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CONTEMPORARY CHALLENGES IN LATIN AMERICAN ADMINISTRATIVE JUSTICE

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This study consists of a critical comparative analysis of the administrative justice systems in eighteen Latin-American signatory countries of the American Convention on Human Rights (Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, El Salvador, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic, Uruguay, and Venezuela). According to this article, the excessive litigation in Latin-American courts that has seriously hampered the effectiveness of the administrative justice systems may be explained as follows: as former Iberian colonies, the aforementioned countries have a Continental European legal culture originating in civil law but nevertheless have improperly integrated certain aspects of the unified judicial

system (*generalized courts*) typical of administrative law in common-law countries. This situation, according to the author, could be rectified through strengthening the public administrative authorities with respect to their dispute-resolution and purely executive functions by endowing them with prerogatives to act independently and impartially, oriented by the principle of legality understood in the sense of supremacy of fundamental rights, in light of the doctrine of diffuse conventionality control adopted by the Inter-American Court of Human Rights.

Keywords: administrative justice; fair trial; due process of law; Latin America.

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1. Introduction

The excessive number of lawsuits filed in Latin America is extraordinary, which might leave a visitor surprised by the high productivity of the courts there. In Brazil, for example, each judge delivered an average of 1,500 judgments in 2014 alone.¹

¹ On excessive judicial review of administrative decisions in Chile, see Supreme Court of Chile (Corte Suprema), Acta 176, 24 October 2014.

In the field of administrative law, judges are being forced to resolve highly similar and repetitive claims, which reduces their role to that of a manager of case files or a purely executive authority² at the cost of their judicial mission of resolving disputes and safeguarding rights.³ This is so because most of the cases are artificial, i.e., not attributable to an administrative authority's actual rejection of an individual's request but rather to the structural impossibility of such authorities to reconcile the principle of legality (associated with the supremacy of fundamental rights) with the administrative principle of hierarchical subordination.⁴ Moreover, in many cases it is the administrative authorities that resort to the Judiciary to enforce their claims against individuals, which is an outward sign of the consensus (among citizens and public authorities) that the administrative agencies cannot be relied on to enforce their own decisions, in flagrant contradiction with the attribute of *self-enforceability* (*autoexecutoriedade*) according to which administrative decisions can be enforced by the government itself without the intervention of the Judiciary.⁵

Although remarkable progress has been seen in Latin-American statutes and case law in terms of procedural principles guaranteeing a fair trial, the efforts to staunch the proliferation of repetitive claims, now called *artificial claims*, have failed for a number of reasons, ranging from the lack of specialized courts and procedural laws sensitive to the public-law nature of administrative disputes to the fact that administrative authorities lack the necessary independence and technical expertise to perform their institutional role.⁶

Against this backdrop, in search of ways to improve administrative justice in Latin America, we shall examine the current state of development of the right to judicial protection in administrative law cases and the corresponding judicial structures, without losing sight of the executive and dispute-resolution functions exercised by the administrative authorities. To that purpose, this article is intended to provide a critical comparative analysis of the administrative justice systems of Latin-American countries that were former Iberian colonies subject to the American Convention on Human Rights (Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, El Salvador, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic, Uruguay, and Venezuela). The sources drawn upon in this study include the case law of the Inter-American Court of Human Rights (I/A Court H.R.) and

² See in general Reis 2011, Silveira 2016, and Gubert & Bordasch 2016.

³ See in general Streck 2013.

⁴ Starting from section 3 of this text.

⁵ See in general Perlingeiro 2015.

⁶ *Repetitive claims* is an expression adopted by Judge Vânia in the Brazilian National Justice Council project *Research on Repetitive Claims* and in Article 976 of the Brazilian Code of Civil Procedure (Código de Processo Civil / Law No. 13.105, of 16 March 2015) entitled *Incidente de Demandas Repetitivas* (interlocutory proceeding for repetitive claims).

that of national courts; national laws of administrative procedure and administrative justice; the Model Code of Administrative Procedure and Administrative Justice for Ibero-America of the Instituto Iberoamericano de Derecho Procesal;⁷ the Euro-American Model Code of Administrative Jurisdiction, of Fluminense Federal University in Niterói, in the state of Rio de Janeiro, and German University of Administrative Sciences Speyer, Germany⁸ as well as the Code of Administrative Justice of the Russian Federation, since this article was originally written for the II Siberian Legal Forum devoted to the development of administrative legal proceedings in Russia.

