JUDICIAL CONTROL OF ADMINISTRATIVE ACTION IN BRAZIL

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I

The State carries out its activities through specific powers, formally distinguished in accordance with the agencies that perform them, and substantively distinguished in accordance with their very content. The legal order is regulated by the legislative function that formulates binding general rules. Legal rules are rendered concrete by the executive function as a practical expression of the abstract substance of the law. Application of legal rules to litigated cases is decided in conclusive form by the judicial power.

The Legislature has the power to create legal rules within a constitutional framework. The Administration and the Judiciary are modalities for implementing positive law. Based upon this extrinsic identity, some writers would limit the powers of the State to only two categories: the Legislative Power, which issues legal rules; and the Executive Power, which implements them, thus uniting the Administrative and the Judicial Powers in the Executive.

Considered from an ideal perspective, it is undoubtedly true that the law has only two moments: that of its creation and that of its execution. Social dynamics show, however, that the law is not always implemented spontaneously or without opposition. In the application of the law, a contradictory phenomenon occurs, a process of reaction to its validity that interrupts its normal implementation. When it intervenes to guarantee the legal order after a conflict has arisen, the State places itself in another perspective. Executive action follows, or is associated with, elimination of obstacles opposed to the obligatory force of the law. Thus, the juristic order really encompasses three distinct levels: creating the law, implementing the law, and enforcing the law. Each of these autonomous categories is substantively addressed by one of the distinct powers of the State: the Legislative, the Administrative and the Judicial.

The substantive distinction set out above, however, is not accompanied by rigorous specialization of governmental organs. The powers of the constitutional branches are not limited to a single function, even though they may be predominantly related to one that characterizes them. Consequently, one has to refer to another formal or organic concept that, in relation to a certain act, considers only its origin, i.e., the organ from which it arose. Hence, from the formal point of

view, an act is legislative, administrative or judicial according to whether it issues from a Legislative, Administrative or Judicial body, regardless of its subject matter.

Administration and adjudication are, thus, distinct moments in the actions of the State. Predominant exercise places each within the sphere of action of specific constitutional Branches.

The Executive, with the President of the Republic at its head and through the agencies that make up the Public Administration, has the duty to exercise the Administrative Power. Only exceptionally the other branches perform administrative services.

The power to adjudicate, the final and definitive procedure to insure the legal order, falls within the province of the Judiciary, and jurisdiction is allocated among the various courts in accordance with the organization of the judicial hierarchy.

II

In a nation governed by the Rule of Law, Public Administration, a dominant power conferred upon the Executive, functions under a dual control of the two other Branches: on the one hand, it is subordinated to the principle of *legality*, in the sense that its activities are tied to the binding force of the law that comes from the Legislature; and on the other hand, in practice, administrative acts and contracts are submitted to judicial review, with the Judiciary having the final decision in annulling unlawful acts or abuse of power, as well as, in certain cases, making administrative decisions effective when they are not otherwise self executing.

The branches of government operate in a way that is both autonomous yet integrated. As has been often said, they are both independent of, and in harmony with, each other.

The Executive does not limit itself to applying the law in concrete cases. It also performs the role, albeit at a hierarchically lower level, of issuing norms, either through the rule-making power of the President of the Republic himself, or through rules and regulations that agencies of Public Administration are permitted to issue by superior norms. Nevertheless, the rule-making power of both the President and the administrative authorities, from the perspective of its legality, is subordinated to judicial control.

The new 1988 Brazilian Constitution instituted another form of control, granting the National Congress the exclusive power "to stay normative acts of the Executive that exceed regulatory authority of the limits of legislative delegation."[1] This harmonizes with another provision that similarly grants the Legislative Branch the duty "to safeguard the preservation of its legislative authority in the face of rule- making powers of the other Branches."[2] The procedures to be adopted by Congress for this purpose are to be governed by Internal Regulations, stipulating

[1] Const. of 1988, art. 49 (V).

[2] *Id.*, art. 49 (XI).

the way to initiate the control and its procedures. The decision reached will be issued by legislative decree.

The constitutional provision that grants Congress the power to suspend regulatory or delegated acts leaves open several important questions, such as when they will be in force, and above all, its subjection to judicial control. That same Constitution provides that no injury or threat to a right may be excluded from judicial review.[3] Thus, when by a stay of an executive act Congress exceeds its power, preservation of the principle of legality makes the guarantee of judicial control indispensable to defend the President's rule-making power or the powers conferred by legislative delegation.[4]

III

Comparative law offers two basic models for control of the legality of Public Administration. One is the French model, which has spread to many other countries, consolidated historically in the system of *jurisdictional duality*, in which administrative jurisdiction is autonomous and distinct from judicial jurisdiction. The highest French administrative tribunal, the *Conseil d'Etat,* has jurisdiction, defined in a law dating from 1872, to hear challenges to administrative acts for exceeding one's power or legal authority (recours de excès de pouvoir and recours de pleine juridiction). The other is the Anglo- Saxon model, characterized in both England and the United States by the system of *jurisdictional unity*, in which the regular courts are granted the final power to annul or condemn acts of the Public Administration.

Because of North American influence, the principle of unitary jurisdiction has prevailed in Brazil since 1891, the date of the first Republican Constitution. The regular courts have been given jurisdiction over cases involving both private and public law. During the Empire, however, administrative action was immune from judicial scrutiny. Defense of individual rights and interests was exercised within the Administration itself. Vicente Pereira do Rego, in a pioneering work on Administrative Law first published in Latin America in 1857, summed up the understanding of the time:

> To administer is not only to execute laws and decrees, which is the role of active administration, but it is also to resolve any difficulties of execution, and to adjudicate complaints that the execution may provoke. This is the function of adversary administrative proceedings.
>
> The power to administer, taken in its broadest sense, logically implies, therefore, the power to judge administratively; that is, administrative jurisdiction or administrative justice.[5]

[3] *Id.*, art. 5 (XXXV).

[4] *Id.*, arts. 68 to 84 (IV).

[5] *Compendio ou Repetições escritas sobre os elementos de Direito Administrativo* 11 (3d ed. 1877).

In his classic work on Brazilian Administrative Law,[6] Antônio Joaquim Ribas emphasizes the prohibition against the Judiciary's hearing administrative disputes, in view of the Imperial Constitution's strict limitation of judicial jurisdiction to "civil and criminal cases."[7] He also added, that according to the prevailing doctrine of the time:

> "Even if the Constitution had not been so explicit, the fundamental distinction that legal science makes between the spheres of action of the judicial and the administrative powers would have produced the same result, and the Constitution should always be interpreted in accordance with the principles of legal science.
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> Moreover, the doctrine [of permitting judicial review of administrative action] is incompatible with the principle of the separation of powers enshrined in Article 98 of the Constitution. The Executive would be placed in a dependent and subordinated position in relation to the Judiciary if the former's acts were subject to review and confirmation by the latter power, whenever the parties deemed it convenient to propose an appeal on the pretext of injury to their rights. . . .
>
> The Judiciary, which is independent in our political organization, would assume a certain superintendence over the Executive if empowered to judge administrative appeals. In this fashion, Executive responsibility would be nullified, and the Executive would become incapable of fulfilling its exalted mission.[8]

An 1841 law conferred jurisdiction to decide administrative disputes, even in cases of conflict of jurisdiction, upon the Council of State.[9] This statute also created adversary procedures for administrative disputes within its jurisdiction.

