1 Garnishment of public servant's wages

The first case involves the garnishing of the wages of public employees to recover undue payments, based on Law No. 8.112/29,⁹⁷ without guarantee of a prior administrative proceeding.

The idea that administrative authorities, in order to collect a debt, have the power to garnish the wages of their own employees without observing judicial due process is based on an outdated, late-nineteenth century idea of the so-called "special relationship to power." This idea provided that public servants, in order to satisfy their claims based on the ties with the state, were subject to special statutes or rules that were not governed by the principles of fundamental rights, legal rights, and legal certainty.⁹⁸ This principle leads to modern statements that "the public servant has no acquired right to a statutory regime."⁹⁹

These special relationships in public law, constitutionally recognized, were characterized by their internally binding regulations.¹⁰⁰ This created a separate legal regime in which fundamental rights that exist outside the administrative authority gave

⁹⁵ See Model Code for Administrative Processes *supra* note 63, . Explanatory memorandum.

⁹⁶ See S.T.F.-MS, No. 25.787-3/DF, Relator: Justice Gilmar Mendes, 14.09.2007 available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=486706> (Braz.). These principles are familiar in the United States. In *Morgan v. United States*, 304 U.S. 1, 19 (1938), the Court discussed how, in administrative proceedings, "the requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

⁹⁷ See Lei No. 8.112, art. 46, de 11 de Dezembro de 1990, D.O.U. de 19.04.1991 (Braz.).

⁹⁸ See MAURER, Hartmut. *Allgemeines Verwaltungsrecht*. München: Beck, 2006, p. 195.

⁹⁹ See S.T.F.-AI, No. 641-911-8, Relator: Justice Carmen Lúcia, 8.9.2009, DJe 1.10.2009 available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=603416> (Braz.); S.T.F.-RE, No. 116.683, Relator: Justice Celso de Mello, DJ 13.3.1993 (Braz.); S.F.T.-AI, No. 685-866-AgR, Relator: Justice Ricardo Lewandowski, 22.5.2009 available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=593889> (Braz.).

¹⁰⁰ See generally MAYER, Otto. *Derecho administrativo alemán*. Buenos Aires: Depalma, 1982.

way to internal regulation. The applicability of this limited separate legal regime for public servants had the force of law (such as with compulsory military service) or the public servant's voluntary submission to the legal regime (such as with civil servants who, by choosing a career in an administrative authority, opt for a differentiated legal regime).

At the same time it was said in Germany that a teacher could "unceremoniously, detain and imprison the negligent student,"¹⁰¹ meaning that citizens who leave civil society and enter organizational institutions of the state are similarly situated.¹⁰² This view, linked at the time to a Rule of Law that existed in theory only, has since been discarded. In Germany, the definitive break with this notion that special relations to power created spaces that operated outside of the law, occurred with a Federal Constitutional Court ruling on March 14, 1972, which stated that fundamental rights also apply to administrative decisions.¹⁰³

Accordingly the Judiciary ought not to enter into internal affairs of the administrative authority. It must respect the statutes, policies and regulations that, for example deal with matters of internal choice of a director of a public university (university autonomy) or even of a tribunal, since conflicts of this nature are extinguished internally and logically there are no individual rights to judicially vindicate, properly speaking.

These considerations lead to the assertion that the Judiciary should not interfere with the *interna corporis* affairs of a public entity and must respect its internal regulations, rules, and regulations. For example, the Judiciary should not interfere with the internal selection criteria for a president of a public university, or even selection criteria of members of a university adjudicatory body. This is because the effects of a selection process of this nature are strictly internal, and of course, there are no individual rights to protect judicially. The same is true with respect to the administrative structure of the legislature (elections to committees, etc.).

If a public employee were to claim that his or her individual rights were violated, however, the claim, even when arising directly from his or her link to the administrative authority, should be within the scope of fundamental rights considerations. Contrary to what was thought in the past, the public servant is not the object of the above mentioned "special powers" but remains a right holder.¹⁰⁴

¹⁰¹ See JELLINEK, Walter. *Verwaltungsrecht*. Berlin: Julius Springer, 1931; MAURER, Hartmut. *Allgemeines Verwaltungsrecht*. München: Beck, 2006, p. 195.

¹⁰² See WOLFF, Hans J.; BACHOF, Otto; STÖBER, Rolf. **Direito administrativo**. Lisboa: Fundação Calouste Gulbenkian, 2006, p. 111.

¹⁰³ See Entscheidungen des Bundesverfassungsgerichts [BverfGE] [Federal Constitutional Court] March 14, 1972, 33 BverfGE 1 (Ger.).

