The (necessary) normative improvement of the Brazilian administrative process: the reform proposed by PL no. 2,481/2022*

O (necessário) aprimoramento normativo do processo administrativo brasileiro: a reforma proposta pelo PL nº 2.481/2022

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ABSTRACT

This article aims to analyze the procedural action of the Public Administration in the form of Law no. 9,784/1999, as well as the reform proposed by bill no. 2,481/2022. The considerations and perspectives presented here aim

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to create greater incentives for the use of the administrative process as a powerful and main instrument-provision for the resolution of disagreements and controversies between administrators and Administration. The subsidies offered are based on the assumption that the procedural administrative action, in addition to being an effective guardian of the legality of public decisions, must be a worthy bearer of trust and effectiveness of the performance of the Public Power, with recourse to the Judiciary being a residual solution. The research methodology is bibliographic, and its objective is to highlight the importance of the procedural action of the Public Administration and to describe and analyze the proposals formulated in PL no. 2,481/2022.

KEYWORDS

administrative law — administrative process — legal reform — Law Project number 2,481/2022 — innovations

RESUMO

O presente artigo tem por objetivo analisar a atuação processual da administração pública, na forma da Lei nº 9.784/1999, bem como a reforma proposta pelo Projeto de Lei nº 2.481/2022. As considerações e perspectivas aqui apresentadas almejam criar maiores incentivos para a utilização do processo administrativo como instrumento-providência potente e principal para a resolução de desencontros e controvérsias entre administrados e administração. Os subsídios ofertados partem do pressuposto de que o agir administrativo processualizado, para além de guardião efetivo da juridicidade das decisões públicas, deve ser um prezável portador da confiança e efetividade da atuação do poder público, sendo o recurso ao Judiciário solução residual. A metodologia da pesquisa é bibliográfica e seu objetivo é o de realçar a importância da atuação processual da administração pública e de descrever e analisar as propostas formuladas no PL nº 2.481/2022.

PALAVRAS-CHAVE

direito administrativo — processo administrativo — reforma legislativa — PL nº 2.481/2022 — novidades

1. Introduction

The public administration model required for a democratic state governed by the rule of law depends on a suitable administrative process, to implement the will of the state. Administrative action must always follow a procedure, which varies according to the complexity of the object: at times, it will be simpler and for the sole purpose of documenting acts; at other times, it will take on a more detailed form, to facilitate the adversarial system and ample defense.[1] In other words, the administrative process creates and legitimizes acts of public administration. Hence, we acknowledge the indispensable role, notably after the promulgation of the 1988 Constitution, of the administrative process as a mechanism for democratic systematization of public management. This text will consider the relevance of the administrative process for the formation of governmental will in a state of law, with particular focus on the reforms proposed by Senate Bill no. 2,481/2022. The methodology combines exploratory qualitative research and bibliographic review, to explore the suitability and adequacy of related normative improvements to the content of the federal law on administrative procedure.

Thus, we focus on specific topics covered by the reform of the common administrative procedure law, in accordance with the proposal contained in Bill no. 2,481/2022, originating in the Federal Senate.[2] In Brazil, the issue of administrative procedure gained prominence with enactment of Law no. 9,784/1999, a regulatory framework which heralded a new phase due to its structuring nature. The law was soon regarded as a paradigm, serving as a model for other federative entities and, at times, filling gaps, with judicial approval, in the discipline of administrative processes of subnational entities.[3] A landmark

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1 Throughout the text, and despite debate on the matter, the words administrative process and procedure are considered synonymous. Both entail a set of intermediate acts issued by the public administration, subject to the adversarial system and broad defense, towards a final objective, manifesting its will.

2 The aforementioned bill was presented to the Senate by Senator Rodrigo Pacheco and arises from a preliminary bill created by a committee of jurists established by Joint Act of the Presidents of the Federal Senate and the Supreme Federal Court No. 1, 2022, published in *Federal Senate Journal* of 23/FEB/2022. The committee, responsible for draft legislative proposals that streamline, unify and modernize the national administrative and tax process, was chaired by Minister Regina Helena Costa, of the Superior Court of Justice (STJ), with Professor Valter Shuenquener de Araujo as rapporteur and coordinator. Professors Gustavo Binenbojm, Patrícia Ferreira Baptista, Flávio Amaral Garcia, Alexandre Aroeira Salles, Maurício Zockun and Andre Jacques Luciano Uchoa Costa also participated in the subcommittee.

3 See Summary no. 633 of the STJ: "Law no. 9,784/1999, especially with regard to the statute of limitations for review of administrative acts within the scope of the federal Public Administration, may be applied, in a subsidiary way, to states and municipalities, if there is no specific rule regulating the matter".

piece of legislation, with an air of completeness and mature rationality, it, nevertheless, needs updating. Following its enactment in 1999, and with the new developments it embodied, administrative law began to incorporate and disseminate new provisions and modern theories and tools to improve administrative performance. The law of administrative procedure, then, is subject to significant claims and aspirations. It should, ideally, be wide-ranging, not just in scope, but in terms of its power and influence in the national territory, fit to resolve conflicts between those administered[4] and the public administration. Its object is an end, not a means, to social pacification, to reduce or eliminate the sense of undergoing a labyrinthine test of will. Indeed, the administrative process must be fit to address issues, with the same standards and rigor expected of a judicial process. Thus, in a spirit of appreciation, ambition and trust, we will consider ways of improving the administrative process, its dynamics and procedural functioning, based on the reform of the seminal administrative process law, Law no. 9,784/1999. A surgical reform of this law is required to make it more modern, efficient and in tune with the times.

