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The three dimensions of administrative law*

As três dimensões do Direito Administrativo

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Abstract: My claim is that administrative law has three dimensions: legal, managerial and political. I intend to present them and to discuss their relations with each other. I also plan to show how the tridimensional framework can be helpful and contribute to the development of this branch of law. The tridimensional conception of administrative law provides relevant analytical uses. First, it allows one to understand the dilemmas involved in each administrative choice. Second, it gives meaning to the differences found in the solutions that different jurisdictions give to similar legal problems. Third, it permits to identify and rationalize historical fluctuations that happen inside the same jurisdiction. Fourth, the tridimensional framework has the merit of overcoming a monistic conception of administrative law, which for long fails to capture the complexity of contemporary public administration. And it can open room for a more realistic justification of options inside administrative law.

Keywords: Administrative Law; Dimensions; Legal; Managerial; Political.

Resumo: A minha tese é a de que o direito administrativo possui três dimensões: jurídica, gerencial e política. Eu pretendo apresentá-las e discutir as relações e interações entre elas. Eu também pretendo mostrar como este quadro analítico tridimensional pode ser útil e contribuir para o desenvolvimento deste ramo do direito. A concepção tridimensional do direito administrativo permite, em primeiro lugar, que se compreendam os dilemas envolvidos em cada escolha administrativa. Segundo, ela dá sentido

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às diferenças encontradas nas soluções que diferentes jurisdições dão a problemas jurídicos similares. Terceiro, ela permite identificar e racionalizar flutuações históricas que acontecem numa dada jurisdição. Quarto, o quadro analítico tridimensional tem o mérito de superar uma concepção monística do direito administrativo, que há muito falha em capturar a complexidade da administração pública. E ele abre espaço para uma motivação mais realista das escolhas públicas no direito administrativo.

Palavras-chave: Direito Administrativo; Dimensões; Jurídica; Gerencial; Política.

Summary: **1** Introduction – **2** Which dimensions? – **3** Relations and interferences across the dimensions – **4** Variations across jurisdictions – **5** Historical fluctuations across dimensions – **6** The insufficiency of one-dimensional justifications – References

1 Introduction

My claim is that administrative law has three dimensions: legal, managerial and political. I intend to present them and to discuss their relations with each other. I also plan to show how the tridimensional framework can be helpful and contribute to the development of this branch of law.

The word “dimension” has a few different meanings. I use it here as a synonym of *element*, *aspect* or *component* of a complex whole. One of the goals of this paper is precisely to assert that a full understanding of administrative law issues and debates requires attention to all these aspects. In any case, the problem that I will address here has been treated under different labels elsewhere. In one recent example, Cass Sunstein and Adrian Vermeule talk about the “multiple aims” of Administrative Law.¹ They denounce the fact that some decisions of the US Supreme Court suppose, on the contrary, that this branch of law serves a single goal. Despite the different terminologies used, it is possible to equate the theoretical concerns of these two Harvard Law professors with at least part of mine, as I will show later. I myself have referred to the problem I am addressing now as the “three different goals” of administrative law.² On the other hand, other studies – one of which I have co-authored with Susan Rose-Ackerman – already referred to these same three-dimensionality, but claimed they were elements of the *accountability*³ or elements of the *legitimacy*⁴ of the State, rather than elements of

¹ SUNSTEIN, Cass; VERMEULE, Adrian. The New Coke: On the Plural Aims of Administrative Law. *The Supreme Court Review*, n. 16-23, p. 41-88, 2015. The aims they cite are: preventing the abuse of power, promoting the rationality of policymaking, democratic participation and political accountability, and the promotion of overall welfare.

² JORDÃO, Eduardo. *Controle judicial de uma administração pública complexa*. São Paulo: Malheiros, 2016 (Portuguese version of my PhD dissertation); or JORDÃO, Eduardo. *Le juge et l'administration: entre le contrôle et la déférence*. Bruxelles: Bruylant, 2016 (French version of my PhD dissertation).

³ MASHAW, Jerry L. Judicial Review of Administrative Action: Reflections on Balancing Political, Managerial and Legal Accountability. *Revista Direito GV*, [S.l.], p. 153-170, nov. 2005.

⁴ JORDÃO, Eduardo; ROSE-ACKERMAN, Susan. Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review. *Administrative Law Review*, v. 66, n. 1, 2014.

administrative law itself.⁵ Finally, there are intersections between the concerns of this paper and those of some works published in my home country Brazil that try to identify *the* peculiar legal regime of administrative law.⁶

The tridimensional conception of administrative law provides relevant analytical uses. First, it allows one to understand the dilemmas involved in each administrative choice. Second, it gives meaning to the differences found in the solutions that different jurisdictions give to similar legal problems. Third, it permits to identify and rationalize historical fluctuations that happen inside the same jurisdiction. Fourth, the tridimensional framework has the merit of overcoming a monistic conception of administrative law, which for long fails to capture the complexity of contemporary public administration. And it can open room for a more realistic justification of options inside administrative law. I will develop these points further.

