

RETHINKING DUE PROCESS OF LAW IN THE ADMINISTRATIVE SPHERE

RICARDO PERLINGEIRO,

Fluminense Federal University (Rio de Janeiro, Brazil)

<https://doi.org/10.21684/2412-2343-2022-9-3-39-52>

This article discusses the scope of the constitutional due process clause in Brazilian administrative law, based on an analysis of the Brazilian Constitution, the Fifth (1791) and Fourteenth (1868) Amendments to the U.S. Constitution, the International Covenant on Civil and Political Rights, and the European and Inter-American human rights systems. The author concludes that since the due process clause (Brazilian Constitution Article 5.54, namely, “no one shall be deprived of liberty or property without due process of law”) was inspired by the U.S. Constitution, Brazilian legislators should exercise their powers of discretion in policy-making to adapt the clause to the realities of the Brazilian administrative authorities and to the experience of the quasi-independent authorities that perform the adjudicative function under U.S. administrative law.

Keywords: fair trial; administrative proceedings; administrative authorities.

Recommended citation: Ricardo Perlingeiro, *Rethinking Due Process of Law in the Administrative Sphere*, 9(3) BRICS Law Journal 39–52 (2022).

Table of Contents

Introduction

1. Particularities of the Brazilian Administrative Authorities

2. Procedural Guarantees in Administrative Proceedings

3. Origin and Scope of Due Process of Law in the Administrative Sphere

Final Considerations

Introduction

To study how due process of law applies to administrative decisions in Brazilian constitutional law, a rethinking of the three key norms is required. According to the methodology adopted by the author, in Brazil, the principle of a fair trial is formulated in Article 5 of the Federal Constitution, in item 35 regarding access to the Judiciary for protection of rights, in item 55 regarding adjudicative procedural guarantees and in item 54 regarding due process of law.¹

Indeed, it may be concluded from a literal interpretation of the above-cited provisions that a proceeding before the administrative authorities should have the same characteristics as a trial in court. It so happens, however, that putting such an interpretation into general practice would have disastrous consequences.

That is so because invoking due process of law in the administrative sphere with such a comprehensive approach would make the exercise of disciplinary and regulatory powers conditional on providing procedural guarantees that are unattainable by Brazilian administrative authorities. How could administrative authorities deal with a case that requires observing the principle of the “judge predetermined by the law”? How could they respond to the criticism that the authority presiding over a disciplinary proceeding does not guarantee tenure to its officials and therefore cannot be impartial? Such issues would bring the administrative authorities to a standstill if the proposed solution required the same degree of due process as in the courts.

With that in mind, this article seeks in historical and comparative sources, especially in international systems of human rights, an explanation of the real origin and scope, in Brazil, of due process of law in the administrative sphere; it also explains the reasons why it is not feasible to impose procedural obligations on Brazilian administrative authorities that are typical of the Judiciary.

1. Particularities of the Brazilian Administrative Authorities

Article 5.35 of the 1988 Federal Constitution stipulates that “the law shall not exclude any injury or threat to a right from the consideration of the Judicial Branch.” Such a provision was introduced into Brazilian constitutional law by the 1946 Constitution² and maintained by the Constitutions of 1967³ and 1969.⁴

¹ Brazilian Federal Constitution (1988), Art. 5 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

² Constitution of the United States of Brazil (1946), Art. 141, § 4 (Braz.): “The law shall not exclude any injury or threat to an individual’s right from the consideration of the Judicial Branch” (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao46.htm.

³ Constitution of the Federal Republic of Brazil (1967), Art. 150, § 4º (Braz.): “The law shall not exclude any injury to an individual’s right from the consideration of the Judicial Branch” (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao67.htm.

⁴ First Constitutional Amendment of 17 October 1969, Art. 153, § 4º (Braz.): “The law shall not exclude any injury or threat to an individual’s right from the consideration of the Judicial Branch” (Feb. 1,

Known as the principle of *inafastabilidade da jurisdição*, the provision considers the Judiciary to be the ultimate sphere of dispute resolution. Thus, the law cannot prohibit creating administrative tribunals or similar bodies to resolve disputes in the administrative sphere but their rulings, whenever a violation or threat to civil rights is involved, can always be appealed to the competent court of law in accordance with the applicable rules of procedure.

