ADMINISTRATIVE PROCEDURE: A COMPARATIVE PERSPECTIVE BETWEEN PORTUGAL AND THE UNITED STATES OF AMERICA

ADMINISTRATIVE AND TAX LITIGATION

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The present work, carried out in the context of the subject of Administrative and Tax Litigation, in the school year of 2022/2023, under the regency of Professor Doutor Vasco Pereira da Silva, has as its object the comparison between the Portuguese and the American administrative Procedure and was developed in collaboration with Michelle MK Hatfield from University of Massachusetts School of Law, Darthmouth.

This paper will develop the concept of Administrative Procedure, exhibit a historical evolution, make a comparison between the judicial system of the two countries and its scope, present the procedural conditions and requirements and finally, through all these points, present the comparison between the administrative procedure adopted in Portugal and the model adopted in the United States.

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1. Administrative Procedure

a. Meaning and Definition

Administrative Procedure[1] refers to the process by which governments develop and issue regulations. It includes the rules for publishing proposed and approved legislation, and defines how the entire legislative process must take place.

Administrative procedure also encompasses the definition of actions such as issuance of policy statements, licenses, and permits. Finally, it also provides standards for judicial review if a person has been adversely affected or aggrieved by any governmental agency's action.

In short, we can say that administrative procedure defines the way in which government operates and also defines paths for the citizen to react if they feel diminished in their rights, in other words, the succession of acts and formalities tending to the formation and manifestation of the Public Administration's will or to its execution according to what is established in article 1 (1) of the Administrate Procedure Code. This is especially important due to the overwhelming power of the state regarding an individual.

2. Historical Development and Origin of its basic principles

a. Portugal

Administrative Litigation arises as a forum privilege in the French Revolution that was intended to guarantee the defense of the public powers and not for the protection of private individuals, which means that Administration bodies are attributed the task of judging themselves, thus Administrative Litigation was born in a system where there was a "confusion between the function of administering and the function of judging"[2]. Pereira da Silva[3] understands that three phases in the evolution of

[1] Given that the translation from Portuguese can raise some questions, it is important to establish that one should keep in mind that when referring to Administrative Procedure in this paper, one is talking about administrative litigation and so, administrative procedure is understood as a process.

[2] Debbasch / Ricci, "Contentieux Administratif", 8º edição, Dalloz, Paris, 2001 *in* Pereira Da Silva, V., 2009. O Contencioso Administrativo no Divã da Psicanálise. *Ensaio sobre as acções no novo processo administrativo*.

[3] In Pereira Da Silva, V., 2009. O Contencioso Administrativo no Divã da Psicanálise. Ensaio sobre as acções no novo processo administrativo.

Administrative Litigation can be identified, which are directly related to three different moments in the evolution of the State. The first phase he calls "original sin" and corresponds to the period of the birth of Litigation and in which there is great confusion between the functions of administering and judging. In 1789, through Decree, Law, and the Constitution[4], it was forbidden for the judicial courts to interfere in the sphere of administration, determining that judges could not disturb the operations of administrative bodies, nor summon their administrators before them by reason of their functions under penalty of a criminal offence. During the French Revolution, the French revolutionaries invoked the principle of separation of powers but made a wrong interpretation of it, since they considered that "to judge the administration is still to administer". This conception of the principle leads to a paradox since in the name of the separation of powers of Administration and Justice there is an indistinction between the functions: administering and judging[5]. With the beginning of the 20th century came a new stage in the evolution of administrative litigation. This second stage of evolution is called the "Jurisdictionalisation of administrative litigation" and is marked by the subordination of the Administration to the Law. This change is due to the onset of the welfare state and an administration that has taken on new functions, thus leading to the growth of the so-called administrative apparatus and administrative litigation. This stage then brought about "a progressive transformation of the rules and institutions that arose to protect the administration into instruments of guarantee for private individuals" and the "transformation of a quasi-court into a real court", or self-made courts as Professor Vasco Pereira da Silva calls them. During this stage there will be an approximation between the French and British administrative systems and in France this evolution is called a "miracle" by Prosper Weil and is largely due to the action of the Council of State since the "Cadot" judgment of 1889, which considered this body as the first instance of administrative litigation while until then there was only a delegation of judicial powers, not a true attribution of these.