2. Administrative procedure in the current legal system

The procedural model, judicial or administrative, characterized by a sequence of measures and the potential of the interested party to influence intermediate acts and the final authoritative act, through adversarial proceedings and broad defense, is a defining feature of a democratic State. It is enshrined in section LV of article 5 of the Constitution of the Republic,[5] a fundamental clause considered a key provision for administrative procedures.[6] It is a norm that ensures basic freedoms in the face of public authority, with an impact on administrative and judicial dynamics. Section LIV[7] of the same article, to a lesser extent, consolidates the growing "trend of *proceduralization* of administrative activity reinforced by the

[4] The use of the word "administered" does not denote any situation of passivity on the part of the interested party in relation to the public administration. The choice of the term is intentional. When referring to "administered", the idea of both natural and legal persons is conveyed, in contrast to the reductive term "citizens", which, in addition to overlooking legal persons, refers, strictly speaking, only to those with electoral status.

[5] Art. 5, LV, CF: litigants, in judicial or administrative proceedings, and defendants in general are guaranteed the right to a hearing and full defense, with the means and resources inherent thereto.

[6] MEDAUAR, Odete. *A processualidade no direito administrativo*. 3. ed. rev., ampl. e atual. Belo Horizonte: Fórum, 2021. p. 88.

[7] LIV—no one shall be deprived of his liberty or property without due process of law.

1988 Constitution".[8] In other words, in relation to regulating acts, the administered person has the right to due process of law, guaranteed by the constitutional order. Thus, the administration has the legal duty to respect the guarantees and rights granted by the Constitution and the law, through impartial actions and measures. The public administrator, particularly when the rights and interests of third parties, private or otherwise, are at stake, must be guided by rules and principles, implementing processes based on guarantees, rights, and duties. Any other path naturally leads to arbitrariness, irrationality, and irregularity. *Procedurality*, the exercise of administrative functions, gears the administrative act towards public objectives, dismissing deviations and omissions which abuse the foundational statute of rights and guarantees. This phenomenon may be termed a "procedural filter".[9] In Gomes Canotilho's view, the requirement of a legally adequate procedure for the development of administrative activity is an irreplaceable dimension of administrative behavior with respect to the democratic rule of law.[10] Thus, from common administrative accountability, through to disciplinary and regulatory, and administrative processes, and other typologies, federated entities issue numerous norms and protocols, established in law. It is, then, through the administrative process that the public administration promotes a constitutionally valid interaction with the administered, in compliance with precepts and forms, above all upholding the adversarial system and right to ample defense. The administrative decision, by definition a deliberate act of will and intelligence, should be, far from random, the product of a fully legal, rational and reasonable procedure.[11]

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[8] In the words of Odete Medauar, items LIV and LV of art. 5 of the Federal Constitution together guarantee an administrative process that allows the administrator to present their defense, evidence, counter arguments, in short, the possibility of influencing the formation of the final result (Medauar, *processualidade no direito administrativo*, *op. cit.*, p. 96-97).

[9] Odete Medauar's classic work on the subject is highly recommended, especially for a comparative law course on administrative procedural matters. As the author notes, "[…] power, in essence, consists, given a relationship between people, in the predominance of the will of one over the others; in a relationship between bodies, in the predominance of one over the others. The exercise of power, in a State of Law that recognizes and guarantees fundamental rights, is not absolute; it is channeled towards an end, implies duties, burdens, subjections, and is transformed into a function, which leads the system to determine the filter of procedurality in various actions vested with power". Medauar, *A processualidade no direito administrativo*, *op. cit.*, p. 34.

[10] CANOTILHO, José Joaquim Gomes. *Direito constitucional e teoria da Constituição*. 7. ed. Coimbra: Almedina, 2003, p. 274-275.

[11] Depending on the classification, the scope may be larger, as Nelson Nery Costa points out in his list of eight types of administrative processes: (a) administrative process of procedure, (b) administrative process of granting, (c) administrative process of public restriction on private property, (d) administrative process of control, (e) administrative process of management, (f) administrative process of punishment, (g) administrative disciplinary process and (h) administrative fiscal process (COSTA, Nelson Nery. *Processo administrativo e suas espécies*. 4th ed. rev. and ampl. Rio de Janeiro: Forense, 2003. p. 49 et seq.).