2 Which dimensions?

Administrative law has a legal, a managerial and a political dimension. In this first section I will try to explain each of them. First of all, it might seem odd to claim that *only one aspect* of administrative law is legal in nature. To be sure, every part of administrative law is legal *in the specific sense* that they are elements of a branch of the legal system. I could call this first sense a *first level* legal nature. All the dimensions I cite below share this *first level* legal nature. However, the norms of administrative law regulate different kinds of issues – and some of them are *more intrinsically legal* than others. I could then say that they are *legal in a second level* – a level in which the other norms will have other natures. Try to compare, for example, a rule that establishes the right to petition government for redress of grievances with a rule that creates and organize the action of a regulatory agency. The first one can at least relatively be more appropriately called legal than the second, given that it is more directly connected to legal issues.

⁵ In the same vein, Bruce Ackerman refers to three ways in which institutions can legitimate their action, and his classification, though more readily concerned with constitutional law, is similar to mine: democratic legitimacy, functional specialization and fundamental rights (ACKERMAN, Bruce. The New Separation of Powers. *Harvard Law Review* v. 113, p. 633-725, 2000. P. 639-640). In his own words: “I return repeatedly to three legitimating ideals in answering the question, “Separating power on behalf of what?” The first ideal is democracy. In one way or another, separation may serve (or hinder) the project of popular self-government. The second ideal is professional competence. Democratic laws remain purely symbolic unless courts and bureaucracies can implement them in a relatively impartial way. The third ideal is the protection and enhancement of fundamental rights. Without these, democratic rule and professional administration can readily become engines of tyranny”.

⁶ See, for example, JUSTEN FILHO, Marçal. *Curso de direito administrativo*. 13. ed. São Paulo: Revista dos Tribunais, 2018, chapter 1; and BANDEIRA DE MELLO, Celso Antônio. *Curso de direito administrativo*. 33. ed. São Paulo: Malheiros, 2018, chapter 1.

At the end of the day, what I mean when I say that Administrative law has three dimensions is that *there are reasons of three different natures that justify the regulation of administrative action*. In short, there are legal, managerial and political reasons to regulate the public administration.

2.1 The legal dimension

Public administration is in constant relationship with citizens and private companies. It establishes with them contractual relationships, it expropriates some of their assets, it manages and allocates resources on their behalf, it is responsible for regulating their freedom and their exercise of private activities, it applies fines and other kind of sanctions to them and it even competes with them in some markets. This close and continuous contact generates tensions. In short, administrative action interferes in the private domain, affects citizen's interests and can violate rights. The first dimension of administrative law encompasses efforts to regulate this relationship and to protect the rights of the citizens.

This dimension is salient in rules that limit government action and provide room for action and liberty of individuals, such as those that define the jurisdiction and the powers of administrative agencies. But this aspect of administrative law is also easily captured in efforts to *prevent* violations of individual rights. There is a whole set of rules that (i) create institutions to review administrative action (such as administrative courts, ombudsmen, court of accounts) or (ii) establish procedural tools to prevent or stop potentially harmful administrative actions (different types of actions, such as civil action or class action, and internal procedural mechanisms, such as injunctions and protective measures).

Likewise, the legal dimension of administrative law is clear in rules of a financial nature, such as those providing for the management of public resources. Take for example the rules on public procurement in general, or specifically those that set debt limits for public entities establishing long term contracts. Regarding the first, it is fairly common to predict objective criteria to guide the acquisitions of goods and services, to ensure for example that no provider of goods or services will be favored for their close relationship with officials. With regard to the provisions that set limits on public indebtedness, there is a clear element of public resources protection. These standards are common in long-term contracts in which public administration have financial obligations, such as in the so-called public-private partnerships.

In all the above examples, the legal dimension was revealed through rules that establish a *negative obligation* to public administration: it must *avoid* doing something (i.e. violating rights). But it is also possible to identify efforts to protect the rights of citizens in rules that determine a *positive action* from administrative

entities. The most obvious example comes from the obligation to repair damages caused by public entities. In this case, as a result of a violation of rights, comes an obligation to compensate. But there are other, less obvious examples. Think about the promotion of legal certainty and the protection given to the legitimate expectations of persons in their relationship with public bodies. The government has a duty to provide a consistent and predictable state of affairs in which private activities can be developed appropriately.

The legal dimension is identifiable in efforts to promote the lawfulness of administrative action. But it goes beyond that. In some cases, administrative law will protect the rights of citizens even in the absence of any unlawful action from the government. The best-known example of this hypothesis is called the “theory of unequal public charges”, which preaches the need for repair when a public measure, although lawful, caused particularly significant damage to specific citizens.

2.2 The managerial dimension

The public administrator does not act on his own behalf. He is a servant of the citizens, to whom he provides benefits of different natures, such as the regulation of risky activities, the direct provision of certain economic activities, the competitiveness of the markets or the stability of financial markets. The second dimension of administrative law is directly linked to this circumstance. It comprises the efforts to ensure that these benefits of different natures are provided *efficiently* by the public administration.