In the United Kingdom, until the end of the 19th century, there was no Administrative Law and the administration was subject to common law, being judged by common courts and this reality was due

[4] See articles 7 of the Decree of September 22, 1789, 13 of Law 16-24 of 1790 and article 3 of the Constitution of 1789.

[5] For an in-depth analysis of what preceded the birth of Administrative Litigation and how it conditions this emergence, see Pereira Da Silva, V., 2009. O Contencioso Administrativo no Divã da Psicanálise. Ensaio sobre as ações no novo processo administrativo;

to the fact that the British legal system did not have the childhood traumas[6] of the French legal system. However, with the welfare state the so-called "tribunals" appeared, which are administrative courts with the power to enforce decisions and judgments, which Professor Vasco Pereira da Silva calls "precocious senility". In the 30s and 40s of the 20th century there was a judicial review in which the last word in litigation was always in the courts and only in the first instance was there administrative specialization. Professor Vasco Pereira da Silva criticizes this phase in some points because he considers that, although there is a change of statutes of the courts, this is accompanied neither by the expansion of jurisdiction, nor by the expansion of the powers of the courts, and, therefore, there was still an objectivist litigation, concerned with the defense of legality and public interests, not with the protection of the rights of individuals. Finally, we have the third phase, that of the "chrism" or confirmation that presents itself as Litigation in its current situation. Today, Administrative Justice is fully jurisdictionalised, with the judge enjoying full independence and powers vis-à-vis the Public Prosecution Service and should only pursue justice and the effective protection of the rights of individuals. This affirmation/confirmation has occurred, with special relevance, at two levels: constitutional and European. At constitutional level, administrative courts have thus become true courts, having been elevated to constitutional level, by the Constitution of the Portuguese Republic (hereafter, CRP[7]) of 1976, with more relevance after the 1989 revision, which enshrines administrative jurisdiction as full in Articles 209, 212 and 268, paragraphs 4 and 5. However, although the developments at constitutional level have been quite relevant, neither the jurisprudence nor the ordinary legislation have been able to concretize the principles in the most adequate way. In this regard, Prof. Vasco Pereira da Silva speaks of Decree-Law 265-A/77 and the 1984/1985 reform of the Statute of administrative and tax courts. Finally, only the constitutional revision of 2004 solved the question of coherence and balance, materializing a reformed model of administrative justice. At the European level, there is not only the appearance of new relevant sources but also a growing innovation in the legislation of the Member States. In this respect, there is talk of a European Administrative Process. There is an increasing disconnection of the administration with the concept of State, with the European Administrative Function becoming more and more an essential element of the material European constitution. One of the bodies that most marks the relevance of litigation at a European level is, without doubt, the Court of Justice of the European Union. All these changes are the result of the evolution that has now taken place towards the Post-Social State, due to a

[6] Professor Vasco Pereira da Silva uses this term to refer to the problematic circumstances and conjuncture that gave rise to administrative litigation.

[7] The abbreviation corresponds to the Constitution name in Portuguese

depletion of the Welfare State, and mark the rupture with the traumas of Litigation's difficult childhood.

b. USA

American Law is distinguished by two elements: a unique kind of federalism and a common law tradition. The rapid change that marks American history can be seen in the fact that only four centuries have passed since the beginning of the colonial period. The multiculturalism and diversity of religions, nationalities, economic groups, and political groups that was observed in the colonies led the United States, in 1774, through to an unauthorized assembly of the Crown, to have a great advance toward united colonial action, which inevitably led to the declaration of independence, which took place in 1776. In its preamble, calls attention both to the "station to which the Laws of Nature and of Nature's God entitle" the colonists and to the "unalienable rights" with which "all men ... are endowed by their Creator" and reflects the influence of theories of natural law under which the Revolution was justified. By 1777, a committee of the Second Continental Congress, at work on the problem of colonial union, had drafted Articles of Confederation, but these were not finally ratified until 1781. This was the first serious attempt at a federal union. Instead of adding coercive and other powers to patch up the old league, the delegates ultimately arrived at the crucial decision of the Convention: to have a central government with widened powers designed to operate on individuals rather than states. In September 1787, the Constitution was signed and submitted to Congress, to become effective upon its acceptance by two-thirds of the states. This occurred in July of 1788, and the first president of the United States, George Washington, was inaugurated the following April.