Hence, with documentation of the acts of the process, in a sequence guided by the adversarial system and broad defense, the authority, applying dialogical rationality and the law, deliberates carefully, making clear the reasons it reached a particular result.[12] In other words, while those governed have the right to know the basis for acts that affect their subjective legal circumstances, the public administration is obliged to supply its reasons,[13] in a dialectical manner, indicating the motives in fact and in law that justify the result, of which the interested party must be aware at the appropriate time. Without such procedural norms, interference in the legal sphere of the administered by the public authorities is illegitimate. In the absence of adequate participation by the interested party,[14] recognized here as the possibility of the administered influencing any process that concerns them, the procedure will not produce the generic effects provided for in the applicable law. Relevant here is the structuralist theory of the Italian Elio Fazzalari, according to which the presence of contradiction is precisely what qualifies the process.[15] The decision to be made in the process is, then, a rationalized consequence of the acts produced in the adversarial procedure. According to Fazzalari, the process is a procedure in which those whose legal sphere the final action is aimed at participate (are authorized to participate): in counterbalance, and in such a way that the author of the act cannot ignore their input.[16] Thus, it

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[12] In a similar sense, with an emphasis on the controllability of the result, Cássio Cavalcante Andrade observes that "[…] the administrative process, alongside other structures, is a means of ensuring, for example, that the final administrative act is produced in such a way that it can be considered legitimate and true, granting the possibility—and this is what seems to matter most—that those interested in its production have appeared in order to 'monitor' its compliance with the law and the facts" (ANDRADE, Cássio Cavalcante. O processo administrativo e sua contribuição para o fortalecimento da confiança na administração pública. *Fórum Administrativo*, Belo Horizonte, a. 14, n. 162, Aug. 2014. p. 17). Through justification better administrative, judicial and even political control of the administrative decision is possible. In the Federal Constitution of 1988, indeed, such justification is a fundamental right. On what is called the administrative law of motivation, see Juarez Freitas for in-depth considerations: FREITAS, Juarez. *Discricionariedade administrativa e o direito fundamental à boa administração pública*. 2. ed. São Paulo: Malheiros, 2009. p. 49-63.

[13] As García de Enterría comments, observing a certain naturalness in how things happen, "*[…] the idea of leading the Power systematically to a judgment where any citizen can complicitly demand justifications for their behavior before the Law is an idea that arises from the State set up by the French Revolution*" (GARCÍA DE ENTERRÍA, Eduardo. *La lucha contra las inmunidades del Poder en el derecho administrativo*. 3. ed. Madri: Editorial Civitas, 1995. p. 13).

[14] Or, see Odete Medauar: *"[…] the valued presence of the individual in the formation of the act"* (Medauar, *A processualidade no direito administrativo*, *op. cit*., 68).

[15] JOBIM, Marco Félix; PEREIRA, Rafael Caselli. O processo como procedimento realizado em contraditório—a teoria estruturalista de Elio Fazzalari. In: GAIO JÚNIOR, Antônio Pereira; JOBIM, Marcos Félix (Org.). Teorias do processo: dos clássicos aos contemporâneos. Londrina: Thoth, 2019. v. 1, p. 201.

[16] FAZZALARI, Elio. Instituições de direito processual civil. Translated by Elaine Nassif. Campinas: Bookseller, 2006. p. 118-119.

is the power granted to the recipients of a given decision to influence its content which gives the process—administrative or judicial—democratic status. These characteristics are highlighted by Brazilian doctrine and case law, which, by way of illustration, do not dispense with a prior administrative process and the hearing of those who will be affected by invalidation of a flagrantly illegal act, no matter how obvious the defect of a given administrative act.[17] Thus, as important as the final result is, the direction taken by the administration in is crucial,[18] so that administrative actions respect legality.[19] Finally, as a fundamental guarantee that ensures individual rights and freedom, the administrative process safeguards the administered against the force and power of the administrative authority which, to express itself legitimately,[20] must observe the norms, paying attention to standards, opportunities[21] to avoid arbitrariness, or abusive actions that violate the complex of individual rights concerned, in accordance with the republican and democratic principle.[22]

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17 BACELLAR FILHO, Romeu Felipe; PIVETTA, Saulo Lindorfer. O regime jurídico do processo administrativo na Lei nº 9.784/99. *A&C—Revista de Direito Administrativo & Constitucional*, Belo Horizonte. a. 14, n. 58, p. 114, out./dez. 2014.

18 The Portuguese jurist Paulo Otero are instructive in this matter, on administrative principles, "[…] the procedure that the Public Administration follows to make its decisions also assumes relevance for citizens: it is not enough to guarantee the material or substantive legality of what is decided, it is also necessary to guarantee the legality of the way in which the decision is reached" (OTERO, Paulo. *Manual de direito administrativo*. Lisboa: Almedina, 2016. v. 1, p. 389).

19 According to Vitor Rhein Schirato, "[…] it is no longer acceptable for the Administration to act divorced from constraints, tied only to a legislative attribution of competence, in an absolutely restricted conception of legality. Legality cannot, in the context of the expansion of constitutional texts and amplification of fundamental rights as the basis and limit of state action, continue to be seen as a simple mathematical operation of the public administrator applying the law Legality is, evidently, much more: it is proof that the Public Administration acted, at all times, in accordance with the legal system. It is precisely a notion of legality" (SCHIRATO, Vitor Rhein. Legitimidade processual e tipos de processo administrativo. *Interesse Público*, Belo Horizonte, a. 12, n. 62, p. 84, Jul./Aug. 2010).

20 In a similar sense, see: SANTOS, Marcos André Couto. O processo administrativo e sua relevância perante o processo judicial. *Revista Brasileira de Direito Processual*, Belo Horizonte, a. 19, n. 75, p. 155, jul./set. 2015.