¹⁰⁴ See WOLFF, Hans J.; BACHOF, Otto; STÖBER, Rolf. **Direito administrativo**. Lisboa: Fundação Calouste Gulbenkian, 2006, p. 111.

12.2 The principle of a fair hearing in decisions of Brazil's Federal Audit Tribunal

The second case concerns prior administrative proceedings as a condition precedent to Federal Audit Tribunal administrative decisions.

For many years in Brazil there was a notion that there was no reason to give interested parties a hearing before the Federal Audit Tribunal in order to preserve the rights of interested parties to a hearing before the court.¹⁰⁵ This notion is based on the assumption that, since the proceeding was exclusively directed at the administrative authority, this was simply an internal check on the legality of the administrative authority. If this assumption were correct, the interested party could defend his rights directly before administrative authorities. In reality, however, the administrative authority, guided by the principle of hierarchical subordination, would never be able to go against the views expressed by the audit tribunal and its rights would be mere formalities without any practical effect. In reality the right of defense would be merely ceremonial.

In 2007, the Supreme Federal Tribunal issued Binding Precedent No. 3 (*Súmula Vinculante* 3), holding that: "In proceedings before the Federal Audit Tribunal, fair hearing and adversarial proceedings are guaranteed when a decision can result in the annulment or revocation of an administrative act that benefits the interested party [...]"¹⁰⁶ However, the Federal Audit Tribunal itself, in interpreting this binding precedent, decided that

It is not the responsibility of the TCU [Brazil's Federal Audit Tribunal] to establish adversarial proceedings for all affected by generic rulings of the Tribunal — issued in the exercise of its constitutional authority that requires strict compliance with the law.¹⁰⁷ This is due to the fact that generic decisions of the TCU do not contemplate concrete, individual situations; therefore a specific actor is not required to appear at hearings.¹⁰⁸

As previously stated, any administrative hearing must be characterized by fair hearing and adversarial proceedings of sufficient scope to legitimize acts that will have an

¹⁰⁵ The Federal Audit Tribunals are comparable to the United States' administrative tribunals in that both are a part of the Executive branch rather than the Judiciary.

¹⁰⁶ See S.T.F., No. 31/2007, 30.05. 2007, 1 available at: http://www.dji.com.br/normas_inferiores/regimento_interno_e_sumula_stf/0003vinculante.htm (Braz.).

¹⁰⁷ See Tribunal de Contas da União [Federal Audit Tribunal], No. 2.553/2009, Relator: Justice José Jorge, 4.11.2009 (Braz.).

¹⁰⁸ This is similar to the U.S. Supreme Court's decision in *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) where the Court articulated that "[w]here a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption . . . Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule . . . no one would suggest that the 14th Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body intrusted [sic] by the state Constitution with the power."

impact the parties' private interests. By the very essence of the administrative proceeding, only individual administrative acts and decisions are consistent with the prior right to a fair hearing. One must recognize that when it comes to composition of general acts, concrete acts, abstract acts, or the general effects of individual acts, administrative procedure must make available the so-called deferred or postponed adversarial proceedings. In such cases, due to the inability to summon parties to defend their interests, deferred or postponed adversarial proceedings are replaced by a *consulta popular* (public hearing), as provided for in arts. 31 and 32 of Law No. 9.784/1999 (similar to other Latin American public hearings such as those of Costa Rica, Peru, Mexico and Venezuela).¹⁰⁹

Furthermore, it should be emphasized that subsequent to the public hearings the interested party is guaranteed the right to initiate a new administrative hearing. In this new administrative hearing there is every opportunity to mount a full defense in order to stave off the effects of the individual act of the earlier administrative hearing in which other entities were able to participate through hearings and public consultations.

Lastly, it is important to remember that questions of general interest may not be decided by an administrative authority inferior in the hierarchy to the administrative authority whose act gave rise to the claim. The responsibility of dealing with these issues of general interest falls to the authority with the powers of self-governance ample enough to internally correct the core issue raised by the interested parties. Thus, if the claim involves a declaration of illegality of an administrative act, only the administrative authority itself with the jurisdiction to annul the act, or an authority higher than it can preside over the proceeding. Lower administrative authorities that annulled an administrative act of a higher authority would be subject to a penalty for contempt or administrative insubordination.