The concept of the separation of the federal legislative, executive, and judicial powers is implied by the form of the Constitution with three separate major articles, each of which delineates one of these three major, and presumably distinct, powers. And the belief that constitutional rights should be embodied in a written instrument is evident from the document itself. The Constitution as ratified contained no guarantees of basic human rights. But in 1789, the first Congress promptly proposed the first ten amendments to the Constitution, which are popularly known as the Bill of Rights because many of them are concerned with the rights of the individual against the federal government.[8]

Just as there was no uniform evolution of political organization in the colonies, there was no uniform growth of colonial law. The same diversity as to the extent of crown control, date of settlement, and

[8] As explained int eh work of Farnsworth, E.A., 2010. *An introduction to the legal system of the United States*. Oxford University Press.

conditions of development resulted in 13 separate legal systems [9], each with its distinct historical background, that due to the short length of the paper it will not be possible to go into depth.

Article III of the Constitution of the United States provides that "judicial power of the United States, shall be vested in one Supreme Court, and such inferior courts" [10] as Congress sees fit to establish. Article III establishes neither how many justices should sit on the Supreme Court, nor the structure of federal courts, so, there was a need to establish that and filled the gaps by providing that "the supreme court of the United States shall consist of a chief justice and five associate justices." This was done through the Judiciary Act of 1789 [11] a federal act that also created federal District Courts and a Circuit Court, which would hear appeals from the district courts and would become the Courts of Appeals, that have specific and limited jurisdiction; and the office of the U.S. Attorney General, and for each federal district the office of United States Attorney and United States Marshal. The Act also established that the Congress could regulate the jurisdiction of all federal courts, while maintaining the original jurisdiction of the Supreme Court provided for in the Constitution, this means that the Supreme Court would handle appeals from the federal circuit courts and appeals from certain cases heard in the state courts. The District Courts held jurisdiction over major federal offenses, civil matters involving diverse jurisdiction or the United States as a party, and admiralty cases under the Act. That is, the Judiciary Act of 1789 did not give District Courts federal question authority, as they now have.

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[9] That the influence should have been English is hardly surprising in view of the language and nationality of most of the colonists; that this influence should have met with the resistance that it did calls for some explanation. There were at least three impediments to the immediate acceptance of English law in the earliest colonial period. The first was the dissatisfaction with some aspects of English justice on the part of many of the colonists, who had migrated to the New World in order to escape from what they regarded as intolerable conditions in the mother country. A second and more significant impediment was the lack of trained lawyers, which continued to retard the development of American law throughout the seventeenth century. The rigorous life in the colonies had little attraction for English lawyers, and few among the earliest settlers had received any legal training. The third impediment was the disparity of the conditions in the two lands. Particularly in the beginning, life was more primitive in the colonies, and familiar English institutions that were copied often produced rough copies at best.

[10] Article III, Section 1 of the United States Constitution, available on https://www.archives.gov/founding-docs/constitution-transcript#toc-article-iii--2 viewed on 07th December 2022;

[11] Available on https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=196 viewed on 2nd December of 2022

Following the country's growth throughout the continent and the turbulence of the Civil War, a significant adjustment was made to the established in the Act. In 1891, Congress established a second tier of appellate circuit courts, removing the need for Supreme Court justices to travel to hear cases in different circuits, a practice known as circuit riding. The framework of the federal courts has remained mostly intact since 1891. [12]

3. Judicial system

a. Portugal

There are three levels in the existing system of specialized courts for administrative and fiscal disputes. The circuit administrative courts, which are located in sixteen various places across the country, serve as the foundation. In most circumstances, the administrative and tax courts are united and referred to as the administrative and tax courts. The central administrative courts, which are located in Lisbon and Porto, make up the intermediate tier. The Supreme Administrative Court, established in 1870, sits atop the pyramid. Each of the administrative central courts and the Supreme Administrative Court has an administrative law division and a tax law section comprised of distinct judges. The Supreme Administrative Court also has a plenary, formed by the Presiding Judge and the longest-serving judges in each section, which decides on conflicts of jurisdiction between the sections of the court or between the sections of the central administrative courts, or else between the circuit administrative courts and the tax courts.