At this point, in light of the terminological differences among the various national systems of administrative law, it is necessary to clarify the meaning and context of certain expressions used in this study: *primary administrative functions* refer to the executive tasks typically assigned to the public administrative authorities; *secondary administrative functions* refer to tasks of administrative dispute resolution, also called *administrative dispute-resolution functions*; *administrative jurisdiction* (administrative dispute resolution or adjudication) refers to the mechanism offered by the State to provide a (definitive and enforceable) solution to an administrative dispute;⁹ *judicial administrative proceeding* refers to judicial proceedings (or a fair trial) intended to resolve administrative disputes, which, in Spanish and Italian, respectively, translates as *proceso administrativo* and *processo amministrativo*; *extrajudicial administrative proceeding* (or a fair hearing) refers to the hearings of disputes by quasi-judicial administrative authorities (U.S. administrative judges, administrative tribunals, quasi-independent bodies for the review of administrative decisions); for present purposes, *administrative procedure* means an extrajudicial administrative procedure that is incapable of offering the guarantees of due process of law (due to the lack of independence of the administrative authorities), which, in Spanish and Italian, respectively, translates as *procedimiento administrativo* and *procedimento amministrativo*.¹⁰ For the sake of readability, the national laws regulating *judicial administrative proceedings* (fair trial) have been cited herein under the standardized name of *Laws of Administrative Justice*, and the laws on *administrative procedure* under the name of *Laws of Administrative Procedure*.

2. Right to a Fair Trial

The right to effective judicial protection, a primary focus of the rule of law in Latin America, is defined as follows under Articles 8.1 and 25 of the American Convention on Human Rights:

⁷ See in general Grinover & Perlingeiro et al. 2014.

⁸ See in general Perlingeiro & Sommermann 2014.

⁹ Academic Project for a Masters (and Doctoral) Program in Administrative Justice – PPGJA/UFF 2008.

¹⁰ See Perlingeiro 2016, at 278–281.

Article 8.1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, **or any other nature.**

Article 25.1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, **even though such violation may have been committed by persons acting in the course of their official duties.**

Article 25.2. The States Parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall enforce such remedies when granted.

In keeping with the Inter-American System of Human Rights, the right to effective judicial protection in administrative law cases, as established by the statutes and case law of most Latin-American countries, comprises the three dimensions set out below.¹¹

2.1. Intensity

2.1.1. Complete Review of Administrative Decisions

The judicial protection must be complete. The review of procedural and substantive lawfulness must include, where appropriate, a verification of whether the administrative authority exceeded the limits of its discretionary powers.

Regarding the review of the points of fact and law in administrative decisions, the I/A Court H.R. has asserted that

a judicial review is sufficient when the judicial body examines all the allegations and arguments submitted to its consideration concerning the decision of the

¹¹ The three dimensions of the right to a fair trial in administrative justice were formulated by Karl-Peter Sommermann and Ricardo Perlingeiro upon conclusion of the *Euro-American Model Code of Administrative Jurisdiction* research project (Perlingeiro & Sommermann 2–3 (2014)). From a comparative perspective, three dimensions are also found in the fair trial clause enshrined in Article 4.1 of the Code of Administrative Justice of the Russian Federation (Кодекс административного судопроизводства Российской Федерации): “Every person is guaranteed access to courts in the defense of his violated or contested rights, liberties and legal interests, including in cases in which, in that person’s opinion, impediments have been created to the exercise of his rights, liberties and legal interests, or an obligation has been unlawfully imposed on him.”

administrative authorities. To the contrary, this Court finds that no judicial review has occurred if the judicial body is prevented from determining the main object of the dispute, as in cases where the judicial body considers that it is restricted by factual or legal determinations made by the administrative body that would have been decisive to decide the case.¹²

