

ano 17 - n. 69 | julho/setembro - 2017
Belo Horizonte | p. 1-270 | ISSN 1516-3210 | DOI: 10.21056/aec.v17i69
A&C – R. de Dir. Administrativo & Constitucional
www.revistaaec.com

A&C

**Revista de Direito
ADMINISTRATIVO
& CONSTITUCIONAL**

**A&C – ADMINISTRATIVE &
CONSTITUTIONAL LAW REVIEW**

A&C – REVISTA DE DIREITO ADMINISTRATIVO & CONSTITUCIONAL

IPDA

Instituto Paranaense
de Direito Administrativo



© 2017 Editora Fórum Ltda.

Todos os direitos reservados. É proibida a reprodução total ou parcial, de qualquer forma ou por qualquer meio eletrônico ou mecânico, inclusive através de processos xerográficos, de fotocópias ou de gravação, sem permissão por escrito do possuidor dos direitos de cópias (Lei nº 9.610, de 19.02.1998).



Luís Cláudio Rodrigues Ferreira
Presidente e Editor

Av. Afonso Pena, 2770 – 15ª andar – Savassi – CEP 30130-012 – Belo Horizonte/MG – Brasil – Tel.: 0800 704 3737
www.editoraforum.com.br / E-mail: editoraforum@editoraforum.com.br

Impressa no Brasil / Printed in Brazil / Distribuída em todo o Território Nacional

Os conceitos e opiniões expressas nos trabalhos assinados são de responsabilidade exclusiva de seus autores.

A246 A&C : Revista de Direito Administrativo &
Constitucional. – ano 3, n. 11, (jan./mar.
2003) - - Belo Horizonte: Fórum, 2003-

Trimestral
ISSN: 1516-3210

Ano 1, n. 1, 1999 até ano 2, n. 10, 2002 publicada
pela Editora Juruá em Curitiba

1. Direito administrativo. 2. Direito constitucional.
I. Fórum.

CDD: 342
CDU: 342.9

Coordenação editorial: Leonardo Eustáquio Siqueira Araújo
Capa: Igor Jamur
Projeto gráfico: Walter Santos

Periódico classificado no Estrato A2 do Sistema Qualis da CAPES - Área: Direito.

Qualis – CAPES (Área de Direito)

Na avaliação realizada em 2017, a revista foi classificada no estrato A2 no Qualis da CAPES (Área de Direito).

Entidade promotora

A *A&C – Revista de Direito Administrativo e Constitucional*, é um periódico científico promovido pelo Instituto de Direito Romeu Felipe Bacellar com o apoio do Instituto Paranaense de Direito Administrativo (IPDA).

Foco, Escopo e Público-Alvo

Foi fundada em 1999, teve seus primeiros 10 números editorados pela Juruá Editora, e desde o número 11 até os dias atuais é editorada e publicada pela Editora Fórum, tanto em versão impressa quanto em versão digital, sediada na BID – Biblioteca Digital Fórum. Tem como principal objetivo a divulgação de pesquisas sobre temas atuais na área do Direito Administrativo e Constitucional, voltada ao público de pesquisadores da área jurídica, de graduação e pós-graduação, e aos profissionais do Direito.

Linha Editorial

A linha editorial da *A&C – Revista de Direito Administrativo & Constitucional*, estabelecida pelo seu Conselho Editorial composto por renomados juristas brasileiros e estrangeiros, está voltada às pesquisas desenvolvidas na área de Direito Constitucional e de Direito Administrativo, com foco na questão da efetividade dos seus institutos não só no Brasil como no Direito comparado, enfatizando o campo de intersecção entre Administração Pública e Constituição e a análise crítica das inovações em matéria de Direito Público, notadamente na América Latina e países europeus de cultura latina.