It is possible to spot this dimension in efforts to equip the public administration. These measures are intended to structure the administrative apparatus so that it can properly perform its duties. This concern is particularly easy to identify in the course of major changes in the model of the State. Thus, for example, administrative law created the institute of “public enterprises” so that the State could perform its business activity more efficiently. This legal innovation (and the expansion of its use) preceded the accentuation of state intervention in the economy – for example, in the post war periods. Similarly, administrative law created the institute of “regulatory agencies” so that the State could perform more efficiently its regulatory activity. Hence the progressive explosion of these structures at the same time that the States withdrew from direct intervention in the economy to act as arbitrators of private actors in competition.

In addition to these examples of macro legal innovations, there is a whole range of micro measures, sometimes internal to administrative authorities, in order to make them better able to perform their duties. Take, for example, the rule according to which the mandates of the members of a regulatory agency must not

be coincident. This is a strategy to insulate the agencies from the political arena, ensuring that their action is of a technical nature – an institutional design that is more suitable to their duties.

But the managerial dimension can also be identified in measures aimed to broaden the range of possible administrative actions, giving agencies greater flexibility to meet certain public needs. A recent example: in many countries with civil law tradition (such as France and Brazil), governments were not allowed to enter into agreements such as public private partnerships, until the law explicitly established such a possibility.

2.3 The political dimension

The public administration makes numerous *autonomous* choices within the liberty explicitly granted by law or resulting from its indeterminacy. These choices have a political nature, at least in a weak sense.⁷ They convey some kind of weighting of conflicting interests. It is indeed often necessary to prioritize some of them, to the detriment of others. Take for example the decision to expropriate certain residential houses for the construction of a university town, or the decision to build a high-speed route inside a public park, or the choice of a national technological standard for digital television.

In these and many other cases, the government will have to make difficult choices, benefiting some citizens and disadvantaging others. In those cases in which it operates in a political or quasi-political function, it is important to discuss the legitimacy of the options taken by the public administrator. Administrative law does not stand at the edge of this concern: it also has a *political dimension*. The intent to ensure the legitimacy of these administrative choices is clear in measures of two kinds.

First, in efforts to make administrative action adherent to the wishes of the people. Take for example the proliferation of rules requiring (or regulating) the participation of citizens in rules made by administrative authorities. The openness to public participation serves to ensure that their wishes are heard and that the resulting administrative decision is reasonably informed by these inflows.

Second, in initiatives aimed at ensuring *transparency* of administrative action. Think about the rules on publicity or reason giving in administrative decisions, as well as rules concerning access to documents held by public bodies. They are ways to guarantee the legitimacy of administrative action through the dissemination of its most important aspects.

⁷ In *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991), the US Supreme Court famously affirmed that “the resolution of ambiguity in a statutory text is often more a question of policy than of law”.

3 Relations and interferences across the dimensions

The three dimensions presented above are not separate realities. They converse with each other, and this may produce either a mutual reinforcement or the weakening of one dimension to the benefit of the other. In short, the attention to one dimension can *bolster* or *undermine* another.

3.1 Mutual reinforcement

First of all, one measure or rule of administrative law can be interpreted as an expression of different dimensions. Thus, for example, the rules that predict the participation of citizens in the proceedings prior to the implementation of any regulation serve both to increase the democratic legitimacy of the administration (*political dimension*), and to contribute to its quality (*managerial dimension*). The data gathered by the public administration with the participation mechanisms can serve to inform the officials of technical aspects that are essential for an *effective* regulation. But this mechanism also gives them the relevant information about the *preferences* of the citizens, which is essential to the production of a *legitimate* regulation, from a political perspective.

A second possibility is similar to the first, but not entirely equivalent. This is the case where measures aimed at reinforcing a particular dimension end up bolstering (laterally, additionally) also another one. Thus, for instance, it seems that the purpose of the rules on State liability is the protection of the rights of the citizens (*legal dimension*), with the redress for damages caused to them. But the duty to compensate also generates positive consequences for the administrative efficiency (*managerial dimension*). This is so because we can assume that the administrative authorities will seek to improve their activities to prevent further violations of rights that would result in obligations to repair.

3.2 Clashing dimensions

More problematic are the cases in which the efforts towards one specific dimension end up undermining others. In these cases, a balance between these conflicting objectives will be necessary, with the option of privileging one over the other. This weighting and this option may be explicit or implicit, intentional or unintentional – but it cannot be escaped. Any decision taken will necessarily correspond to a specific balance between these clashing dimensions.