All administrative court judges enjoy the same constitutional guarantees of immunity and independence as the judges in civil and criminal courts. Powers for the appointment, promotion, transfer, and dismissal of administrative and tax court judges lie with the Higher Council for the Administrative and Tax Courts. This Council, provided for in the Constitution, is chaired by the Presiding Judge of the Supreme Administrative Court (who is elected by and from the judges of this court) and comprises two members appointed by the President of the Republic, four members elected by Parliament and four judges elected by and from the entire administrative and fiscal judiciary. The Higher Council's composition reflects the intention of combining representatives of State bodies endowed with democratic legitimacy derived from direct and universal suffrage with representatives of the judges themselves in the delicate task of managing the careers of administrative and fiscal judiciary members. We should remember that, like in Continental European systems, the judiciary is made up of career judges who are first appointed to the circuit courts and only progressively rise

[12] The modern-day Supreme Court is composed of the Chief Justice of the United States and eight associate justices and has created 13 courts of appeals and 94 district courts.

through the ranks based on the Higher Council's technical appraisal of their performance and duration of service. Only exceptionally may a very small number of jurists of proven experience in the field of public law, obtained through public office, legal practice, university teaching or service in the administrative authorities, be admitted through a competitive procedure to the Supreme Administrative Court.

The Portuguese system for resolving administrative disputes combines the principle of two-step review with a three-tier court hierarchy and the principle of reserving first instance jurisdiction for circuit administrative tribunals. As a result, the Act had to include procedural safeguards that would allow the Supreme Administrative Court to exercise its authority over more serious matters. The emphasis thus shifted to the impact of resolving specific cases on the unity and quality of administrative law jurisdictional application, as well as the notion that a Supreme Court should be competent to decide situations of higher social or economic significance in the ultimate instance. These procedural processes include a judgement by the Supreme Administrative Court in second instance as a result of a per saltum appeal[13] against administrative circuit courts decisions; (ii) Exceptional third level review by the Supreme Administrative Court; (iii) Appeal for the uniformity of the case-law; (iv) Referral for a preliminary ruling.

Per saltum appeal applies when the value of the cause judged by a circuit administrative court exceeds three million euros or is undeterminable, and the parties, in their arguments, only raise questions of law (Code of Procedure, article 151). Exceptional third-level review applies to decisions handed down in the second instance by central administrative courts, when the question at issue is of fundamental importance, in view of its legal or social importance, or when an appeal clearly needs to be admitted for better application of the law (Code of Procedure, article 150). The appeal for the uniformity of the case law applies when there is a contradiction on the same fundamental question of law between two decisions of the Supreme Administrative Court, or between a decision of a central administrative court and a previous decision handed down by the same court or the Supreme Administrative Court (Code of Procedure, article 152). Referral for a preliminary ruling applies when a circuit administrative court is faced with a new question of law that raises serious difficulties and may be raised again in other disputes. In these cases, the preliminary ruling of the Supreme Administrative Court is binding, but only for the purposes of the final decision on the case in which it is handed down. In admitting appeals for third-level review and referrals for a preliminary ruling, the Supreme Administrative Court

[13] In the legal order this means the possibility of seeking a resolution before a higher court, bypassing intermediate courts.

exercises a considerable margin of discretionary leave. In the Supreme Administrative Court and the central administrative courts, decisions are always taken by panels of judges. In the circuit administrative courts, a single judge is a general rule. But panels of three judges hear cases of greater economic value or relating to immaterial interests.

b. USA

The United States does not have a separate system of administrative courts. Instead, administrative law judges (ALJs) preside over tribunals within executive branch agencies. In American jurisprudence, ALJs are always regarded as part of the executive branch, despite their quasi-judicial adjudicative role, because of the strict separation of powers imposed by the United States Constitution. Decisions of ALJs can be appealed to courts in the judicial branch. [14]

Matters and disputes involving administrative law are handled through the administrative law system. Administrative hearings utilize many of the same processes and procedures used in traditional courtrooms. Whereas court proceedings are overseen by a judge, administrative hearings are conducted by an administrative law judge (ALJ). One of the major differences between a traditional court proceeding and an administrative hearing is that the presiding administrative law judge serves as the trier of fact. In other words, administrative law proceedings are virtually always conducted as bench trials. [15]

The Administrative Office is the legislative, legal, financial, technology, management, administrative, and program support services to federal courts, established in 1939. Judicial Conference committees, with court input, advise the Administrative Office as it develops the annual judiciary budget for approval by Congress and the President, which means that it is directly supervised by the latter. The Administrative Office is responsible for carrying out Judicial Conference policies. A primary

[14] Farnsworth, E.A., 2010. *An introduction to the legal system of the United States*. Oxford University Press.