In the past, that was the intention of the 7th Constitutional Amendment of 1977⁵ which amended the 1969 Constitution by authorising the creation of administrative litigation (*contenciosos administrativos*) and setting up mechanisms enabling their decisions to be reviewed directly without passing through the courts of first instance.⁶

With broad powers of review over the administrative authorities' decisions, the Judicial Branch alone is forced to assume the whole burden of the international duties of maintaining a competent, independent and impartial body to ensure a fair trial, as expressed by Article 8.1 of the American Convention on Human Rights (ACHR) and Article 14.1 of the International Convention on Civil and Political Rights (ICCPR). From the standpoint of international human rights law, imposing the duties of competence, independence and impartiality on quasi-judicial administrative bodies will be a matter of the discretionary margin for policy-making by the legislators of the Brazilian State.

The duty of "competence" for the exercise of fair and effective dispute resolution by the State should be understood to mean having adequate expertise and qualifications concerning the question submitted for judgment. In general, Brazilian administrative decision-making bodies have such competence.

Yet, the same cannot be said of the duty of independence, which is a prerequisite for so-called "objective impartiality." The administrative dispute-resolution bodies are by no means staffed with government officials with prerogatives enabling them to act independently, such as tenured decision-making positions. As a logical corollary, it is natural that the decision-maker is not impartial in the eyes of society.

The Maritime Tribunal remains an exception to the rule, serving as an important example in Brazilian law of an administrative dispute-resolution body in which the adjudicators have prerogatives similar to those of court judges. It was created by Law No. 2.180 of 1954 and is linked with the Ministry of Maritime Affairs.⁷

Incidentally, the lack of independence of the administrative authorities is rightly considered to be an important difference between the adjudicatory functions of the Judiciary and the dispute-resolution functions of the administrative authorities.

2022), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc_anterior1988/emc01-69.htm.

⁵ Seventh Constitutional Amendment, of 13 April 1977 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc_anterior1988/emc07-77.htm.

⁶ José Cretella Júnior, *O contencioso administrativo na Constituição de 1969*, 104 *Revista de Direito Administrativo* 30 (1971).

⁷ Law No. 2.180, of 5 February 1954 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/l2180.htm.

In legal systems in which the administrative authorities resolve disputes independently and impartially, it is understandable that the adjudicative decision-making powers are distributed between the Judiciary and Executive Branch without implying any undue restrictions on the fundamental human right of access to adjudicative services for the protection of one's rights. If the administrative authorities themselves give individuals access to a proceeding conducted by quasi-judicial authorities with the characteristic guarantees of a court trial, it is reasonable for the law to require that individuals exhaust the means of appeal within the administrative sphere before gaining access to the Judiciary. The same can be said of the power of judicial review of an administrative decision which, in such a case, may be limited to questions of law to the exclusion of questions of fact that may have supported the challenged administrative decision.

In Brazil, where administrative dispute-resolution lacks independence and (objective) impartiality, the courts have broad powers of judicial review of administrative decisions with respect to their formal aspects and legal and factual content,⁸ as well as the exercise of their discretionary powers and assessment of vague legal concepts.⁹ In this context, an appeal in the administrative sphere appears to be simply one option available to the individual claimant who, when confronted with an injury or threat to his or her rights, may opt from the outset to seek dispute-resolution services from a court,¹⁰ or else forego the administrative channels initially chosen and file a lawsuit instead.¹¹ Thus, only the absence of an injury or threat to one's rights can block access to the Brazilian courts.

