JUDICIAL DEFERENCE & RIGHT TO A FAIR TRIAL:

A feasible conciliation in Latin America?

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> Congress is the font of democratic legitimacy in the nation´s traditional constitutional theory. And courts are the traditional model for legitimate decision-making in the mind of the legal profession, in which most law professors are socialized. […] we cannot trust the administrative authorities themselves and must rely instead on officials external to the bureaucracy – that is, elected lawmakers and life-tenured judges. Thus 'administrative law' has been largely synonymous with external constraints – statutory and especially judicial – on administrative action.
> According to Jerry Mashaw's theory it is a mistake. We are not wrong in our aspiration to subject government to law. But we are wrong to think that exacting statutory commands and judicial review are the means to fulfill that aspiration. […] An administrative authority, under the right conditions, can self-generate law from within - and do it far better than elected lawmakers or courts can.[1]

The excessive litigation in Latin America is mainly attributable to administrative law cases (tax and social security matters) as well as cases of private law subject to regulation by agencies, such as telecommunications services and supplementary health care. The astounding backlog of pending court claims (nearly 50 million in Brazil)[2] is symptomatic of a judicial system on the verge of collapse. Under the pretext of protecting fundamental rights, the Latin America court system constantly advances into typically executive and legislative functions.

My research on judicial deference towards administrative authorities includes a comparative study of contemporary models of administrative justice. This approach attempts to contribute to the debate on the concept and scope of judicial deference, which is traditionally

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[1] Nicholas R. Parrillo, *Jerry L. Mashaw creative tension with the field of administrative law*, *in* 2 ADMINISTRATIVE LAW FROM THE INSIDE OUT 5 (Nicholas R. Parrillo ed., 2017).
[2] CONSELHO NACIONAL DE JUSTIÇA, JUSTIÇA EM NÚMEROS 2017 [Justice in Numbers 2017] (2018).

linked with the idea of separation of powers and based on the notion that certain questions referred to the administrative bodies are too technically complex to be reviewed by the ordinary courts.[3] By the way, those basic ideas on judicial deference are made clear by US/UK law but are not always apparent in the legal systems of French origin, including those of Latin America. Moreover, it is sometimes forgotten that judicial deference, as it is currently understood, especially in US/UK law, grew out of notion of "the due process clause", which is binding not only on the courts but also on other public authorities.[4]

According to the Inter-American Court of Human Rights, one of the dimensions of the fundamental human right to effective protection in administrative law cases is the "intensity of review of both the form and content of administrative decisions".[5] This protection should be complete and the review of procedural and substantive legality should include, where appropriate, verification that the administrative authority did not exceed its discretionary powers.[6]

In any case, all over the world, administrative justice is based on either of two models, the one of English, the other of French origin. The French model is a system divided into courts of general jurisdiction, on the one hand, and specialized administrative courts with full powers of review of administrative acts, on the other. In common-law countries, the models of administrative justice tend to have only generalist courts with limited powers of review, which refrain from examining certain aspects of administrative acts; nevertheless, due process is ensured through adjudication conducted by administrative tribunals or administrative bodies endowed with quasi-judicial powers[7].

Due process in the administrative sphere is therefore a constitutional prerequisite for courts to exercise only limited review of administrative decisions, since it ensures that citizens

[3] Guobin Zhu, *General report on deference to the administration in judicial review*, in 20TH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, International Academy of Comparative Law, Fukuoka (July 2018).
[4] Omar T. McMahon, *A fair trial before quasi-judicial tribunals as required by Due Process*, 29 MARQ. L. REV. 95 (1946).
[5] Case of Barbani Duarte et al. v. Uruguay, INTER-AMERICAN COURT OF HUMAN RIGHTS (Oct. 13, 2011), para 204.
[6] Articles 3 and 4 of the Euro-American model code of administrative jurisdiction. RICARDO PERLINGEIRO & KARL-PETER SOMMERMANN, EURO-AMERICAN MODEL CODE OF ADMINISTRATIVE JURISDICTION 7, 8 (2014).
[7] See Peter Cane, *Por que ter tribunais administrativos?* [Why have administrative tribunals?], 17 A&C – REVISTA DE DIREITO ADMINISTRATIVO & CONSTITUCIONAL (69) 77-110 (July/ Sept. 2017).

will not be deprived of their human right to (independent, impartial and qualified) adjudication.[8] To prevent unnecessary duplication of adjudication and government spending, only part of the disputes will be reallocated from the courts to other spheres of power. As Michael Asimow explains in his article *Five Models of Administrative Adjudication*,[9] the implementation of due process in the administrative phase will naturally tend to increase judicial deference to the authorities, thereby reducing the caseload of the courts.