[15] Bench trial refers to the type of trial that does not involve a jury but is conducted by the judge alone, in which the judge both decides the facts of the case and applies the law. The word bench in the law is in reference to the judge, so a bench trial is a trial conducted by a judge, as opposed to a jury trial, according to the Wex Definition Team of Cornell Law

responsibility of the Administrative Office is to provide staff support and counsel to the Judicial Conference and its committees[16].

The AO's director (now Roslynn R. Mauskopf) [17] serves as Secretary of the Judicial Conference and is appointed by the Chief Justice of the United States, along with the deputy director (currently Lee Ann Bennett) [18]. The AO has an Office of the General Counsel, an Office of Judicial Conference Executive Secretariat, an Office of Public Affairs, an Office of Legislative Affairs, an Office of Judges Programs, an Office of Court Administration, an Office of Human Resources, an Office of Finance and Budget, an Office of Facilities and Security, an Office of Defender Services, an Office of Information Technology, and an Office of Internal Services.

When a party requests an administrative hearing, a notice of the hearing will be sent to interested parties, which have the right to legal representation both before and during the hearing, but an attorney is not required. The notice may include a short summary of the issues to be addressed at the hearing. In some instances, the administrative law judge will hold a prehearing conference with the parties and will encourage the parties to work toward a settlement agreement during the prehearing conference.

The party who files the complaint or appeals a prior administrative decision has the burden of proof during the proceedings. Typically, the ALJ's first matter of business will be addressing each exhibit that the parties intend to submit into evidence and ensuring that each side has a copy. Once the exhibits are accounted for, the ALJ will admit them into the hearing record. When a piece of evidence is admitted, it means that it may be relied upon and referred to by both parties and the ALJ. The parties are also allowed to call witnesses to testify. Witnesses are sworn in prior to providing testimony and are subject to the same perjury laws as witnesses during regular jury trials. At the end of the hearing, each party may provide a closing statement.

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[16] Available on https://www.uscourts.gov/about-federal-courts/judicial-administration , viewed on December 9, 2022

[17] AO Director Announcement" (Press release). Washington, D.C.: Supreme Court of the United States. January 5, 2021. Retrieved January 8, 2021, available on: https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_01-05-21 viewed on 27th November 2022.

[18] James C. Duff (2020). Annual Report 2020 Director's Message (Report). Administrative Office of the United States Courts. Retrieved July 15, 2021.

Following the hearing, the ALJ may require the parties to submit a brief summarizing each party's side of the case and advocating for each party's desired outcome. Each hearing and the events that took place during the proceeding are recorded in some way, either by audio recording, videotaping, or a court reporter. Each party may purchase a copy of the transcript in order to help them prepare their brief, or to assist them with preparing an appeal if necessary. After the parties submit their briefs, the ALJ must prepare a proposed decision or Final Decision. This document details the ALJ's findings and ultimate decision in the matter. The ALJ must identify the applicable law, the relevant facts, and how the law applies to those facts. A party who disagrees with an ALJ's ruling has the right to appeal the decision to an administrative appeals authority.[19]

Many states have established a robust administrative sector within their borders. The power to create a state-level administrative agency is generally derived from the state's constitution, which makes provisions for the legislature to delegate its authority to an independent or executive agency. Much like federal agencies, state agencies assist governors and the legislature with administrating policy objectives, implementing new programs, and enforcing statutory laws. Each state has the power to determine the extent to which its agencies will be permitted to promulgate rules[20].