The articles of the Euro-American Model Code of Administrative Jurisdiction regulating the complete judicial review of administrative decisions, the exercise of discretionary administrative powers, and acts involving an assessment of multiple interests read as follows:¹³

Article 3 (Scope of review of the legality)

(1) The court reviews the legality of the administrative authority's actions and omissions. The review of legality covers both errors of competence, procedure and form (formal or external legality) as well as errors of content (substantive or internal legality). Review of the content concerns examining both the legal grounds of the individual act or the regulations as well as the factual grounds for legal classification of the facts. The court also verifies whether the administrative authority has committed an abuse of power.

(2) Even when the administrative authority has applied undefined legal concepts, the court examines whether they have been correctly interpreted and applied.

Article 4 (Review of discretionary powers)

(1) Whenever the administrative authority has exercised discretionary powers, the court shall examine, in particular:

a) whether the administrative action or omission exceeded the limits of the authority's discretionary powers;

b) whether the administrative authority acted in keeping with the purpose established by the norm that granted said powers;

c) whether fundamental rights or principles such as equal treatment, proportionality, prohibition of arbitrary action, good faith and protection of legitimate expectations were violated.

(2) The failure to exercise a discretionary power shall likewise be reviewed.

¹² Inter-American Court of Human Rights, *Case of Barbani Duarte et al. v. Uruguay* (Judgment of 13 October 2011), para. 204.

¹³ Perlingeiro & Sommermann 7–8 (2014). Also see Article 25 of the Model Code of Administrative Procedure and Administrative Justice for Ibero-America (Grinover & Perlingeiro et al. 2014, at 117).

Article 5 (Review of acts involving an assessment of multiple interests) ... the court shall review whether the act or regulation complies with the laws and, especially, whether it is justified and whether the administrative authority has not committed errors of assessment concerning the legally protected property, rights and interests that are at risk. Errors of assessment include non-assessment or improper assessment, failing to take relevant interests and property into account, attaching undue importance to certain property or interests (improper evaluation of property and interests) and the lack of proportionality in the overall assessment.

A similar opinion has been expressed by the Supreme Court of Justice of Costa Rica:

[T]he administrative function, according to the constitutional criteria (Articles 33 and 49 of the Political Constitution), must be subject to a **complete and all-encompassing** review of legality, leaving no stone unturned, especially in the case of public service organisations created and put into operation in order to meet the needs of the citizens and entities under its administration.¹⁴

In the same way, in the opinion of the Federal Supreme Court of Brazil, “the principle of separation of powers is not violated by a judicial review that holds an administrative decision to be illegal or abusive after checking it for compliance with the factual and legal requirements, in which case the court may also evaluate the related questions of proportionality and reasonability”¹⁵ and “such courts may apply a proportionality test not only to the means and ends of the administrative decision but also to the relationship between the administrative decision and the underlying reasons [as expressed in the statement of grounds for the decision]”¹⁶

Thus, the administrative authority’s permissible range of action (discretionary power plus margin of appreciation)¹⁷ is subject to judicial review with respect to

¹⁴ Constitutional Section of the Supreme Court of Justice of Costa Rica (Sala Constitucional de La Corte Suprema de Justicia de Costa Rica), Exp: 04-011636-0007-CO, Res. 03669-2006 (Judgment of 15 March 2006). See in general Jinesta 2014. Incidentally, according to Article 15 of the General Public Administration Act of Costa Rica (Ley General de la Administración Pública / Law No. 6.227, of 28 April 1978), the judge “shall act as comptroller to ensure the legality of the various aspects of the discretionary administrative decision and observance of the limits thereof.” On the subject of substantive review of administrative decisions, see Article 51 of the Mexican Federal Law of Administrative Justice (Ley Federal de Procedimiento Contencioso Administrativo, of 4 October 2005).

¹⁵ Federal Supreme Court of Brazil (Supremo Tribunal Federal), Agravo de Instrumento 800.892 (Judgment of 12 March 2013).