21 As Paulo Otero comments, "[…] the procedural participation of citizens embodies respect for the adversarial system and the adversarial system fulfills the administrative rule of law" (Otero, *Manual de direito administrativo*, *op. cit.*, p. 395).

22 As Paulo Sarno Braga notes, the predicate of democracy is demonstrably present and qualified by the action in contradiction, verifiable in administrative, legislative and jurisdictional processes, and even in "infra-state" processes, of a private nature, based on the autonomy of the will, such as arbitration processes, deliberation in associations, societies, etc. (BRAGA, Paulo Sarno. Norma de processo e norma de processo: o problema da repartição de poder mínima constitucional no direito constitucional brasileiro. Salvador: JusPodivm, 2015. p. 114-115). In other words, the horizontal effectiveness of fundamental rights is central, based on the perception that the guarantee of adversarial proceedings and broad defense is exercised not only with respect to public authorities, but also among private individuals.

3. The paradigmatic role played by Law no. 9,784/1999

Designed to regulate the so-called common administrative process at the federal level, Law no. 9,784/1999 took on the role of guiding actions of the public authorities in their legal relations, especially through its general rules on procedure, given the absence of material limitations as to the type of process to which it applies. In fact, as stated in article 69, the aforementioned law is assumed to be a subsidiary rule of application in relation to specific administrative processes governed by a specific law.[23] It was developed with an expansive character, notably in view of the need for a minimum procedural and principle-based standardization at the federal level. Currently, however, it needs improvements, which will be discussed in the next topic. Law no. 9,784 is coterminous with Constitutional Amendment No. 19/1998, which, among other changes, added the principle of efficiency to the *head paragraph* of art. 37 of the Constitution of the Republic. It is, therefore, yet another element, introduced in that period, for the reform of the State apparatus.[24]-[25] The text, which is very technical and thorough, is a result of the efforts of a renowned commission of jurists coordinated by the late professor Caio Tácito.[26] Designed to regulate the federal administrative process, Law no. 9,784/1999 gradually became a type of general rule applicable not only to federal bodies and entities, but to other federated entities which lacked norms on the subject. At times, it stimulated enactment of a homologous domestic law, at other times it filled the gap where there was no local

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[23] Law no. 9,784/99. Art. 69. Specific administrative procedures will continue to be governed by their own law, with the provisions of this Law applied only subsidiarily.

[24] As Octavio Penna Pierante notes, Law no. 9.784/1999, notwithstanding possible theoretical divergence, followed a similar path to EC no. 19/1998. It reiterated the constitutional principle of efficiency, in relation to others, such as objectivity in serving public interest and adequacy of means and ends, proscribing obligations other than those required to serve the public interest (PIERANTE, Octavio Penna. *O processo sem fim*. Brasília: Universidade de Brasília—Faculdade de Comunicação, 2021. p. 69).

[25] To this end, the explanatory statement of the project which originated Law no. 9,784/99, EM no. 548/1996, was signed by the Minister of State for Federal Administration and State Reform Luiz Carlos Bresser-Pereira.

[26] Besides the coordinator, the commission was initially made up in 1995 by professors Odete Medauar and Maria Silvia Zanella di Pietro and by professors Inocêncio Mártires Coelho, Diogo de Figueiredo Moreira Neto, Almiro do Couto e Silva and José Carlos Barbosa Moreira. In January 1996, professors Adilson de Abreu Dallari, José Joaquim Calmon de Passos, Paulo Eduardo Garrido Modesto and Carmem Lúcia Antunes Rocha were included.

equivalent standard.[27] As a general law applicable at federal level, the legislation in question coexists harmoniously and simultaneously with other sectoral laws on administrative procedures.[28] It is, therefore, restricted to the establishment of basic standards, to protect the rights of the administered, and fulfill administrative purposes. We may note, here, the relative—and healthy—minimalism of the administrative procedure law, which does not catalog and distinguish procedural types:[29] "[…] it is a minimalist law, which says little, but speaks with certainty".[30] Notwithstanding, as said, certain aspects require attention. The Law, when guiding the actions of public authorities, introduced legal forms, parameters and criteria with the effect of rationalizing, guiding and systematizing the procedural actions of bodies and entities. The clauses of the sole paragraph of article 2 indicate, for example, a minimum observable guideline, constituting a repertoire of "good administrative procedure" when the rights or interests of those administered are at stake.[31]

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[27] This is the case, for example, with the STJ, which understood that Federal Law no. 9.784/1999 has subsidiary applicability to entities of the Federation which lack their own legislation, in a pragmatic compromise solution, to adequately protect the rights of the administered, granting legal security, and to the administration, in an environment of reasonable objective good faith. For illustrative purposes, see the following: RMS 35033/RS, min. rel. Sergio Kukina, 1st Term, j. 15/OCT/2015; AgRg in AREsp 263635/RS, rel. min. Herman Benjamin, 2nd Class, j. 16/MAY/2013.

[28] An example of the administrative disciplinary process in the public sector, provided for in Law no. 8.112/1990.

[29] In this regard, see: SUNDFELD, Carlos Ari. *Direito administrativo para céticos*. 2. ed. São Paulo: Malheiros, 2017. p. 294. According to this author, the option, in the Brazilian case, was for a relatively small, simple text, without conceptual pretensions; essentially guidelines, with few rules (p. 299). He continues by stating that "[…] it is just another law; a relevant law, it is true, but it is neither the spiritual center nor the synthesis of Brazilian administrative law. It is a supporting actress, whose style does not seek to draw excessive attention from the audience" (p. 300).