4. The Scope of Jurisdiction of Administrative Courts

a. Portugal

Procedural law defines the competent court for every case falling within the scope of jurisdiction of the administrative courts. For this purpose, the Code of Procedure in the Administrative Courts (referred to below as Code of Procedure) sets out criteria of competence on the grounds of subject matter, territory, and hierarchy. Multiple venues are not therefore available for the same case. The Portuguese system for judicial resolution of administrative (and tax) law disputes does not allow any kind of forum shopping. There is no possibility of lotteries for claims filed in more than one court.

[19] Available on https://www.justia.com/administrative-law/administrative-hearings/, viewed on November 30th, 2022

[20] Kentucky, for example, places detailed restrictions on the extent to which state agencies can create laws, while California's version of the APA provides agencies with substantial rulemaking authority. For example, California has an elaborate body of administrative agencies and laws, including a hearing agency dedicated to the supervision of administrative law judges.

Portuguese procedural law does not provide for *lis pendens*[21]. If the forum where the claim is filed does not meet the venue requirements, it has the authority to transfer the case to the court deemed competent. And there are no venue provisions for alternative possible locations: a suit can be legally brought only in the competent court. And for each case (conceived in terms of its objective and subjective elements), only one specific court has jurisdiction. Only for disputes deriving from contracts (between the public administration and private entities or between two different public entities) may the parties agree which circuit administrative court they wish to judge the case in. In the absence of agreement between the parties as to venue, the circuit administrative court with territorial jurisdiction over the place of contractual performance is competent (Code of Procedure, article 19). The injunctive nature of the rules on the competence of the administrative courts does not prevent the parties from agreeing on arbitration for certain types of administrative dispute. This is the case of disputes relating to contracts, the liability of the administrative authorities and the legality of adjudicative decisions that the competent administrative bodies can still revoke (Code of Procedure, article 180).

The circuit administrative courts are, in accordance with the general rule, the first instance reviewing courts. Exceptionally, cases are heard directly by the Supreme Administrative Court (for instance, in the judicial review of decisions taken by the Council of Ministers or by the Prime Minister). As for the number of instances, the principle is a two-step review. For this reason, when the Supreme Administrative Court pronounces a first instance judgment, an appeal can be brought before a larger bench of the court's judges. Examples of higher courts having first instance jurisdiction for certain types of cases are not rare in comparative law. Suffice it to recall the example of exclusive circuit court review in the United States. Normally, the purpose of legislation permitting direct access to review by a higher court is not to ensure a personal forum for certain higher administrative authorities. These legislative solutions are instead based on the presumption that the decision-making powers of higher administrative authorities relate to situations where higher level public and private interests are involved.

The material scope of jurisdiction of the administrative courts coincides as a general rule with that of administrative disputes. But the case law and legal scholarship have considered that article 212 (3) of the Constitution, which reserves the judgment of actions relating to disputes deriving from legal administrative relations for the administrative courts, has the nature of a general clause without thereby seeking to prohibit the exceptional adoption of other criteria for jurisdiction. The exceptional

[21] The jurisdiction, power, or control which courts acquire over property involved in a suit, pending the continuance of the action, and until final judgment.

rules consist both of assigning jurisdiction over certain administrative disputes to the civil and criminal courts, and of assigning to the administrative court's jurisdiction over certain civil law disputes to which the administrative authorities are party. These include cases relating to the civil wrongs of public bodies and to private law contracts with the administrative authorities when negotiated through a public procurement procedure.

The range of the jurisdiction of the administrative courts is not determined merely by substantive or material factors. Equally important are functional factors, relating to the difference between the roles of the administrative courts and of the administrative authorities: constitutional principles such as the separation of powers and the democratic legitimacy of executive power do not allow the courts to transform review into the final exercise of administration. This constitutional guideline is applied in two specific areas: that of respect for the initial decision-making power of the Administration and that of the limits on the judicial control of administrative discretion. These questions arise from the circumstance that review covers the exercise of public powers that belong primarily to the Government and not to the courts. We may extract from the Constitution the implicit existence of a principle of respect by the courts for the initial decision-making powers of the administrative authorities. Indeed, the Constitution assigns a specific role to the administration and sees the role of the courts as generally that of correcting and not substituting that of the administrative authorities.

