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Reviewability of Administrative Action

Comparative Legal Analyses between U.S. Law and Portuguese Law

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List of Abbreviations:

APA – Administrative Procedure Act

CPA – Código do Procedimento Administrativo (lit. Administrative Procedure Act)

CPC – Código de Processo Civil (lit. Civil Procedure Code)

CPTA – Código de Processo nos Tribunais Administrativos (lit. Procedure in Administratives Courts Code)

CRP – Constituição da República Portuguesa (lit. Portuguese Republic Constitution)

U.S. Code – United States Code

1. Introduction

A necessary requirement for the review of administrative action by the judicial system, both in Portuguese's and United States of America's legal system, is that the administrative action in question is reviewable[1], that is to say the action should be susceptible to judicial examination.

According to American law, an action is reviewable, if it has reached the point of finality[2], on contrast, the Portuguese law has dropped this requirement long ago, opting instead for a solution according to which all administrative action that produce an external effect is, generally speaking[3], reviewable.

The present paper will take a comparative approach of both legal systems mentioned, analysing the solutions adopted, how they differ, and, ultimately, how the American solution would stand in Portugal in terms of constitutionality.

2. Reviewable Administrative Action

2.1 According to U.S. Law

According to American Law, every administrative action is presumed reviewable[4]. This results from the APA for two reasons[5]:

i) U.S. Code, §703 states that "[e]*xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review.*";

ii) on the other hand, §704 of the U.S. Code establish that "(…) *final agency action for which there is no other adequate remedy in a court are subject to judicial review*."[6].

Nevertheless, this presumption was upheld in the 1967 Supreme Court Case, *Abbott Laboratories* v. *Garner*, where the court went so far as to state "[t]*he APA's 'generous*

[1] The term adopted by Portuguese law is "*impugnável*", as it is used in Articles 50th and following of the CPTA.
[2] *Vide infra* (Point 2.1.1) and PETER L. STRAUSS, An Introduction to Administrative Justice in the United States, Administrative Law The Problem of Justice, Vol. Iº, Giuffrè, 1991, p. 745.
[3] Although that is the rule, some exceptions exist and may apply, for further development see Point 2.2.1.
[4] See, *e. g.*, PETER L. STRAUSS, *op. Cit.*, p. 745, and *Reviewability of Administrative Action: The Elusive Search for a Pragmatic Standard*, Duke Law Journal, Vol. 1974, No. 2, 1974. The exact terms where this presumption is applied will vary from State to State.
[5] According to PETER L. STRAUSS, *op. Cit.*, p. 745.
[6] The term agency is defined "(…) *as each authority of the Government of the United States, whether or not it is within or subject to review by another agency* (…)" according to § 701(b)(1) of the U.S. Code.

review provision' must be given a 'hospitable' interpretation… only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."

Therefore, an action is not reviewable, that is the presumption does not apply, whenever:

i) there is a statute that precludes judicial review;

ii) the action in question is committed to discretion[7].

And, although not explicitly mentioned, any action that has not reached the point of finality is not reviewable according to U.S. Law. Besides finality, it is also required the exhaustion of all administrative remedies[8] and the action in question must be "ripe".

2.1.1 Finality

The Supreme Court has identified two requirements for an action to be qualifiable as final:

i) the action must be the "(…) *'consummation' of the agency's decision-making process*."[9];

ii) the action must be one:

a) "(…) *from which 'rights or obligations have been determined'*; or,

b) "(…) *from which 'legal consequences will flow'".*

Per example, according to *Barry* v. *Sec*. "[t]*he press release is therefore not 'final' action subject to review under the APA*"[10], since it is not the consummation of the administration decision-making process. However, it is possible that a given statue establishes the reviewability of non-final action, in that case what happens is a "statutory extension of judicial review"[11].

[7] § 701(a) of the U. S. Code states as much.
[8] See PETER L. STRAUSS, *op. Cit.,* p. 760.
[9] According to Bennett v. Spear, 520 U.S. 154 (1997), adding "(…) *it must not be of a merely tentative or interlocutory nature*."
[10] This idea was reiterated in *Trudeau* v. *Fed. Trade Comm'n* – "*we have never found a press release of the kind at issue here to constitute 'final agency action' under the APA*".
[11] See *Reviewability of Administrative Action: The Elusive Search for a Pragmatic Standard*, Duke Law Review, Vol. 1974, 1974, pp. 388-389.

Nevertheless, it is not required that an action must be enforced in order to be reviewable[12].

2.1.2 Ripeness

The ripeness requirement implies a test in order to determine whether an action is fit for review or adjudication, that is whether said action requires immediate judicial decision. In other words, judicial review "(…) *should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote.*"[13]

According to 1967 Supreme Court Case, *Abbott Laboratories* v. *Garner*, in order to determine if an action is ripe, it is necessary:

i) to analyse the need for judicial resolution;

ii) the degree of hardship imposed on the aggrieved party by withholding review.