Therefore, the audit tribunals must refrain from delegating to an administrative authority the guarantee of a fair hearing and adversarial proceedings. Instead, the audit tribunals must themselves conduct the administrative hearings involving individual challenges to its decisions in matters where the underlying issues are of general

¹⁰⁹ See BREWER-CARIAS, Allan. **Principios del procedimiento administrativo en América Latina**. Caracas: Legis, 2003, p. 98 – 99. In France, the participation of interested parties in decision-making of a collective interest has been a difficult debate, undertaken by the *Commission Nationale du Débat Public* (National Commission of Public Debate), which now has the status of independent administrative authority, whose task it is to strengthen popular participation in the development of urban projects of economic and environmental repercussions. POCHARD, Marcel. **La Administración Pública y la protección de los derechos fundamentales**. In: Memories:- Seminario Franco-Colombiano sobre la Reforma a la Jurisdicción Contencioso Administrativa, 2008. See also FROMONT, Michel. **Droit administratif des Etats européens**. Paris: Presses Universitaires de France – puf, 2006, 220 - 221. British law has invested the most in public procedures through public hearings: "Undoubtedly, this is the British law that gave more importance to public procedures that are called public inquiries. What characterizes the surveys is that they start by advertising measures allowing all interested persons to take part in hearings which are then organized in a quasi-adversarial court, but shall in principle concern the factual situation of the territory concerned, which then allows the competent administrative authority to take account of the objectives that go beyond the strict territorial" *Id.* at 220.

interest. In so doing the audit tribunals would ensure the fullest guarantee of due process, subject to the caveat that the favorable effects of the ultimate decisions would necessarily be extended to all those similarly situated.¹¹⁰

13 THE REALITY OF BRAZIL'S ADMINISTRATIVE AUTHORITIES

In my opinion, Brazilian administrative law, with its structure, judges, and standards and principles of judicial due process, is consistent with the fundamental principles of effective judicial functioning and the Rule of Law. This assessment also extends to Brazilian procedural law governing hearings within the administrative authority.

Despite this consistency, there is a widespread notion in Brazilian society that administrative authorities do not respect individual rights.¹¹¹ Additionally, there is a general belief that the Judiciary is slow and unable to respond adequately to the challenges it faces.¹¹² In fact, statistics indicate that the number of claims against administrative authorities is increasing.¹¹³ In proportion to the increased number of claims,

¹¹⁰ See, e.g., Resolução Administrativa No. 15, de 15 de Junho de 1993, D.O.U. 9.12.2003 arts 161, 281 (Internal Rules of the Court of Accounts) (Braz.).

¹¹¹ The claims arising from the legal relationships governed by public law, wherein the plaintiffs or defendants are public authorities, represent an absolute majority of cases pending in courts. See **Justiça em Números** [Justice in Numbers], Conselho Nacional de Justiça available at: <http://www.cnj.jus.br/programas-de-a-a-z/eficiencia-modernizacao-e-transparencia/pj-justica-em-numeros> (Braz.). The "Justice in Numbers" project seeks to expand the knowledge processes of the Judiciary through the collection and systematization of data and calculating statistical indicators capable of profiling the performance of the courts. *Id.* In the specific case of this study, it is important to obtain a profile of claims, seeking to understand government participation in lawsuits, as well as litigiousness, new cases, the workload of judges, backlogs, external and internal rate of appealability, and rate of amended decisions. *Id.* According to data collected by CNJ in the base year 2009, public authorities in Federal Court of the 1st degree were named in a total of 3,458,831 new cases. *Id.* This includes five regional courts, federal lawsuits filed by the Union, municipalities, foundations and corporations, federal, and public agencies in the states, municipalities and the federal district. *Id.* The Government was sued for a total of 2,580,232 claims in courts of the first degree. *Id.* In the 2nd degree, it sued a total of 740,818 times and was sued directly 676,966 times. *Id.* In state courts, the public sector was a plaintiff a total of 4,126,159 times, although, as stated on the website, some states did not have the data available, so that we conclude that the actual result is higher than asserted. *Id.* First and 2nd degree courts are included in those numbers. *Id.* And a total of 1,134,963 claims were filed against the Government in 2009 in state courts. *Id.*

¹¹² MATUSUURA, Lilian. **Para brasileiro, Justiça é lenta, cara e parcial**. DISPONÍVEL EM: <http://www.conjur.com.br/2009-fev-22/brasileiro-poder-judiciario-lento-caro-imparcial>. Acessado em: 16 de Abril de 2013.