Each time a law gives an administrative authority a certain decision-making power (either of an adjudicative or rulemaking nature) there will be no case ripe for judicial review as long as such authority, having had the opportunity to exercise its primary jurisdiction, has declined or abstained from adjudication. In Portuguese constitutional and administrative law, statutory administrative jurisdiction implies primary jurisdiction: in the face of a statutory power belonging to an administrative authority, a claimant cannot seek judicial resolution without having prior recourse to the agency charged with responsibility to implement the statute. Subsequently, if such power is exercised by the administrative authority in an illegal way, an action can be filed asking for judicial review for reversal and remand. If, on the contrary, instead of exercising its statutory power in order to confer new contents to the legal administrative relationship, the administrative authority refuses to comply with the application and to issue the individual determination thereby requested or remains idle for a period defined by law (*ab initio*, ninety days), the claimant can ask the court for an injunction ordering the agency to act. If the content of the administrative power is precisely defined by the law, the court will state in its decision what content the decision it orders the administration to take must have. If there is discretion, the court will merely order that the decision be taken without prescribing its contents, simply stating which legal requirements must be respected in the discretionary decision-

making process. In both situations, the court fixes the time limit for issuing the administrative decision (Code of Procedure, article 66 (1)).

b. USA

In the United States, there are no administrative courts, although there are specific judges for administrative matters.

There is a specific topic of judicial review in the United States Code, namely Title 5 - GOVERNMENT ORGANIZATION AND EMPLOYEES, PART I - THE AGENCIES GENERALLY, CHAPTER 7 - JUDICIAL REVIEW, Sec. 702 – Right of review, in which is stated that:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought"

Often, an agency's organic statute will specifically provide how an action of that agency is to be reviewed in court. These statutes generally specify whether review is performed in a court of appeals or in a district court.

If no specific statutory review is provided in the relevant organic statute, plaintiffs may seek review under more general principles of administrative law that will allow them to prevent unlawful governmental action or to obtain redress when they have been injured.

As mentioned before, there are specific judges, called Administrative Law Judge (ALJ), who can adjudicate claims and disputes over administrative law and conduct trials. These judges are commonly members of a specific agency, albeit having a clear separation of powers clause and decisional independence, and are therefore considered part of the executive, not the judicial branch.

Given the legislative nature of the US, these ALJ can be both federal or state, given that in each state, the power and prestige of an ALJ varies, to the extreme of being considered mere recommendations.

In some states, a central panel organization was created to employ ALJ, as a way of guaranteeing independence from agencies.

So, although no specific administrative courts exist, as is the case in Portugal, and there are varying degrees of intervention depending on the state, there is a clear definition on how administrative decisions, or decisions made by any executive agency, state or federal, can be judicially reviewed and how any citizen can seek to revert a decision deemed unsatisfactory.

5. Procedural Conditions and Requirements

a. Portugal

Procedural assumptions are, in a few words, the elements on the verification of which, in a certain procedure, the judge's duty to rule on the merits of the case depends. They are the elements that allow the judge to assess the merit of the claim made and give a decision on it. They are the conditions for the judge to be able to decide on the merits, so that he or she can definitively settle the dispute.

These obstacles to knowing the merit of the case roughly correspond to the dilatory exceptions in civil proceedings, where the judge, in the absence of these procedural assumptions, is also prevented from deciding on the substance of a particular dispute Art. 576 no. 2 Civil Procedure Code (CPC).

Let us take a look at the regime consecrated in the CPTA. If these assumptions are not verified, or better still, if negative assumptions are present, the administrative court will be responsible for filling the dilatory objections and inviting the party to correct the irregularities in the pleading art. 88 no. 2 of the Code of the Procedure of Administrative Courts (CPTA[22]). This solution is inspired on the principle of the use of proceedings. The lack of assumptions thus implies a decision rejecting the claim. If the plaintiff does not correct those exceptions, the consequence will be the acquittal of the defendant from the proceedings. Similarly, to the civil regime, the acquittal of the defendant does not prevent the plaintiff from filing a new action, correcting the defects in the pleading.

[22] The abbreviation corresponds to the code name in Portuguese.

However, there are important particularities in the CPTA regarding the lack of procedural assumptions.