¹⁶ Federal Supreme Court of Brazil, Recurso em Mandado de Segurança 24.699 (Judgment of 30 November 2004).

¹⁷ On the difference between discretionary power, margin of appreciation, and vague legal terms, see Maurer 2012, at 21–52.

fundamental rights and the principle of proportionality.¹⁸ This means that, in reality, the assertion that *the judge must not interfere with the authorities' margin of discretion*¹⁹ is only relevant to very specific situations such as the review of administrative decisions involving technical matters that go beyond knowledge of the law, for which the judge is not qualified or is no more qualified (than the administrative authorities) to review the content (of the powers of discretion and margin of appreciation) of such decisions.²⁰

2.1.2. Judicial Review of Government Acts

In principle, government acts should also be subject to judicial review, but this is still controversial in certain countries.

Otto Mayer never accepted the category of governmental actions (*actes du gouvernement*); according to him, state actions may be legislative, judicial or administrative but never governmental, which would only serve to justify an immunity.²¹

According to Ernesto Jinesta:

The rule should be that any act attributable to Government bodies, including those of the highest rank and importance, which are subject to a legal system, should be reviewed by the administrative law courts, since they are responsible for verifying legality, and there is no justification for any area of judicial immunity for any reason whatsoever.²²

The opposite point of view has been adopted by numerous Latin-American laws, however: Article 6 (c) of the Ecuadorian Law of Administrative Justice recognizes the category *political acts of government* and exempts them from judicial review;²³ Article

¹⁸ Nobre Júnior 2016, at 21.

¹⁹ Article 6 (a) of the Ecuadorian Law of Administrative Justice (Ley de la Jurisdiccion Contencioso Administrativa / Law No. 35, of 18 March 1968) denies courts the right to review the exercise of discretionary powers by administrative authorities.

²⁰ On the subject of German Federal Administrative Court precedents, see Blanke 2012, at 41. According to Fábio de Souza Silva, the degree to which courts should be allowed to interfere with the acts of administrative authorities depends on the 'trustworthiness' of the administrative decision in question (see in general Silva 2014). On the subject of judicial deference to administrative authorities from the standpoint of *discricionariade técnica* (an administrative decision based on an expert opinion can only be challenged by means of a contrary expert opinion), see Jordão 2016.

²¹ Mayer 1982, at 3–5. On the subject of controversies involving the conflict between the 'government act' (*acte du gouvernement*) and administrative justice activities at the time, see Fernández Torres 2007.

²² Jinesta 2014, at 607–634.

²³ Ecuadorian Law of Administrative Justice (Ley de la Jurisdiccion Contencioso Administrativa do Equador / Law No. 35, of 18 March 1968).

3 (II) (a) of the Bolivian Law of Administrative Procedure stipulates that “governmental acts based on the power to freely appoint and remove authorities” are not subject to the provisions of that same Law of Administrative Procedure;²⁴ according to Article 4 (b) of the Law of Administrative Justice of Honduras, administrative courts have no authority to examine issues raised by “actions involving the relationship between Branches of Government or occasioned by international relations, defense of the national territory or military command and organization;”²⁵ Article 4 (a) of the Law of Administrative Justice of El Salvador;²⁶ Article 21.1 and Article 21.2 of the Law of Administrative Justice of Guatemala;²⁷ and Article 17.1 of the Law of Administrative Justice of Nicaragua.²⁸

2.2. Admissible Claims

The judicial protection must cover every type of conduct of public authorities. Judicial review must cover not only an administrative authority’s acts or decisions that restrict a citizen’s rights but also any negligence or culpable omissions on the part of that authority. In other words, procedural law must ensure that citizens are able to resort to the courts to challenge not only administrative decisions or acts that affect them adversely but also the authority’s failure to reply to a request or to provide a benefit to which the claimant believes himself to be entitled. The court must have both the authority to rule on the administrative authority’s obligations and the necessary powers of enforcement to guarantee that their ruling will actually be put into practice.²⁹

According to the Inter-American Court of Human Rights, legislators should apply the following criteria when deciding whether it is necessary to adopt procedures enabling (administrative) courts to issue orders to perform or refrain from performing an action:

²⁴ Bolivian Law of Administrative Procedure (Ley de Procedimiento Administrativo de Bolivia / Law No. 2341, of 23 April 2002).