Take the example of the judicial review of administrative action. Efforts to control the public administration are particularly related to the protection of the rights of the citizens, and thus to the reinforcement of what we have called the *legal dimension* of administrative law. Indeed, it is reasonable to expect that the more

intense and more frequent the review, the more protected citizens will be against eventual violations of their rights. These efforts toward this dimension, however, may affect the others. In the case of the judicial review of public administration, the most widespread argument in this regard is that an intense judicial intervention in the decisions of public administration could undermine the efficiency of administrative action. A reinforcement of the *legal dimension* could then jeopardize or weaken the *managerial dimension*.

First, the judicial intervention can disrupt and compromise the performance of administrative agencies in different ways. It can limit the range of their options, damaging their flexibility. It can affect the proper time of their action, by imposing unnecessary constraints, making their action too costly and causing their paralysis.⁸ It can affect the coherence of their regulation, by voiding only partially or regionally the measures they have taken.⁹

Second, judicial intervention may end up conveying less efficient public decisions.¹⁰ This risk would result from the substitution of the agency's decisions by those of the courts. In these cases, considering that the agency is usually better placed to take that particular technical decision, for example, there is a potential loss of efficiency in the fact that the decision will be allocated to an institution less able to make it. Basically, here it would be the courts themselves – and not the public administration – offering certain utilities for the citizens. The risk is that they would potentially do it less efficiently, given their comparatively low institutional skills.

These considerations imply that advances in judicial review, despite potentially generating greater rights protection, tend to diminish administrative efficiency. When deciding how much review to allow in a given jurisdiction, this trade-off is unavoidable, even if it is made implicitly. For any option made, there will necessarily be an underlying weighting between these conflicting dimensions of administrative law.

Consider as an example the Chevron Doctrine, established by the American Supreme Court in 1984. According to this doctrine, the issues for which the law does

⁸ See MCGARITY, Thomas O. Some Thoughts on 'Deossifying' the Rulemaking Process. *Duke Law Journal*, v. 41, n. 6, p. 1385-1462, 1992; PIERCE JR., Richard J. Seven Ways to Deossify Agency Rulemaking. *Administrative Law Review*, v. 47 p. 59-95, 1995 and CLARICH, Marcello. *Le autorità indipendenti tra regole, discrezionalità e controllo giudiziario*. Foro amministrativo: TAR, 2002. p. 3858-3871.

⁹ On the problem of the "balkanization of administrative law", see BYSE, Clark. Judicial Review of Administrative Interpretation of Statutes: an analysis of Chevron's Step Two. *Admin. L.J.*, v. 2, p. 255, 1988 and KMIEC, Douglas W. Judicial Deference to Execute Agencies and the Decline of the Nondelegation Doctrine. *Admin. L.J.*, v. 2, p. 269, 1988. p. 282. On the problems of the partial voiding of a regulatory policy, see MOGLEN, Eben; PIERCE JR., Richard J. Sustain's New Canons: Choosing the fictions of statutory interpretation. *U. Chi. L. Rev.*, v. 57, p. 1203, 1990. p. 1239-1243 and STRAUSS, Peter. One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action. *Columbia Law Review*, v. 87, p. 1093, 1987.

¹⁰ See BREYER, Stephen. Judicial Review of Questions of Law and Policy. *Admin. L. Rev.*, v. 38, p. 363, 1986.

not provide clear answer should be construed by administrative authorities – and give rise to judicial intervention only when such constructions are *impermissible* or *unreasonable*.¹¹ The Supreme Court justifies its orientation as a means to allocate decision-making power to the agencies by virtue of their greater political legitimacy and greater technical expertise, when compared to the courts'.¹² It is undisputable, however, that this is done at the expense of a greater protection of rights that could arise from an alternative solution.

To define how and when the courts should defer to the decisions of the public administration, each jurisdiction will devote a specific weighting to these contrasting dimensions. French administrative courts opt for a solution that is the exact opposite of the Chevron Doctrine. In France, ambiguous legislations are to be ultimately construed by the courts.¹³ There is no deference to statutory constructions put forward by administrative agencies. Courts will look for *errors of law* (“erreurs de droit”), subjecting the agency construction to an unlimited standard of review.¹⁴

One way to understand the differences between French and American Law is precisely to read them as a result of the privilege of different dimensions, as I will show in the next item.¹⁵ For now, I should add that this circumstance implies that it is nonsense to talk about “best solutions” in the abstract. We could, of course, talk of a best solution if we keep constant a particular dimension. Then we could say that one solution is preferable because it will reinforce this given dimension. We can also assign superiority to an alternative on the grounds that it establishes a specific weighting of the dimensions that is convenient in the face of historical,

¹¹ Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at. 842-843: “First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute”.

¹² Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 864-866 (1984).

¹³ See, for example, the case CE, 31 mai 2000, Société Cora et Société Casino-Guichard-Perrachon, in which the Conseil d’Etat gives no deference to the interpretation that both the Antitrust Authority and the Minister of Economic Affairs had given to a specific term of the antitrust legislation. In the words of the then commissaire du gouvernement Francis Lamy: “En exigeant dans la présente affaire qu’une entreprise commune ait tous les attributs d’une société autonome pour être qualifiée de concentration le ministre s’est en réalité rallié à la doctrine du Conseil de la Concurrence, ce qui naturellement ne vous dispense pas de vous prononcer sur le bien fondé de l’interprétation retenue en l’espèce par le ministre puisqu’elle est critiquée par les requérantes”.