[30] MENDONÇA, José Vicente Santos de. *O Direito Administrativo brasileiro entre escombros e possibilidades*. Available at: https://www.jota.info/opiniao-e-analise/colunas/publicistas/o-direito-administrativo-brasileiro-entre-escombros-e-possibilidades-12042022. Accessed on: 5 Aug. 2022. The aforementioned author, defending minimalism in the reform of Law no. 9,784/1999, notes that it should be updated to "[…] make formalities more flexible, deal with repetitive processes, admit procedural conventions, regulate administrative silence, face bis in idem, open up to technology".

[31] Art. 2. The Public Administration shall comply with, among others, the principles of legality, purpose, motivation, reasonableness, proportionality, morality, full defense, the adversarial system, legal certainty, public interest and efficiency.
Sole paragraph. In administrative processes, the following criteria will be observed, among others:
I—acting in accordance with the Law;
II—meeting purposes of general interest, with the total or partial waiver of prohibited powers or competences, unless authorized by law;
III—objectivity in serving the public interest, prohibiting the personal promotion of officials or authorities;
IV—acting in accordance with ethical standards of probity, decorum and good faith;

The legal norm also regulated the rights (active legal positions) and duties (passive legal positions) of those administered, identifying positions of advantage (or prerogatives) and, at the same time, situations of subjection, with duties required of the participants in the administrative process.

Given its effectiveness as a paradigmatic legal act, the majority of subnational entities reproduced, in general, the wording of Law no. 9,784/1999. The legal regime set out therein, which guarantees implementation of constitutional precepts, led to a better understanding of the limits of administrative activity in a democratic state governed by the rule of law. The Union, with its inherent protagonism, played a key role in the dissemination of a new administrative culture, reproduced by the other federated entities in its essential aspects.

More than 23 years after its enactment, Law no. 9,784 remains a key text that embodies the ideal of public administration sought by the 1988 Constitution. Its precepts are opposed to authoritarianism, arbitrary and unfounded discrimination, favoritism, personalism, persecution, misuse of purpose, abuse of rights, and all species of illegalities. Furthermore, the Law brings stability and predictability, providing advance knowledge of what can and should happen in formulating state will.

It is a noteworthy public law and, although relatively recent, embodies the prudence and restraint of the most enduring. This premise should be highlighted before discussing aspects of reform. Change is needed, not because the original text is inferior, but since, to remain relevant, it must evolve and adjust to new developments; to fit the times.

V—official disclosure of administrative acts, except in cases of confidentiality provided for in the Constitution;
VI—adequacy of means and ends, prohibiting the imposition of obligations, restrictions and sanctions to a greater extent than those strictly necessary to meet the public interest;
VII—indication of the factual and legal assumptions that determine the decision;
VIII—compliance with the essential formalities to guarantee the rights of those administered;
IX—adoption of simple forms, sufficient to provide an adequate level of certainty, security and respect for the rights of those administered;
X—guarantee of the rights to communication, to present final arguments, to produce evidence and lodge appeals, in proceedings that may result in sanctions and in litigation situations;
XI—prohibition of charging procedural expenses, except as provided for by law;
XII—ex officio initiation of the administrative process, without prejudice to the actions of interested parties;
XIII—interpretation of the administrative rule in the manner that best guarantees fulfillment of the public purpose for which it is intended, with retroactive application of a new interpretation prohibited.

4. Regulatory improvements and possible pathways: Bill no. 2,481/2022

The present study arises, in large part, from the creation, in February 2022, by the Federal Senate and Federal Supreme Court (STF), of the Commission of Jurists for modernization of Brazilian administrative and tax process legislation.[32] The object of the measures was for experts to prepare draft legislative proposals and present suggestions and solutions to unify, modernize and, above all, streamline procedures that impact the lives of citizens.[33] In September 2022, the commission's work was finalized and delivered to the presidents of the Senate and the STF. In the same month, the administrative process reform findings became Bill no. 2,481/2022.[34]

As Edilson Pereira Nobre Júnior observes, the administrative procedure configures a model, whose functionality is in continuous development,[35] requiring constant improvement. Based on this premise, two of the Powers of the Republic have launched an initiative that, among other objects, aims at containing excessive judicialization.

In fact, the most urgent factor for improving the administrative machinery, in terms of the procedural actions of public authorities, is the pressing need to decongest the Judiciary. In other words, since public administration is the chief litigant,[36] it is to be expected that many of the conflicts could be resolved extrajudicially, in the administrative sphere. The Judiciary, accordingly, is behind this move: to reinforce the administrative process as an instrument for

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[32] Ato Conjunto dos Presidentes do Senado Federal e do Supremo Tribunal Federal nº 1, de 23 de fevereiro de 2022. Available at: https://legis.senado.leg.br/sdleg-getter/documento?dm=9087234&ts=1656022581865&disposition=inline. Accessed on: 6 Aug. 2022.