Cobertura Temática

A cobertura temática da revista, de acordo com a classificação do CNPq, abrange as seguintes áreas:

- Grande área: Ciências Sociais Aplicadas (6.00.00.00-7) / Área: Direito (6.01.00.00-1) / Subárea: Teoria do Direito (6.01.01.00-8) / Especialidade: Teoria do Estado (6.01.01.03-2).
- Grande área: Ciências Sociais Aplicadas (6.00.00.00-7) / Área: Direito (6.01.00.00-1) / Subárea: Direito Público (6.01.02.00-4) / Especialidade: Direito Constitucional (6.01.02.05-5).
- Grande área: Ciências Sociais Aplicadas (6.00.00.00-7) / Área: Direito (6.01.00.00-1) / Subárea: Direito Público (6.01.02.00-4) / Especialidade: Direito Administrativo (6.01.02.06-3).

Indexação em Bases de Dados e Fontes de Informação

Esta publicação está indexada em:

- Ulrich's Periodicals Directory
- Latindex
- Directory of Research Journals Indexing
- Universal Impact Factor
- CrossRef
- Google Scholar
- RVBI (Rede Virtual de Bibliotecas – Congresso Nacional)
- Library of Congress (Biblioteca do Congresso dos EUA)
- MIAR - Information Matrix for the Analysis of Journals
- WorldCat
- BASE - Bielefeld Academic Search Engine

Processo de Avaliação pelos Pares (Double Blind Peer Review)

A publicação dos artigos submete-se ao procedimento *double blind peer review*. Após uma primeira avaliação realizada pelos Editores Acadêmicos responsáveis quanto à adequação do artigo à linha editorial e às normas de publicação da revista, os trabalhos são remetidos sem identificação de autoria a dois pareceristas *ad hoc* portadores de título de Doutor, todos eles exógenos à Instituição e ao Estado do Paraná. Os pareceristas são sempre Professores Doutores afiliados a renomadas instituições de ensino superior nacionais e estrangeiras.

Globalization and convergence in judicial review: what can we learn from the case of Brazil?

Globalização e convergência no controle judicial da Administração Pública: o que podemos aprender com o caso do Brasil?

Eduardo Jordão*

Fundação Getulio Vargas Rio (Brasil)
eduardo.jordao@fgv.br

Recebido/Received: 16.07.2017 / July 16th, 2017
Aprovado/Approved: 02.08.2017 / August 2nd, 2017

Abstract: This paper offers one way to verify the existence of dominant convergence trends in the market of legal ideas. By looking through the history of judicial review in Brazil, it aims to sketch some intuitions on the changing influences that can be spotted in such market. Being a peripheral jurisdiction and a traditional importer of legal ideas and doctrines, Brazil is relatively open to foreign influences and international trends. It is, in this sense, a good proxy of any domination occasionally being exerted. Thus, paying attention to the evolution of judicial review in Brazil can be a way to identify global developments.

Keywords: Judicial review. Comparative law. Convergence. Dominance. Globalization.

Resumo: Este artigo propõe uma forma de verificar a existência de tendências de convergência no mercado de ideias jurídicas. Por meio de uma análise do histórico do controle judicial no Brasil, ele busca esboçar algumas intuições relativas às influências cambiantes que podem ser identificadas neste mercado. Sendo uma jurisdição periférica e um tradicional importador de ideias e teorias jurídicas, o Brasil é relativamente

Como citar este artigo/*How to cite this article:* JORDÃO, Eduardo. Globalization and convergence in judicial review: what can we learn from the case of Brazil?. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 17, n. 69, p. 23-31, jul./set. 2017. DOI: 10.21056/aec.v17i69.837.

* Professor da Fundação Getulio Vargas – FGV Direito Rio (Rio de Janeiro-RJ, Brasil). Doutor em Direito Público pelas universidades de Paris, Panthéon-Sorbonne, e de Roma, La Sapienza, em co-tutela. Master of Laws (LL.M) pela London School of Economics and Political Science – LSE. Mestre em Direito Econômico pela Universidade de São Paulo. Bacharel em Direito pela Universidade Federal da Bahia. Atua especialmente nas áreas de Direito Público Econômico e Administrativo. *E-mail:* <eduardo.jordao@fgv.br>.

aberto a influências estrangeiras e tendências internacionais. Neste sentido, o país pode ser um bom indicador de que alguma dominação esteja ocasionalmente sendo exercida. Assim, prestar atenção à evolução do controle judicial no Brasil pode ser uma forma de identificar inclinações globais.

