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Brazilian administrative law: influences, characteristics and recent changes

Direito administrativo brasileiro: influências, características e mudanças recentes

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Resumo: O presente artigo objetiva expor, usando o método hipotético-dedutivo, as origens e influências do direito administrativo brasileiro. Trata-se de artigo descritivo e que foca nas principais características da disciplina, pertencente ao ramo do direito público. Também procura abordar as mudanças recentes para fornecer um panorama atualizado do sistema brasileiro de direito administrativo. Intenta-se expor como os novos institutos e as reformas na matéria contribuem para o funcionamento da Administração Pública.

Palavras-chave: direito administrativo; Administração Pública Direta e Indireta; contrato administrativo; servidores públicos; controle.

Abstract: The present article aims to expose, using the hypothetical-deductive method, the origins and influences of Brazilian Administrative Law. It is a descriptive article that focuses on the main characteristics of the discipline, belonging to the branch of public law. It also seeks to address recent changes to provide an up-to-date overview of the Brazilian Administrative Law system. It tries to explain how the new institutes and the reforms in the matter contribute to the functioning of the Public Administration.

Keywords: Administrative Law; direct and indirect Public Administration; administrative contract; public servants and control.

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BRAZILIAN ADMINISTRATIVE LAW: INFLUENCES, CHARACTERISTICS AND RECENT CHANGES

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Sumário: 1. Origins and influences of Brazilian Administrative Law; 2. Administrative function in the division of Powers; 3. Principles and Powers of Public Administration; 4. Administrative Process and Act; 5. Administrative Contracts; 6. Public Services in Brazil; 7. Administrative Structure and its public servants; 8. Liability of State in tort; 9. External and Internal Systems of controlling Brazilian Public Administration; 10. Conclusions.

1. Origins and influences of Brazilian Administrative Law

Brazilian Administrative Law is a branch of public law related to principles and rules of administrative function, which encompasses public organs, agents and activities developed by Public Administration in order to achieve public interests.

Brazilian law, as a whole, is part of the Civil Law System. Brazilian Administrative Law has statute law as a primary source. It comprehends public acts edited by Legislative Power, based on Constitution. The regulatory activities of Public Administration is, as a rule, based on formal law, which means that rulemaking in Brazil cannot actually innovate the public order, creating new obligations and duties.

Jurisprudence is not a primary source of Administrative Law, except in case of "binding sumula" edited by Supreme Federal Court, that obliges all the Judiciary System and also the Public Administration, as a systematic created in Judiciary Reform from 2004.

The origins of Administrative Law are strongly connected with the effects of French Revolution (DI PIETRO, 2000, p. 30). Before that event, the State was not obliged by rule of law, and, as a consequence, the arbitrary will of the King was considered law. After the establishment of rule of law, government activities were limited by law.

In Zagrebelsky's formula, there was an inversion: instead of *rex facit legem* (the king makes the rules), *lex facit regem* (rules limit the government's activities). The development of public law is associated with jurisprudence constructions of the French organ called *Conseil d'Etat*, which separated issues involving the State from private ones. In that specific area, it is possible to point out some differences

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between systems, as in comparison to Civil Law, Common Law was strongly against having different patterns of judgment concerning state issues.

As a result, the continental European Civil Law evolved to a contentious system, with a duality of jurisdiction. On the other hand, Common Law encompassed unique jurisdiction. Although having being influenced by the French contentious system, Brazil adopted a unique jurisdiction since its Constitution from1891, influenced by United States institutes.

In that particular matter, Brazilian Administrative Law can be considered rather miscellaneous, as it is strongly influenced by Civil Law System, but, on the other hand, it also has some elements of Common Law, as its unique jurisdiction. However, the quality of mixture is just apparent: Public Administration is judged at a unique jurisdiction system, together with private issues, but the criterion used to judge Public Administration is almost always public law, instead of private law.

It means that the spirit of Common Law as a whole is actually not followed by Brazilian Administrative Law. In recent times, the Administrative Reform of the nineties tried to include new institutes inspired on New Public Management from Common Law in Brazilian Administrative Law, such as: regulatory agencies, "publicization" process by Non-Governmental Organizations, and new instruments of partnership associated with management contracts, which tried to guarantee more flexibility in the restricted rules of public regime.

Nevertheless, most of them are still being discussed in the Judiciary System and were adapted to the rules and principles of the 1988 Constitution, which has almost thirty years of existence, which brought a model of Public Administration.

2. Administrative function in the division of Powers

Brazil adopted the division of Powers. The third article from 1988 Constitution recognizes Legislative, Executive and Judiciary as independent and harmonized Powers. Each of the Powers has its typical and atypical functions.