It should be emphasized, however, that certain benefits that the State has a duty to provide are available to citizens only on prior application, because otherwise the State would be unable to identify the scope and beneficiaries of the required benefits. Such is the case, for example, with the pension benefits of voluntary retirement, which the State is not required to pay unless the claimants indicate in advance that they intend to exercise their right.¹²

On this point, it should be noted that, contrary to private law, where a summons to appear in court implies a sufficient demand to establish *mora ex persona*, in administrative disputes, the claimant's application only has to be presented in the administrative sphere. Judicial channels are not the most appropriate, because the courts have no specific qualifications for the initial evaluation of a question concerning

⁸ Case of *Barbani Duarte et al. v. Uruguay*, Inter-Am. CtHR (ser. C), § 204, Oct. 13, 2011.

⁹ S.T.F., RMS 24.699, Reporting Justice: Eros Grau, 1st Panel, Nov. 30, 2004 (Braz.).

¹⁰ S.T.F., RE 549.238 AgR, Reporting Justice: Ricardo Lewandowski, 1st Panel, May 5, 2009 (Braz.); S.T.F., RE 549.055 AgR, Reporting Justice: Ayres Britto, 2nd Panel, Oct. 30, 2010 (Braz.).

¹¹ S.T.F., RE 233.582, Reporting Justice: Joaquim Barbosa, Full bench, Aug. 16, 2007 (Braz.); S.T.F., RE 469.600 AgR, 1st Panel, Feb. 8, 2011 (Braz.).

¹² S.T.F., RE 631.240, Reporting Justice: Roberto Barroso, Full bench, Sept. 03, 2014 (Braz.).

administrative law.¹³ There are three exceptional situations in which the claimant may seek redress directly from the Judiciary without filing a prior administrative request or awaiting a response to it: (a) undue delay by the administrative authorities in responding to the request; (b) the claimant's certainty *ab initio* that the administrative authority will deny his request, and (c) the risk of irreparable harm from allowing summary proceeding to resolve the dispute.¹⁴

2. Procedural Guarantees in Administrative Proceedings

Article 5.55 of the Federal Constitution of 1998, stipulates that

the litigants, in judicial or administrative proceedings, and defendants in general shall be guaranteed the right to a full defence in adversary proceedings, with the means and resources inherent therein.

That provision is considered by case law to have established due process of law in the administrative sphere.¹⁵

In fact, earlier constitutions never referred to "litigants in judicial or administrative proceedings" but only to the right of defence against an accusation and the right to the corresponding resources before the courts.

This is how the earlier constitutional provisions were worded:

1891 Constitution, Art. 72, § 16: The defendants shall be ensured the fullest possible defence by law, with the essential means and resources inherent therein, from the statement of charges, delivered to the prisoner within 24 hours and signed by the competent authority, with the names of the accusing party and of the witnesses.¹⁶

1934 Constitution, Art. 113.24: The law shall ensure defendants a full defence, with the essential means and resources inherent therein.¹⁷

1937 Constitution, Art. 122.11: ... the criminal trial shall be conducted through adversary proceedings, with the necessary guarantees of defence

¹³ Corte Suprema de Justicia de San José de Costa Rica [Supreme Court of Justice of San José], Case No. 04-005845-007-CO, Res. No. 6866-2005, para. VIII, A. (Sentencia, June 1, 2005) (Costa Rica).

¹⁴ S.T.F., RE 631.240, Reporting Justice: Roberto Barroso, Full bench, Sept. 03, 2014 (Braz.).

¹⁵ S.T.F., AI 207.197 AgR/PR, Reporting Justice: Octavio Gallotti, Jun. 5, 1998 (Braz.); S.T.F., RE 244.027 AgR/SP, Reporting Justice: Ellen Gracie, Jun. 28, 2002 (Braz.); S.T.F., MS 24.961, Reporting Justice: Carlos Velloso, Full bench, Nov. 24, 2004 (Braz.).

¹⁶ Constitution of the Republic of the United States of Brazil (1891), Art. 72, § 16 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao91.htm.