[33] As highlighted by the President of the Senate, Rodrigo Pacheco, at the inauguration of the Committee of Jurists, the expectation is to implement reforms that reduce the weight of demands on overwhelmed judicial structures. At the end of 2020, he noted, more than 62 million lawsuits were in progress in Brazil; and that year, 25.8 million lawsuits were filed and 27.9 million cases ruled on. Available at: https://www12.senado.leg.br/noticias/materias/2022/02/23/criada-comissao-de-juristas-para-reformar-os-processos-administrativo-e-tributario. Accessed on: 21 Sept. 2022.

[34] Em 16 de setembro de 2022, o senador Rodrigo Pacheco decide apresentar o texto recebido da comissão de juristas como projeto de lei no Senado. Available at: https://www25.senado.leg.br/web/atividade/materias/-/materia/154735. Accessed on: 20 Sept. 2022.

[35] NOBRE JÚNIOR, Edilson Pereira. Law 9784/99 and administrative procedure: 20 years of a paradigm. *Revista de Direito Administrativo e Infraestrutura*, v. 8, p. 129-149, jan./mar. 2019.

[36] The study *Justice in numbers 2022,* carried out by the CNJ, presents information about the main litigants and those with the most cases in progress are from sectors of Public Administration, including Defense, Social Security and financial and insurance activities" (CONSELHO NACIONAL DE JUSTIÇA. *Justiça em Números 2022*. Brasília: CNJ, 2022, p. 32).

resolving disputes involving public authorities, Hence the key role of the STF in constituting the Commission of Jurists.

From another perspective, as highlighted by Carlos Ari Sundfeld, the emergence or revision of general laws on administrative procedures is regarded as a key strategy for countries to advance, and consolidate, legal control over public administration decision-making.[37] In fact, the systematization of an administrative procedure, with adequate participation of the interested party, provides a bulwark against exorbitance, improper deviations or excessive discretion, as noted. It is, therefore, a vital measure for improving the business environment, as well as effectively resolving disputes (and appeasing the skeptics). A high-quality, reliable, well-conducted and timely administrative process serves the interests and satisfies the demands of the administered

In a context in which *proceduralization* of administrative activity involves greater visibility, giving legal certainty to the interests involved, the cult of recourse to the Judiciary must be proportionally limited and discouraged.

In this sense, the effort to reinforce the attractiveness and quality of the administrative process must facilitate easy access to administrative channels for the extrajudicial resolution of conflicts, not specifically serve as a stimulus for a progressive review of administrative activities before the Judiciary. Indeed, as the administrative process is the real guardian of administrative legality, so that more can be demanded of it, the effective motive and result of procedural actions[38] should be focused on addressing conflicts, resolving problems and relieving the Judiciary.

In other words, it should be easier for the individual to access administrative channels to ensure their rights compared to the invariably labyrinthine and expensive Judicial route. This greater ease of access is related to more simplified mechanisms for exercising administrative claims, i.e., directness in initiating the administrative route, and persistence until the final resolution, in an expedited fashion. In fact, since the administrative procedure is the model that currently actualizes the legal-administrative relationship, it is surprising that it is not given greater attention

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[37] Sundfeld, *Direito administrativo para cético*, *op. cit.*, p. 291.

[38] Although concerning a very different reality from Brazil, see the articles in the special edition of *The Legal Agenda*, entitled "*La justice administrative: qui protège l'État? Qui le défend?*", focused on the administrative jurisdiction of Lebanon, in the Lebanese newspaper *L'Orient-Le-Jour*. Available at: https://www.lorientlejour.com/article/1221950/la-justice-administrative-qui-protege-letat-qui-le-defend-.html. Accessed on: 4 Aug. 2022.

Bill no. 2,481 adopts the thesis that the subject of "administrative procedure" is concurrent jurisdiction, in accordance with the provisions of art. 24, XI, of the Constitution of the Republic.[39] In this way, the Union exercises its authority to legislate on general rules regarding administrative procedures and Law no. 9,784, once amended, will convey, according to the new wording proposed for article 1, "general rules of administrative procedure and procedures in administrative procedural matters, applicable to the direct and indirect Public Administration of the Union, the States, the Federal District and the Municipalities". The reform will provide national legislation on the matter.

Another issue of concern for the Committee of Jurists concerns administrative precedents. Greater legal rationality and convenience is required, through efficient dissemination of administrative precedents, with reduced personalism and an individual sense of justice on a case-by-case basis.[40] To this end, Bill no. 2,481 proposes a new chapter for Law no. 9,784, specifically to regulate the scope of decisions. Similar cases should be decided by the administration in a like manner. Administrative and judicial decisions concerning more than one interested party must be expanded from within, to reach those not originally affected by it. The proposal advances equality and fosters greater predictability.[41]

The issue of an electronic administrative process also appears in Bill no. 2,481. Currently, the digital interfaces of public administrations are, as a rule, fragile and incomplete. Laws and decrees, commonly, cannot be found on the corresponding official websites of states and municipalities. The information is incomplete, asymmetrical and, at times, where it exists, difficult to locate and follow, lacking user-friendly platforms and search engines.

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[39] Art. 169. It is the responsibility of the Union, the States and the Federal District to legislate concurrently on: XI—procedures in administrative matters.