The typical functions of Legislative Power are to make normative public acts and to supervise other Powers, according to checks and balances system. The supervision of other Powers is made by the establishment of Parliamentary Commissions of Inquiry, in order to investigate certain facts, and also by financial control of the State with assistance of the Court of Audit.

The Executive Power deals with government and administrative functions. Governmental issues are the ones related to the delimitation of policies and other subjects of the State's direction. It is a duty divided with the Legislative Power. However, Brazil adopts a presidential system of government.

In comparison with United States dynamics of Powers, the Brazilian Congress seems to manage the impeachment system much more often.[1] As a result, the President should stablish a good relationship with the Congress, in order to reach governability. It's being said that Brazil, in practice, has a coalition Presidential System. There are a lot of Parties and to reach the majority in the government projects, the President should negotiate hard, offering public offices that are available to politic indications at the head of Public Administration.

Administrative function involves the routine of the Public Administration. It is practical and direct, comprehending daily life, dealing, for instance, with: the regime of the public servants, the management of public contracts, protecting state property, accountability for public acts and the activities of police power: the power to restrain individual property and liberty in order to protect public interests.

Public Administration also deals with atypical functions, such as the function to judge administrative processes and also to edit normative acts. It must be explained that when Administrative Courts 'judge' that's not technically a manifestation of jurisdiction.[2]

Brazil adopts a system of unique jurisdiction. Therefore, the thirty-fifth item of the fifth article from 1988 Constitution determines that "the law does not exclude from judicial review injury or threat to rights". It is accordingly possible that the Judiciary Power reviews a decision which was taken by an Administrative Court.

The unique system of jurisdiction adopted in Brazil doesn't require the prior exhaustion of administrative courts as a condition to judicial review, that's a point that can differ Brazilian system from Latin American ones. There are a lot of latin American countries that requires the exhaustion of administrative courts as a condition to the review that occurs at the Contentious System, as for Brazil doesn't adopts a Contentious System, and the unique system adopted can be trigger directly, without the need to act first in administrative courts. So, it is also possible that the citizen can enter directly with a claim against Public Administration in Judiciary Power.

In rulemaking activity, the Public Administration cannot innovate the public order when editing normative acts. So, the regulatory activity of public organs and agencies is almost always restricted to law.

Judiciary Power has jurisdiction as a typical function. Jurisdiction is the activity in which Judiciary Power applies the rules and principles extracted from law to

[1] In thirty years of the Constitution existence, two President have been removed by impeachment: Fernando Collor de Mello, in 1992, and Dilma Rousseff, in 2016.

[2] Hely Lopes Meirelles remembers an explanation of Rafael Bielsa, in which the correspondance of jurisdiction in administrative field: "constituye una especie de justicia dentro de la Administración Pública activa, y su objeto es, ante todo, restablecer la legalidad de la acción administrativa", 1952, p. 180.

concrete cases. There are three characteristics of this activity, which differ it from the application of law used by Public Administration: inertness, substitutivity and definitiveness.

Inertness means than the Judiciary System always manifests itself when provoked (*ne procedat judex ex officio*). On the other hand, Public Administration can act without being provoked. *Substitutivity* means that the judge remains equidistant between the parties. In Brazil, Public Administration does not act with substitutivity when a citizen enters with an administrative process in Administrative Courts, as the claim against the State is processed at an organ that does not stay equidistant from the parties. At last, *definitiveness* means that the judiciary system is the only Power capable of editing a decision that makes *res judicata* (that cannot be reviewed again by any of the other Powers).

3. Principles and powers of Public Administration

Public Administration develops its activities obeying some principles. Article 37 from the Brazilian Constitution lists five of them: lawfulness, impersonality, morality, publicity and efficiency. However, there are some Public Acts that add other such as: motivation, reasonableness and purpose.

Lawfulness or Legality is the basis of the Rule of Law. In comparison between legality required from the citizen, who can act with liberty when there is no prohibition, Public Administration is restricted to a specific sense of legality: the state can only act with the allowance of law. There must be a permission extracted from legal system to able to justify state action.

Impersonality is a principle that points out a government by law, instead of a government by men. It means that the Public Administration must treat every citizen as equal, avoiding unjustifiable privileges. Its main role is to prevent the State being used by some groups of people to guarantee private interests instead of serving public interests, which is a great challenge in countries underdevelopment.

Public Administration must respect the order in paying its debts and also in the following of a set system for public procurement, once the rules are strictly established at the request for tender. That is the aspect of impersonality applied in respect of the citizen, but there is also a sense of impersonality that prevents public agents from using the publicity of acts, programs, works, services and campaigns, in order to promote themselves, as it is strictly forbidden in the first paragraph of the 37th article of the Constitution.