During the Empire, however, a complete administrative court system was never in effect. The decisions of the Council of State, which were subject to final review by the Emperor, were similar to the first phase of the French *Conseil d'Etat* before it was granted typical independent and definitive judicial powers. It was patterned after the system of subordination which, in French law, was characterized as *justice retenue* (retained justice), since it depended upon the Emperor's approval. Administrative litigation involving public finances was controlled by the Treasury Tribunal which, through regulations, granted jurisdiction to fiscal and customs authorities, under the supervision of the Minister of the Treasury.

Visconde do Uruguai, in a notable synthesis of administrative law of his time,[10] underscored the fact that:

[6] A. Ribas, *Direito Administrativo Brasileiro* 162 (1866).

[7] Const. of 1822, art. 151.

[8] A. Ribas, *supra* note 6, at 162-63.

[9] Law No. 231 of Nov. 23, 1841. The Council of State was provided for in Chapter VII, Title II of the Constitution of 1822. It was a consultative body even in matters concerned with the exercise of the Moderating Power of the Emperor, conferred upon him by Article 142 of Law No. 231.

[10] *Ensaio sobre o Direito Administrativo* (2 vols. 1862).

> Adversary administrative proceedings concerning the Treasury and other governmental departments have an extremely insignificant foundation in legislation enacted specifically by the Legislature. The adversary administrative proceedings that we do have is for the most part, if not entirely, a result of governmental regulations, issued by virtue of legislative authorization, that stated no outlines for it.[11]

This same author, who studied at length the genesis and formation of the Council of State in the Empire, shows that even in litigated matters, the jurisdiction of the Council of State was merely consultative.[12] His emphatic conclusion is "that the organization and nature of the Council of State given to it by our law proves what I have said: The Council of State was merely a consultative body and lacked jurisdiction to resolve disputes on its own."[13]

IV

After Proclamation of the Republic on November 15, 1889, the structure of the branches of government was redefined in the first Republican Constitution, promulgated on February 24, 1891. The powers of the Judiciary are fully concentrated in its exercise of jurisdiction. The Constitution adopts the principle of unitary jurisdiction, divided among the Federal Supreme Court and the other federal and state courts and judges, but permitted a separate system of military courts. The Council of State and the Moderating Power, both characteristic of the monarchist system, were abolished. In a special study of the Council of State, Temístocles Cavalcanti stated:

> With the advent of the Republic, administrative jurisdiction was abolished. A regime was adopted that eliminated the duality of the jurisdictional system. Controversies are to be decided by a single judicial system composed solely of judicial tribunals that are part of the courts . . .
>
> Any administrative decisions, even those made by administrative agencies, are subject to judicial review.[14]

Later republican constitutions further confirmed the jurisdictional monopoly of the Judiciary. Access to justice became a subjective right of the citizen, forming an integral part of the list of fundamental rights. The 1946 Constitution emphasized the principle of the guarantee of access to the courts, proclaiming that "the law shall not exclude any injury to an individual right from consideration by the Judiciary."[15] Although acts of the Supreme Command of the Revolution of 1964 were excluded from judicial review temporarily,[16] the 1967 Constitution restored

[11] *Id.*, vol. 1, at 153.

[12] Law No. 234 of Nov. 29, 1841, art. 7.

[13] Visconde do Uruguai, *supra* note 10, vol. 1, at 301.

[14] Cavalcanti, "O nosso Conselho de Estado", 24 Revista de Direito Administrativo 1, 8 (1961).

[15] Const. of 1946, art. 141 § 4.

full judicial jurisdiction[17], which was preserved in its entirety by the 1969 Reform.[18] This guaranty is reiterated in the present Constitution: "The law shall not exclude from judicial review any injury or threat to a right."[19]

Throughout the period of republican constitutions, control of legality has been based on the principle of unitary jurisdiction, to which the Administrative Branch's disputes are submitted. The concession made by Article 111 of the 1969 Constitutional Amendment, permitting creation of a contentious administrative tribunal to decide cases between civil servants and the Federal Government, and broadened by Constitutional Amendment VII of April 13, 1977, which permitted the creation of a similar body to decide tax and social security questions, did not prosper. These bodies — that were not created would have no judicial power, which meant that the Judicial Branch would eventually retain had full power of judicial review. Equally fruitless was the provision that access to the courts could be conditioned upon exhaustion of administrative remedies.[20] The 1988 Constitution definitively put an end to these timid attempts to restore, if only partially, a formal administrative court system.

V

Administrative acts develop within a pre-established legal frameworks. The legal rule, which is binding upon both administrators and those affected by the administration, is thus a tie that binds the freedom of action of the authority. This limit or legal containment of the administrative power is called a *linked power*, (*poder vinculado*) because every administrative act is subordinated or linked to a prior judicial norm, that is, to the rule that permits the agency to perform the administrative act.

This subordination does not mean, however, that the Administration is not permitted a certain latitude in its review of facts and solutions, independent of any legal predetermination. As Jellinek has observed, "The conception of a state whose every activity is linked is unworkable."[21] As the field of government involvement grows ever larger and is directed daily to new societal tasks, it becomes imperative to supply the State with the material means of efficient and prompt action. Administrative activity, today more intense and varied, multiplies in particular aspects that cannot be exhaustively treated in the minutiae of legal texts. The social phenomenon can not be enslaved by straight-jackets, nor even by seat belts. So the Administration needs sufficiently flexible ways and means to deal with pressing and disparate complaints.

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[16] Institutional Act No. 2 of Oct. 27, 1965, arts. 6 and 190.

[17] Const. of 1967, art. 150 § 3.

[18] Const. Amend. 1 of Oct. 17, 1969, art. 153 § 4.

[19] Const. of 1988, art. 5 (XXXV).

[20] Const. Amend. 7 of Apr. 13, 1977.

[21] La dottrina generale del Diritto dello Stato — italian translation 177 (1949).

The Administration thus finds, in the process of its performance, a field in which it may freely develop, and within which it may select its manner of acting. Subject always to the legality of his actions, the administrator may lawfully evaluate for himself the appropriateness and expedience of his administrative acts. This self-determinative capacity represents the discretionary power of the State, which is fully exhausted within the administrative sphere, and cannot be the object of consideration by the Judiciary. The appropriateness of an act may, in certain cases, be re-examined by the Administration itself; in no case may it be reviewed by the Judiciary, which is barred from expressing itself.

Proper legal balance requires that the judge and the administrator place themselves at their respective poles, each carrying out the typical functions for which they are qualified, not only by degrees of authority, but also by professional training. In the United States, it was precisely judicial invasion of the discretionary field that retarded the systematic formation of a body of administrative law, as Roger Pinto pointed out in his study of North American constitutional development.[22]

The administrator, endowed with practical experience and a greater capacity to adapt to facts, will decide administrative problems more flexibly. It is not for the judge to substitute judicial determination for executive action. A dictatorship by the Judiciary would be as harmful as a lack of standards by the Administration. Inviolability of the *discretionary power*, however, is not absolute. Although sovereign with respect to appropriateness and convenience, administrative acts are subject to judicial scrutiny of their legality.

Thus, one has to define the concept of discretion in the presence of the legal norm. Defining its content and its limits, one will have traced the border between legality and appropriateness, between judicial control and administrative discretion.

The classic definition of Michoud expresses, in general terms, the meaning of discretionary power: "Discretionary power exists whenever an authority acts freely without having its conduct dictated in advance by a rule of law."[23]

When the law expressly determines the manner of performance, the discretionary sphere ends. Administrative proceedings are linked to legal determinations. The Administration does not enjoy the freedom to choose between one or another method of execution. Instead, it must substantially reproduce the content of the legislative rule. On the other hand, if the law does not specify the context of administrative conduct, or if it permits a choice among alternative solutions, then discretionary power fully exists.

Mandatory jurisdiction is, in a sense, the opposite of discretionary jurisdiction. They are antonyms that repel each other through conceptual

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[22] La crise de l'État aux États Unis 195 (1951).