¹⁴ For a longer account of the French orientation, see JORDÃO, Eduardo. *Controle judicial de uma administração pública complexa*. São Paulo: Malheiros, 2016 (Portuguese version of my PhD dissertation); or JORDÃO, Eduardo. *Le juge et l’administration: entre le contrôle et la deference*, Bruxelles: Bruylant, 2016 (French version of my PhD dissertation).

¹⁵ KENNEDY, Duncan. Political ideology and comparative law. In: BUSSANI, Mauro; MATTEI, Ugo (Ed.). *Comparative Law*. Cambridge, CUP, 2012: “one way to understand any particular difference between two contemporary legal systems is as the product of different balances between conflicting considerations, be they principles or policies, rights, powers, or whatever”.

political or social aspects of a given jurisdiction. Imagine, for example, a jurisdiction marked by a history of abuses of power committed by the public administration (for example, in a context of authoritarian governments). This circumstance can justify a privilege of the first dimension over the others, for example. But it is puerile to advocate for the superiority of one solution *in the abstract*.

I have been using the example of judicial review to illustrate clashes among dimensions. But other examples can be found in different areas.¹⁶ In public procurement, for instance, the more you constrain the liberty of the administrator to purchase goods and services; the more you will be protecting the interest of those that want to offer these goods or services. However, you will probably be doing that at the expense of the managerial dimension. Likewise, with the creation of independent agencies, a government might achieve superior results from a managerial point of view – but there will be a potential loss of political legitimacy.

The tridimensional conception of administrative law does not provide answers for the various dilemmas of administrative law, but it offers a theoretical framework by which to understand and position the varying answers to them.

4 Variations across jurisdictions

The attention a jurisdiction pays to a given dimension varies. It would be impossible (i) to prove the prevalence in a specific jurisdiction of a particular dimension over the others or (ii) to demonstrate the greater importance of one specific dimension in a jurisdiction as compared to the importance given to it in another. I can however present some widely shared intuitions about these two points.

On the first one – comparison of the internal relevance of different dimensions in the same jurisdiction –, it is quite clear to someone with legal training in countries with a civil law tradition (such as France, Italy and Brazil) the greater inclination that these jurisdictions devote to the legal dimension. In these countries, the protection of the rights of the citizens is often presented as *the* (sole) purpose of administrative law. Indicative of this prevalence of the legal dimension (or perhaps a consequence thereof) is the relative little deference that judges give to the decisions of the public administration. Judicial deference is a clear example of the legal dimension giving way to the managerial and the political dimensions. Indeed, deference doctrines are usually justified on the grounds that the decision-making

¹⁶ For Jerry L. Mashaw, “[t]he stresses involved in balancing accountability regimes show up anywhere and everywhere in administrative law doctrine”, in MASHAW, Jerry L. *Judicial Review of Administrative Action: Reflections on Balancing Political, Managerial and Legal Accountability*. *Revista Direito GV*, [S.l.], p. 153-170, nov. 2005.

should be allocated to the institutions that are better designed to take it from a technical or a political point of view (see item above).

In a previous study, I have speculated over the impact of the nature of the legal education to this circumstance. The more dogmatic way to teach law that is common in civil law countries seems to contribute to this prevalence of the legal dimension. The multidisciplinary way to teach law in Anglo-Saxon countries would make the courts in these countries more ready to recognize their own limitations (or the limitations of the legal expertise to address social problems) and more ready to defer to the options of the public administration.¹⁷

On the second point – comparison of the relevance of the same purpose in different jurisdictions –, few comparative law scholars would contest the intuition that the political dimension is more pronounced in countries of Anglo-Saxon tradition (like the United States, UK and Canada) than in civil law countries. Some key terms and indicators of this particular concern, such as *accountability*, do not even find proper translation outside the English-speaking legal world.¹⁸ There are of course a cross-fertilization process that leads to the export of different traditions and mechanisms – and that hampers this kind of conclusion.¹⁹ However, the identification of these flows (where they originated and to which direction they go) can assist in revealing these different trends. The experience of the European Union is a rich illustration of this reality. Concerns related to access to documents and transparency of European administrative authorities were largely product of an import from British law – and from the European Union Law they have been exported to other Member States.

At this point, a personal anecdote may be illustrative. In an entrance examination for a master's program in Brazil, I came across a direct question: "What is the purpose of administrative law?" The answer I gave was pretty obvious to me at that point, considering my Brazilian legal education: administrative law serves to protect the rights of the citizens against the overarching government. Just over a year later, when I was starting a second master's degree at the London School of Economics, I heard the same question at the inaugural lecture on Administrative Law by Professors Richard Rawlings and Carol Harlow. I was then surprised to realize that the foreign

¹⁷ JORDÃO, Eduardo. *Controle judicial de uma administração pública complexa*. São Paulo: Malheiros, 2016 (Portuguese version of my PhD dissertation); or JORDÃO, Eduardo. *Le juge et l'administration: entre le contrôle et la déférence*, Bruxelles: Bruylant, 2016 (French version of my PhD dissertation).