¹¹³ This statement is backed by a survey conducted by the National Council of Justice's Judiciary Research Department, which identified the top 100 parties in state, federal regional, and labor courts. It demonstrated that Brazil's National Social Security Institute (INSS) accounts for over a fifth of the total cases. The Federal public sector is the lead litigator with a total of 38.5% cases, followed by the State, at 7.8%, and municipalities at 5.2%. Taken as a whole, administrative authorities represent a total of 51.5%. This represents a greater number of claims than the country's next 80 largest litigants, including the entire banking and telecommunication industries. Data available at: http://www.cnj.jus.br/images/pesquisas-judiciarias/pesquisa_100_maiores_litigantes.pdf. Accessed: June 3, 2011 (de MORAES, Andre Cardoso Vanila. **Redundant claims arising from actions or omissions of Administrative Authorities: hypotheses for solutions and the need for public procedural law based on the Constitution**. 2011. 231 f. Dissertation (Master of Administrative Justice) - Universidade Federal Fluminense, Niterói, RJ, 2011).

the length of time to complete a judicial proceeding has increased.¹¹⁴ Paradoxically, however, the judicial structures have grown in size, with a corresponding increase in costs.¹¹⁵ These symptoms indicate something is not functioning well. Indeed, there is a gap or lag in time between Brazilian legislation and the reality of the country's administrative authorities.

I have tried to show that most conflicts arise as a result of resistance by administrative authorities, sometimes resulting from a lack of knowledge, to comply with the fundamental principles specified in the backbone of administrative law: the procedural laws governing hearings within the administrative authority. Today, 15 years after the issuance of the General Law on Procedure within Administrative Authority (Law No. 9784), and 25 years after the ratification of the country's Constitution, we still see vestiges of a time when administrative acts were imposed without allowing for fair hearing and adversarial proceedings. Also, the widespread lack of training of public servants has become common knowledge. Recently, when the country's new access to information law went into effect, this lack of training made the news. The newspapers, including those of the government itself, reported that when asked about the new law many public servants responded: "What access law is that?"¹¹⁶

14. CLOSING THOUGHTS

Given an administrative culture and mentality in many ways rooted in the past, it would be premature and even rash to immediately increase the power of administrative

¹¹⁴ "(...) even with improved management, the 2nd instance of the federal courts, especially the Federal Court of the 1st Region, has been unable to shorten the time of trials for claims. On the contrary, the periods are becoming longer. Irrefutable proof of this is the fact that backlogged cases have remained stable or increased throughout the years, as shown below:

COURT	2004	2009
<i>Tribunais Regionais Federais</i> TRFs (average)	67.1%	67.1%
TRF 1st Region	69.0%	87.2%

Data obtained from the CNJ website and the **Cartilha Novos Tribunais: uma questão de justiça** (New Courts Primer: a matter of justice), commissioned by the Association of Federal Judges of Minas Gerais (AJUFEMG), November 2010. (ASSOCIATION OF FEDERAL JUDGES OF MINAS - AJUFEMG (Brazil). **Cartilha Novos Tribunais: uma questão de justiça**. Minas Gerais: AJUFEMG, 2010. P. 34). Backlogged cases and number of new claims that have not been tried. <<http://www.cnj.jus.br/>>. It should be noted that a significant part of this increase is due to the change in methodology by CNJ, from 2008 to 2009, when calculating the rate of backlog "(de Moraes, op. Cit.).

¹¹⁵ Since 1989 the Federal Court of 1st instance grew 470%, and is now present in more than 214 municipalities. Through Law No. 12.011/2009, more than 230 federal courts were created, scheduled to be operational between 2010 and 2014, bringing the increase to 606% and the number of municipalities to 273. (ASSOCIATION OF FEDERAL JUDGES OF MINAS - AJUFEMG (Brazil). **New Courts Primer: a matter of justice**, op. Cit.).

¹¹⁶ See BRUNO, Cássio; BASTOS, Isabela; CASTRO, Juliana; RAMALHO, Sérgio, **Que lei de acesso é essa?, reage uma servidora**. DISPONÍVEL EM: <http://clippingmp.planejamento.gov.br/cadastros/noticias/2012/5/17/que-lei-de-acesso-e-essa-reage-uma-servidora>. Acessado em 17 de Abril de 2013

authorities to resolve administrative disputes, and restrict or only allow access to courts in a secondary way. In the longer term, however, I recognize that the improvement of so-called “independent administrative authorities” is the most natural solution. Special attention should be afforded to the experience of American administrative agencies, with a view toward an overdue re-approximation of Brazilian and American administrative justice systems.

Therefore, what is required in Brazil, are reforms not only the Judiciary itself or the administrative procedural law (whether supplied by the Judiciary or the administrative authority), but also reforms directed at administrative authorities themselves. These urgently needed reforms would consist of training and qualification of public servants. This training would be technical, but also, and just as importantly, ethical. These reforms would create more efficient administrative authorities that are credible, strong and fortified as a true third branch of government. Brazil requires reforms that lead to an administrative authority that does not hide behind strict legality, comfortable with delegating to the Judiciary the responsibility of recognizing rights based on the Constitution and international conventions. Finally, Brazil needs reform that will result in administrative authorities committed to Rule of Law and which, without relying on the Judiciary, take the initiative to guarantee fundamental rights.

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