Administrative Procedural Means

A Comparative Analysis between Portugal and the United States

Course: Administrative and Tax Procedural Law

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I: Introduction

Administrative Procedural Law is an important component of legal systems around the world. It plays a crucial role in ensuring the rule of law, regulating the actions of administrative bodies, and safeguarding the rights of individuals in their relations with the administration. It establishes the procedures by which individuals can challenge administrative decisions and hold public authorities accountable for their actions. Administrative Procedural Law acts as a safeguard against the arbitrary exercise of power and promotes transparency, fairness, and legality in administrative procedures. Moreover, it fosters a delicate balance between ensuring that the administration operates within the prescribed legal limits and the need for efficient and effective governance.

This paper was written within the scope of Administrative and Tax Litigation, course taught by Professor Vasco Pereira da Silva at the University of Lisbon School of Law. It aims to provide a comparative analysis between the procedural means of Administrative Procedural Law in Portugal and the procedural means of the Judicial Review in the United States, in order to better understand the main similarities and differences between the two systems. For a complete understanding of these two systems, this paper will focus on the scope of administrative jurisdiction in each system, followed by an outline of the different procedural means in each regime.

II: Administrative Procedural Law in Portugal

A. Framework and Scope of Jurisdiction

In order to fully analyse the procedural means of Portuguese Administrative Litigation, it is first necessary to define the scope of administrative jurisdiction in this system. In accordance with Article 212(3) of the Portuguese Constitution, administrative jurisdiction is recognised as an autonomous judicial system, which has its own subject matter: proceedings for the settlement of disputes arising from administrative legal relations.

The concept of administrative legal relations is understood by the doctrine in different senses. In an organic sense[1], an administrative legal relation would be one in which the administration intervenes as the subject of the relation, regardless of how it acts. In a material sense[2], an administrative legal relation is one in which any public authority intervenes, provided that it is regulated by administrative law. In a functional sense, an administrative legal relationship would correspond only to the exercise of the administrative function, excluding from administrative justice disputes relating to acts that are materially political, legislative, or judicial, and admitting disputes in which the conduct is carried out by a private individual in the exercise of public powers.

This last understanding is the one followed by doctrine and jurisprudence. The criterion of the administrative legal relation establishes a relative material reservation of the administrative jurisdiction. It entails occasional derogations that exclude certain administrative legal relations from the administrative jurisdiction (negative delimitation), but it also entails an extension of the administrative jurisdiction to matters that would normally fall within the jurisdiction of the judicial courts and not the administrative courts (positive delimitation).

Faced with this criterion, that is difficult to define, the legislator itself lists the matters that fall within the jurisdiction of the administrative and tax courts. Article 4(1) of the Statute of Administrative and Tax Courts (ETAF) contains a list of matters falling within the scope of administrative jurisdiction. Article 4(3) and (4) of the ETAF contains a list of excluded matters.

B. Procedural Means

In the current legal framework, the **common administrative action** is the main procedural tool of portuguese administrative litigation. It is the instrument that is used in the majority of situations and through which the most important subjective rights in administrative legal relations are protected.

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[1] Mário Aroso de Almeida – Manual de Processo Administrativo, Almedina, 2020

[2] José Vieira de Andrade – A Justiça Administrativa, Almedina, 2021

This type of action has a wide scope, allowing for a variety of claims and a variety of effects in the judgments. As Professor Vasco Pereira da Silva points out[3], this procedural tool is a kind of "super-action" in which there are multiple "sub-actions" that are qualified according to the claim and the form of the administrative action.

According to Article 37 of the Code of Administrative Procedure (CPTA), there is no exhaustive list of claims that can be brought in administrative proceedings. However, it is worth mentioning those that constitute the main claims in administrative actions:

1. Impugnation of Administrative Acts
2. Condemnation to Practice Due Administrative Acts
3. Impugnation of Regulatory Norms
4. Condemnation to Issue Regulatory Norms

However, under Article 36 of the CPTA, the legislator also provides for five types of **urgent proceedings** regarding situations in which it is urgent to obtain a decision on the substance of the case, such as:

1. Electoral Disputes
2. Mass Proceedings
3. Pre-contractual Disputes
4. Subpoena to provide information, consult documents and issue certificates.
5. Subpoena for the protection of rights, freedoms and guarantees

Therefore, it is worth taking a brief look at each of these procedural means in order to get an overall picture of the system.