Morality demands from Public Administration ethical, honest and loyal proceedings. It helps guarantee security and stability of legal relations. Administrative morality corresponds to the kind of behavior that citizens should expect from public administration in order to achieve the purposes of collective interests, according to

a community of values expressed through standards, models and patterns of behavior that should guide the inner discipline.

It is, for instance, against administrative morality that the public organ purchase products and services that are unreasonably expensive, even if the rules of the Bidding Law are fulfilled. Administrative Brazilian Law recognizes, in general, that principles are as enforceable as rules.

Everybody has right to know about administrative acts taken in public matters (res publica). Publicity is a basic principle of Public Administration. It allows credibility by transparency. General publicity involves the publication of official acts that have external and general effects. Restricted publicity means the right to know the content of acts, contracts and documents, in order to clarify situations and defend rights by knowing what is registered in records at public departments.

The thirty-third item of the fifth article of the Constitution determines that "everyone is entitled to receive from government agencies information of private interests, collective or general interests, which shall be provided within the law, under penalty of liability, except those whose secrecy is vital to the security of society and the State". Public Act nº 12.527, edited on November 18th 2011, is the one which regulated the right of information.

Efficiency was put in the 37tharticle of the Constitution by nineteenth Constitutional Amendment of 1998. This Amendment came from the last Administrative Reform and was inspired by some principles of New Public Management. The original text of the Amendment mentioned quality of services, but then was changed into efficiency.

It imposes that the conduct of the Public Administration must focus not only on proceedings but especially on results. There are some rules which were inspired in this principle: (1) the introduction of the management contract in the eighth paragraph of the 37th article of Constitution, that gave more flexibility for means used by public administration, according to the establishment of some goals; (2) the insertion in the Constitution, in the third item of the first paragraph from the forty-first article, of loss of post because of non-regular performance, according to the content of complementary law; and (3) determination, inserted on second paragraph of the thirty-ninth article of Constitution, that Federal State, the States and the Federal District maintain government schools for training and staff development.

Besides principles, there are some powers that are recognized for Public Administration. Administrative Law lists at least five of them: discretional, the ones derived from hierarchy, disciplinary, regulatory and police power.

Discretional power comprises the liberty that remains to Public Administration in order to choose between two or more possibilities of acting, all of them accordingly

to law. As statute law cannot always determine with certainty the correct conduct for all kinds of cases, there always remains some degree of freedom in which the public agents can act with discretion.

It is important to remember ourselves that discretion in the Brazilian system is not equivalent to arbitrariness (MEIRELLES, 2009, p. 120). Different from discretion, which is an action that occurs inside the bounds of law, an arbitrary act is considered illegal, as it exceeds the limits of the legal system.

There are also some powers derived from hierarchy. They are the power to: command, control, review, punish, call back, delegate assignments and edit normative acts. Administrative organization is structured by rules of coordination and subordination between organs and agents, which are established in specific statutes.

The statutes of civil servants also regulate the disciplinary power. This is the power that allows the punishment of servants, when, after due process of law it is proved that they break the rules. The Constitution does not admit that a public servant is punished without the contradictory and the opportunity of legal defense.

Disciplinary power also comprehends the power to punish. In this particular area, Brazil adopted a mixed system in which although the authority responsible for punishment will take the final decision, the disciplinary procedure will be developed after a disciplinary committee.

Regulatory power embraces the rulemaking activity. The Executive Chief can edit decrees that turn the abstract rules into more concrete ones. However, rulemaking can also be done by agencies and other authorities that have competence to do so.

Police power is the power to restrain individual property and liberty in order to protect public interests. It comprises not only rulemaking activities, but also adjudication. The attributes of police power are: discretion, self-implementation and coercivity. Discretion because of the openness of law, which does not always clearly indicates what measures public agents should take in order to achieve public interests. Self-implementation is the attribute that recognizes the possibility of acting without the need to request the Judiciary System. Coercivity means that citizens must obey Public Administration determinations of police power, which includes the possibility of using public force.

Proportionality should be taken into account in the employment of public force, under penalty of accountability of the authority. The Brazilian doctrine recognizes plenty of limits in the use of police power: the competence, the form and the scope, that must be inspired in public interests. Brazilian Administrative Law System does

not admit the delegation of typical state activities, like the use of police power, as it was once judged by Supreme Court (ADI 1717)3.

4. Administrative process and act

Brazil adopts the federative form of State, consisting on Federative Units: twenty-six States, one Federal District, which includes the capital Brasília, and more than five thousand five hundred Municipalities, which are also considered autonomous.