[23] Alternately, there is Giraud's formula: "The Administration possesses discretionary power when it is not bound by the law to adopt a predetermined attitude. It has the choice of action or abstention, or, if it does act, the choice among diverse decisions . . . Discretionary power is a certain freedom of decision left to the administration." See Marcel Waline, "Étude sur le pouvoir discrétionnaire de l'Administration" 198 Revue de Droit Publique 47 (1930).

incompatibility. Where there is compulsion, discretion ceases. Where discretion appears, compulsion is repulsed.

Administrative practice shows, however, that those extreme and categorical models are rare. Usually, no act is either totally compulsory or totally discretionary. Most administrative acts are a blend of both, in which either administrative freedom or administrative subordination predominates. The error of classical doctrine lay in considering an administrative act as an indivisible whole and classifying it in one or the other of those categories. If we pause to analyze an act's creation, however, we will conclude that compulsion or discretion appear with respect to each of the essential elements of the act.

One can no longer speak of a discretionary act as an organic whole, but rather of discretionary aspects related to determined elements, such as motive or subject. In the beginning of this century, Maurice Hauriou's writing was among the first to perceive the importance of this distinction:

> There are no discretionary acts. There is a certain discretionary power of the Administrator, found in more or less all acts and which is essentially the power to examine the appropriateness of the administrative measures. This power is discretionary because the administrative judge is not the judge of the appropriateness; the examination of the appropriateness is left entirely to the active administration, constituting its reserved domain. There are acts in which the question of opportunity is more important than in others, but there are no acts where, besides the question of appropriateness, the question of legality may not be raised, or even the question of administrative morality; administrative legality and morality are not discretionary, they are mandatory.[24]

Reviewing the creation of an administrative, act, recreating its etiology, we may diagnose the influence of the discretionary power over the different parts which it comprises. According to its nature, each essential element may fall within the area of legality or opportunity.

The first stage of an administrative act is verification of specific legal authority. Each authority possesses the power to act that stems from a rule of law. Administrative agencies have no general or universal jurisdiction. Broad as it may be, jurisdiction must arise from a legal provision. Its range does not depend upon the will of the party who exercises that jurisdiction; rather it stems from a prior legal precept.

The rule of jurisdiction is not a product of volition but emanates from the norm. It is not a subjective creation of the administrator, but an objective criterion of the law. In short, it is not a discretionary requirement, but a mandatory element.

Performance of the act presupposes, on the other hand, certain objective antecedents. An administrative authority neither acts in a vacuum nor arbitrarily. Certain factual or legal situations determine its initiative. The first dynamic stage of an administrative act, therefore, is verification of the existence of motives. Immediately thereafter comes an examination of the validity of these motives, so

[24] 2 *La jurisprudence administrative de 1892 à 1929* 184 (1929).

that the authority may determine the need for it to act and the proper means to obtain a result.

It is precisely in the sequence of these two stages that the discretionary element is inserted. Whereas verification of the material or legal existence of motives is only a process for determining reality, in the evaluation of these motives the administrative act becomes subjective. Whether motives exist is an objective matter: imperfect observation results in an error of fact or of law, subject to control of legality. The weighing and measurement of motives, as determining causes of the administrator's action, correspond to a psychological process belonging to the discretionary sphere.

After learning and analyzing the antecedents, the authority manifests itself by an action or omission that makes its objective concrete. It is principally in this sector that the discretionary power operates with the greatest amplitude. This is its own territory *par excellence*. When no legal rule requires the authority to perform or not to perform a determined act, the ability to decide freely belongs to the Administration, according to its own conviction about the act's appropriateness, justice, expedience or necessity. The core of discretionary power, its most important and habitual part, is the free determination of the object of the act.

Nevertheless, the element of purpose is superimposed upon free choice by the Administration. In the choice of the object, the agent is not limited to evaluating the antecedents of the act, that is, those objective factors that require the administrative action. He determines the procedure, particularly taking into account the reach of his jurisdiction and the public ends that justify this interference. He acts in relation to the motives so as to realize legal ends.

If these goals can be only those determined by law for the specific case, and if the agent cannot lawfully substitute them even for another public goal, it is evident that the purpose of the act represents a limitation on discretion, a barrier against expansion of opportunistic criteria in the determination of the object. Ultimately, purpose is always a limiting element that does not comport with discretionary appraisal.

Finally, in its expression of the administrative act, the authority is obliged to obey the formal requirements established by the legislator. Therefore, the essential role of form is another condition tying the hands of the administrative agent. Only when the form of the act may be freely chosen can the discretionary power operate. The non-observance of prescribed legal formalities vitiates the juristic act and makes its legality open to question.

This analytical reconstruction shows that there is no absolute discretionary power. Discretion may affect certain elements of the administrative act, but it is subordinated to explicit or implicit limitations. Discretion enjoys an autonomous area within which it can act entirely as it pleases. Nevertheless, once it violates its legal limits, the mechanisms for control of legality mobilize to confine it within its own domain. Strictly speaking, discretion functions in a system of supervised freedom. As Seabra Fagundes has stated, "With respect to jurisdiction, purpose and form, the discretionary act is just as subject to legal provisions as any other."[25]

[25] 12 Revista de Direito Administrativo, 58 (1948).

The discretionary power is thus a faculty granted to the Administration to judge the *worth of the motives* and determine the *object* of the administrative act when not prescribed by a rule of positive law. It is the right to choose the *form* when not essential. It is subjected not only to external limits of legality (which Victor Nunes Leal[26] symbolically calls the horizontal limits) namely: jurisdiction, essential form, and the material existence of the motives, but also to internal limits (which may be described as vertical), that have to do with the observance of the legal purpose.

Limiting discretionary power is incumbent upon the Judiciary. Determining whether an administrative authority has exceeded the limits of its discretion is not merely a question of fact, but rather one of law. The Judiciary has the power to examine not only the outer framework of the administrative act, but also the internal conditions of legality.

The judge is not forbidden from examining factual matters related to an administrative action. The view that the courts can only review extrinsic elements of the act is based upon a false conception of the merits, as Seabra Fagundes has demonstrated. Determining the existence of motives is a substantial legal question. If the administrator bases his actions on non-existent facts, or upon a false interpretation of actual facts, the substantive basis for the act is invalid. If the motive, which is the antecedent, is absent or defective, then the act, which is the consequence, will be illegitimate.

In 1894, Brazilian legislation accepted this principle when it provided for the illegality of administrative acts or decisions if they failed to apply or incorrectly applied the law in force, stating:

> The judicial authority shall be based upon legal reasoning and shall refrain from considering the desirability of administrative acts from the point of view of their appropriateness or convenience.[27]

A valid administrative act is binding *erga omnes*. Both private parties as well as the administration itself must obey it under the classic principle *"legem patere quam ipse fecisti"* (one is subject to one's own rules). The effectiveness of the administrative act, like that of legal transactions in general, may be instantaneous, or may depend upon a subsequent act or fact that is a condition suspending its effectiveness or a requirement for it to take effect. Administrative acts may also be successive in nature, that is, they may become effective at distinct moments that follow each other in time. In contrast to private juristic acts, administrative acts are usually self-executing in the sense that the Administration has the ability to coerce obedience to its orders and instructions. In exceptional circumstances, the law will condition the effectiveness of an administrative act upon judicial enforcement, such as the collection of tax debts or the condemnation of private property for public use. The usual rule is that administrative acts are self-executing or are executed administratively.

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[26] "Poder discricionário e ação arbitrária da Administração" 14 Revista de Direito Administrativo 65 (1948).