¹⁷ Constitution of the Republic of the United States of Brazil (1934), Art. 113.24 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao34.htm.

ensured before and after the formulation of the accusation by the prosecuting authority.¹⁸

1946 Constitution, Art. 141, § 25: The defendants shall be ensured a full defence, with the essential means and resources inherent therein, from the statement of charges, which, signed by the competent authority, with the names of the accusing party and witnesses, shall be delivered to the prisoner within twenty-four hours. The criminal trial shall have adversary proceedings.¹⁹

1967 Constitution, Art. 150, § 15: The law shall ensure defendants a full defence, with the resources inherent therein.²⁰

1969 Constitution, Art. 153, § 15: The law shall ensure defendants a full defence, with the essential means and resources inherent therein.²¹

As can be seen, these norms contain rules that do not allow for an interpretation that goes beyond the laws of criminal procedure.

It should be noted that the current Constitution still contains the essence of the normative requirements: “[D]efendants in general are ensured of the adversary system and of full defence, with the means and resources inherent therein” (Art. 5.55). The way in which the provision is worded, referring first to “the litigants, in judicial or administrative proceedings” and, subsequently, to “defendants in general,” makes it clear that it is only directed at the “defendants” in the criminal proceeding. That exception to the right of defence against a criminal accusation is now redundant, because Article 5.54 of the Constitution expressly provides for the right to due process of law, which naturally includes criminal proceedings.

What is interesting to research now is the scope of the other part of Article 5.55 (“the litigants, in judicial or administrative proceedings”). Understanding that phrase requires a prior historical analysis of the notion of a fair trial, by placing it in the context of the international human rights scene.

This concept of due process originated in the Declaration of the Rights of Man and of the Citizen of 1789²² and, starting with the subsequent international human rights norms, began to be accompanied by a separate reference to the “determination of

¹⁸ Constitution of the United States of Brazil (1937), Art. 122.11 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao37.htm.

¹⁹ Constitution of the United States of Brazil (1946), Art. 141, § 25 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao46.htm.

²⁰ Constitution of the Federal Republic of Brazil (1967), Art. 150, § 15 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao67.htm.

²¹ The First Constitutional Amendment of 17 October 1969, Art. 153, § 15 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc_anterior1988/emc01-69.htm.

²² Declaration of the Rights of Man and of the Citizen of 1789 (Feb. 1, 2022), available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT00000697056/1789-08-26/>.

civil rights and obligations.” Even though its original form may be linked with the “Declaration by the Representatives of the United Colonies of North-America,”²³ the fact is that the Declaration of the Rights of Man and of the Citizen of 1789 did not enshrine the requirement of a prior hearing. Instead it merely established the principle, in Article 7, that “no man can be accused, arrested or detained, except in the cases determined by the law and according to the forms it has prescribed.”²⁴

Under Article 10 of the Universal Declaration of Human Rights of 1948, a prior hearing as a clear prerequisite for any State action restricting individual rights became applicable exclusively with respect to criminal accusations:

Everyone is entitled, in full equality, to a fair and public hearing by an independent and impartial tribunal, in the determination of their rights and obligations and of any *criminal charge against him*.²⁵ [emphasis added]

The European Convention on Human Rights (ECHR) made advances, prescribing in Article 6.1 that:

1. In the determination of his civil rights and obligations or of any *criminal charge against him*, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.²⁶ [emphasis added]

Article 14 of the ICCPR reads as follows:

In the determination of any *criminal charge against him*, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.²⁷ [emphasis added]

²³ Georg Jellinek, *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History* 2–7, 13–21 (1901) (Feb. 1, 2022), also available at <http://oll.libertyfund.org/titles/1176>.

²⁴ Declaration of the Rights of Man and of the Citizen of 1789, Art. 7º: “Nul ne peut être homme accusé, arrêté, ni détenu que dans les cas déterminés par la loi et selon les formes qu’elle en a prescrites. Ceux qui sollicitent l’exécution de lois expirées ou suspendues, ou qui ont exécuté des ordres arbitraires, ne peuvent être poursuivis; Mais tout citoyen, accusé ou saisi en vertu de la loi doit obéir à l’instant; il se rend coupable par sa résistance” (Feb. 1, 2022), available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000697056/1789-08-26/>.