Each of the Federative Units has autonomy to legislate about Administrative Law. This is the reason why there is no general code of Administrative Law in Brazil.[4] It is rather different from other subjects, such as, Civil or Criminal Law, which are a privative competence of Union, according to the first item of the twenty-second article from the 1988 Brazilian Constitution.

Despite the autonomy of the Federal Units to establish Administrative Law, it is not particularly correct to say that the subject has no systematics, because most of the basic rules involving Administrative Law are in fact in the Constitution and must be followed by each of the Federative Units.

On the subject of Administrative procedures or administrative process, each of the States can create its own law. In Federative level, there is the Public Act nº 9.784, from January 20th 1999, but a lot of the States have their legislation.[5] The federal administrative procedure act was created by a group of specialists[6] in Administrative Law.

Comparing with other countries, the edition of a general act that regulates constitutional principles as due process of law, contradictory and wide defense was relatively late. It changed the culture of the *ad hoc* procedures in Public Administration.

Until the end of the nineties, there were specific procedures such as the bidding law, the discipline procedures of civil servant's statutes, the expropriation public decree, but there was not a general public act to guarantee standardization in the process and plenty of rights.

It must be stressed that administrative procedure acts from Federal Units regulate the administrative process that develops inside Public Administration Courts, which

[3] Direct Action of Unconstitutionality number 1.717, judged by Brazilian Supreme Court in 7thNovember, 2002.

[4] Despite the opinion of a particular doctrine, that aims to recognize in the federal public act of administrative procedure a code to be applied in national level. But that construction is not being obeyed by courts and also by the Public Administration of the Federal Units.

[5] But not all of them.

[6] Included: the President of the Commission, Caio Tácito, Maria Sylvia Zanella Di Pietro, Odete Medauar, Inocêncio Mártires Coelho, Diogo de Figueiredo Moreira Neto, Almiro Couto e Silva, Adilson Abreu Dallari, Calmon de Passos, Paulo Modesto and Cármen Lúcia Antunes Rocha.

are not part of the Judiciary System, since Brazil adopted the unique jurisdiction. Brazilian Administration is generally judged inside Judiciary System on the grounds of Civil Process Code, which is applied to all subjects, except the criminal ones.

The procedure act can be compared, for instance, with the APA of the United States (*Administrative Procedure Act*), the *Verwaltungsverfahrensgesetz* (VwVfG) of Germany, from 1976, and the Administrative Code of Procedure, from Portugal, which was revised in 2015 (Código de Procedimento Administativo).

The Federal procedure public act nº 9.784 enunciates some principles of public administration, which are not listed in the Constitution, as: finality, motivation, reasonableness, proportionality, juridical security and public interest, rights and duties from citizen, rules about impediment or suspicion of authorities, forms, time and places to practice procedure acts, communication, instruction, terms, resorts systems of administrative appeal, decision, cancellation, revocation and validation of administrative acts.

The public act also regulates public participation, such as public hearing and public inquiry. The difference between these two means of public participation in the Brazilian system is that public hearing (in Portuguese: *audiência pública*) consists of oral debates, while in public inquiry (in Portuguese: *consulta popular*) people express their understanding about some issue by writing.

The Administrative act is the declaration of state, or from whom who develop administrative function, with immediate effects, in the exercise of the public prerogative to enforce law and be subject to judicial review (DI PIETRO, 2016, p. 235). It has immediate effects in comparison to normative acts, which have otherwise mediate effects because they are general. Administrative acts are based on law, but they are particular or specific.

Administrative acts are also subject to judicial review. The Judiciary System can review aspects like: competence, form, scope, and also the content of the act according to legislation and its motive (*Tatbestand*). However, it is not possible to review the discretional act, when the Public Administration edited it with accordance to rules and principles.

With post-positivism influence on Brazilian Administrative Law, the limits of discretional power were narrowed by the consideration of normative force of principles. It means that more aspects of administrative act are considered nowadays subjected to judicial review, also due to the application of reasonableness (NOHARA, 2006, p. 79) in state measures, considering the constitutional protection of individual rights.

5. Administrative contracts

Administrative contract is the agreement in which one of the parties is the Public Administration; it has the goal of achieving public interests, and demands, in general, bidding as a prerequisite, being subject to "exorbitant" clauses.

The Bidding and Contract law is the Public Act nº 8.666, from June 21th 1993, but there is a project that should change the legislation if approved in the next years. Bidding is called in Portuguese: "licitação". The twenty-seventh item of the twenty-second article of 1988 Constitution determines that it is private for the Union to legislate about general rules of bidding and contracts, in all the modalities, for the Public Administration of the federative units.

Although administrative subject is a matter of the autonomy from the federal units, "bidding and contract" are exceptions, as the Constitution requires the presence of a general national law, applied to all federative members. So, the federative units can also edit their own special legislation, since the general rules of the Public Act nº 8.666/93 are respected.