[27] Law No. 221 of Nov. 20, 1894, art. 13 § 9 (a).

VI

As stated above, judicial control over administrative acts and contracts is addressed to either extrinsic legality (jurisdiction, object and form as determined by law) or intrinsic legality (the actual existence of motive and observance of the legally determined purpose) of the administrator's intentional act.

Administrative acts and contracts are bound by the principle of legality by which, under a rule of law, the limitations of power and the supremacy of the law are affirmed. Both Public Administration as well as private parties, although they are not on an equal level,[28] have their behavior conditioned by the imperative of legal rules. Even the prerogatives of the Administration, which permit it to act unilaterally and compulsorily always emanate from the law and are always exercised within its ambit.

As I observed in an early work:

> The administrator should enjoy an area of broad legal authority within which he can freely act. The control of legality has as its task, however, the patrolling of the borders, so as to prohibit abusive excursions and maintain the discretionary power within its legitimate domain. At the legal level, the administration functions in a system of supervised liberty: it is permitted to do everything in benefit of the public interest except that which offends the law. The notion of legality supervises discretionary activity, without interfering therein, unless such activity is exorbitant.[29]

The idea of legality encompasses, primarily, the rule of legal authority, which confers on an administrator a certain power or capacity to act in the name of the State. The law specifies the degree of jurisdiction, which can be neither presumed nor conceived in absolute terms. There is no general or universal jurisdiction in administrative matters. As broad as it may be, jurisdiction is always qualified by and arises from a legal provision. As I stated in my prior study, "It is not he who wishes that has jurisdiction, but rather he who has been granted it by a rule of law. Administrative jurisdiction has always a mandatory element, objectively fixed by the legislator."[30] Administrative jurisdiction, in short, is the element of *capacity* which, together with the lawfulness of the *object* and the *form*, completes the validity of juristic acts in general, as set out in Article 82 of the Civil Code.

The notion of legality of administrative acts is not exhausted, however, by these external elements. The administrator does not look after private or selfish interests; he holds powers that permit him to care for collective interests. His conduct is determined by objective antecedents that inspire or condition it. An authority with jurisdiction does not act in a vacuum: it acts as a function of factual or legal aspects that determine its deliberations. The administrative act retains a

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[28] According to Hariou's well-known description, Administrative law is the law of unequal persons. See Précis de Droit Administratif et de Droit Public, VII (7th ed. 1911).

[29] C. Tácito, *Direito Administrativo* 25 (Saraiva 1975).

[30] *Id.*, at 26.

casual nexus with *determining motives*, whose actual existence becomes a condition for legality.

> It is not sufficient, however, that the authority have jurisdiction, that the object be lawful, and that the motives be adequate. The rule of jurisdiction is not a blank check made out to the administrator. Administration necessarily serves characterized public interests. It is not lawful for the authority to use its powers to satisfy personal, sectarian, or political interests, nor even another public interest beyond its jurisdiction. A legal rule serves specific purposes that are expressed or implicit in its text."[31]

The *purpose* that the law designates is, therefore, another essential element of the legality of administrative acts, in accordance with the common teaching of Brazilian legal scholars, as well as those of comparative law. As Hely Lopes Meirelles has pointed out:

> . . .[A]n administrative act without a public purpose is incomprehensible . . .. The object of the administrative act is that which the law explicitly or implicitly indicates. It is not for the administrator to choose another, nor to substitute the one indicated in the administrative norm, even though both seek public goals. In this regard, there is no room for choice by the administrator, who is entirely bound by the legislative will.[32]

Celso Antônio Bandeira de Mello expresses a similar opinion:

> The law is not indifferent to the use of one jurisdiction or another in the pursuit of a given purpose. Each law has its own goal. Each "power" expressed as an administrative jurisdiction is nothing more than the reverse side of a specific duty to implement a certain legal goal. Even when one seeks a legally valid objective, one must reach it by means defined by law as the proper way to reach that objective.[33]

The classic teaching of Roger Bonnard had already adopted this opinion when he established the linkage of the administrative act to the legal and obligatory purpose:

> With regard to the goal, there is never discretionary power of the administrator, for he is never free to judge the objective sought to be achieved. The goal is always imposed by the law and regulations, either explicitly or implicitly.[34]

Italian doctrine has accepted the identical principle that the *causa*, stemming from the law, integrates the classification of administrative acts, as Cino Vitta makes clear:

> Because the administrative act is by its nature unilateral, it is generally supported by public utility. The current doctrine is that every category of

[31] *Id.*, at p. 28.

[32] *Direito Administrativo Brasileiro* 128-29 (14th ed. 1989).

[33] *"O desvio de poder,"* 172 Revista de Direito Administrativo 1, 7 (1988).

[34] *Précis de Droit Administratif* 228 (1935).

> administrative act has as its reason a particular species of public utility which the legislator had determined it to be.[35]

A similar direction has been taken by Anglo-Saxon law, with some variations in terminology. Discretionary power has as one of its cornerstones a purpose defined by law. S.A. De Smith has summarized the position of English law:

> Discretionary powers must be exercised for the purpose for which they were granted . . . In general, a discretion must be exercised only by the authority to which it is committed . . . It must act in good faith, must have regard to all relevant considerations and must disregard all irrelevant considerations, must not seek to promote purpose alien to the letter or to the spirit of the legislation that give it power to act, and must not act arbitrarily or capriciously.[36]

The same concept reappears in Spanish legal literature. To cite one among many possibilities, Sayagués Laso has written:

> Administrative agencies are placed in a situation of *duty*, which they perform through determined *legal powers* granted to them by the law. Therefore, upon exercising these powers, they must act in accordance with the *purpose* of their assigned task, renouncing any alien idea that might cause them to deviate from their natural conduct. . . .[37]

The list of citations is endless that support the universally held understanding that respect for the legal objective, expressly or implicitly contained in the legal rule, is an essential condition for the legality of administrative acts.

Brazilian doctrine, case law and even a statute[38] have already incorporated this concept, through which the guarantee of private parties — individuals or legal entities — against the more subtle forms of distortion of administrative legality can be perfected.

The failure of the administrative agent to heed the specific goal to which the law addresses the exercise of his jurisdiction is grounds for nullifying the administrative act, either at the administrative level itself, or by judicial means. The use of administrative jurisdiction to perform an act that is not meant to reach the legal objective, but while appearing to do so really serves another purpose, constitutes a particular type of defect in administrative acts. In this instance, the expression of the agent's will takes a direction different from that conceived by the legislator, and therefore *deviates* from the legal target. The case law of the French Council of State (*Conseil d'Etat*), (which fashioned this specific means of appeal because of misuse of power) baptized it with the name that has become well known: *detournement de pouvoir*, or in the vernacular, a "deviation of power" or a "deviation of purpose."

[35] 1 *Diritto Amministrativo* 376 (3d ed. 1948).

[36] *Judicial Review of Administrative Action*, pp. 61, 172 (1st ed. 1959). On the same subject, see also Hood Phillips, *The Constitutional Law of Great Britain and the Commonwealth* 406 (1952).

[37] 1 *Tratado de Derecho Administrativo* 449 (1953).

[38] Law No. 4.717 of June 29, 1965, art. 2 (e).