²⁵ Universal Declaration of Human Rights of 1948, Art. 10 (Feb. 1, 2022), available at <https://www.un.org/en/universal-declaration-human-rights/>.

²⁶ European Convention on Human Rights, Art. 6.1 (Feb. 1, 2022), available at https://www.echr.coe.int/documents/convention_por.pdf.

²⁷ International Convention on Civil and Political Rights, Art. 14 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0592.htm.

Finally, ACHR Article 8.1, on the Right to a Fair Trial, stipulates as follows:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a *criminal nature made against him* or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.²⁸ [emphasis added]

Although they look equivalent at first glance, there is a subtle difference between criminal cases and other types of cases regarding the way in which the clause affects the fair trial clause in ACHR Article 8.1 and ICCPR Article 14 (and the ECHR Article 6.1). By including the phrase “determination of his rights and obligations,” the provisions seek to ensure that individuals have access to a fair trial in order to assert their “subjective” rights. In contrast, linking “substantiation of any accusation of a criminal nature” with the procedural guarantees is not intended to confer a right of action on the defendant but rather to impose restrictions on the State, requiring it to refrain from a criminal conviction without a previous fair trial.

That said, there is an undeniable parallel between the international norms in force in Brazil (ICCPR and ACHR), on the one hand, and the Brazilian Constitution, on the other. Also note the following passages of comparative norms regarding the fundamental human right to procedural guarantees for the protection of civil rights:

[T]he litigants, in judicial or administrative proceedings, and defendants in general shall be guaranteed the right to a full defence in adversary proceedings, with the means and resources inherent therein. [1988 Constitution Art. 5.55; ACHR Art. 8.1]

On the other hand, due process of law is mentioned in connection with a criminal accusation:

... and defendants in general shall be guaranteed the right to a full defence in adversary proceedings, with the means and resources inherent therein ... [1988 Constitution, Art. 5.55] ... In the determination of any criminal charge against him ... [Art. 14 of the International Covenant on Civil and Political Rights] ... in the substantiation of any accusation of a criminal nature made against him ... [ACHR, Art. 8.1]

It is important to note that according to the case law of the European Court of Human Rights (ECtHR), the phrase “determination of his civil rights and obligations,”

²⁸ American Convention on Human Rights, Art. 8.1 (Feb. 1, 2022), available at https://www.cidh.oas.org/basicos/portugues/c.convencao_americana.htm.

in ECHR Article 6.1 includes administrative law cases.²⁹ The same is true of the case law of the Inter-American Court of Human Rights (Inter-Am. CtHR), which considers administrative law cases to be covered by the phrase “or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature” in ACHR Article 8.1.

It is worth noting that according to both the ECtHR and the Inter-Am. CtHR, the applicability of the principle of the right to a fair trial under administrative law is restricted to proceedings that are substantially adjudicative on a question of administrative law.³⁰ Moreover, in Ibero-American administrative law, with the exception of Brazilian law, the expression *processo administrativo* (administrative proceeding) undeniably refers to a court trial concerning an administrative law case that is conducted by bodies endowed with competence, independence and impartiality.

At this point, it is worthwhile questioning what the Brazilian legislature meant by the phrase “judicial or administrative proceedings” under Article 5.55. Could not the objective have been to limit the impact of the provision to judicial proceedings on administrative law cases, which in Brazil are conducted solely before the Judiciary? The same question should be asked about Article 15 of the Brazilian Code of Civil Procedure,³¹ which stipulates that “in the absence of rules regulating electoral, labour or administrative proceedings (*processos*), the provisions of this Code shall be applied to them in a supplementary and subsidiary manner.”³² It is possible that the Code is referring to procedural due process in administrative law cases, in addition to electoral law and labour law cases. If so, the subsidiary applicability of the Code of Civil Procedure should be acknowledged for the proceedings of writs of mandamus, federal small claims courts, actions for lack of grounds, class actions, and so on. In the event that this is not the case, it is hard to imagine how a proceeding before the Brazilian administrative authorities could follow the same procedural rules and principles as a court trial.