Palavras-chave: Controle judicial. Direito comparado. Convergência. Dominância. Globalização.

Summary: **1** Introduction – **2** The era of French dominance – **3** The state of affairs after the decline of the French dominance – **4** Conclusion – References

1 Introduction

Globalization and convergence between legal orders is a hot topic for the field of comparative law. Its central question is: to what extent *are* jurisdictions across the globe *adopting* (or to what extent *will* they *adopt*) the same legal solutions to social problems? In the process of increased exchange of goods and information, one could intuitively expect to spot fewer differences among jurisdictions. They would tend to converge to one (best?) solution, the acquaintance of which is increasingly accessible through the various channels of information.

To the extent that it is happening, legal convergence represents both *a product of* and *a menace to* comparative law. It is a product of comparative law, because it is mostly through studies of this field of law that differences between jurisdictions are revealed and that convergence is suggested. It is a menace to comparative law, because it tends to diminish the relevance of this field of research. After all, there is little to compare if differences between jurisdictions are rare.

Legal convergence could be the result of at least two different processes. First, it could indicate the dominance of a given jurisdiction in the global market of legal ideas, the solution of which is exported to several others. Second, it could represent a mix of different solutions, consolidated somewhat spontaneously or through the intervention of an intermediate body, such as a supranational or multinational entity. The former possibility would represent a *unilateral dominance*, whereas the latter indicates a *multilateral dominance*.

The first process has been widely observed by the literature of comparative administrative law. One could point out, for instance, the convergence processes that emerged by opposition of different legal systems by a group of thinkers. In the beginning of the 19th century, French liberals tried to make their case for a change in French administrative law by sharply contrasting the administrative legal orders of England and France – the latter still marked by traces of absolutism – and indicating the bright spots of the former. With time, it could be argued that this thinking gained space in the market of legal ideas, and French administrative law acquired prerogatives that

were in compass with what those liberals defended (the liability of the administration by damages caused to individuals is an example).¹

Regarding the second process, there are several factors that entail multilateral legal convergence. These could be, for instance, the spread in the use of foreign and international law in national courts as a response to the possibility of review by international and transnational courts,² the economic pressure to compete in a globalized market,³ the sharing of basic values and principles of administrative law that are materialized in rules of global governance,⁴ and so on. An example of legal convergence promoted by a supranational body is the changes in continental Europe's regulatory framework in the 1990s. EU directives pushed countries that traditionally explored natural monopolies by public-owned companies to a model inspired by that of the United States, where private companies are overseen and regulated by autonomous government agencies.

There is no easy way to demonstrate the actual existence of a convergence process, or to identify one of the instances of dominance mentioned above. The analysis of convergence processes is usually done in countries with established legal traditions. The pressures in market of legal ideas that favored the Anglo-American legal influences, for example, can explain the evolution of French administrative law in the 19th. However, some of the typical problems that fall upon the comparative administrative law scholar might be more intense in the analysis of such countries. Because of the fact that there are fewer changes to be analyzed, it is difficult to say if the changes observed are really a part of the convergence process: the fact that French law opened space to some more individual prerogatives could also be explained as an internal phenomenon of an evolving system, and not as an "anglicization" process. Moreover, in the mentioned case of the creation of independent regulatory agencies in continental Europe, it is possible to observe influences other than supranational

¹ CASSESE, Sabino. Le problème de la convergence des droits administratifs: vers un modèle administratif européen? In: *L'État de Droit*: Mélanges en l'honneur de Guy Braibant. Paris: Dalloz, 1996.

