JUDICIAL DEFERENCE AND PUBLIC POLICY:

Respecting the boundaries

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I. INTRODUCTION

Judicialization of the politics is a widespread phenomenon, challenging judges and academics to draw a model of judicial scrutiny capable to balance human rights enforcement and separation of powers. Deference to public choices embodied into administrative law is one of the available tools to provide that balance. The concept is not new, with distinct experiences in various countries – and Brazil is no exception.

Despite thirty years of a Constitution promulgated in a newly redemocratized ambience, the idea of a deferential approach is still associated with an unintended constraint to judicial review – therefore, as a violation of the checks and balances principle. On the other hand, Brazil face a growing tendency to judicialization, especially in the socioeconomic rights field. The result is a growing judicial interference in public policies, with an unclear scrutiny frame.

This paper examines specifically to the application of deference as judicial criteria in conflicts related to administrative law concerning the design and implementation of public policies. The problem is particularly relevant in Brazil, due to a growing phenomenon of judicialization of social rights, usually regulated only in the administrative realm.

Departing from an historical contextualization that explains why the deferential approach entered in disfavor, the paper explores a theoretical frame that enables judicial review,

without discarding that administrative choices are based in specific institutional capacities. Through a descriptive-analytical methodology, it proposes a content to judicial deference that requires disclosure of the administrative reasoning in the deliberation under scrutiny, valuing a procedural dimension when it comes to public choices. Substantive criticism may be consider by the Judiciary, but only in a dialectical relation with the motivations informed by Public Administration.

Rescuing deference to administrative choices according to the proposed scope is a relevant alternative to prevent Judiciary from entering a swampy field, replacing public choices that should be hold by other agents.

II. HOW THE DEFERENTIAL APPROACH ENTERED IN DISFAVOR IN THE BRAZILIAN LEGAL COMMUNITY

Pressed by conservative forces of the elite who feared a left-wing dictatorship, the military assumed power in Brazil – some will say reluctantly[1] – enacting nine days after the revolution, an "Institutional Act"[2] altering the 1946 Constitution.

As tension grows in the country, that first initiative reveals to be insufficient. The military repeated the strategy of twisting the constitution by successive "Institutional Acts", which imposed severe limitations on the federal organization of the country, as well as the political and civil liberties of the population.[3]

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[1] R.D. Evans, *The Brazilian revolution of 1964*: *Political surgery without anaesthetics*, 44 INTERNATIONAL AFFAIRS (Royal Institute of International Affairs 1944-) (2), 267-281 (Apr. 1968).

[2] The "institutional acts" were enacted at the time by the Executive, and reformulate partially the constitutional text without observing the formal procedure required to the approval of a constitutional amendment. There were seventeen institutional acts enacted during the dictatorship, mostly to centralize power in the Executive branch, ceasing individual liberties, and reducing legislative power and prerogatives.

[3] Roberto Gargarella, *Latin American Constitutionalism: Social Rights and the "Engine Room" of the Constitution*, 4 NOTRE DAME J. INT'L COMP. L. 9, 10-16 (2014) (reporting the historical process through which social rights were included in Latin America constitutions—without the necessary adaptation in the institutional dimension of those same countries).

At the time, one could distinguish two distinct kinds of administrative choices: the ones entirely designed by law, with no space for political deliberation from public officials; and the discretionary ones – in which a broad spectrum of alternatives is grant to the decider. In the last case – discretionary administrative acts – judicial scrutiny was not allowed, according to an understanding that this will violate the checks and balances principle.

A major canon that represented that idea was that "the merit" (meaning, the political choice) of the administrative act could never be scrutinized by the Judiciary, that should be deferent to the Executive decision. Deference, therefore, was associated with a definitive blockage to judicial review, and was applied as a shield, protecting very questionable choices held during those dark times.

Power change hand in 1985, with the election by the still-existing Electoral College of Tancredo Neves, who represented democratic and progressive political forces at the time. Tragically, Tancredo Neves faced illness and was unable to take the Presidency. Hospitalized in March 14th, 1985, he died in April, 21st of that same year, leaving as President, José Sarney – an politician clearly aligned with the previous conservative political forces. This was one of the reasons to summon a National Constituent Assembly (NCA), in which conservative and progressive representation, strongly polarized, tried to achieve minimum consensus.[4]

After an agitated constitutional process, the Constitution was enacted in October 5th, 1988. The absence of a prevailing political representation in the National Constituent Assembly contributed to a somehow disjointed text, in which very different tendencies searched for accommodation. That lack of coordination is deepened by recurrent constitutional amendment – there are already ninety-nine of then up to August 2019.

Despite the political disarray in the constitutional drafting, the text initiated with a sound commitment with fundamental objectives, all of them emanating from human dignity as a core idea. This is the trigger to a new understanding when it comes to judicial review of administrative action. After all, if the fundamental objectives of the Brazilian state are express in the Constitution, administrative action is always subject to an analysis about its alignment

[4] Gary M. Reich, *The 1988 Constitution a decade later: Ugly compromises reconsidered*, 40 J. INTERAM. STUD. WORLD 5, 6 (1998) (reporting some of the dynamics that happened between the political forces during the Brazilian Constituent Assembly).

with those same purposes. Therefore, there could be no administrative act or decision, entirely exempt of judicial review.