²⁹ Case of *Oleksandr Volkov v. Ukraine*, ECtHR (2013) (Feb. 1, 2022), available at <http://bit.ly/1J2UjHc>. Along the same lines (as a paradigm): Case of *Vilho Eskelinen v. Finland*, ECtHR (2007) (Feb. 1, 2022), available at <http://bit.ly/1CwgckK>. See René Chapus, *Droit du Contentieux Administratif* 136–138 (2006); Sergio Bartole et al., *Commentario breve alla Convenzione Europea per la salvaguardia dei Diritti dell’Uomo e delle libertà fondamentali* 176 (2012); Ireneu Cabral Barreto, *The European Convention on Human Rights* 150 (4th ed. 2010).

³⁰ Case of *Vélez Loor v. Panamá*, Excepciones Preliminares, Fondo, Reparaciones y Costas, Inter-Am. CtHR (ser. C), No. 218, § 108 (Nov. 23, 2010) (Feb. 1, 2022), available at <http://bit.ly/1D9AWKS>.

³¹ Law No. 13.105, of 16 March 2015 (Code of Civil Procedure), Art. 15 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm.

³² S.T.F., ADI 5492/DF, Reporting Justice: Dias Toffoli, pending judgment (Feb. 1, 2022), available at <http://portal.stf.jus.br/processos/detalhe.asp?incidente=4959031>.

3. Origin and Scope of Due Process of Law in the Administrative Sphere

The 1988 Constitution expressly mentions due process of law in Article 5.54, which reads as follows: “no one shall be deprived of freedom or of property without the due process of law.” That is an unprecedented precept in Brazilian constitutional law. The wording chosen for the clause was clearly influenced by the content of the rules underlying the due process clause in the United States. The Fifth Amendment to the U.S. Constitution of 1791 reads as follows:³³

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.³⁴ [emphasis added]

Section 1 of the 14th Amendment of 1868 has a similar orientation:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.³⁵ [emphasis added]

Note that, in U.S. constitutional law, the due process clause is open to the protection of life, liberty and property. In the same way, the Brazilian Constitution refers to liberty and property when discussing due process of law.

In reality, to understand due process of law in the administrative sphere and perceive its true scope it is necessary to go back to Article 39 of the Magna Carta of 1215, which is considered to be the forerunner of due process of law:

No free man shall be seized or imprisoned, or stripped of *his rights or possessions*, or outlawed or exiled, or deprived of his standing in any way,

³³ The Fifth Amendment to the U.S. Constitution (Feb. 1, 2022), available at <http://1.usa.gov/1bA2RpE>.

³⁴ The laws already provided a similar rule before the 1787 Constitution: Acts of Connecticut (Revision of 1784, 198); of Pennsylvania, 1782 (2 Laws of Penn. 13); of South Carolina, 1788 (5 Stats. of S.C. 55); New York, 1788 (1 Jones & Varick’s Laws, 34).

³⁵ 14th Amendment to the U.S. Constitution (Feb. 1, 2022), available at <http://1.usa.gov/JIDkjF>.

nor will we proceed with force against him, or send others to do so, except by the lawful *judgment* of his equals or by the law of the land.^{36/37} [emphasis added]

Since then, the objective of the due process of law has been to enshrine (the prerequisite of) a prior hearing before any State enforcement action that restricts individual rights. Naturally, since no one was thinking about administrative law in that era, the Magna Carta exclusively concerned criminal law enforcement orders by the State which, in addition to individual liberty, affected property rights.

Along the same lines, Article 12 of the Massachusetts Declaration of Rights of 1780 prohibited depriving persons of their property without a prior hearing:

No subject shall be held to answer for any crimes or no offence until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself; and every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel at his election. And no subject shall be arrested, imprisoned, despoiled, or *deprived of his property*, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.³⁸ [emphasis added]

As far as the European sources of administrative law are concerned, they can be classified as (either) a system of executive administration similar to that of France (or) a system of judicial administration similar to that of the United Kingdom.³⁹ At the origin of French law, the prevailing idea was that administrative authorities could enforce their own decisions (*auto-executoriedade*) without judicial intervention, whereas according to the English model, administrative decisions cannot be enforced against individuals without offering them the right of defence in a prior trial.