¹⁸ See CHOFFEL, Denis; ALDRIN, Jérémy. Réflexions autour de la notion « d'accountability » à travers l'application d'une grille d'analyse sur deux études de terrain en management public. *Gestion et management public*, v. 4, n. 1, 2015/3.

¹⁹ See CANANEIA, Giacinto della. I fattori sovranazionali e internazionali di convergenza e di integrazione. In: NAPOLITANO, Giulio (a cura di). *Diritto Amministrativo comparato*. Milano: Giuffrè, 2007 and CASSESE, Sabino. Le problème de la convergence des droits administratifs: ver un modèle administratif européen?. In: *L'État de Droit*. Mélanges en l'honneur de Guy Braibant. Paris, Dalloz, 1996.

students who attended that course totally neglected my “obvious answer”. They seemed to focus on aspects such as the promotion of accountability or the necessity to organize the public service. My initial estrangement was confirmed over the following years, when I contrasted the table of contents of administrative law textbooks in civil law jurisdictions (French, Italian, Spanish, Portuguese, Brazilian) with those of common law countries like the United States, England and Canada.²⁰ Themes that were ubiquitous in the latter (such as access to documents and transparency) were virtually ignored (or relegated to minor importance) in the former, where they only recently began to gain relevance.

5 Historical fluctuations across dimensions

The tridimensional framework is also helpful to spot major changes in the administrative law of a given jurisdiction. The emphasis put in one of the three dimensions fluctuates over time. The history of French Administrative law can illustrate this statement. Over the course of the twentieth century in France, there was a clear move in focus from the managerial dimension to the legal dimension. A more recent trend towards the political dimension can be located in the last two decades – possibly as a consequence of the cross-fertilization movement mentioned above. Let’s see this in detail.²¹

Legal historians dissent on where to locate the origins of French administrative law, but there are two main landmarks: (i) the *ancien régime* and (ii) the *arrêt Blanco*, in 1873. For the purpose of this section, the divergence is irrelevant because in both periods French administrative law was mostly about ensuring the proper functioning of the administrative apparatus. There was a clear focus on the managerial dimension.

Thus, some authors heed the thesis of Alexis de Tocqueville, for whom the origin of French administrative law is to be found in the *ancien régime*, between the seventeenth and eighteenth centuries.²² By then, the administrative law architected by the Cardinal of Richelieu was primarily concerned with the structure and the functioning of the royal administration. This was the justification for many of its most characteristic features, such as (i) the hierarchical organization, (ii) the limited decentralization of power; (iii) the creation of the King’s Council; (iv) the impossibility to hold the monarch liable for his decisions, since “the king [could]

²⁰ See, for example, GABARDO, Emerson. Understanding Brazilian administrative law, the related literature, and education: a comparison with the system in the United States. *Vienna Journal on International Constitutional Law*, v. 9, p. 371-397, 2015.

²¹ For a more comprehensive account, see D’ALBERTI, Marco. *Diritto amministrativo comparato: trasformazioni dei sistemi amministrativi in Francia, Gran Bretagna, Stati Uniti, Italia*. Bologna: Il Mulino, 1992.

²² TOCQUEVILLE, Alexis de. *L’Ancien régime et la révolution*. Paris, Folio, 1985.

do no wrong”; (iv) the incompetence of judicial courts to judge the lawfulness of administrative decisions.²³ The protection of the (very limited) rights of the citizens was clearly a secondary concern.

This tradition did not change soon after the French revolution. The state was then officially under the law, but this still produced very limited rights to citizens. The public administration kept large discretionary powers, the so-called exorbitant prerogatives were maintained and the powers of expropriation were consolidated and expanded. The Constitution of the year VIII provides for the existence of *Préfets* (decentralized administrators), but keeps concentrating power in the central government. In addition, it provides that public officials can only be convicted if the *Conseil d’État* authorizes. The focus on the managerial dimension is also present in the landmark *Arrêt Blanco*, judged by the *Tribunal des Conflits*. Its underlying thesis is precisely that state liability cannot follow the same rules of the civil liability of private persons, so that the government could function properly (“*règles spéciales qui varient suivant les besoins du service*”).²⁴

This explains why the creation of the *Conseil d’État* in 1799 was not initially seen as a pro-citizen movement. On the contrary, the *Conseil d’État* was born with the taint of being pro-administration and to favor authoritarianism,²⁵ a stain that it still tries to get rid of. An exempt observer of its performance on the course of the twentieth century however would have to recognize that it is precisely the *Conseil d’État* which made the (autonomous) move toward the protection of the rights of citizens and gave a new face to French administrative law. During the first decades of the century, it promotes major advances in the domain of review of administrative action, strongly increasing the protection of the rights of citizens. Take, for example, the creation of the concept of *abuse of powers* (*détournement de pouvoir*), the steps to favor the review of errors of fact,²⁶ the idea of manifest error of appraisal,²⁷ the cost-benefit analysis in cases of expropriation,²⁸ and the recognition of implicit principles of law from the 60s.²⁹ All these steps have been

²³ See the *Édit de Saint-Germain-en-Laye*, of 1641.