The seed from which this mechanism of judicial control grew was the famous opinion of the French administrative tribunal ratified by the Emperor in the *Lesbats* case, issued on February 25, 1864.[39] It annulled an act by the Mayor of Fontainebleu, who, in the name of the police power, had denied appellant permission to have his carriages enter the courtyard outside the train station to pick up disembarking passengers. The tribunal found that the purpose of the administrative act was not, as it should have been, to provide satisfactory service to the public; instead the real objective of this discretionary power was to protect a monopoly of service for another, previously authorized transporter.[40]

Henri Ebren, in his monograph dedicated to the subject at the beginning of this century, underlined the originality of this creation by the highest French administrative tribunal. By penetrating into the intimacy of the administrative act, it made it possible to determinate surreptitious illegality: "A rather ingenious theory, that of the *détournement de pouvoir*, allows the most hidden, or most imperceptible, and perhaps the most dangerous defects, to be reached."[41]

In the "*détournement de pouvoir*" occurs "substitution of the desire of the law for the personal desire of the administrator."[42] The intrinsically defective act retains its outward appearance of fairness, but at its core is spoiled fruit. In the words of Henry Ibsen, "It is therefore necessary to seek the determining causes underlying the *appearance* of the act. This means that the act *appears* to have been regularly and legitimately performed, but in reality, it is vitiated by the purpose of the administrator in performing it."[43]

Duez and Debeyre show the importance of making an "administrative lie" impossible by repelling any deviation of power. "The deviation of power can hypocritically mask itself beneath appearances of correctness that in reality are falsely affirmed."[44]

In their book on recourse against administrative acts in the countries of the European Economic Community, J.M. Benoit and M. Fremont did a comparative study of the systems in effect in Germany, Belgium, France, Italy, Luxembourg and Holland. In all of them, the defect of deviation of power is either expressly by statute (Germany, Belgium, Luxembourg and Holland) or by case law (France and Italy) regarded as ground for a special action to annul administrative acts for failure to observe the proper purpose.[45]

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[39] This decision was confirmed by another decision on June 7, 1865.

[40] See Henri Welter, *Le Controle Jurisdictionnel de la Moralité Administrative* 161-64 (1929).

[41] *Théorie du Détournement de Pouvoir* 28 (1901).

[42] *Id.*, at 30.

[43] *Id.*, at 36.

[44] *Traité de Droit Administratif* 398 (1952).

[45] *Les Recours contre les Actes Administratifs dans les Pays de la Communauté Économique Européenne* (1971).

In Italy, "*sviamento di potere*" is a term characterizing an excess of power related to the violation of the legal objective, which permits the judicial annulment of an administrative act.[46]

After a thorough study of the French system, Julio A. Prat, in a complete monograph on deviation of power, showed that this doctrine has been accepted in countries with independent administrative courts, such as Belgium, Italy, Germany, the Netherlands, Portugal, Sweden, Greece, Turkey, Egypt and Colombia as well as in those of a traditional unitary jurisdiction, such as the United Kingdom and United States.[47]

Spain, which according to Prat had not accepted appeals based upon deviation of power,[48] expressly listed it in its 1956 Law of Contentious Administrative Jurisdiction. Decisions of the Spanish Supreme Court on this subject have inspired large amounts of legal doctrine.[49]

In North American law the concept of *ultra vires* has been accepted in situations corresponding to *détournement de pouvoir*, classifying them as *abuses of discretion*. We shall cite only two examples. In the celebrated case of *Yick Wo v. Hopkins*,[50] the U.S. Supreme Court invalidated an ordinance requiring a permit to operate a wooden laundry. Although it was a discretionary ordinance and unobjectionable on its face, it was applied with a purpose of racial discrimination. Ostensibly its purpose was fire prevention, but permits were denied to all 200 Chinese applicants and granted to 79 out of 80 non-Chinese applicants. The Court concluded that: "No other reason exists, except for hostility to the race and the nationality to which the petitioners belong, and which, in the eyes of the law, is not justified."[51] In a more recent decision, *Kennedy Park Homes Association v. City of Lackawana*,[52] the U.S. Supreme Court upheld a decision that had declared unconstitutional denial of a request to connect a residential complex to the city sewer system. This affirmance was based upon evidence that the authorities had

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[46] *Id.*, at 318; Pietro Virga, *La Tutela Giurisdizionale nei Confronti della Pubblica Amministrazione* 261 (1971).

[47] *De la Desviación de Poder* (Montevideo 1957).

[48] *Id.*, at 336.

[49] *See*: Martinez Useros, *Desviación de Poder*, Murcia, (1956); S.M. Retortillo Baquer, *"La Desviación de Poder en el Derecho Español,"* 22 *Revista de Administración Pública* (1957); M.F. Clavero Arevalo, *"La desviación de Poder en la Reciente Jurisprudencia del Tribunal Supremo,"* 30 *Revista de Administración Pública* (1959); J. Trujillo Pena, *"La Desviación de Poder en Relación con el Recurso de Apelación y el Silencio Administrativo,"* 35 *Revista de Administración Pública* (1961); J. A. Garcia Trevijano Fos, *"Acotamiento Qualitativo de la Pretensión Contencioso Administrativa y Desviación de Poder en el Sistema Español Vigente,"* 38 *Revista de Administración Pública* (1962).

[50] 118 U.S. 356 (1886)

[51] *See* Lawrence Tribe, *American Constitutional Law* 1483 (2d ed. 1988).

[52] 401 U.S. 1010 (1971).

denied the request only to impede racial integration of an exclusively white zone of the neighborhood.[53]

The Federal Administrative Procedure Act of 1946 provides for judicial review of those cases where the practice of an administrative act is shown to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[54]

Rotunda, Nowak and Young show, in light of the case law of the U.S. Supreme Court, that the defense of the principle of equal protection of the law has required examination of the administrator's motives. Whenever the purpose of the act reveals an unlawful objective (racial or ethnic discrimination against minorities, for example), the legislator's or administrator's freedom to act becomes defective, which signifies the unconstitutionality of the law or the illegality of the act.[55]

VII

Diagnosis of the legality of an administrative action by examination of its compatibility with the legally established goal for the exercise of jurisdiction has as its starting point *control of the motives* of the administrative act submitted for verification of its legality. *Motive* is the antecedent of the performance of a volitional act producing a juristic effect. It is not to be confused with the weight of the evidence — a matter wholly contained within the discretionary portion of the act. It is the reality of the actual existence of the motives determining the administrator's conduct. Even though discretionary, an act is subject to verification that the motives that inspired it *actually exist.*

Paul Duez has reasoned that "the power of the judge to verify legality is not strictly and necessarily limited to examination of questions of law; he acquires the power to review certain facts when they are intimately linked to the question of legality. Thus, the legality/expediency dichotomy does not correspond to the law/fact dichotomy."[56]

Brazil's Federal Supreme Court, deciding a request for rehearing in Civil Appeal 7.307 on December 20, 1944, where the Reporter was Castro Nunes, confirmed its understanding "that it is forbidden for the Judiciary to examine the convenience or expediency of a measure, but not the merits by way of other aspects that may constitute a false, defective or erroneous application of a law or

[53] See Fielding, "The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?," 39 Univ. Chicago L. Rev. 617 (1972).

[54] Paragraph 706, note 2, line B, cited in Bernard Schwartz, *Administrative Law Casebook* 890 (1988).

[55] 2 *Treatise of Constitutional Law — Substance and — Procedure* §§ 18.4 and 18.5 (1986) (1990 supplement).

[56] *Les Actes de Gouvernement* 12 (Paris, 1935).

regulation, considerations that generally characterize illegality by improper application of the law."[57]

Along this constructive path, Brazil has an abundance of case law in consonance with Seabra Fagundes' position that the merits of an administrative act — the very area for discretionary power — is not to be confused with the examination of motives through the prism of their substantive or legal existence. Such an examination lies in the field of legality.[58]

The judge's access to the intimate features of the administrative act is, in short, one of the factors in identifying its legality. He may not investigate administrative policy, as long as it is within legal criteria and rules. The investigation of motives determining the act can never go outside the bounds of the substantive or legal existence thereof. The valorization of existing motives is privileged matter reserved to the administrator in the exercise of his discretionary power. There is no obligation, when issuing an order or a decision, to state the motives behind it, except when the law so determines, or better, when the administrative act is *linked* to certain motives. Inherent in discretion is lack of any requirement to furnish motives. In principle, unless the law establishes the contrary, the administrator may remain silent as to the motives determining his conduct.