² ADENAS, Mads; FAIRGRIEVE, Duncan. Intent on making mischief: seven ways of using comparative law. In: MONATERI, Pier Giuseppe (Ed.). *Methods of comparative law*. Cheltenham: Edward Elgar, 2012. p. 28.

³ The globalization of trade fosters "regulatory harmonization" and "regulatory competition", potentially leading, in both cases, to legal convergence of administrative law. In some cases, harmonization is chosen as a way to reduce costs of trade by imposing similar requirements. In others, the competition for businesses forces countries to reform their administrative rules and processes in order to reach international standards. See BERMANN, George. Comparative law in administrative law. In: *L'État de Droit*: Mélanges en l'honneur de Guy Braibant. Paris: Dalloz, 1996.

⁴ Anthony, Auby, Morison and Zwart sustain that it is possible to identify core values to global administrative law, such as "accountability, transparency, rationality and legality". These values are, according to them, reflected in the processes of supranational institutions: "We also suggest that EU law should be regarded as an integral part of the global administrative law regime precisely because globalization entails decision-making processes that are overlapping rather than mutually exclusive and in which regional standards exist as important elements of the broader global dynamic", in ANTHONY, Gordon *et alli*. Introduction to the collection. In: ANTHONY, Gordon *et alli*. (Eds.). *Values in global administrative law*. Oxford and Portland: Hart, 2011.

regulation that might have led to this result.⁵ In fact, different institutions can produce the same legal solutions,⁶ and it is necessary to look at the broader picture of reforms to confirm the existence of such legal trends.

In one further example of how difficult it is to observe such legal trends in countries with established legal traditions, Marco D'Alberty identifies the broad reduction of discretionary administrative power as global trend of the public regulation of markets, as a way of facilitating access to markets and lessening political influence over administrative actions that concern economic regulation. As France has a legal tradition of administrative independence from courts, this global trend cannot be well observed there, where it faces strong resistance.⁷

This paper offers one alternate possibility to the verification of dominant convergence trends in the market of legal ideas. By looking through the history of judicial review in Brazil, I will try to sketch some intuitions on the changing influences that can be spotted in the market for legal ideas.⁸ A jurisdiction with longer and more relevant legal tradition, such as France, is intuitively more refractory to external influences, holding more stable legal orientations. Being a peripheral jurisdiction and a traditional importer of legal ideas and doctrines, Brazil is relatively open to foreign influences and international trends. It is, in this sense, a good proxy of any domination occasionally being exerted. In other words, precisely because it is an importing country, Brazil is relatively porous to legal innovations and therefore can be a good barometer of global trends. Thus, paying attention to the evolution of judicial review in Brazil can be a way to identify global developments.

2 The era of French dominance

A stroll through the history of the judicial review of administrative action in Brazil reinforces this intuition. From the beginning of last century to the 1980's, the influence of French law and the decisions of its Conseil d'État were very strong and virtually sovereign. Almost all the developments that took place in Brazilian Administrative

⁵ As Dominique Custos points out, "The French independent network industry regulator emerged from the interweaving of European Union encouragement, American inspiration, the UK example, deliberate or unconscious mimicry among Member States and the constraints of the administrative tradition of France". In CUSTOS, Dominique. Independent administrative authorities in France: structural and procedural change at the intersection of Americanization, Europeanization and Gallicization. In: ROSE-ACKERMAN, Susan; LINDSETH, Peter (Eds.). *Comparative administrative law*. Cheltenham: Edward Elgar Pub., 2011.

⁶ See CASSESE, Sabino. Le problème de la convergence des droits administratifs: vers un modèle administratif européen? In: *L'État de Droit: Mélanges en l'honneur de Guy Braibant*. Paris: Dalloz, 1996. p. 47-48.

⁷ D'ALBERTI, Marco. Administrative law and the public regulation of markets in a global age. In: ROSE-ACKERMAN, Susan; LINDSETH, Peter (Eds.). *Comparative administrative law*. Cheltenham: Edward Elgar Pub., 2011. p. 75.