2.1.3 Exhaustion

According to the exhaustion doctrine an administrative action is not reviewable if the plaintiff has not used all administrative remedies at his disposal. Historically, this doctrine is associated with the requirement of finality, however it has been recognized that the exhaustion of all administrative remedies would be, for the most part, meaningless.

Thus, nowadays the exhaustion doctrine is only used by the court in order to preclude review, whenever the use of administrative remedies would have been decisive. Nevertheless, the exercise of administrative remedies may never required whenever its use would be futile[14].

2.1.4 Statutory Preclusion of Review

A statutory preclusion of review may result:

i) expressly from the statue[15];

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[12] See JARED P. COLE, *An Introduction to Judicial Review of Federal Agency Action*, Congressional Research Service, 2016, p. 11 – "(…) *individuals are not necessarily required to wait for an enforcement action to be brought against them to challenge an agency's determination.*"

[13] See *Reviewability of Administrative Action: The Elusive Search for a Pragmatic Standard*, Duke Law Review, Vol. 1974, 1974, p. 390.

[14] See *idem*, p. 400-402, note 103.

[15] This happens for instance for the decisions of the Administrator of the Veterans Administration, in consequence of §§ 38 and 211 (a) of the U.S Code.

ii) be implicated by the statue[16].

In order to determine whether or not a statue precludes review of administrative action the Court may use at its disposal all elements of interpretation[17].

The preclusion may not apply whenever the action in question may have violated the constitution[18]. Nevertheless, the Court's have interpreted the provisions very narrowly in order to determine if a preclusion does exist[19], this happens since the possibility of judicial review is seen as a basic right.

2.1.5 Discretion

According to § 701 (a) (2) if the action has a discretionary element, said action cannot be eligible for review.

Such a thing happens when "a statute's terms are so broad that there simply is "no law to apply" in evaluating its requirements."[20]

Nevertheless, this solution is criticized[21], for starters this solution determines that an action made by a governmental entity is not reviewable. Or in other words, the checks and balances that should characterize the Rule of Law are not present whenever the administration has an element of discretion.

Although explainable thanks to the separation of power principle, a literal approach to this requirement would be excessive. This notion has been recognized by the Supreme Court in 1993 Case, *Lincoln* v. *Vigil*, according to which if the law establishes sufficient standard the court is allowed to determine the existence of abuse.

This solution is not perfect, since:

i) it requires the existence of standards for a discretionary action being reviewable;

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[16] See *Block* v. *Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984).
[17] See *idem* – "(…) *express language* (...) *the structure of the overall statutory scheme, its objectives, its legislative history and the nature of the administrative action involved.*"
[18] If this preclusion applied to constitutional claims, what would be happening is the law protecting a violation of the constitution, thus this solution is reasonable.
[19] See *Reviewability of Administrative Action: The Elusive Search for a Pragmatic Standard*, Duke Law Review, Vol. 1974, 1974, p. 383. The author adopts the term "*restriction of judicial review"*.
[20] See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971) and Heckler v. Chaney, 470 U.S. 821, 830 (1985) – an action is committed to discretion when "(…) *the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion* (…)".
[21] See DANIEL HALL, Administrative Law Bureaucracy in a Democracy, 3rd edition, Pearson Prentice Hall, 2006, p. 220.

ii) regardless of separation of powers, the court should always be allowed to detect and punish the abuse of administrative discretion.

Another interesting note comes from the *Chevron* Case according to which if the Court interpretation of the law differs from the administration's interpretation, the administration's interpretation prevails as long as it is reasonable[22].

So even when the law establishes said criteria, if the administration's interpretation is reasonable, the Court should defer to it.

2.2 Comparative Analyses with Portuguese Law

2.2.1 Finality

As said prior, according to Portuguese Law there is no requirement of finality in order for an action to be reviewable[23]. It is only required that the action in question violates the rights of the plaintiff and that it produces effects[24/25], thus even pre-decisions as long as these two criteria are meet should be reviewable.

Similarly to American Law, it is not relevant whether or not the action in question has been executed in order for it to be reviewable with the exception of actions that have yet to produce an external effect. In those cases, according to Article 54th of CPTA, the action in question may be reviewable if it has started to be executed or if it is likely to start produce external effects.

2.2.2 Ripeness

Part of the requirement of ripeness is also, in some way, a requirement in Portuguese Law, the so called *interesse em agir* or *interesse processual*[26], literally interest in acting, according to which the plaintiff must have effective necessity of judicial intervention.