However, Public Act nº 8.987, from February 13th 1995, is a specific law that deals with contracting out public services. Yet, if there is a Public-Private Partnership created by Private Finance Initiative the adequate law would be the Public Act nº 11.079, from December 30th2004, which embraces contracts of at least ten million reals, the amount was decreased from 20 to 10 in December 2017, in which the execution will last from five to thirty-five years and that must not have the unique object as the supply of labor.

There is a recent movement of comprehending bidding not only as a way to look after advantageous contracts, respecting equality, but also as a way to promote sustainable development with governmental purchasing power. It is done since Brazilian Small Business Act, of 2006, that forecasted measures to include small business in government purchasing, but was reinforced with the inclusion of the new objective (to promote national sustainable development) between the traditional scopes of Bidding in the third article of the Law nº 8.666, by Law nº 12.349, from 2010.

Exorbitant clauses are the ones that recognize prerogatives for the Public Administration. They are displayed in the fifty-eighth article of the Bidding and Contract Law (Public Law nº 8.666), and comprehend the possibility of: modifying the contract; rescinding the contract, in cases specified by law; supervising its execution; applying sanctions motivated by total or partial non-performance and provisionally occupying property personnel and services.

According to the Bidding Law, Public Administration can only determine a modification of 25% of the value in works, services and purchases, or 50% increase

in remodeling of the building or equipment. So, the unilateral change can only be required in obeyance of the mentioned limits.

They are instrumental to public interests and must guarantee the economic and financial balance of the adjustment, as the first paragraph of the fifty-eighth article of the Bidding and Contract Law determines that: "economic and financial clause of administrative contracts cannot be altered without prior agreement of the engaged".

There are still some circumstances, called 'aleas', which allow the revision of administrative contracts. This kind of *aleas* must, first of all, be extraordinary, as Public Administration would not be responsible for ordinary happenings, like the normal range of market, which are considered part of the entrepreneur's risks.

Administrative *aleas* are the circumstances caused by Public Administration: the unilateral alteration, an action or omission that directly affects the contract, or a measure taken that reflects indirectly in the contract, allowing its revision. Economical *alea* is the one associated with unpredictability theory.

6. Public service in Brazil

Brazil has a specific system of public service, whose basis is established in 1988 Constitution. Article 175 of the Constitution determines that the provision of public services is a task that belongs to Public Power, as provided by law, directly or through concession or permission, always observing the bidding process.

Therefore, the Public Administration can provide public services directly or even delegate its provision, by contract. In case of delegation, it is considered that the private company which wins the bidding process receives just the exercise of the public service, but its ownership belongs to the State.

The economic activities are divided into: (1) activities of the market, which are normally free to private initiative, being restricted by police power; and (2) public services, which are considered tasks of the State, according to the material competence division of the Constitution and also to specific legislation.

Public service is a rather controversial issue in Administrative Law. However, there is a relative *consensus* about three basic criteria (GROTTI, 2003, p. 87) that allow the definition of the concept: (1) the subjective or organic criteria, which indicates the presence of State; (2) the material criteria, which points out that public services usually satisfy public needs; and (3) the formal criteria, which means that public services are submitted to exorbitance prerogatives, derived from the public regime.

The use of the subjective concept is, however, unsatisfying. Apart from the State, Article 175 determines the possibility that a private company provides public services. Needless to say with the recent movement of privatization, the delegation

of public services was transformed into a common reality, but the government can only delegate a public service that is fixed in its own competence by the Constitution.

The Brazilian Constitution has a mixed system of allocation of competences. There are exclusive competences and also the common ones, according to cooperative federalism adopted since the 1934 Constitution. The Union has exclusive competences, like national defense, currency emission, postal service, telecommunications, but it also has common competences, in which there is shared responsibility in the implementation of some matters.

The Municipalities, for instance, are responsible for local interest public services, like public transportation and garbage and solid waste collection, and State Members have two specific duties: dealing with local services of piped gas and creating metropolitan areas, and they also have the remaining material competences (except the remaining taxation competence, which is, according to article 154, I, from 1988 Constitution, attributed to the Union).

The material criteria are also rather controversial, as, in Brazilian system, the ownership of public service is much more a legislative decision, then something strictly connected with the fulfillment of public needs. So, there are some activities, like the lottery, which are considered a public service.

Of the three of them, the last one is considered the most rigorous. It was first elaborated by Gaston Jèze (JÈZE, 1942, p. 4), as the presence of public services indicates a public regime, in which the public interests should prevail. When a company is providing a public service, for instance, its liability in tort will be grounded in risk theory, rather than subjective responsibility.