If on the other hand, an administrator who is not required to make explicit the motives underlying his determination, nonetheless limits himself by manifesting *ex abundantia* the factual grounds for the act he performed, he then opens to the judge the possibility of reviewing the *reality of the motive* invoked.

In a prior study, I have observed that "it is not necessary for the law to have foreseen the motives of the act (the case of linkage) or that it imposed on the agent a duty to enunciate them. If the giving of motives is not obligatory, but the agent manifests in express form the grounds for his decision, the judge may then review the exactness thereof."[59]

VIII

The definitive and final expression of control of legality is review by the Judiciary. The courts only act when provoked, always respecting the statute of limitations, which prevents any possibility of judicial consideration.

The Judiciary is not alone, however, in its power to annul acts or contracts tainted by illegality. If convinced of its error, the Administration, has the power to annul any of its own acts that are defective in their essential elements. It may do so spontaneously or upon request of an interested party, since an illegal act or contract

[57] 3 Revista de Direito Administrativo 69 (1946).

[58] See Seabra Fagundes, "Conceito de mérito do ato administrativo," 23 Revista de Direito Administrativo 1016 (Jan/Mar. 1951).

[59] "Desvio de poder em matéria administrativa" (1951), at 28.

cannot create any rights. Annulment of an act for the defect of illegality — whether by a court or by the administration itself — means the undoing of the effects that have been produced. Illegality does not bear fruits that must be preserved. The essential effect of an annulment is retroactive (*ex tunc*).

Otherwise *revocation* of an act is the exclusive authority of the Administration in the exercise of its discretionary power, but subject to the principles of vested rights and perfected legal transactions. These are constitutional provisions[60] directed both to the Legislator and to the Administration. Revocation applies only in the future (*ex nunc*) and can be opposed by the subjective right that the original act has vested in its recipient.

IX

In Brazilian tradition, the guarantee of the rights of persons affected by administrative acts has had continuous improvement in the development of remedies for the efficient exercise of judicial control of legality. In the beginning of the Republic, legislation in whose enactment Ruy Barbosa was doubtless instrumental, created the special summary action.[61] However, it is through judge-made case law in the first quarter of this century broadening the reach of habeas corpus that the Federal Supreme Court perfected the defense of certain and uncontestable rights — to use the terminology of the time — against unlawful action by the Executive Branch. The writ of habeas corpus went from safeguarding only freedom of movement to supporting any and every right for which this freedom was necessary. The right to go and come (the classic content of habeas) was thus understood as a manifestation of the right's scope ("direito-escopo") in the expression of Justice Pedro Lessa, a pioneer in the creation of this judicial construction. The so-called Brazilian theory of *habeas corpus* filled a gap in procedural law, furnishing swift justice in support of individual and political rights.

The 1926 constitutional reform deliberately sought to suppress the broadening creativity of case law, by taking habeas corpus back to its classic limits as a remedy against only actual or imminent violation of the freedom of locomotion.[62]

Shortly thereafter, however, numerous bills were presented to overcome this lacuna. In 1926, Gudesteu Pires presented a bill to the Chamber of Deputies proposing the creation of the writs of protection and restitution, as vehicles for the defense of a "liquid and certain right," a phrase that was to become enshrined in future constitutional treatment of the subject. Afranio de Melo Franco offered a substitute bill, which was followed by another crafted by Mattos Peixoto. Other similar propositions were presented by Odilon Braga, Bernardes Sobrinho,

[60] Const. of 1988, Art. 5 (XXXVI).

[61] Law No. 221 of Nov. 20, 1894, art. 13. The unification of civil procedure in 1939 abolished this special remedy. M. Seabra Fagundes, O Controle dos Atos Administrativos pelo Poder Judiciário 237 (5th ed.)

[62] New wording given to art. 72, § 22.

Clodomir Cardoso and Sérgio Loreto, thus characterizing a trend towards a summary procedural form for the restraint of administrative abuses.

When Congress was interrupted by the Revolution of 1930, the subject of the preparation of a new constitution arose once again. In the Draft Constitution submitted by the so-called Itamarati Committee, João Mangabeira proposed a special remedy entitled the writ of security (*mandado de segurança*) as a guaranty of incontestable rights violated or threatened by manifestly illegal acts of the Executive.

Thus in 1934, a constitutional special right of action, the writ of security, was created that constitutes the guarantee *par excellence* of fundamental rights before administrative action of the State.[63] The writ of security was subsequently regulated by statute.[64] After further regulation in the 1939 Code of Civil Procedure, the writ of security was consolidated by Law No. 1.533 of December 31, 1951 and its subsequent amendments.

The 1934 Constitution also enshrined the popular action (*"ação popular"*), which conferred standing on any citizen to bring an action declaring null and void any illegal act harmful to the public patrimony.[65] Repeated in the following Constitutions (except for that of 1937), the popular action was eventually procedurally regulated by Law No. 4.717 of June 29, 1965, which requires that the impugned act be both illegal and injurious. Even before its regulation, however, the Judiciary had permitted the popular action to be brought using ordinary civil procedure. The pioneer decision in this sense was that of Judge José Frederico Marques, inspired by the teachings of Carlos Maximiliano.[66]

In the citizen's suit, no individual right is being claimed. The plaintiff is exercising a right inherent in citizenship. For this reason, the legislation only gave standing to sue to individuals, in the enjoyment of their public rights, and did not extend it to legal entities.

Collective interest has, in the last two decades, led to expansion of the defence of human rights. They now include specific categories of collective rights, joined by a basic legal relationship (such as holders of social rights) so as to protect the legitimate interests of groups of undefined persons, joined by a common social value. What have been denominated as *"diffuse rights"* ("direitos difusos") have arisen. These are rights with no certain owner, but which have collective interests as their content, and are of significant general interest. Environmental conditions are essential for the inhabitants of a given region; product quality and protection from market manipulation are important to consumers; free access to impartial information, or the protection of historic and artistic values are elementary means for the dispersal and preservation of culture. In order to defend such diffuse right when attacked or threatened by the action or inertia of governmental branches, a

[63] Const. of 1934, Art. 113 (33).

[64] Law No. 191 of Jan. 16, 1936.

[65] *Id.*, Art. 113 (38).

[66] 52 Revista de Direito Administrativo. 46 (Apr.-June 1958); 181 Revista dos Tribunais 838 (1949).

1985 statute created an analogue to a class action for the protection of the interests of environmental, cultural and consumer groups. These groups can bring a civil public action to impose liability for damage caused to the environment or to consumers, as well as to artistic, aesthetic, historical, touristic and landscaping rights and interests.[67] The Government, represented by the Public Ministry[68], has standing to sue in such cases, as do associations whose purpose is protection of the environment or consumer defense. However, the Government can also be the defendants whenever the damage has been caused by governmental or quasi-governmental bodies. Therefore, the public action is directed to judicial control of unlawful conduct by the Public Administration causing injury to those values protected by the special remedy. Whenever the facts of the case so require, the Public Ministry may find itself representing both the plaintiff and the defendant.

Control of the legality of the Public Administration is also exercised in cases in which the performance of administrative acts depends upon a judicial act, such as a condemnation suit or an enforcement action to collect a tax debt. On the other hand, judicial control of the Administration is also carried out by ordinary proceedings, most frequently the unspecified provisional proceedings that provide outstanding remedies for restraint of administrative unlawfulness.