²⁵ Law of Administrative Justice of Honduras (Ley de la Jurisdicción de lo Contencioso Administrativo de Honduras / Decree No. 189, of 31 December 1987).

²⁶ Law of Administrative Justice of El Salvador (Ley de la Jurisdicción Contencioso-Administrativa de El Salvador / Decree No. 81, of 14 November 1978).

²⁷ Law of Administrative Justice of Guatemala (Ley de lo Contencioso-Administrativo de Guatemala / Decree No. 119, of 17 December 1996).

²⁸ Law of Administrative Justice of Nicaragua (Ley de Regulación de la Jurisdicción de lo Contencioso Administrativo de Nicaragua / Law No. 350, of 18 May 2000).

²⁹ On the subject of the need to ensure means of enforcing judgments against the administrative authorities, see Inter-American Court of Human Rights, *Case of Maldonado Ordoñez v. Guatemala* (Judgment of 3 May 2016), para. 109.

[W]hen evaluating the effectiveness of the remedies filed under the domestic administrative jurisdiction, the Court must observe whether the decisions taken in that jurisdiction have made a real contribution to ending a situation that violates rights, to guaranteeing the non-repetition of the harmful acts and to ensuring the free and full exercise of the rights protected by the Convention.³⁰

In a 2001 judgment, the I/A Court H.R. held that “for the appeal for annulment to be effective, it would have had to result in both the annulment of the decision, and also the consequent determination or, if appropriate, recognition, of the [relevant statutory] rights.”³¹

Regarding enforcement measures, the Euro-American Model Code of Administrative Jurisdiction provides as follows:³²

Article 58 (Measures)

To ensure full implementation of the judgment or decision, the court may, at any time, at the request of either party, order appropriate enforcement measures and stipulate a time limit for enforcement if necessary. In particular, the court may:

- a) impose a coercive fine;³³
- b) seize such of the administrative authority assets as are not indispensable to the performance of its public duties and the alienation of which would not compromise a public interest;³⁴
- c) order that the action which the administrative authority failed to perform be carried out by a third party at the authority’s expense.

Latin-American laws are beginning to incorporate judicial seizure of the public authorities’ assets as recommended by the Euro-American Model Code, with the

³⁰ Inter-American Court of Human Rights, *Case of Barbani Duarte et al. v. Uruguay* (Judgment of 13 October 2011), para 201. Along the same lines: Articles 4 and 5 of the Peruvian Law of Administrative Justice (Ley que regula el Proceso Contencioso Administrativo / Law No. 27.584, of 22 November 2001); Article 9 of the Organic Law of Administrative Justice of Venezuela (Ley Orgánica de la Jurisdicción Contencioso Administrativa / Law No. 39.447, of 16 June 2010); Article 14 of the Law of Administrative Justice of Nicaragua (Ley de Regulación de la Jurisdicción de lo Contencioso Administrativo / Law No. 350, of 18 May 2000).

³¹ Inter-American Court of Human Rights, *Case of Barbani Duarte et al. v. Uruguay* (Judgment of 13 October 2011), para. 211.

³² Perlingeiro & Sommermann 2014, at 23–24.

³³ On the subject of coercive fines (*astreints*), see Articles 88.2 and 122.3 of the Code of Administrative Justice of the Russian Federation.

³⁴ See Article 63 of the Model Code of Administrative Procedure and Administrative Justice for Ibero-America (Grinover & Perlingeiro et al. 2014, at 117).

proviso that the public interest must not be compromised by such debt-enforcement measures.³⁵

On this point, however, national legislation in Latin America has proven incapable of establishing a distinction between the public interest and the interest of the administrative authorities; moreover, they fail to recognize the subtle difference between the effects of ruling in favor of the public interest by granting a petition for *interim* relief and the effects of doing so in a *final* judgment, as will be explained at the end of the next section.