Public Law nº 8.987/95 provides rules about the delegation of public services for concessionaires and permitees, the special nature of the contract and its extension, the conditions of forfeiture, control and termination, user rights, tariff policy and the obligation to maintain an adequate service.

The conditions listed by article six of Public Act nº 8.987/95 about an appropriate service are: regularity, continuity, efficiency, safety, timeliness, generality, courtesy in the provision and reasonable rates. There is a recent law (Public Act nº 13.460/2017) that regulates the participation, protection and defense of the rights of the user of the public services of the public administration, which is specially applied to the relationship between Direct and Indirect Administration and the users of public services.

7. Administrative Structure and its public servants

Brazilian Public Administration is divided into Direct and Indirect Administration. Direct Administration embraces the structure of Public Administration that lies

under hierarchical dependence of the government. It comprises the organs subordinated to a unique command, such as, Ministries, Offices and Departments.

The phenomenon of being divided into organs, which have no juridical personality, associated with Direct Administration, is technically called "deconcentration." There are three criteria (BANDEIRA DE MELLO, 2008, p. 150) which usually justify deconcentration: territorial, from subject and also from grade.

Direct State Administration can be divided into regional departments (territorial criterion), in order to better serve its citizens, because of their proximity; there are divisions based on subject matters, which motivate the existence of Ministries of Defense, the Environment, External Relations, Justice, Science and Technology and Labor and Employment; the departments are also internally divided into levels of posts, like direction, supervision and commissionaire.

It must be stressed that public organs differ from agencies. The proliferation of regulatory agencies in Brazil occurred during the nineties. It was a phenomenon associated with the last State Reform. The Brazilian Administrative Reform of the nineties was inspired in New Public Management from the Common Law countries, but its effects were adapted to the Brazilian system of Administrative Law (NOHARA, 2012, p. 204).

So, the prior idea of agencies was changed into an autarchy with a special regime. That juridical regime guaranteed to its directors or members of the collegiate a fixed term, that does not correspond with the term of the Chief Executive, and greater autonomy from the Executive control, in comparison with the other autarchies.

However, Brazilian agencies are not autonomous in relation to Judiciary or even to Congress control. If an agency edits a regulation that causes injury or threat to a right, it can be reviewed by Judiciary Power. There is also a discussion about the limits of innovation of the juridical order by agencies in Brazil, because of the extension given to the legality principle. The second item of the fifth article from the Constitution determines that: "no one shall be obliged to do or refrain from doing something except by virtue of law".

Only the statute law[7] can, therefore, innovate the public order. It is possible that an agency edit a regulation that supplements the law, but there are lots of jurists[8] that do not recognize the possibility of editing an autonomous decree, which is allowed for instance in French or North-American Systems.

[7] In this context law means statute law (legislated law). It does not signify the law applied by judges.
[8] As an interpretation of the 37th article of the French Constitution and also of the possibility of unfolding the standards published by the National Congress in United States of America.

Indirect Administration is formed by autonomous entities, whose structures are not subordinated to a central command. They are supervised only about their restricted following of their purposes of existence.

Ibama, for instance, is a federal autarchy linked to the Ministry of the Environment. It has financial and administrative autonomy, being not subordinated to hierarchical system of the Ministry, but it can suffer supervision-ministery control if its actions are not restricted to its legal competences, related to the protection of the environment.

Indirect Administration is composed of the following entities: autarchies, public foundations, public companies and mixed economy societies. Autarchies and Public Foundations are commonly subordinated to a public legal regime, as they must have a public personality, prerogatives and special constraints, whereas Public companies and mixed economy societies are state companies subordinated to a private legal regime. Public Act nº 13.303/2016 tried to regulate the control of public companies, stablishing the regime of the bidding and contracts.

The regime of work from the public servants depends, in general, on the nature of the entity with which they are connected with. If they work for Direct Administration or for a public entity, they will normally obey a public law regime, which is statutory; on the other hand, if they work for a public company or even for a mixed economy society they obey the consolidation of labor laws, which enunciate a private regime, except in some especial requirements, like passing an entrance examination.

The statutory public servants employed by virtue of public entrance examinations acquire tenure after three years of actual service, according to article 41 from the Constitution. A tenured public servant shall only lose his office: (1) by force of an unappealable judicial decision; (2) by means of an administrative process, in which he is assured ample defense; or (3) by means of periodical proceeding of performance, according to provisions by complementary law, since ample defense being assured.

There is also another case of loss from office by tenured public servant, introduced by Constitutional Amendment nº 19, from June 4th 1998, which is when expenditure with active and pensioned personnel exceeds the limits established in supplementary law (which is the Fiscal Responsibility Law).