⁸ For a longer account on the History of Judicial Review in Brazil in Portuguese, see PERLINGEIRO, Ricardo. Uma perspectiva histórica da jurisdição administrativa na América Latina: tradição europeia-continental versus influência norte-americana. *Revista de Investigações Constitucionais*, Curitiba, v. 2, n. 1, p. 89-136, jan./abr. 2015.

law throughout this period can be traced to similar developments that had occurred a few years before – or a few decades before – in French Administrative law. From the 1980's, however, the picture gets much more nuanced. Not only because Brazil starts to receive influences from several other countries, but also because the influence from French Law declines rapidly. This story may also reflect the very global circumstances: the global dominance of French law was recently replaced by the influx of other jurisdictions – and especially of the United States.

Especially during the first half of the 20th century, Brazilian courts would very often look up to the Case Law of the French Conseil d'Etat to decide their own cases. Interested parties would wield French administrative law concepts when pleading for a change in the practice of Brazilian courts. Invariably, the use of such concepts led to a *more intrusive* review of administrative action. Thus, for example, the idea of “*détournement de pouvoir*” (*abuse of power*) – created by the Conseil d'Etat in 1875 –⁹ was first accepted in Brazilian Law in a regional court judgment of 1941.¹⁰ The judge that was responsible for the case was Miguel Seabra Fagundes, a well-known scholar who would acknowledge the French inspiration in his most famous book.¹¹ The book itself is an evidence of the French influence in Brazilian Law. Citations of French scholars and Conseil d'Etat cases are ubiquitous.

The *Supremo Tribunal Federal* (STF) did not differ from this pattern. For instance, in two judgments in 1944, Brazilian highest federal court imported the ideas of “*qualification juridique des faits*” and of “*exactitude matérielle des faits*”.¹² Both concepts were used to extend the reach of judicial review to the factual basis of an administrative decision. While admitting to review the facts that led to the dismissal of a public servant, the STF stated that such a review was then for 30 years admitted by the Conseil d'Etat.

At least two further French constructions were incorporated to Brazilian administrative law somewhat less consistently: (i) the doctrine of the “*erreur manifeste d'appréciation*”¹³ (manifest error of assessment), that allows for a superficial review of discretionary decisions, in cases of patently unreasonable choices; (ii) and the review based on “*general principles of law*”, that became mainstream in Brazil especially after the 1988 Constitution.

Brazilian deference to French legal constructions would sometimes even create curious anecdotes. Gaston Jèze's understanding of French Case Law was imported by

⁹ Conseil d'Etat, 26 novembre 1875, Pariset.

¹⁰ Tribunal de Justiça do Rio Grande do Norte, Acórdão de 28.7.1948. *RF*, 121, p. 209-219.

¹¹ FAGUNDES, Miguel Seabra. *O controle dos atos administrativos pelo Poder Judiciário*. 8. ed. Rio de Janeiro: Forense, 2010. p. 89-90.

¹² Supremo Tribunal Federal, Francisco de Assis Brasil vs. União Federal, Embargos na Apelação Cível nº 7.307. Rel. Min. Castro Nunes, j. 20.12.1944.

¹³ The leading case is CE, 15 février 1961, Lagrange.

Brazilian courts and gave rise to the so-called “teoria dos motivos determinantes” (the doctrine of the determinant grounds), according to which the grounds stated by the public administration for the enactment of a decision binds its further actions.¹⁴ The funny part is that the doctrine is still valid in Brazil, but does not express the current state of French Law, in which administrative courts allow for the substitution, before the judge, of the reasons given by the public administration at the time of its decision.

Throughout the whole century up until the beginning of the 90’s, it was not that Brazilian law did not suffer influences from other jurisdictions. One may point out, for example, the Italian concept of “merito” or the German considerations on legal certainty and judicial review. However, French contributions were until then far more numerous and more important than those coming from any other country.