³⁶ The Carta Magna of 1215, Art. 39, available at <http://bit.ly/1zrb39q>. Original Latin text: "Nullus liber homo capiatur vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terrae."

³⁷ See William S. Mckechnie, *Magna Carta: A Commentary on the Great Charter of King John, with an Historical Introduction* 377 (1914). On the origin of the 5th Amendment of 1791 to the U.S. Constitution, see *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856).

³⁸ Massachusetts Declaration of Rights of 1780, Art. 12 (Feb. 1, 2022), available at <https://blog.mass.gov/masslawlib/legal-history/massachusetts-declaration-of-rights-article-12/>.

³⁹ Juliana Ferraz Coutinho, *Introduction in Direito administrativo de garantia: contributos sobre os mecanismos de proteção dos administrados* 117–118 (Juliana Ferraz Coutinho et al. eds., 2018).

Administrative law in countries with common law legal systems has significantly evolved towards implementing “due process of law” in the administrative sphere.⁴⁰

Based on a reinterpretation of the 5th and 14th constitutional amendments, the U.S. Supreme Court confirmed in the 1970 case of *Goldberg v. Kelly* that the due process clause applied to the administrative sphere.⁴¹ At the same time, U.S. administrative law judges and UK and Australian (administrative) tribunals collaborated to achieve due process in the administrative sphere, approximating that in the judicial sphere.

However, under Brazilian law (as explained in Section 2 above) the reality is completely different, because there is no independent trial conducted within the administrative authority itself, which is a prerequisite for the enforceability of an administrative decision that deprives citizens of their individual rights. According to the Brazilian Federal Supreme Court (Supremo Tribunal Federal or S.T.F.), “the principle of due process of law, as worded in the Constitution, also applies to administrative proceedings.”⁴² With the proviso that it is “true that extending the guarantee of adversary proceedings to administrative adjudication does not make it necessary to adopt all the rules specific to court trials.”⁴³

Moreover, according to the Inter-American Court of Human Rights:

118. Article 8.1 of the Convention *applies not only* to judges and judicial courts. The guarantees established by that provision should be observed in the various proceedings in which State authorities adopt decisions that determine the rights of the individual, because the State also empowers administrative, collegiate and unipersonal authorities to adopt decisions that determine rights.

119. Consequently, the guarantees established in Article 8(1) of the Convention are also applicable when a public authority adopts decisions that determine such rights, bearing in mind that, *although the guarantees inherent in a jurisdictional body are not required of that authority*, it must comply with the guarantees designed to ensure that his decision is not arbitrary.

120. The Court has established that decisions adopted by domestic authorities that could affect human rights *must be duly justified*, since otherwise they would be arbitrary decisions ...⁴⁴ [emphasis added]

⁴⁰ See *Murray's Lessee*, *supra* note 37. See also APA/Administrative Procedure Act (5 U.S.C. Subchapter II) (Feb. 1, 2022), available at <http://1.usa.gov/1xXldYG>.

⁴¹ *Goldberg v. Kelly*, 397 U.S. 254 (1970). See Thomas W. Merrill, Jerry L. Mashaw, *The Due Process Revolution, and the Limits of Judicial Power in Administrative Law from the Inside Out* 39, 40 (Nicholas R. Parillo ed., 2017).

⁴² S.T.F., AI 592.340 AgR, Reporting Justice: Ricardo Lewandowski, 1st Panel, Nov. 20, 2007 (Braz.).

⁴³ S.T.F., AI 207.197 AgR/PR, Reporting Justice: Octavio Gallotti, Jun. 5, 1998 (Braz.); S.T.F., RE 244.027 AgR/SP, Reporting Justice: Ellen Gracie, Jun. 28, 2002 (Braz.); S.T.F., MS 24.961, Reporting Justice: Carlos Velloso, Full bench, Nov. 24, 2004 (Braz.).