2.3. *Interim Relief*

The third dimension of effective judicial protection concerns the timeliness of the protection. Judicial protection that comes too late is hardly helpful. Procedural law should therefore enable interim relief to be obtained quickly and easily in urgent cases, through petitions to prevent acts of undue interference by the administrative authority or to obtain declaratory judgments in case of danger in delay. The court should be able to order the administrative authority to perform or to refrain from performing an act. Interim relief should be available whenever interference with the citizen's rights could have irreparable consequences.

The Euro-American Model Code of Administrative Jurisdiction provides as follows:³⁶

1) The court may grant interim relief. The court shall adopt all provisional measures necessary to safeguard or implement a legal position and any measure necessary to ensure the effectiveness of the judicial protection.

2) The interim relief measures shall be granted in a procedure based on the principles of priority and speediness whenever there is a serious doubt about the legality of the administrative proceeding in question (*fumus boni iuris*), and the need for protection is urgent (*periculum in mora*), in such a way as to ensure a balance between public and private interests.

The technique of using *generic interim relief measures*,³⁷ i.e., the absence of a specific predetermined procedure for each type of claim, providing judges with a greater

³⁵ See Article 170 of the Costa Rican Code of Administrative Justice (Código Procesal Contencioso-Administrativo / Law No. 8.508, of 28 April 2006). On the subject of public interest (essential service to the community) as grounds for stay of execution of a judgment, see Article 41(a) da Law of Administrative Justice of El Salvador (Ley de la Jurisdicción Contencioso-Administrativa / Decree No. 81, of 14 November 1978). See also Article 110.2 of the Organic Law of Administrative Justice of Venezuela.

³⁶ Perlingeiro & Sommermann 2014, at 19. See also Articles 58–60 of the Model Code of Administrative Procedure and Administrative Justice for Ibero-America (Grinover & Perlingeiro et al. 2014, at 117).

³⁷ See Chiti 2013, at 170–174.

margin of discretion, has been adopted by certain countries, such as Argentina,³⁸ Brazil,³⁹ Colombia,⁴⁰ Mexico,⁴¹ Guatemala,⁴² and Venezuela.⁴³ Incidentally, in this area, statutory provisions that interfere with the judge's general power to provide provisional remedies, whether by restricting such measures or requiring that they be granted, should be considered 'teleologically' by the judges and authorities who interpret the law as merely indicative because, at any time, such interim relief measures are subject to weighing in light of the principles of due process, such as access to the courts and the right of defense.⁴⁴ *Necessity*, as a prerequisite for interim relief requires not only *periculum in mora* (danger in delay) but also *proportionality* between the request for interim relief and the protective or anticipatory nature of the principal claim.⁴⁵

One peculiarity of interim relief in administrative law is that a demonstration of *periculum in mora* and *fumus boni iuris* does not suffice: it is also of fundamental importance to weigh the conflicting interests, even the interests of other essential public services that would be affected by the measure but are not direct parties to the dispute. Such weighing, based on proportionality *stricto sensu*, must show a prevailing public interest in favor of the claimant, i.e., it is necessary to demonstrate that it would be more harmful to the public interest to deny the claim than to grant it, in the words of Article 231.3 of the Colombian Law of Administrative Procedure and of Administrative Justice.⁴⁶

³⁸ Article 232 of the Code of Civil and Commercial Procedure of the Nation of Argentina (Codigo Procesal Civil y Comercial de La Nacion / Law No. 17.454, of 18 August 1981).

³⁹ Articles 300 to 310 of the Brazilian Code of Civil Procedure.

⁴⁰ Article 230 of the Colombian Law of Administrative Procedure and Administrative Justice (Código de Procedimiento Administrativo y de lo Contencioso Administrativo / Law No. 1437, of 18 January 2011).

⁴¹ Article 24 of the Mexican Federal Law of Administrative Justice.

⁴² Article 18 of the Law of Administrative Justice of Guatemala (Ley de lo Contencioso Administrativo / Decree No. 119, of 17 December 1996).