It is from the 90’s on that the picture becomes slightly more nuanced and Brazilian law goes on to incorporate many clear strong influences also from other countries. The most important examples of foreign contributions to Brazilian Law on judicial review in the last 25 years include (i) the “principle of proportionality”, from German Law; (ii) the concept of “technical discretion”, from Italian Law; (iii) the idea of judicial deference to public administration in the event of technical or political decisions under review, mostly from American Law.

Meanwhile, no big news came in from French Law. These facts suggest a decline of the influence of French Law in Brazilian Administrative Law, along with a rise of the influence of other jurisdictions. French scholars themselves share this intuition about the decline of influence of French administrative law. Fabrice Melleray, for example, talks about “three ages” of French administrative law, from the golden era to the days of decadence.¹⁵

Naturally, the fact has not escaped from the perception of the members of Conseil d’Etat. In 2008, while I was pursuing the second year of my PhD researches in Paris, I was hired by the Conseil d’Etat to take part in the creation of a comparative law center inside the highest administrative court. The diagnosis that led to this initiative was precisely that the influence of French administrative law was in decline. The idea of the vice president of the Conseil d’Etat with the creation of the center was twofold. On the one hand, to gather information on the Case Law of foreign jurisdiction related to issues that would later be addressed by the Conseil d’Etat itself. On the other hand – and more importantly to this essay –, the center would be a mechanism to rebuild the importance of French Administrative law globally. Thus, among its tasks were: (i) the translation to English of Conseil d’Etat main rulings, which would then be

¹⁴ MENDONÇA, José Vicente Santos de. Conceitos inventados de direito administrativo. *Revista Brasileira de Direito Público*, Belo Horizonte, ano 14, n. 53, abr./jun. 2016.

¹⁵ MELLERAY, Fabrice. Les trois âges du droit administratif comparé ou comment l’argument de droit comparé a changé de sens en droit administratif français. In: MELLERAY, Fabrice (Dir.). *L’argument de droit comparé en droit administratif français*. Bruxelles: Bruylant, 2007.

sent to key scholars and Courts around the world and made available online; (ii) the establishment of partnerships with courts in other countries, the members of which would sometimes do research stages in Paris.

3 The state of affairs after the decline of the French dominance

In such a context of decline of the French influence, the question remains of whether another jurisdiction has taken the hegemony and whether this new dominance can point to a convergence. As for the jurisdiction that would now be hegemonic, the probable answer is the American. One of the most widely cited and exported doctrines of administrative law in the last three decades is the Chevron Doctrine, which results from a 1984 decision of the American Supreme Court and predicates judicial self-restraint in the case of review of administrative agencies' constructions of unclear legislation.

An even more complicated question would be whether this American hegemony has led (or has been leading) to an international convergence on questions related to the judicial review of the administrative action – if a trend can be spotted that other jurisdictions would turn (or are turning) to the American example. In the context of a largest circulation of ideas and in face of the process of globalization, a trend towards convergence is intuitive and expected, as it was said in the beginning of this text. Despite this, however, I cannot say that I have been able to identify this convergence in the research I conduct on the subject of judicial review in a comparative perspective. On the contrary, there is a noticeable resistance especially from the most traditional jurisdictions to adopt the American model.

I turn to the examples of Italy and France. In Italy, after having dropped in 1999, the idea of technical discretion,¹⁶ the Consiglio di Stato has come closer to the American orientation. In a series of cases between 2001 and 2004, it created the concept of “complex technical assessments” that would lead to judicial deference to administrative options.¹⁷ The reasoning and the rationale of such a doctrine was exactly the same of the American Chevron doctrine.¹⁸ But this approach did not prevail. After internal criticism pointing to a violation of the Italian Constitution, the Consiglio

¹⁶ Cons. Stato, sez. iv, 9 aprile 1999, n. 601.

¹⁷ See, especially, Cons. Stato, sez. iv, 06 ottobre 2001, n. 5287 (Formambiente), item 9; Cons. Stato, sez. vi, 23 aprile 2002, n. 2199 (RC Auto).