⁴⁴ Case of *Claude-Reyes et al. v. Chile*, Inter-Am. CtHR (ser. C) (Sept. 19, 2006).

Law No. 9,784/1999⁴⁵ governs federal administrative proceedings and specifies the orientation of the S.T.F. and the Inter-Am. CtHR by requiring their administrative, disciplinary and supervisory powers to comply with rules established thereunder concerning the right of defence and other procedural guarantees, which are not necessarily equivalent to procedural rules and principles pertaining to judicial proceedings under the exclusive jurisdiction of judicial authorities.

With that in mind, it may be said that, given the reality of life in Brazil, “due process of law” in the administrative sphere imposes an obligation on public authorities to provide a statement of grounds for their decisions, in accordance with the Inter-Am. CtHR case law, and requires the application of the rules provided by each branch of government in its laws of administrative procedure (Art. 24.11 of the Constitution). The administrative decision will be subject to full judicial review in any case.

Final Considerations

By rethinking the international rules of human rights with respect to the interpretation of a fair trial, three conclusions may be drawn about the origin and scope of the due process of law in the administrative sphere in Brazil.

First of all, it is not true that administrative due process is anchored in Article 5.55 of the Brazilian Constitution. In reality, Article 5.55 was inspired by the international rules concerning a fair trial, which are interpreted by the European and Inter-American Human Rights Courts to refer exclusively to such administrative adjudicative proceedings as are presided over by competent, independent and impartial authorities.

Secondly, it should be noted that due process of law in the administrative sphere is based solely on Article 5.54 of the Brazilian Constitution. Given the realities of Brazilian administrative law, the scope of the due process clause in the administrative sphere should not be confused with the due process required of judges and courts in the judicial sphere. In practice, administrative due process should be limited to the duty to provide a statement of grounds for decisions and to compliance with the rules of administrative proceedings in force.

Finally, it should be concluded that, since the due process clause (Art. 5.54 of the Constitution) was inspired by U.S. constitutional law, its full and authentic implementation in Brazilian administrative law depends on the legislators exercising their powers of discretion in policy-making to adapt the clause to the realities of the Brazilian administrative authorities and to the experience of the quasi-independent authorities who perform the adjudicative function under U.S. administrative law. That origin would not deviate from the constitutional principle of “non-exclusion

⁴⁵ Law No. 9.784, of 29 January 1999 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/l9784.htm.

of judicial powers of review” (“the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power”) as stated in Article 5.35 of the Constitution, because the Judiciary could still be required to issue a final decision on the administrative authorities. On the contrary, such a measure would also have the advantage of reducing the burden on the law courts, since institutions and claimants would place greater trust in public authorities who exercise their duties independently.

References

Bartole S. et al. *Commentario breve alla Convenzione Europea per la salvaguardia dei Diritti dell’Uomo e delle libertà fondamentali* (2012).

Cabral Barreto I. *The European Convention on Human Rights* (2010).

Chapus R. *Droit du Contentieux Administratif* (2006).

Ferraz Coutinho J. *Introduction in Direito administrativo de garantia: contributos sobre os mecanismos de proteção dos administrados* (Juliana Ferraz Coutinho et al. eds., 2018).

Jellinek G. *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History* (1901).

Mckechnie W.S. *Magna Carta: A Commentary on the Great Charter of King John, with an Historical Introduction* (1914).

Merrill T.W. Jerry L. Mashaw, *The Due Process Revolution, and the Limits of Judicial Power in Administrative Law from the Inside Out* 39 (Nicholas R. Parrillo ed., 2017). <https://doi.org/10.1017/9781316671641.002>

Information about the author

Ricardo Perlingeiro (Rio de Janeiro, Brazil) – Professor, Faculty of Law, Fluminense Federal University (62 Rua Presidente Pedreira, Niterói, Rio de Janeiro, CEP 24210-470, Brazil; e-mail: ricardoperlingeiro@id.uff.br).