In this case, fixed by article 169 of the Constitution, before affecting the office of tenured servants, there must be: (1) a reduction of at least 20% of expenditures with commissioned offices and trusting positions; (2) dismissal of non-tenured servants. If these measures are not sufficient to assure compliance with the provisions of the supplementary law, then the tenured servants may lose their offices, provided an indemnification.

8. Liability of State in tort

The system of liability of State in tort is quite advanced in Brazil. The Constitution recognizes the liability of State based on risk theory, without the need to prove the guilt of a particular public servant. It is based on three elements: (1) an act; (2) a damage to someone; and (3) the nexus of causality between the act and the damage.

The liability of the State for tortious act of its servants derives from the sixth paragraph of the 37tharticle of 1988 Constitution, which determines that: "Public legal entities and private legal entities rendering public services shall be liable for damage that any of their agents, acting as such, cause to others, ensuring the right of recourse against the liable agent in cases of malice or fault" (guilt/negligence).

The liability based on risk theory, also known as objective liability, was first established in the 1946 Constitution, and thereafter was provided in all of the following Brazilian Constitutions. Brazil does not adopt an integral risk theory, but just the administrative risk theory, in which the liability is excluded by force majeure or fortuitous event, exclusive of fault of the victim and exclusive of fault of others.

The term to sue the State is in general five years from the date of the act or event from which it originated, based on the first article of decree-law nº 20.910, from 1932, except in cases like: reimbursement of damages caused to treasury, as it is extracted from the fifth paragraph of the 37th article of Constitution, with the exception of civil unlawful, as the decision of the RE 669.069, judged from Supreme Court in 2016, damages caused in fundamental rights, due to torture occurred during military dictatorship,9 and also some of the environmental damages (BENJAMIN, 1993, p. 291).

Brazilian citizens sue the State first and then the Public Administration will be responsible to perform the right of recourse against the liable agent, in cases of malice or fault. It must also be stressed that actions against the State usually last many years in Brazil, some of them decades, until the actual repayment.

There are lots of procedural prerogatives in favor of the State in court, such as: larger terms, for instance, it is double the time; double degree required in some cases, which means that a condemnation against State will be necessarily reviewed by court, with or without appeal; and also the repayment will be executed by budget forecasting, using a system called precatory, that lasts many years.

The National Congress is usually not liable to the creation of laws that cause damage to others, because the existence of effects that are designed by public interests is part of this system. However, there are two exceptions, which allow indemnification: (1) the creation of an unconstitutional law, recognized as such from the Judicial

[9] REsp 529804/PR, 2 T., Min. Fux, DJ 24.5.2004 and REsp 379414/PR, Min. José Delgado, DJ 17.2.2003.

System; and (2) laws that have concrete effects and, therefore, affect specific individuals or groups.

In cases of judicial error, it is prescribed in the LXXV item of the fifth article from the 1988 Constitution that: "the State shall indemnify a conviction for judicial error, as well as a person who remains imprisoned for a period longer than the one established by the sentence".

9. External and internal systems of controlling Brazilian Public Administration

Control of Public Administration designates a set of mechanisms that allow vigilance, guidance and correction of administrative measures and acts that are not taken under principles and administrative rules. It also comprehends the accordance with public interests that legitimize the existence of the State itself. This control is divided into: (1) *internal control*, as the Public Administration can review its own acts; and (2) *external control*, exercised by other Powers, as the Legislative has typical attribution to control the Executive, and the Judiciary is the Power that controls all other Powers.

Judiciary Power is legitimated to exercise a control of legality, as it is its duty to apply the law in concrete cases. It is still obliged to respect so called *self-restraint*, as there are cases in which public agents have some freedom to act with discretion, but if an administrative act is taken beyond the borders of the limits from the legal system, there should be judicial control.

There are lots of theories about the bounds of administrative discretion[10] in Brazil, but most of them, with influence of post-positivism, considerer that not only the rules are controllable in jurisdiction, but also principles such as morality, impersonality etc. There are lots of advanced jurisprudences that restrict administrative discretion.

Besides judiciary control, there is the control of the Public Ministry, which is a body of public prosecutors. It is a permanent institution, both federal or on state level, which is responsible for defending the legal order, the democratic regime and the social and unavailable individual interests, according to article 127 of the Constitution.

The public prosecutors act with independence. The Public Ministry can privately promote public criminal action. It also brings action against private individuals,

[10] There are some rejection of juridical activism, but in the same time lots of advanced decisions of the Brazilian Supreme Court that straighten the bounds of administrative discretion in accordance with the progressive theory of hermeneutics in post-positivism times.

commercial enterprises and the governments, acting in defense of minorities, in favor of the environment, the consumers and also the civil society in general.