²⁴ Tribunal des Conflits, 8 février 1873, M. Blanco contre Manufacture des tabacs de Bordeaux: “Considérant que la responsabilité, qui peut incomber à l’État, pour les dommages causés aux particuliers par le fait des personnes qu’il emploie dans le service public, ne peut être régie par les principes qui sont établis dans le Code civil, pour les rapports de particulier à particulier;

Que cette responsabilité n’est ni générale, ni absolue; qu’elle a ses règles spéciales qui varient suivant les besoins du service et la nécessité de concilier les droits de l’État avec les droits privés”.

²⁵ This impression was behind Albert Venn Dicey famous criticisms to French administrative law in his “Studies of the Law of the Constitution”. On this subject, see ARTHURS, Harry. Rethinking administrative law: a slightly Dicey business. *Osgood Hall L.J.*, V. 17, 1979 and FRANKFURTER, Felix. Foreword: Current Developments in Administrative Law. *Yale L. J.* v. 47, p. 515, 1938.

²⁶ CE, 4 avril 1914, Gomel; CE, 14 janvier 1916, Camino.

²⁷ CE, 15 février 1961, Lagrange.

²⁸ CE, A, 28 mai 1971, ‘Ville Nouvelle Est’.

²⁹ VEDEL, Georges. *Droit administratif*. 9. ed. 1984. p. 444: « les larges pouvoirs de création du droit que possède le juge administratif lui permettent de poser des règles de droit nouvelles qui intègrent a la

made in the absence of specific legal provisions – a circumstance that proves the efforts of the *Conseil d'État* to expand the protection of individual rights against administrative action.

Such efforts were quite successful. Achille Mestre, an important French administrative law scholar from the beginning of the last century, reports the differences between the administrative law textbooks of 1870 and those of 1920.³⁰ The former dealt mainly with authorities, councils and courts and discussed rules that restricted individual liberties. No mention was found to concepts such as “state liability” or “abuse of power” in their table of contents. A completely different perspective informs the latter. The textbooks of Hauriou, Duguit and Jèze, for example, were rather focused on the protection of the rights of the citizens. Another revealing fact from the same period was the change in the *fundamental criterium* of administrative law³¹ from the ideas of “puissance publique” and “actes de gestion” (both related to the managerial dimension) to the idea of “service public” (which is closer to the legal dimension).

After this evolution reported here, a more recent movement can be spotted – one that aims at reinforcing the political legitimacy of administrative action. It is in this domain that we have seen the most spectacular evolution from the 70s and the 80s of the last century. This trend is linked mainly to a procedural strengthening of administrative action, under the influence of the Anglo-Saxon tradition. Two good examples are the law of reason giving in 1979 and the law on the democratization of public inquiries. In the first case, we can see an enlargement of the transparency of public administration, thereafter required to explain the reasons behind some of its decisions. In the second case, we have an effort of opening up for popular participation in administrative decisions. In recent years, this trend has proliferated within the decisions taken by regulatory agencies. In all, we might be experiencing now a move of focus towards the political dimension of administrative law in France.

légalité nombre d'éléments se rapportant a l'opportunité de l'acte... Au point de vue du droit fait, il n'y a jamais contrôle de l'opportunité et du pouvoir discrétionnaire; au point de vue du droit qui se fait, le juge s'assure le contrôle de certains éléments d'opportunité et de pouvoir discrétionnaire en forgeant des règles de droit qui étendent le domaine de la compétence liée et de la légalité ».).

³⁰ *Apud* D'ALBERTI, Marco. *Diritto amministrativo comparato: trasformazioni dei sistemi amministrativi in Francia, Gran Bretagna, Stati Uniti, Italia*. Bologna: Il Mulino, 1992. p. 36-37.

³¹ By “the fundamental criterium of administrative law” (*le critère du droit administratif*), French administrative law scholars refer to the notion that would justify the application of the exorbitant legal regime of this branch of law. Historically, the two most important theses were those of Maurice Hauriou (puissance publique) and Léon Duguit (service public). According to the first, what justifies the application of the administrative law regime is the holding, by the government, of the monopoly of force. In the second, what justifies such application is the provision of public services to citizens.