¹⁸ First, the cases confirmed the changes brought about by the 1999 decision: actions involving mere “technical discretion” could be reviewed. However, where technical decisions were intertwined with real administrative discretion, such as the balance of multiple public interests, the courts would use “weak review”. Instances where “technical discretion” and administrative discretion were mixed together and inseparable were called “complex technical assessments” (valutazione tecniche complesse). Examples are the evaluations performed by the antitrust agency when it interpreted and applied indeterminate legal concepts, such as “relevant market” and “abuse of dominant position”.

di Stato stepped back, claiming that its decisions had been misunderstood and simply abandoned the idea of complex technical assessments.¹⁹

In France, the resistance is even clearer. The judge-led modulation of the intensity of the review is only a possibility in the case of “legal classification of facts” (*qualification juridique des faits*), and even so, in limited cases. In the classic domain of the Chevron doctrine (administrative agencies’ construction of unclear statutes), the guidance is very clear in French law: this is the typical domain for the judges. They are the masters of statutory interpretation and deference is not even considered in such cases.²⁰

Even in Brazil, which I qualified before as more porous to global trends, the adoption of Chevron orientation is still unclear. The doctrine has seduced the academia and many articles have been written on the topic, most of which urging Brazilian courts to adopt a similar doctrine.²¹ But empirical studies have shown that actual judicial deference to administrative agencies’ decisions is still rare.²²

4 Conclusion

In summary and in conclusion, the evolution of judicial review in Brazilian law provides an interesting illustration of the evolution of global trends on the topic and of the succession of dominant doctrines. But albeit intuitive and expect, the convergence of legal doctrines in the domain of the judicial review of administrative action seems still far to have materialized.

¹⁹ Arguing that its reference to “weak review” had been misinterpreted, the Consiglio di Stato abandoned the concept and began to stress that review had only one limit: the judge could not substitute the decision of the authorities with its own, and the court must annul the administrative decision and remand the case back to the agency. See Cons. Stato, sez. vi, 02 marzo 2004, n. 926. Later cases completely abandoned the previous language, rejecting “weak review” and characterizing their standard as “full and particularly penetrating” (*pieno e particolarmente penetrante*) and “certainly not weak” (*certamente non debole*, see, e.g., Cons. Stato, sez. vi, 3 febbraio 2005, n. 280; Cons. Stato, sez. iv, 8 febbraio 2007, n. 515; Cons. Stato, sez. vi, 17 dicembre 2007, n. 6469. Whereas the Consiglio di Stato previously invoked indeterminate legal concepts to justify limited review, it now uses “full review also in regard to indeterminate legal concepts” (See Cons. Stato, sez. vi, 3 febbraio 2005, n. 280, item 2.1). Whereas the Consiglio di Stato previously highlighted the agencies’ institutional positions to suggest the need for judicial deference, it now states that a full review is needed because independent agencies are insulated from the political arena (*fuori del circuito dell’indirizzo politico*, see Cons. Stato, sez. vi, 2 marzo 2004, n. 926, item 3.3).

²⁰ French administrative judges will assess the “correctness” of administrative agencies’ construction of statutes. If they disagree with such construction, they will claim that there is an “error of law” (*erreur de droit*) and that the construction can be annulled. On this topic, see JORDÃO, Eduardo; ROSE-ACKERMAN, Susan. Judicial review of executive policymaking in advanced democracies: beyond rights review. *Administrative Law Review*, v. 66, p. 1-72, 2014.

²¹ See, for example, BINENBOJM, Gustavo; CYRINO, André Rodrigues. Parâmetros para a revisão judicial de diagnósticos e prognósticos regulatórios em matéria econômica. In: SOUZA NETO, Cláudio Pereira de; SARMENTO, Daniel (Coords.). *Vinte anos da Constituição Federal de 1988*. Rio de Janeiro: Lumen Juris, 2009. p. 739-760.