Due process in the administrative sphere is guaranteed by the constitutions of Brazil, Colombia, Ecuador, Nicaragua, the Dominican Republic and Venezuela, and by the legislation of Argentina, Bolivia, Peru and Uruguay. Nevertheless, in Latin America, such (extrajudicial) procedural guarantees are still in the implementation phase, because Latin American administrative bodies, culturally influenced by their Continental European origins, are not in keeping with the exercise of quasi-judicial powers by administrative authorities. For instance, in Brazil, the only administrative body with quasi-judicial powers is the maritime tribunal, as recognized by the Federal Supreme Court in its precedent of 1934;[10] since then, there has never been any further discussion on the subject. In reality, for the time being, the extrajudicial administrative [dispute-resolution] proceeding in Latin America does not fulfill its role of settling disputes but "is merely an attempt to draw water from a dry well".[11]

Moreover, Michael Asimow's hypothesis still needs to be demonstrated on the Latin American legal scene, i.e., it needs to be confirmed that the implementation of due process in the administrative sphere would reduce review by the courts, as is traditionally observed in the models of English origin. If not, it would merely result in a duplication of spending and adjudication, which, in Latin America, would amount to the duplication of millions of cases.

In other words, instituting due process in the administrative phase in Latin American countries would be justifiable only if it automatically entailed judicial deference, which is not

[8] See Jerry L. Mashaw, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985). On the lack of need for a robust doctrine of judicial deference in countries where administrative authorities do not have the power to adjudicative, see John C. Reitz, *Deference to the administration in judicial review*, 66 THE AMERICAN JOURNAL OF COMPARATIVE LAW (1) 297-298 (2018).
[9] Michael Asimow, *Five models of administrative adjudication*, 63 AM. J. COMP. L. 3 (2015).
[10] STF, Agravo de Instrumento 11.094, Report by Justice Bento de Faria (May 28, 1934).
[11] Juan Carlos Cassagne, *El procedimiento administrativo y el aceso a la justiciar* [Administrative procedure and access to the justice system], *in* TENDENCIAS ACTUALES DEL PROCEDIMIENTO ADMINISTRATIVO EN LATINOAMÉRICA Y EUROPA [Current Trends In Administrative Procedure In Latin America And Europe] 53, 75 (Pedro Aberastury & Hermann-Josef Blanke eds. 2012).

so obvious in those countries. It should also be borne in mind that mutual confidence between courts and administrative institutions, and especially the citizens' confidence in administrative bodies, is a factor that must be taken into account in the characterization of judicial deference.

Yet the subject matter of this study will go beyond the difficulties experienced in Latin America. An equally important question is whether the creation of administrative due process resulting in the limitation of the courts' powers of review would in fact only shift the problem, that is to say, whether part of the claims would simply be withdrawn from the courts and transferred to other spheres of authority without reducing the high level of litigiousness (which is the result that has been observed in both the USA and United Kingdom in the case of the "administrative law judges" and the administrative tribunals.[12] The executive duties (or administrative functions of implementation) falling within the competence of the administrative authorities must not be left out of the equation, because it is the faulty performance of such duties that is the root cause of individual complaints against the administrative bodies.

One might therefore ask whether it is really justifiable to spend public funds to implement due process in the administrative phase since, in practice, it merely shifts administrative conflict resolution from the courts to other bodies with quasi-judicial powers? Is that the purpose of judicial deference and closed judicial review in contemporary administrative justice? Judicial deference that merely withdraws claims from the courts, or that withdraws them both from the courts and from any other adjudicative body? And what if that happened? Would preliminary due process also be admissible for initial administrative decisions (front-line decisions)? If so, to what extent?

In this context, my research objectives are (1) to identify parallels and contrasts between theoretical approaches of judicial deference to administrative decisions in the UK, US, and Latin America [not only to administrative adjudication decisions, but also to front-line administrative decisions]; (2) to explain the various legal arguments in favor of deference and to correlate them with the corresponding constitutional theories, especially regarding the due process clause; (3) to contribute to the understanding of the theoretical foundations of judicial deference and to present recommendations for the use of such deference.

[12] See Daniel Lee Feldman, *Administrative agencies and the rites of due process*: Alternatives to excessive litigation, 7 FORDHAM URB. L.J. 229 (1978).

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