The **impugnation of administrative acts**, provided for in Article 50(1) of the CPTA, seeks the annulment or the nullity of the act. This action is therefore broadly aimed to check the invalidity of administrative acts, and may lead to a constitutive judgment, if it annuls the administrative act, or to a declaratory judgment, if it declares the act null and void or the non-existent.

[3] Vasco Pereira da Silva - O Contencioso Administrativo no Divã da Psicanálise, Almedina, 2013, p.316

Given the evolution of Administrative Litigation, which is currently characterised by a subjectivist approach, this type of action cannot be based exclusively on the illegality or invalidity of the administrative act in question, it must be related to the subjective right that has been harmed, and there must be a connection between the illegality of the administrative act and the subjective right that has been violated.

The **condemnation to practice due administrative acts** is provided for in article 66 of the CPTA, according to which the administrative courts can order the performance of legally due administrative acts. This type of action can take place in various situations, namely when an act of rejection or refusal has been carried out and the act has been unlawfully omitted, when an act with a positive content is carried out but does not fully satisfy the claim of the interested party, and also in situations where the interested party wants the content of the administrative act to be replaced.

The **impugnation of regulatory norms**, provided for in Article 73 of the CPTA, aims to control the validity of regulations issued by administrative bodies according to the rules of administrative and tax law (Article 4(1)(b) of the ETAF), and regulations issued by any body, regardless of its public or private nature, in the exercise of public powers (Article 4(1)(d) of the ETAF). Through this procedural tool it is possible to declare the illegality with general binding effect (Article 73(1) of the CPTA), to declare the illegality with effects limited to the specific case (Article 73(2) of the CPTA and Article 281(1) of the CRP) and also to disapply the regulatory norm in case (Article 73(3)(a) of the CPTA).

The **condemnation to issue regulatory norms**, provided for in Article 77 of the CPTA, is based on the existence of a situation that imposes an obligation on the administrative bodies to issue a certain regulation, and such an omission is unlawful.

Within the scope of urgent proceedings, the **electoral disputes**, provided for in Article 97(1) and Article 98 of the CPTA, has been made autonomous for the assessment of disputes arising from electoral acts concerning the bodies of legal persons governed by public law. The purpose of this procedure is not only to have the electoral act annulled or declared null and void, but also to condemn the administrative authorities, to order the competent body to reformulate the electoral procedure, to repeat the elections or even to determine the electoral result itself, thus fully resolving the issue.

Mass proceedings, provided for in Article 99 of the CPTA, consists of an evaluation of several cases with the aim of selecting a model case that will be subject to a final decision, so that this decision will be issued for all the other cases that have been submitted. This procedure is applied when more than 10 similar cases are brought before the same court, with an identical substantive administrative legal relation, in order to rule on the conduct of the same administrative body.

P**re-contractual disputes**, in the new wording of Article 100(1) of the CPTA, is now the procedural tool for settling disputes arising from the conclusion of public works contracts, public works concessions, public service concessions, the acquisition or leasing of real estate and the acquisition of services are settled. This procedure is based on a European legal source and then transposed into the Portuguese legal system by the "Resources" Directive.

Finally, the **subpoena procedure** is designed to provide immediate protection in the exercise of a right. The subpoena procedure for the disclosure of information, consultation of documents and the issue of certificates, provided for in Article 104 of the CPTA, is an autonomous procedural tool for the effective exercise of the citizens' right to procedural administrative information and access to administrative documents. The subpoena procedure for the protection of rights, freedoms and guarantees, provided for in Article 109 of the CPTA, aims to effectively guarantee the exercise of a right by ordering the administration to issue an act or to cease its effects, to perform a material act or to refrain from performing a certain act.