⁴³ Articles 69 and 103–106 of the Organic Law of Administrative Justice of Venezuela.

⁴⁴ On the unconstitutionality of statutes prohibiting interim relief measures against administrative authorities, see Bedaque 1998, at 84.

⁴⁵ Although Article 85.2 of the Code of Administrative Justice of the Russian Federation describes purely protective measures ("The court may suspend the effects of the challenged decision in whole or in part, prohibit carrying out certain acts, take certain preliminary measures of defense against administrative proceedings in the cases mentioned in subsection 1 of the present article, except to the extent that the present Code prohibits taking such preliminary measures of defense against predetermined categories of administrative affairs," or Article 85.4 ("Preliminary measures of defense against administrative proceedings must be correlative with and proportional to the stated claims," the requirement of a correlation between the principal claim and the precautionary measure should be interpreted as an open door to provisional relief measures of an anticipatory nature, too.

⁴⁶ Article 231.3 of the Colombian Law of Administrative Procedure and Administrative Justice, imposes the following requirement for interim relief (measures), among others: "The applicant must have presented documents, information, arguments and justifications that make it possible to conclude, by weighing the relevant interests, whether it would be more harmful to the public interest to deny the interim relief than to grant it." For more on the subject of the weighing of public and private interests in interim relief measures, see Article 104 of the Organic Law of Administrative Justice of Venezuela.

For example, in the case of a request for interim relief by ordering the administrative authorities to dispense expensive pharmaceutical products, if the budget of other essential public services would be seriously compromised by doing so, it might be best for the claimant's fundamental rights to health and judicial protection to be sacrificed, temporarily, in favor of the fundamental rights of the community to continue benefiting from other equally essential services. An interim relief measure cannot be denied solely because a defendant claims that granting the measure would harm essential public services such as healthcare or education; rather, in each specific case, it is necessary to determine which public interest should prevail: the public interest in granting the interim relief or the public interest in safeguarding other fundamental values that the authorities are in charge of protecting.

Thus, it has been recently affirmed that laws that generally prohibit interim relief measures⁴⁷ and laws restricting such measures on the grounds of public interest (or synonymous expressions such as social well-being, public health, etc.) should be interpreted with certain provisos.⁴⁸ Finally, it should be noted that even if the judge denies a request for interim relief on the grounds of an overriding public interest, the principal claim may still be admissible because the claimant adversely affected by the overriding public interest may still be entitled to financial compensation for his personal sacrifice to the community.⁴⁹ Such financial compensation would not be justifiable within the scope of the *provisional* remedy.

2.4. Excessive Judicialization

Despite the significant advances made with respect to the right to effective judicial protection, in reality, Latin-American courts are faced with a major problem: the uncontrollable judicialization of administrative claims (exacerbated by thousands of pending lawsuits filed by individuals against public authorities, and vice-versa). This trend seems to be due to the increasing loss of credibility of the administrative authorities in the eyes of the general public, and the inability of the courts to respond to the enormous number of claims.

In Brazil, the number of lawsuits continues to rise in spite of the improved productivity of the judges, each of whom, on average, delivered 1,564 judgments

⁴⁷ See Article 7 of the Brazilian Law on Collective and Individual Writs of Administrative Procedure (Lei sobre o Mandado de Segurança individual e coletivo) / Law No. 12.016, of 7 August 2009).

⁴⁸ In Brazilian law, Article 15 of the Brazilian Law on Collective and Individual Writs of Administrative Procedure establishes that individual interests cannot prevail at the cost of serious injuries to public interests in social welfare, health, safety, and the economy. Along the same lines, Article 22 of the Costa Rican Code of Administrative Justice imposes the requirement that interim relief measures must be compatible with the budget allocations to the administrative authorities.