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[22] See RICHARD ALBERT/ANNA NIKOLAYEVA, *Judicial Review of Administrative Action in the United States*, A&C – Revista de Direito Administrativo & Constitucional, Fórum de Conhecimento Jurídico,2017, pp. 18-20, according to which if the statute is unambiguous, the court's interpretation should prevail.

[23] In prior legislation, only definitive and executory action could be reviewed, see Article 25th, number 1 of the Decree-Law 267/85.

[24] This results from the Articles 51st and 58th of CPTA. This solution is a consequence of the Constitutional Imperative resulting from Article 268th, number 4 of CRP.

[25] It is to note that actions that do not produce external effects may also be reviewable in accordance and in the situations established in Article 54th of CPTA.

[26] See MÁRIO AROSO DE ALMEIDA, Manual de Processo Administrativo, 3rd Edition, Almedina, 2016, pp. 210-211

The ponderation associated with the second requirement of ripeness doctrine does not have general reflection in Portuguese Legal System, except for "*procedimentos cautelares*", the equivalent to injunction orders in the Common Law Legal Systems.

In those orders, after verifying general requirements[27], the injunction is not ordered if by doing so would create damages far greater than the ones feared and as long as they could not be attenuated by any means[28].

2.2.3 Exhaustion

The exhaustion of administrative remedies is not a requirement according to Portuguese Law, nevertheless there is an administrative remedy that may impact the reviewability of administrative action, the so called Recurso Hierarquico Necessário, literally Required Hierarchical Appeal. This figure is an administrative remedy that translates to the requirement to appeal to another administrative entity, that has the power to annulate or to revoke the decision, in order for the action to be reviewable, in other words without this appeal, be it fruitful or not, the administrated cannot use his right for judicial review.

The Constitutionality of this figure has already been put into question[29]. According to VASCO PEREIRA DA SILVA this requirement to exhaust an administrative remedy violates a number of principles from the principle of the separation of powers to the principle of administrative deconcentrating.

Nevertheless, the Portuguese Constitutional Court already had the opportunity to pronounce for the Constitutionality of said figure[30] stating:

i) that the right to access the court is not supressed, since the particular can appeal to the court after using his administrative remedy;

ii) that, since the need to appeal to an agency suspends the production of effect of the action in question[31], the Constitutional Command that states that every action that produce external effects is not violated.

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[27] The so called *fumus boni iuris* and *periculum in mora*. The first translates to the need for the principle cause to be apparently viable and founded, while the second requires a founded apprehension of creating an irreversible situation. For further developments see *Acórdão do Supremo Tribunal Administrativo*, 30th January 2013, Process Number 1081/12.

[28] See Article 120th, number 2 of CPTA. It is to note that this provision is hardly ever applied.

[29] See VASCO PEREIRA DA SILVA, O Contencioso Administrativo no Divã da Psicanalise, 2nd Edition, Almedina, 2013, pp. 348-349.

[30] See *Acórdão do Tribunal Constitucional*, 25th November 2008, Process number 765/08.

[31] See Article 189, number 1 of CPA.

It is to note that the Court also uses arguments of a more practical order as the cost of judicial review, the fact that agency are at a better position to evaluate the action, the duration of the litigation in administrative courts and a more cautious use in general of those courts[32].

Thus, the American solution, if translated to the Portuguese Legal System, would also suffer from the same discussion.

2.2.4 Statutory Preclusion of Review

This one has no legal parallel in Portuguese Legal Culture, besides maybe the jurisdiction of administrative courts, but-even then that would not be a perfect parallel in the sense that the legal consequences differ.

If an administrative relation does not fall under the jurisdiction of administrative courts, because it is not included or because it is excluded[33], then the general courts have jurisdiction[34].

While whenever there is a statutory preclusion of review, the action is unsusceptible of judicial review, not just by administrative tribunals, but by courts in general, unless the plaintiff claims a constitutional violation.

Such solution would be unconstitutional according to CRP, since it would violate the principle to access the courts and the principle of separation of powers[35], since whenever an action falls under a Statutory Preclusion of Review it is only subject to administrative remedies, in other words the administration is exercising the courts duty of review.

3. Conclusion

In conclusion, the two legal systems although similar, differ greatly. These differences seem to be explained by the differences in interpretation of the principle of separation of powers and the Rule of Law[36].

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[32] It is to note that the Administrative Courts are considered to be under founded and, as a consequence, litigation last a considerate amount of time.
[33] See Article 4th, number 4 of ETAF according to which a series of administrative relationships are excluded from the jurisdiction of the administrative courts.
[34] According to Article 64th of CPC.
[35] See respectively Article 20th and 111th of the Portuguese Constitution.
[36] For reference, these principles are interpreted in such different manner in Common Law that it is possible for Courts to create through Court Orders administrative entities – see Ashgar Leghari *v.* Federation of Pakistan.

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