III: Judicial Review in the United States

A. Framework and Scope of Jurisdiction

In the United States, Judicial Review is the legal power of the court to determine whether a statute or administrative regulation conflicts with or violates the provisions of existing law. The process for the Judicial Review of federal administrative regulations is set forth by the Administrative Procedure Act (APA), which establishes the procedures that federal institutions and agencies use for rulemaking and adjudication, implementing a set of rules

and standards designed to ensure fairness, legality, and the protection of individual rights. The APA also establishes procedures for how courts may review such administrative actions.

To obtain a review under the APA, the person (individual, business, or other organisation) seeking review must have suffered a legal wrong or been otherwise harmed by a final agency action.

Judicial Review under the APA is limited to actions of a federal agency, which is defined as an "authority of the United Nations". This definition generally includes all executive branch agencies, including the independent regulatory agencies, but specifically excludes Congress and the Judiciary. The U.S. Supreme Court has held that the definition of agency in the APA does not encompass the President, although lower courts had held that entities within the Executive Office of the President may qualify as agencies.

The concept of agency actions is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or the denial or failure to act" and includes both rulemaking and adjudication.

The Judicial Review is also limited to a final agency action, that is defined by the U.S. Supreme Court as a "consummation of the agency's decision-making process, by which rights or obligations have been determined, or from which legal consequences will follow". This principle limits the Judicial Review of agency actions that do not have a final, legally binding consequence. On the other hand, individuals are not necessarily required to wait for an enforcement action to be brought against them to challenge an agency's determination. Some actions, such as the issuance of binding regulations, may qualify as a final agency action.

However, even if a case meets these criteria, the APA limits Judicial Review in three additional situations.

First, a court may only review and agency action if there is a separate statute authorizing review of the action or if the action is final and "there is no other adequate remedy in a court" regarding that action.

Second, the review is not available if the statue precludes review. The U.S. Supreme Court has interpreted the APA as establishing a "basic presumption of judicial review" of agency decisions in the absence of another statute that clearly precludes review in federal court.

Some statutes explicitly preclude judicial review of agency actions. In other situations, review may be precluded by implication. To determine whether another statute precludes review under the APA may include an examination of that statute, its language, objectives, and legislative history, as well as the nature of the administrative action involved.

Finally, review under the APA is unavailable if the agency's action is legally committed to the agency's discretion. The U.S. Supreme Court has noted that an agency's action is committed to its discretion when a statute's terms are so broad that there simply is "no law to apply" in evaluating its requirements. In other words, if "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," then judicial review is unavailable.

B. Procedural means

For cases that fall within its scope, the APA defines the scope of courts review of agency action. Specifically, the APA authorizes federal courts to (i) decide all relevant questions of law, (ii) interpret constitutional and statutory provisions, and (iii) determine the meaning or applicability of the terms of an agency action.

By default, the U.S. District Courts have jurisdiction to hear APA challenges, but Congress has vested review in other courts, such as the Federal Courts of Appeals, in specific circumstances.

In the current legal framework, the APA authorizes courts reviewing agency actions to:

1. Compel agency action unlawfully withheld or unreasonably delayed;
2. Hold unlawful and set aside agency action, findings, and conclusions.

Concerning the procedural means of **compelling agency action**, a person can challenge an agency for withholding or unreasonably delaying a required action. For this type of claim to proceed, a challenger must assert "that an agency failed to take a discrete action that it is required to take". If a reviewing court determines the agency unlawfully withheld or unreasonably delayed action, it can compel the agency to act. The court cannot, however, tell the agency how to act.

The reviewing court also holds the power to consider whether an agency action complies with applicable law and **hold unlawful and set aside agency actions** found to be:

1. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
2. Contrary to constitutional right, power, privilege, or immunity;
3. In excess of statutory jurisdiction, authority, limitations, or short of statutory right;
4. Without observance of procedure required by law;
5. Unsupported by substantial evidence in a case subject to sections 556 and 557 of Title 5 [concerning formal rulemaking and adjudicatory proceedings] or otherwise reviewed on the record of an agency hearing provided by statute;
6. Unwarranted by the facts to the extent that the facts are subject to trial by the reviewing court.

The most common standard of review that courts apply in challenges to agency action is the "arbitrary and capricious standard". This "catch-all" provision of the APA applies to factual determinations made during informal rulemaking proceedings such as notice and comment rulemaking and most other discretionary determinations an agency makes.