Coslovsky emphasizes that:

> Brazilian prosecutors can conduct inspections and investigations, subpoena documents, organize public hearings, dismiss cases, and initiate (and settle) civil lawsuits in a range of areas, including environmental preservation, minority rights, public health, and more. Based on this range of prerogatives, I claim that Brazilian prosecutors are comparable to regulatory enforcement agents (COSLOVSKY, 2011, p. 70).

One instrument that is constantly handled by Public Ministry, and is strongly connected with controlling the public agents, is the administrative improbity civil action. Administrative improbity is considered an act, normally practiced by a public agent, "that violates the law or even moral principles and, in most cases, damages the public budget integrity".[11]

Among other effects, it enables judicial control of ethics in the public service by punishing corrupt public officials. It is provided by Public Law nº 8.429/1992 and evolves a civil action. Brazilian law also imposes criminal liability for corruption as well, but these sanctions are cumulative with the sanctions imposed by improbity civil action, which are: (1) compulsory resignation from the public position; (2) suspension of political rights; (3) prohibition to contract with the State; and (4) imposition of financial penalties.

Last but not least, there is an Enterprise Anticorruption Law, which makes legal persons liable for acts committed against the public administration. It is the Public Act nº 12.846/2013, and it provides for heavy penalties, such as a fine of up to 20% of the previous year's billing and extraordinary publication of the conviction. The heavy sanctions of the law can be mitigated by leniency agreement or by the effective adoption of a compliance program.

10. Conclusions

Administrative Law in Brazil is an issue submitted to the autonomy of the Federal Units. There is no general Administrative Code in comparison with other subjects like Civil or Criminal Law. Nonetheless, it is a systematical issue, as there is a general pattern prescribed by the 1988 Constitution that must be followed by all Public Administration.

[11] According to a research conducted by Susana Henriques Costa and fomented by United Nations Program for Development: The judicialization of corruption in Brazil: a diagnosis of the administrative improbity civil action. Exposed at 2012 International Conference on Law and Society.

Brazilian Public Administrations are divided into Direct and Indirect Administration. While Direct Administration includes the structure that lies under hierarchical dependence of the government, Indirect Administration is formed by autonomous entities, like: autarchies, public foundations, public companies and mixed economy societies.

The regime of work from the public servants depends, in general, on the nature of the entity with which they are connected. Usually, if they work for a public entity, their regime will be statutory.

Statutory public servants employed by virtue of public entrance examinations acquire tenure after three years of actual service. Public servants that work for private entities, like public company or a mixed economy society, obey a private regime, except by case of some special requirements, like passing the entrance examination, but they do not have tenure.

The system of liability of State in tort is based on administrative risk theory. It is not necessary to prove the guilt of a particular public servant, being just required: an act, caused by an agent, acting as such; a damage; and the *nexus* of causality between the act and the damage, as prescribed by the sixth paragraph of the 37th article of 1988 Constitution.

Brazilian Administrative Law is rather miscellaneous: it is strongly influenced by Civil Law System, but has some elements of Common Law, like its unique jurisdiction. The quality of mixture from the systems is in fact just apparent, as there is a wide recognition that the criteria to judge the Public Administration are almost always public law, instead of common or even private law.

The last Administrative Reform of nineties tried to include new institutes inspired on New Public Management from Common Law in Brazilian Administrative Law repertoire, like: the regulatory agencies, the "publicization" process by Non-Governmental Organizations, now ruled by Public Act nº 13.019/2014, and new instruments of partnership associated with management contracts, which aimed to guarantee more flexibility in the restricted rules of public regime.

Nevertheless, most of them are still being discussed in the Judiciary System and were adapted to the rules and principles of the 1988 Constitution, which brought a model of Public Administration. The regulatory agencies, for instance, were transformed into autarchies in special regime, because police power and control of public services are tasks not delegable to private initiative.

Administrative contract is still considered an agreement in which one of the parties is the Public Administration, being subject to "exorbitant" clauses. It is generally prescribed in Public Law nº 8.666, which also regulates the bidding process, but Public Law nº 8.987/95 provides rules about the delegation of public services for

concessionaires and permitees. If that concession constitutes a Public-Private Partnership, then, the law applied will be nº 11.079/2004.

Public services are the ones that belong to the State, according to article 175 of the Constitution. If the Public Administration delegates its provision, the private company that wins the bidding process will receive just its exercise.

And the control of the Public Administration is divided into *internal control*, as it can review its own acts, and *external control*, exercised by the Legislative Power, the Judiciary Power and also by the Public Ministry, which in Brazil play a special role in controlling the Public Administration.

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