The Constitution itself endorses that new perspective, as long as it provides a wide range of procedural devices in which judicial review of administrative choices can happen.[5] Considering an ambience of regained political freedom, it was just natural that the legal community rejected the deferential approach as outlined during the dictatorship period. As usual in reactive periods, the Judiciary assume the opposite orientation, granting no deference at all to administrative bodies and choices, engaging in a deep scrutiny of every aspect of Executive decisions. That strategy was clearly predominant in the realm of judicial review on fundamental rights violations.

III. CONSTITUTIONAL FRAMEWORK IN FUNDAMENTAL RIGHTS AND THE JUDICIALIZATION OF POLITICS

The Brazilian constitution contains an extensive list of human rights. Aside from proclaiming that the Republic grounds in human dignity (among other core values); the Brazilian constitution establishes fundamental objectives as to build a free, just and solidary society, eradicate poverty and promote the well-being of all. Those nucleus clauses derived in an extended list of human rights, including socioeconomic ones, all of them provided by an express constitutional clause, with immediate application.[6] This is the result of a political strategy held by the progressive forces in the National Constituent Assembly. Constitutional clauses granting social rights with immediate application should promote a transformative agenda to be carry out by Congress, bringing social inclusion.

That transformational process, according to the Constitution itself, requires massive legislative deliberation. Clearly inspired in the Portuguese doctrine of the "constitutional

[5] K.S. Rosenn, *Judicial review in Brazil: Developments under the 1998 Constitution*, 7 SW. JL & TRADE AM., 291 (2000).
[6] Vanice Regina Lírio do Valle, *Enforcing socio-economic rights through immediate efficacy: A Case study of Rio de Janeiro's right to housing*, 25 TUL. J. INT'L & COMP. L., 1 (2016).

dirigisme"[7], the Brazilian constitution, in turning concrete its general provisions, required in its original text the enactment of 285 ordinary statues and 41 complimentary laws.[8] Summoning the Legislative to such a task was a clear reaction to the end of the dictatorship period. Nevertheless, building minimum consensus in Parliament around a wide variety of topics is never an easy task, especially when among them you find the distributive deliberations inherent to the grant of socioeconomic rights.

When it comes to human rights, Parliament's inertia will not authorize the non-enforcement due to the immediate efficacy clause. It was a difficult crossroad. Separation of powers required the preservation of legislative's realm of deliberation – but that solution would result in ineffectiveness of those rights. The answer was to mitigate separation of powers concerns, acknowledging room to administrative deliberation in designing public policies. Administrative law will grow as a relevant tool in promoting social rights. Frequently, whenever a lawsuit is filled, administrative regulation will be the only parameter a judge will have to decide.

Here is the point in which recent history took its toll. Administrative law was accept as means to regulate and promote socioeconomic right, in face of legislative inertia. However, the Brazilian society in general, haunted by a three-decade dictatorship, was still suspicious about the Executive, and the fairness of its deliberations. Deference to administrative law sounded as abdicating from legitimacy brought by representation when it comes to public choices. Separation of powers is revalued as an obstacle to judicial deference. Administrative law is backed in order to provide application to human rights – but always subject to broad judicial review. Despite the internal incoherence in that understanding, this is why deference was almost abandon as criteria in Brazilian Courts.

[7] Manoel Gonçalves Ferreira Filho, *Fundamental aspects of the 1988 Constitution*, *in* PANORAMA OF BRAZILIAN LAW 11 (Jacob Dolinger & Keith S. Rosenn eds., 1992).
[8] Keith S. Rosenn, *Brazil's new constitution*: *An exercise in transient constitutionalism for a transitional society*, 38 AM. J. COMP. L. 773, 778 (1990).

VI. RESCUING THE DEFERENTIAL APPROACH

Judicial deference to administrative decisions is still controversial – but it is undeniable that broad scrutiny is an understanding that overburden the Judiciary, with a serious potential to preclude its adequate functioning. In complex and accelerated times, exercising the Executive function requires much distinct expertise, reinforcing the idea that institutional capacities should be take into account. This is an idea that favors deference. On the other hand, the reviewing possibility when it comes to power decisions is a historical achievement, and should not be neglect.

The possible balance between those two compelling arguments should be find in turning the deferential approach not a blockage to judicial scrutiny – but a requirement for deepening the understanding of the procedure and reasons adopted by the Administration in deciding.

According to that proposal, judicial deference in Brazil should involve a three-step approach. First, judges should inquire about the existence and content of the public policy discussed in the lawsuit. Public administration, therefore, should be capable to present its own planning on the matter, and the rationality that oriented that same public choice. The second step involves checking if the public policy is implement according to plan – or if there was any kind of change or adjustment.

These two steps are instrumental to the recognition that the particular institutional capacity that substantiate deference to administrative decisions was rightly exercise in the matter under scrutiny.

The last step would be requiring from the plaintiff that challenges the Executive decision, a necessary dialectic with the justification presented by Public Administration to its own choices. Ruling about a previous choice taken by Public Administration will be the result of an intellectual operation that take into account the initial rationale, testing its reasonableness with the counter argument presented by whomever challenged the public policy.

The core idea in that last step is that the balance between separation of powers and institutional capacities can be achieve through a differentiated burden of justification. This cannot happen if criticism against the administrative decision abstracts from the Administration's reasons. Allowing that judicial scrutiny happens without that dialectic would abdicate the educational potential that a lawsuit can always held when it comes to a better understanding about the Executive duties and constraints.

The central proposition is that judicial deference to administrative choice is still a useful tool - as long as it relies in a known and reasonable justification on the administrative choice, considering the available options. This is a natural development of the strengthening of a democratic society.

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