When examining an agency's action under the APA, a court will generally consider whether (i) the agency action is lawful, (ii) the agency adequately supported its factual findings and discretionary decisions, and (iii) the agency complies with the procedural requirements.

To assess if the agency action is **lawful**, the APA requires a reviewing court to consider whether an agency action complies with applicable laws. This type of review includes whether an agency action is "contrary to constitutional right, power, privilege, or immunity". Likewise, the court must consider whether an agency action exceed the agency's statutory jurisdiction or authority or if it violates a statutory right. Finally, the reviewing court must decide whether the agency action is "otherwise not in accordance with law", including whether it complies with applicable agency regulations.

In the Judicial Review courts must often interpret the meaning of statutory provisions to determine if the agency's actions accord with its statutory authority. The U.S. Supreme Court has created several deference doctrines that instruct courts to defer certain agency interpretations of ambiguous statues and regulations. For example, when reviewing a challenge to an agency's interpretation of a statute it administers, courts must apply the two-step framework outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*[4]. Pursuant to this decision, step one requires courts to examine "whether Congress has directly spoken to the precise question at issue". If so, "that is the end of the matter," and courts must enforce the "unambiguously expressed intent of Congress". In the case of silence or ambiguity in the statute, "step two" requires courts to defer to a reasonable agency interpretation, even if the court would have otherwise reached a contrary conclusion. Other doctrines are to be considered as well, namely the *Auer v. Robbins* or *Bowles v. Seminole Rock*[5] deference, that generally applies to an agency's reasonable interpretation of its own regulations, and the *Skidmore v. Swift & Co*[6]. deference, that applies to an agency's informal interpretation of a statute.

In addition to whether an agency action adheres to applicable laws, a reviewing court may also examine the agency's **factual findings and discretionary decisions**. The U.S. Supreme Court has recognized that courts generally cannot review an agency's factual findings and discretionary decisions. The court cannot substitute its own judgment for the agency's. Instead, a court will generally consider whether the agency determination was "arbitrary, capricious, or an abuse of discretion". Under this standard, courts examine whether the agency "examined the relevant data and articulated a satisfactory explanation" for its decision. A reviewing court is then limited to the grounds that the agency invoked when it took the action and whether the agency acted within the bounds of reasoned decision-making.

[4] Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)
[5] Auer v. Robbins, 519 U.S. 452 (1997), and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)
[6] Skidmore v. Swift & Co., 323 U.S. 134 (1944)

IV: Conclusion

The present comparative analysis underlines the diversities and similarities within the Administrative Procedure Law in Portugal and the Judicial Review System in the United States.

The main relevant differences that can be pointed out are: (i) the nature of administrative jurisdiction; (ii) the scope of administrative jurisdiction; (iii) the extent of procedural means available for administrative disputes.

Regarding the nature of administrative jurisdiction, while the portuguese system employs an autonomous and independent administrative jurisdiction, with specialized courts for administrative matters, the United States system incorporates the Judicial Review within the scope of Federal Courts. As Professor Vasco Pereira da Silva points out, these degrees of specialization can have a meaningful impact on the effectiveness and efficiency in controlling administrative actions and protecting the rights of individuals. This would definitely be an interesting topic to develop latter on.

Concerning the scope of administrative jurisdiction, although both systems delineate the scope of administrative jurisdiction, the portuguese system focus on defining which administrative relations fall under the jurisdiction of administrative courts, while the United States systems narrow down the Judicial Review to final agency actions and according to agency's statutes and discretion.

Regarding the extent of procedural means available for administrative disputes, the portuguese legislator ends up being more extensive, enshrining a range of specific procedural means for different situations, while the United States system establishes two types of reviewing means.

Nevertheless, there are some similarities in these legal orders. The main one that should be pointed out is the proximity between the two main procedural means used in both countries: the possibility to set aside administrative acts that do not comply with the applicable law and the possibility of compelling administrative bodies to practice due administrative acts that were unlawfully withheld. In both countries it can also be noticed a safeguard for a non-interference of the courts in the discretionary acts of administrative bodies.

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