[40] As Jair Teixeira dos Reis and Lucas Gil Carneiro Salim note, the system of precedent provides a solution to decisionism, introducing practical rationality and the search for legal certainty based on a reasoning structure that takes into account the text and the context (REIS, Jair Teixeira dos; SALIM, Lucas Gil Carneiro. Racionalidade, previsibilidade, precedentes e administração pública. *Quaestio Juris*, Rio de Janeiro, v. 12, n. 1, p. 399-422, 2019).

[41] Predictability is one of the predicates highlighted by Éric Sagalovitsch, in an article on the evolution of the quality of the French administrative process, according to whom, in effect, "*[…] la prévisibilité est un* élément *essentiel pour les acteurs de la vie* économique *et facilite la recherche avant ou pendant le procès administratif d'une solution transactionnelle*". He notes, further, that a high number of adversarial proceedings exercised within administrative jurisdiction also contributes to the quality of French administrative justice. SAGALOVITSCH, Éric. Bilan et perspective d'évolution de la qualité du procès administratif: le point de vue d'un avocat. *Revue française d'administration publique*, v. 159, n. 3, p. 715-726, 2016. Available at: https://www.cairn.info/revue-francaise-d-administration-publique-2016-3-page-715.htm. Accessed on: 3 Aug. 2022.

Regarding administrative processes, the situation is scarcely different. The lack of clarity about what the administration does and decides by practical means leads to distrust and, consequently, a need to coordinate administrative action. Adoption of the electronic administrative process is urgent, for greater transparency and to simplify the relationship between the citizen and the administration, through digital means, or facilitate the mass collection of data (*big data/data lake*), to provide information for the development of public policy.

Specifically, the increase in transparency provided by procedural virtualization can assist in combatting corruption and ensure that similar cases have the same outcome. Incidentally, as with the Paris Administrative Court, a monthly selection of judgments is made available on the website, with a commentary and appropriate anonymization of sensitive data.[42] The adoption of a similar measure, in terms of greater transparency and pragmatism, on the part of public administrators and those administered, encourages and incorporates greater responsibility, including on the part of those with viable claims vis-à-vis the authorities.

Speed, rationality and predictability are not incompatible, of course, with procedural acts in electronic form. Given the advances in the digitalization of administrative activities, it is inconceivable that administrations will continue to, or insist on, using analog methods. Physical records and paper trails are notoriously time-consuming and cumbersome. The credibility and security expected of administrations depends in large part on the implementation of digital technologies and interfaces.

From a regulatory point of view, several decrees have sought to provide public administration with improved electronic efficiency. Regarding administrative simplification, for example, Federal Law no. 13,726/2018 rationalizes administrative acts and procedures and is applicable to all federated entities. Exemption from notarization and authentication of documents are measures that, provided for in scattered legislation, are by no means common in the administrative process. Federal Law no. 14,129/2021, similarly, provides

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[42] According to Sagalovitsch, "*[…] le tribunal administratif de Paris présente sur son site une sélection mensuelle des jugements rendus avec pour chaque jugement un commentaire et le jugement anonymisé dans son intégralité. La communication en accès direct et gratuite de ces informations générales contribue à la transparence des juridictions administratives*" (Sagalovitsch, Bilan et perspective d'évolution de la qualité du procès administratif: le point de vue d'un avocat, *op. cit.*, p. 715-726).

principles, rules and instruments for Digital Government and increased public efficiency.

On the subject of digital transformation, Bill no. 2,481 offers, in line with its normative status, a minimalist approach to the electronic administrative process.

The text identifies objectives of the electronic administrative process, such as simplifying and reducing the duration of procedures and facilitating the exercise of rights, while ensuring data protection and access to information. There is a concern with digital inclusion, as the Bill requires the administration to ensure the means to access and consult electronic systems. AI is endorsed, provided its use is "transparent, predictable, auditable, previously informed to interested parties and allow the review of its data and results".[43]

In the discipline of nullity theory, Bill no. 2,481, inspired by LINDB and the new Law on Public Tenders and Administrative Contracts, considers validation as the default option and invalidation an extreme measure. Invalidation, where unavoidable, must be accompanied by modulation of effects and a consequentialist approach that considers its economic, financial, social and environmental impact. The term of the administration's right to annul acts that result in favorable effects for the recipients remains five years, but, in cases of bad faith, the proposed invalidation term is 10 years. This contradicts the thesis that bad faith makes it possible to invalidate an administrative act at any time.

Bill no. 2,481 fosters a dialogical and consensual public administration model; not only when it regulates public hearings and consultations, but when it creates legal business, a provision which allows respective parties to adjust procedures to their specificities.

The difficult issue of administrative silence was also considered in the reform proposal, judged to be at odds with the clear and concrete rights of interested parties. Bill no. 2.81 discusses hypotheses in which silence will produce different effects: transference (temporarily altering the jurisdiction

[43] Terms suggested by Bill no. 2,481/2022: "Art. 47-E. The use of artificial intelligence models within the scope of the electronic administrative process must be transparent, predictable, auditable, previously informed to interested parties and allow the review of its data and results. Sole paragraph. Artificial intelligence models should preferably use open codes, facilitate integration with systems used in other public bodies and entities, and enable their development in a collaborative environment."

to decide the matter),[44] negative (equivalent to a tacit rejection)[45] and positive (tacit acceptance).[46] The text of the project defines "repeated omission" as "the frequent failure to comply with the deadline provided for in art. 49 of this law or established by specific rule for the assessment of administrative requests".[47] Any interested party may request correction of this repeated omission, in which case the administration must present an action plan showing how it will comply with the legally established deadlines.