6 The insufficiency of one-dimensional justifications

One major practical consequence of the tridimensional framework is to cast doubt over one-dimensional justifications of choices in administrative law. I refer to choices made by the legislator, the public administrator or courts in spaces of previous legal indeterminacy. Consider, for example, (i) the choice of the legislator to establish a legal regime for public procurement in one specific domain, (ii) the choice of the public administrator to expropriate residential houses to build a university town, or (iii) the choice of courts to defer to statutory constructions put forth by administrative agencies. All these choices will have to be justified. My claim here is that any justifications that focus exclusively in one of the three dimensions of administrative law are insufficient. A well-justified choice in administrative law needs to recognize potential trade-offs among the dimensions and explain the specific balance that it enshrines.

One-dimensional justifications are fairly common in administrative law. French administrative courts do not recognize that their non-deferential approach to administrative decisions or interpretations of law can lead to suboptimal outcomes from a managerial or political point of view. In *Chevron*, the US Supreme Court did not recognize that its orientation could lead to violations of rights being left unscathed. The author of one-dimensional justifications will often limit himself to show the benefits his choice promotes to the dimension he is privileging.

In a recently published article, Cass Sunstein and Adrian Vermeule express a similar concern. They denounce that the US Supreme Court has taken some decisions during the last term that assume a single goal of administrative law.³² Those decisions were exclusively based on the need to prevent abuse of power – a circumstance that, according to the framework I propose here, would place their focus on the legal dimension of administrative law. For example, in one case about the application of judicial deference to agencies interpretations of their own regulations, Justice Scalia wrote that “[w]hen the legislative and executive powers are united in the same person (...) there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner”.

Such an approach is, however, “one sided (...) and offers an irremediably partial (and sometimes downright odd) account of both administrative and constitutional law (...) [T]he U.S. constitutional order in general, and administrative law in particular, attend to other goals and risks as well, and do not take abuse-prevention on the part of the executive as the overriding goal or master principle.

³² SUNSTEIN, Cass; VERMEULE, Adrian. The New Coke: On the Plural Aims of Administrative Law. *The Supreme Court Review*, n. 16-23, p. 41-88, 2015.

Executive abuses are not to be strictly minimized, either as a matter of original understanding or optimal institutional design. Instead, public law in effect trades off the risks of executive abuse against other goals and commitments, including the rationality of policymaking, democratic participation and political accountability, and the promotion of overall welfare – often by means of executive action from public officials, who sometimes display constitutionally legitimate ‘energy’.³³

In short, if the prevention of abuse of power is not the only goal of administrative law, we might need to accept some institutional designs that could potentially lead to such abuses, to the extent that they are able to promote these other conflicting goals.³⁴ In this sense, it will not be enough to justify one decision by claiming that it will undermine *a given* goal or *a given* dimension.

The specific one-dimensionality focused by Sunstein and Vermeule is one that is intuitively expected from Courts. Their favoring of the legal dimension can be explained both by the nature of their expertise and as a mechanism of preserving power in their hands. This however does not imply the social convenience of such orientation. In Canada and in the US, many have denounced the downsides of the “supremacy of law”³⁵ and the moves towards judicial deference were read as a means to privilege the “option for efficiency” previously made with the creation of the administrative state itself.³⁶

Finally, one-dimensional justifications often come disguised. The author of the choice (the legislator, the public administrator, the courts) will cherry pick an abstract principle of law or specific provisions, while neglecting those that would point to an alternative solution. In his discourse, the choice is not his – it has been previously established and he is only applying it. Failure to recognize legal indeterminacy is just another manifestation of one-dimensional justifications. In this sense, an important contribution of the tridimensional framework would be to force the recognition of the alternatives and of the trade-offs involved in different decisions. Taken seriously, the tridimensional conception of administrative law would serve to make the justification of administrative decisions more realistic.

³³ SUNSTEIN, Cass; VERMEULE, Adrian. The New Coke: On the Plural Aims of Administrative Law. *The Supreme Court Review*, n. 16-23, p. 41-88, 2015.

³⁴ In another article, VERMEULE, Adrian talks about the ‘Optimal Abuse of Power’. *Northwestern University Law Review*, v. 109, p. 673, 2015,

³⁵ See RISK, Richard C. B. In Memoriam: John Willis. *U.T.L.J.*, v. 47, p. 301, 303, 1997. See also SUNSTEIN, Cass. Law and Administration after Chevron. *Colum. L. Rev.*, v. 90, p. 2071, 2072, 1990: “Indeed, the creation of the administrative state was largely a self-conscious repudiation of legalism. The New Deal reformers believed that modern problems required institutions having flexibility, expertise, managerial capacity, political accountability, and powers of initiative far beyond those of the courts. On this view, the appropriate response of the legal system to the rise of administration is one of retreat”.

³⁶ See, for example, MACKLIN, Audrey. Standard of review: the pragmatic and functional test. In: FLOOD, Coleen; SOSSIN, Lorne (Coord.). *Administrative Law in Context*. Toronto: Emond Montgomery, 2008. p. 204, and DYZENHAUS, David; FOX-DECENT, Evan. Rethinking the Process/Substance Distinction: Baker v. Canada.

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