X

To this varied catalogue of judicial forms for protecting the private parties from violations or threats to their rights and liberties — habeas corpus, writs of security, popular actions, public actions, condemnation suits and tax enforcement actions, provisional proceedings, as well as appropriate ordinary actions — the 1988 Constitution added improvements and innovations that will challenge the acumen of judges and the skill of interpreters.

The writ of security, whose basic purpose remains unchanged, has taken on greater latitude. The *collective* writ of security grants standing to sue to political parties represented in the National Congress, as well as, when defending the interests of their members or associates, to unions, class associations and legally organized associations in operation for more than one year.[69]

The same expansion did not occur with the popular action. Under the Draft Constitution, the popular action would have been available to all individuals and legal entities in general, but the present standing limitation has prevailed. Standing, as a projection of a public right, is granted only to "any citizen."[70] Its scope has been broadened, however, to include, in addition to strict legality, a guarantee of administrative morality, the environment, and historical and cultural patrimony, thus confirming and expanding the procedural law.[71]

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[67] Law No. 7.347 of July 24, 1985.

[68] For the concept of Public Ministry see Constitution of 1988, art. 127.

[69] Const. of 1988, art. 5 (LXX).

[70] *Id.*, art. 5 (LXXIII).

The original wording of the Draft Constitution allowed the writ of security to protect individual or collective rights, "no matter which authority is responsible for the illegality or abuse of power, extending protection against the conduct of private parties who exercise of public powers." As finally approved, the text, with greater technical precision, allows the writ "when the party responsible for the illegality or abuse of power is a public authority or an agent of a legal entity in the exercise of governmental activities."[72]

Two novel concepts extending judicial review in the 1988 Constitution, the mandate of injunction and *habeas data*, are being built up by case law construction. *Habeas data*, as written in the Draft of the Constitution, was restricted only to Brazilian citizens. This limitation was eliminated, extending this writ equally to foreigners. Still, the access to information and data, which previously included those on file with private entities, was in the end restricted only to those that appear in "records or data banks of governmental or public entities."[73] Jurisdiction to hear and decide writs of *habeas data* is the same as that for writs of security. It can only be brought either in federal or state court, depending upon whether the public authority against which the suit is brought is federal or state. The decision may be appealed as of right to the next appellate level, including the Federal Supreme Court when an appellate court exercises original jurisdiction to deny the writ. *Habeas data* assures not only access to personal information on the plaintiff, but also the correcting of the data, as part of the same proceeding, except "when it is preferable to do so through confidential judicial or administrative proceedings."[74] The judge of the convenience of confidentiality may be the petitioner or the authority.[75] Thus, the right of individuals to receive from public agencies information in their private interest, provided for in Article 5 (XXXIII) of the 1988 Constitution, has been perfected. The case law of the Federal Supreme Court has been moving in the direction that *habeas data* is only appropriate when the administrative authority has refused to act after a specific request by the interested party.

Finally, the Constitution has formalized two special procedures as guarantees against legislative inertia, insofar as the enjoyment of rights, liberties and prerogatives may be frustrated by the failure to enact regulatory rules. For this purpose, the Constitution permits granting the mandate of injunction.[76] Complimentarily, Article 103 permits a declaration of unconstitutionality for omission where a measure necessary to make any constitutional rule effective has not been enacted.[77]

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[71] Law No. 4.717 of June 29, 1965, art. 1 § 1.

[72] Const. of 1988, art. 5 (LXIX).

[73] *Id.*, art. 5 (LXXII) (a).

[74] *Id.*, art. 5 (LXXII) (b).

[75] *Id.*, art 5 (XXXIII) *in fine*.

[76] *Id.*, art. 5 (LXXI).

[77] The Federal Supreme Court has been granted original jurisdiction over actions for declaration of

While both seek the same goal of supplanting legislative inertia, the two procedural vehicles are substantially different. The mandate of injunction, as a subjective public right, is available to the holder of a right who is injured by the absence of a regulatory rule. The direct action of unconstitutionality by omission considers an abstract rule and is only available to a limited group of persons, organs, and entities specifically endowed with standing under Article 103.[78]

In the Draft Constitution, the mandate of injunction was assured "as provided by law." This condition has disappeared from the text as promulgated. Under paragraph 1 of Article 5 — within which the mandate of injunction is contained — "rules defining fundamental rights and guarantees are immediately applicable." Thus, any "defining rule" should be immediately enforceable. The extraordinary nature of the judicial action, however, makes the immediate effectiveness of the new special remedy questionable, as well as the nature of the procedural relationship to be established, and above all, the form of proceedings to be held. Who has standing to request the new *writ*? Should the administrative authority from whom the plaintiff seeks a benefit be the defendant? Or should the special remedy be directed towards the omissive legislator? If suit is brought against the Legislative Branch, should the named defendants be the Executive Committees of the Chamber of Deputies, the Federal Senate, or the National Congress, or all or some of these? Is the President of the Republic a necessary party, if laws on the subject can only originate from bills submitted by him? What if the omission is by the Federal Tribunal of Accounts, the Federal Supreme Court or other upper-level federal courts, to which Articles 102-I(q) and 105 (h) refer? Can there be a mandate of injunction at the state or county level? Since no single-judge court has jurisdiction, should control of the rule-making power when delegated to an administrative organ, be exercised by the Federal Supreme Court, or by the Superior Justice Tribunal?

The similar terminology of the mandate of injunction ("mandado de injunção") with the remedy of *injunction* in English and United States law, is more appearance than substance. The *injunction*, as an action in Equity, was designed to supplement available recourses under the *common law*. It presupposes the absence of an adequate remedy at law. Initially, it protected the right of property, and was extended progressively to the defense of personal rights. An injunction is principally directed towards private litigation, and has an eminently prohibitive character (the "prohibitory injunction"). Having also assumed, in the present day, a mandatory nature (the "mandatory injunction"), it becomes similar to a judicial order to guarantee an *in personam* right in a specific case. It is only secondarily used as a form of control over administrative action. It is more similar, in our procedural system, to an action for sanctions, or, in relation to Public Administration, to the writ of security.

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unconstitutionality by omission. *Id*, art. 102 (I) (a).

[78] This group consists of the President of the Republic, the Executive Committees of the Federal Senate and the Chamber of Deputies and those of State Legislative Assemblies, State Governors, the Procurator-General of the Republic, the Federal Council of the Brazilian Bar Association, political parties represented in the National Congress, unions or national class entities.

The new Brazilian constitutional creation, as it is defined in the promulgated text, presupposes a lacuna in the ordinary or complementary statutes, and leaves open the nature of the judicial action. If it is to be understood, by analogy to the original model of Anglo-Saxon law, as an equitable judgment, it would permit the judge, in the language of the former 1939 Code of Civil Procedure, "to apply the rule that he would establish if he were the legislator."[79] However, in the remedy to which it is most closely related, the declaration of unconstitutionality by omission, the judge cannot supply what is lacking. The judge can only advise the appropriate Branch to adopt necessary measures within an indefinite period. A time period may only be fixed when the judicial order is directed to an administrative body.[80]

In the numerous instances where the Constitution itself conditions the efficacy of its provisions on the enactment of complementary or ordinary laws, the legislator is allowed discretionary judgment as to the appropriateness of regulations, subject always to the requirements of factual feasibility. The intervention of the judge would, consequently, demand an appraisal of the motives behind the legislative inertia. This examination would necessarily involve determining the reasonableness of a political judgment, and would have great potential for interfering with harmonious relations among the Branches.