²² See ALMEIDA, Fabricio Antonio Cardim de (Coord.). *Revisão judicial das decisões do conselho administrativo de Defesa Econômica (CADE)*. Belo Horizonte: Fórum, 2011.

References

- ADENAS, Mads; FAIRGRIEVE, Duncan. Intent on making mischief: seven ways of using comparative law. In: MONATERI, Pier Giuseppe (Ed.). *Methods of comparative law*. Cheltenham: Edward Elgar, 2012.
- ALMEIDA, Fabricio Antonio Cardim de (Coord.). *Revisão judicial das decisões do conselho administrativo de Defesa Econômica (CADE)*. Belo Horizonte: Fórum, 2011.
- ANTHONY, Gordon *et alli*. Introduction to the collection. In: ANTHONY, Gordon *et alli*. (Eds.). *Values in global administrative law*. Oxford and Portland: Hart, 2011.
- BERMANN, George. Comparative law in administrative law. In: *L'État de Droit: Mélanges en l'honneur de Guy Braibant*. Paris: Dalloz, 1996.
- BINENBOJM, Gustavo; CYRINO, André Rodrigues. Parâmetros para a revisão judicial de diagnósticos e prognósticos regulatórios em matéria econômica. In: SOUZA NETO, Cláudio Pereira de; SARMENTO, Daniel (Coords.). *Vinte anos da Constituição Federal de 1988*. Rio de Janeiro: Lumen Juris, 2009.
- CASSESE, Sabino. Le problème de la convergence des droits administratifs: vers un modèle administratif européen? In: *L'État de Droit: Mélanges en l'honneur de Guy Braibant*. Paris: Dalloz, 1996.
- CUSTOS, Dominique. Independent administrative authorities in France: structural and procedural change at the intersection of Americanization, Europeanization and Gallicization. In: ROSE-ACKERMAN, Susan; LINDSETH, Peter (Eds.). *Comparative administrative law*. Cheltenham: Edward Elgar Pub., 2011.
- D'ALBERTI, Marco. Administrative law and the public regulation of markets in a global age. In: ROSE-ACKERMAN, Susan; LINDSETH, Peter (Eds.). *Comparative administrative law*. Cheltenham: Edward Elgar Pub., 2011.
- FAGUNDES, Miguel Seabra. *O controle dos atos administrativos pelo Poder Judiciário*. 8. ed. Rio de Janeiro: Forense, 2010.
- JORDÃO, Eduardo. *Le juge et l'administration: entre le contrôle et la déférence*. Bruxelles: Bruylant, 2016.
- JORDÃO, Eduardo; ROSE-ACKERMAN, Susan. Judicial review of executive policymaking in advanced democracies: beyond rights review. *Administrative Law Review*, v. 66, p. 1-72, 2014.
- MELLERAY, Fabrice. Les trois âges du droit administratif comparé ou comment l'argument de droit comparé a changé de sens en droit administratif français. In: MELLERAY, Fabrice (Dir.). *L'argument de droit comparé en droit administratif français*. Bruxelles: Bruylant, 2007.
- MENDONÇA, José Vicente Santos de. Conceitos inventados de direito administrativo. *Revista Brasileira de Direito Público*, Belo Horizonte, ano 14, n. 53, abr./jun. 2016.
- PERLINGEIRO, Ricardo. Uma perspectiva histórica da jurisdição administrativa na América Latina: tradição europeia-continental versus influência norte-americana. *Revista de Investigações Constitucionais*, Curitiba, v. 2, n. 1, p. 89-136, jan./abr. 2015.

Informação bibliográfica deste texto, conforme a NBR 6023:2002 da Associação Brasileira de Normas Técnicas (ABNT):

JORDÃO, Eduardo. Globalization and convergence in judicial review: what can we learn from the case of Brazil?. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 17, n. 69, p. 23-31, jul./set. 2017. DOI: 10.21056/aec.v17i69.837.