In accordance with the Economic Freedom Law, Law no. 13,874/2019, and the Regulatory Agencies Law, Law no. 13,848/2019, Bill no. 2,481 presents a proposal for a Regulatory Impact Analysis and a Regulatory Result Assessment, the latter to verify the impact of current regulatory acts. According to the proposed wording for art. 50-A of the Administrative Procedure Law:

> Proposals for the publication, amendment and revocation of normative acts of general interest to those administered, economic agents and users of public services under the jurisdiction of a body or entity of the direct or indirect Public Administration of the Union, States, Federal District and Municipalities must be preceded by a regulatory impact analysis, which will contain information and data on the possible effects of the normative act on costs, benefits and risks for those affected.

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[44] Art. 49-H. The omission or refusal of the authority to decide after the expiration of the period provided for in the head paragraph of art. 49 shall transfer, for the same period, the decision-making power to the higher authority, whenever the law does not provide otherwise, without prejudice to the liability of whoever caused the delay. § 1 In the case of the head paragraph, the authority that should have decided the case may, at any time, before the decision of the higher authority, remedy the omission.
§ 2º The transfer of competence referred to in the head paragraph does not eliminate the need for adequate instruction of the process, with prior completion of all technical stages provided for by law.
§ 3 The higher authority shall be responsible for ensuring compliance with the provisions of § 2.

[45] Art. 49-H. […] § 5 Administrative silence will have the effect of tacit rejection of the request made by the interested party in processes that result in:
a) the transfer of powers relating to the public domain or service to the applicant or to third parties;
b) which involve the exercise of activities that are harmful to the environment, as established by the respective competent environmental body;
c) patrimonial liability and financial commitment of Public Administrations.
§ 6 In cases of tacit rejection due to administrative silence, an administrative appeal will be possible, with the competent authority responsible for expressly deciding within the legal time limit.

[46] Art. 49-H. § 4 In cases of omission or refusal to decide and whenever the law does not provide otherwise, the Public Administration may attribute, in a normative act or contract, effects of tacit acceptance or transfer of competence to decide.

[47] Excerpt from the proposed text for art. 49, I, § 1, of Law no. 9,784/1999.

The topic of the administrative sanctioning law (DAS) was duly considered in Bill no. 2,481/2022, with a specific chapter on the matter. The following points should be highlighted: i) enumeration of DAS principles (art. 68-A); ii) provision that effective functioning of internal mechanisms and procedures, facilitating the report of irregularities and application of codes of ethics and conduct in the legal entity, will be considered in determining the applicable sanction; iii) in the event of more than one administrative sanctioning proceeding, based, in whole or part, on the same facts, the administrative authorities of the same or different administrative spheres and units of the Federation must reduce the processing time and avoid imposing multiple sanctions of the same nature arising from the same fact; iv) guarantee of the chain of custody, with preservation of all evidence; v) communicability of instances also arising from decisions in the civil sphere.

Finally, for the administrative process to be an effective alternative to the judicial process, with a reduction of cases that challenge public authorities in the Judiciary, the procedural method must be fully implemented and expanded, to optimize the work of the public servant and the public they serve. In this context, the proposals made in Bill no. 2,481/2022 help promote best practices of contemporary administrative law, encouraging de-judicialization, greater transparency, procedural simplification, consolidation of decision-making technicality, normative uniformity, the desired consensual solution, protection of legal certainty and trust, and a more expressive sanctioning rationale. This reform, if approved, will indeed be a major leap forward in the normative evolution of public law.

5. Final considerations

It is clear, then, that, although Law no. 9,784/1999 is one of the most important public norms in Brazil, it is in need of reform. This is essential in order to improve the methodical and systematized functioning of the administrative process, making its rules more uniform at a national level; more effective, consistent, prompt, and open to dialogue with the administered.

A more resolute procedural model that produces useful and satisfactory results—both from a formal and material perspective —requires an update of Law no. 9,784/1999, in accordance with the text of Bill No. 2,481/2022, currently under consideration by the National Congress.

The public administration of the future must have a strong focus on process, as an expression of its will, based on the democratic realization of public interest. Implementation of guarantees of effectiveness, resolution and digital transformation require a normative treatment.

Finally, an administrative process that safeguards fundamental rights, constructively resolves administrative disputes, and frees up a congested Judiciary, can transform the role of the public administration, as a leader in building a more effective and responsive system.

An efficient public administration geared to the use of electronic technology will be able to collect data for the formulation of public policy, act with greater transparency, disseminate decisions and guidelines and, overall, strengthen its relationship with the population. The administrative process as a producer of positive externalities goes beyond the relationship between parties. As a whole, such measures, especially those outlined in Bill no. 2,481/2022, are crucial to structuring and strengthening administrations, particularly in terms of dispute resolution. Thus, they can be truly democratic – going beyond their conventional role as guarantors of adversarial process and ample defense—and proactive, alleviating judicial logjams and modernizing the administrative process to meet contemporary demands.

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