Under the special administrative action there is an *ex officio* correction of the petition by the judge or a fine-tuning order. The purpose of this correction or order is to allow the author of the dilatory objections to supplement or correct them, under the terms of Article 88 of the CPTA, which is a general rule. If the defects in the petition are not overcome or corrected, the consequence will be that the defendant will be acquitted of the case with the aforementioned effects.

On the other hand, article 4, nos. 3 and 4 (illegal cumulation of requests), article 12 nos. 3 and 4 (illegal coalition) and article 14 (lack of jurisdiction of the court) clearly benefit a less diligent plaintiff. The plaintiff has the possibility of correcting the insufficiencies and inaccuracies of the pleading, in a broad space of manoeuvre that is not recognised in the civil regime.

Finally, let us look at the time limits for the lodging of new applications. Faced with a mere formal decision (the dismissal of the case), the plaintiff has longer deadlines to file new petitions. In the words of Vieira de Andrade, the law was generous and the current regime is highly favourable[23].Thus, the delivery of a new pleading obeys the general time limit of 15 days, under the terms of Article 89, but will be of one month, either in the case of an illegal accumulation of requests art. 4, paragraph 4 and art. 12 or in the case of absolute lack of jurisdiction of the court art. 14.

As far as timing is concerned, Article 89 no. 2 establishes that the petition is considered to have been presented on the date on which the first one was presented. The author will also only benefit from this regime once art.89 no.4 *in fine*.

The knowledge of these negative assumptions must be made at the time of the preliminary decision[24] Art. 87 CPTA. The regime regarding the moment when procedural assumptions are made known is similar in both jurisdictions. Also in civil proceedings, the existence of dilatory objections that prevent

[23] Andrade, J. C. V., 2009. A Justiça Administrativa (Lições), 10.ª ed, Almedina, page 277.

[24] There are cases in which its knowledge is not possible in the preliminary order, such as legitimacy, but the law imposes the concentration of these assumptions at this moment, as explained by Professor Vieira de Andrade in the work previously cited.

the hearing of the merit and constitute facts capable of preventing the hearing of the merit of the case must be known in the opening administrative order Art. 595/1/a) (CPC)[25].

The right to effective judicial protection against actions or omissions of public entities that harm the rights and interests of citizens and companies is now fully guaranteed in our legal system, requiring lawyers to have a profound knowledge of both the material law at stake and the applicable procedural law.

b. USA

In the United States, the Administrative Procedure Act (APA) is a federal statute that governs the way federal agencies may propose and establish regulations as well as the procedural requirements to contest those. Although these procedural requirements can be supplemented or overridden by specific provisions in other statutes, the APA is considered almost as a "Constitution" for administrative law.

Any agency, when issuing regulations, must follow the APA (or equivalent) rulemaking process, in which there is a specific phase for public hearings, in which any citizen can express their views on the subject. When an individual disagrees with any administrative action, it can take its claims to the agency in question, which will then be reviewed by the agency's ALJ or a central panel ALJ. As with any judicial decision, these can also be reviewed, and the procedures for ALJ's decision review varies from agency to agency. Some have an internal appellate body, while other have a Cabinet Secretary to decide the final result of the appeal. Even when all these internal appeals and reviews are exhausted, a party may have the right to file an appeal in the state or federal courts (usually a party can only exercise this right when all internal administrative appeals are exercised).

6. Conclusion

As we have seen, the topic of administrative justice is handled very differently in Portugal and the USA. These distinctions come both from the judicial system as well as historic reasons. In Portugal there is an administrative component within the judicial system with its own set of rules and procedures, while in the USA the administrative component is seen as a part of the executive branch, with rules and procedures highly dependent on the agency in question.

[25] Marques, J.P., 2007. *Acção declarativa à luz do código revisto*. Coimbra: Coimbra Editora, 2007.

These differences also translate to the extent of appeals one can have and how they can be made. In Portugal, the appeals follow the administrative judicial system up to the Supreme Administrative Court, while in the United States the appeal can be made in a state or federal court.

Albeit the differences, there is one very important topic that remains: there is a defined procedure for any individual to defend against state or government decisions, and these mechanisms enforce a separation of powers to ensure a just decision.

This is one crucial aspect to ensure that the State (government in Portugal, or agencies in the US) do not exercise uncontrolled power over the citizens and that there is a true democratic society in which a citizen can react whenever its rights are in question.

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