This is the reason that the suit for unconstitutionality by omission failed to work in Portuguese law, which had an equivalent provision in its 1976 Constitution, which was amended in 1982. Under the original wording of Article 279, the Council of the Revolution could recommend to the legislative body that it fill the omission "in a reasonable time." Prudently, after the 1982 reform, the Constitutional Tribunal, having verified the existence of an omission, only "notifies the appropriate legislative body."[81]

After the 1988 Constitution came into effect, actions seeking a mandate of injunction, exploring the tendency to apply a new remedy affirming fundamental rights and liberties, have flowed into the Federal Supreme Court. The case law is reaching an equilibrium establishing the prudent use of the extraordinary guarantee. From the outset, the Federal Supreme Court affirmed that the mandate of injunction is self-executing and does not require any specific procedural form to regulate it. The Court adopted, by analogy, the procedure used for the writ of security, thus defining its fundamental nature.[82] The mandate of injunction presupposes the "absence of a regulatory norm," by which language it has been understood that an action does not lie when the legislative procedure has been initiated by presentation of a bill.[83] In addition, the Federal Supreme Court has settled its case law so that the mandate of injunction "does not authorize the Judiciary to supplant the legislative or regulatory omission by issuing the missing

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[79] Code of Civil Procedure, art. 114 (Decree-Law No. 1.608 of Sept. 18, 1939).

[80] Const. of 1988, art. 103 § 2 *in fine*.

[81] Portugal, Const. of 1976, art. 281 (2) (as amended 1982).

[82] (Decision on a Point of Order on the Mandate of Injunction 107, Justice Moreira Alves, Reporter, judgment of Nov. 23, 1989. The same result is given by Article 24 of Law No. 8.038 of May 25, 1990.)

[83] Dispatch of Justice Celso de Melo, Dec. 15, 1990, D. J. of Feb. 1, 1990.

normative act; even less does it permit it to order, immediately, a concrete act in satisfaction of the claimed right." It can only declare the omission to exist, and notify the appropriate organ so that it may take action.[84]

The doctrine, however, has been varied in interpretation of the new constitutional remedy, especially in studies comparing it to the American *writ of injunction* and to the German constitutional action (*verfassungsbeschwerde*), as well as to its links with Portuguese constitutional law.[85] Celso Bastos has observed the tendency to form three interpretational schools of thought:

> The first school believes that the judge should issue a recommendation to the appropriate authority — the Legislative or Executive Branch — to prepare the regulating legislation. The second maintains that the judge should fix the manner in which the right should be exercised and should order its enforcement. And the third states that the judge should resolve the concrete case.[86]

As can be seen, the above-mentioned trend of the Federal Supreme Court seems to be in the direction of the first school of interpretation. Nevertheless, legal writers who have considered the question tend to be closer to the third hypothesis.[87]

Finally, it is important to highlight the importance of temporary restraining orders. In writs of security, as well as the direct actions of unconstitutionally, these allow the judge to suspend the enforcement of a contested law or act. The temporary restraining order, just as any other provisional remedy called for under procedural law, preliminary to suit, has as its prerequisites two essential elements: that the claim filed in court have some apparent indicia of success (*fumus boni juris*) and that the performance of the contested act may make any future of judicial remedy that may be granted ineffective, (making it impossible or difficult to repair the injury [*periculum in mora*]).

XI

To complete this panorama, it is appropriate to emphasize that the traditional exceptions to the principle of the monopoly of jurisdiction have continued under the 1988 Constitution. According to the present Constitution, the Judicial Branch has no power to try impeachable offenses by the President and Vice- President of the Republic, or by their State Ministers when they are involved. These offenses remain the exclusive province of the Federal Senate by reason of their thoroughly political nature.[88] Similarly, jurisdiction over rendering of accounts remains the

[84] (Decision in Mandate of Injunction 168, Justice Sepulveda Pertence, Judgment of Mar. 21, 1990).

[85] See, the studies appearing in the collected work, *Mandados de Segurança e de Injunção — Estudos em Memória de Ronaldo Cunha Campos* (Saraiva 1990).

[86] *Id*, at 377.

[87] Among these are Celso Agricola Barbi and José Afonso da Silva, *id.* at 391 and 400.

[88] Const. of 1988, art. 52 (I).

province of the Federal Tribunal of Accounts and of the National Congress, which must annually approve the accounts rendered by the President of the Republic.[89]

The provisions on accounting, financial and budgetary supervision are extended to the State.[90] In this regard, the Constitutional text is formally self-contradictory. Article 75 mandates that the rules established in that Section be applied, where appropriate, to the organization, composition and supervision of the Tribunals of Accounts of the States and the Federal District (which makes sense), as well as to the Tribunals and Councils of Accounts of the Counties. Article 31 § 4, however, emphatically forbids "creation of Tribunals, Councils or Organs of Accounts of Counties", but permits existing ones to continue. This should have been a transitory rule, set apart from the permanent body of the Constitution.

Reference should be made to the jurisdiction conferred upon the Federal Tribunal of Accounts in the performance of quasi- judicial and budgetary supervision. Article 71 (VIII) permits the Tribunal "to apply to those responsible, in cases of illegal expenses or irregular accounts, the sanctions *provided for in law.*" In such cases, the Legislator has established, among other penalties, "a fine proportional to the damages caused to the Public Treasury." The decision of the Tribunal imposing a fine or financial penalty on the responsible party "shall be enforceable as an executory right."[91] The new Constitution has substantially strengthened the Tribunal of Accounts, stating that when it suspends an administrative contract and the National Congress has not taken the actions required within 90 days, the Tribunal of Accounts may definitely decide about the illegality.

In conclusion, another observation. An outline submitted by a committee of jurists, and predating the drafting of the Constitution, suggested the creation of a new organ seeking to widen the concept of citizenship and to favor community participation. This is the institution of the Defender of the People, patterned after the recent Constitutions of Portugal and Spain, and inspired by the Swedish *ombudsman*, which has spread among all the continents, and, among us, has existed at the municipal government level with the creation of the "Ouvidoria" (the "Listening Post") for that purpose. This proposal, which was originally incorporated into early drafts of the Constitution, was eventually rejected. In its place came a proposal to amplify the jurisdiction of the Public Ministry, which was finally inscribed in Article 129 of the definitive test. Among the institutional functions of this body is that of "safeguarding effective respect by the government and services of public importance, for rights protected by the Constitution, taking the necessary means to guarantee such rights."

The powers of Congressional Committees includes the power to "receive petitions, claims, representations or complaints from any person against acts or

[89] *Id.*, art. 71.

[90] *Id*, art. 75.

[91] *Id.*, art. 71 § 3. An executory right is needed to proceed to the execution phrase of Brazilian civil procedure. There are two types of executory right. One is judicial, derived from a final judgment. The other is extrajudicial, derived from certain kinds of debts treated by law as the functional equivalent of a judgment, such as negotiable instruments.

omissions of government authorities or public entities."[92] One or the other of these organs, has authority for indirect control over the Public Administration by learning of violations of fundamental rights and liberties and initiating the appropriate corrective measures. The Organic Law of the Public Ministry[93] and the Internal Regulations of the Houses of Congress will determine the reach and the function of one or both of these powers.

The new Brazilian Constitution, in short, will open new paths in restraining abuses by the Administrative Branch, giving greater value to the common man and greater protection to community interests through the perfection of democratic institutions. Only time will tell whether the fruits of such generous proposals, which will challenge the wisdom of the governing powers, the creativity of the courts and the capacity of their addressees, will actually allow the State to place itself at the service of the common good under the rule of law.

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[92] Const. of 1988, art. 58 § 2 (IV).

[93] See *supra* n. 68.