⁴⁹ On the subject of financial compensation for the individual losses suffered as a result of non-enforcement of a judgment, see Constitutional Court of the Republic of Colombia, Sentencia No. T-554/92 (Judgment of 9 October 1992). Also see Article 110.2 of the Organic Law of Administrative Justice of Venezuela.

in 2013.⁵⁰ According to the (latest) 2014 Report of the National Council of Justice (Conselho Nacional de Justiça – CNJ), the number of cases pending before the courts has reached 100 million (28.9 million new cases added to the previous backlog of 70.8 million cases).⁵¹ According to the CNJ's study on the top 100 litigants in Brazil, administrative authorities account for 51.5% of the total caseload in Brazil, with the federal sector in the lead with 38.5%, followed by state (7.8%) and municipal (5.2%) authorities. This means that, overall, the three levels of administrative authorities account for more pending lawsuits than the other top 80 litigants combined, including the entire banking and telephony sectors.⁵² The INSS (Brazilian National Social Security Institute), with a 22.33% share of the total outstanding caseload, occupies first place on that list of the top 100 litigants in Brazil.⁵³

The Costa Rican courts have encountered a huge increase in the number of administrative cases since the enactment of their Code of Administrative Justice:⁵⁴ the number of pending cases increased from 1,195 in 2008 to 14,182 in 2015.⁵⁵ In Mexico, the multi-judge (circuit) courts [*tribunales colegiados de circuito*], single-judge circuit courts [*tribunales unitario de circuito*], and district courts [*juzgados de distrito*] received 283,843 new administrative lawsuits in 2013 and 302,500 in 2014.⁵⁶ In Argentina, 44,220 new lawsuits were added to the 220,174 already pending (versus 60,307 new lawsuits added to 118,018 cases already pending in 2006).⁵⁷ In Paraguay, 853 new administrative lawsuits were filed with the State Audit Tribunal (Tribunal de Cuentas) in 2015, versus 583 new cases in 2012.⁵⁸ In El Salvador, the Supreme Court of Justice (Corte Suprema de Justicia) was faced with 2,291 administrative law cases in 2015, as compared to 1,692 pending cases in 2011.⁵⁹ In Panama, 383 new administrative lawsuits were filed with the Supreme Court (Suprema Corte Judicial) in 1990, increasing to 963 new claims in 2010.⁶⁰ In Nicaragua, 14 lawsuits were filed with the Administrative Law Section (or Division)

⁵⁰ Conselho Nacional de Justiça 2014, at. 39.

⁵¹ See Cardoso 2015.

⁵² See Conselho Nacional de Justiça 2011.

⁵³ See Conselho Nacional de Justiça 2011.

⁵⁴ Costa Rican Code of Administrative Justice (Legislative Decree No. 8.548, of 28 April 2006 (entry into force on 1 January 2008).

⁵⁵ See Poder Judicial da República de Costa Rica 2016.

⁵⁶ Dirección General de Estadísticas Judicial de los Estados Unidos Mexicanos (2014).

⁵⁷ Junta Federal de Cortes y Superiores Tribunales de Justicia de las Provincias Argentinas y Ciudad Autónoma de Buenos Aires 2006. Junta Federal de Cortes y Superiores Tribunales de Justicia de las Provincias Argentinas y Ciudad Autónoma de Buenos Aires (2014).

⁵⁸ See Corte Suprema de Justiça del Paraguay 2016.

⁵⁹ Corte Suprema de Justicia de la República de El Salvador 2016.

⁶⁰ Órgano Judicial de la República de Panamá 2011.

of the Supreme Court (Sala de lo Contencioso Administrativo da Corte Suprema de Justicia) in 2006, increasing to 213 new cases in 2014 and 161 in 2015.⁶¹

The situation is better in Uruguay, Honduras and Bolivia, with statistics indicating stability.

In Uruguay, the statistics of the Tribunal for Administrative Dispute Resolution (Tribunal do Contencioso Administrativo) show that the number of pending cases has even decreased, from 985 in 1991 to only 791 cases in 2015.⁶² In Honduras, in 2006, 221 new cases were filed with the Appellate Courts (Cortes de Apelaciones), 840 with the Administrative Courts of First Instance (Juzgados de Letras Contencioso Administrativo), and 27 with the Administrative Tax Court of First Instance (Juzgados de Letras Fiscal Administrativo); in 2015, 380, 449, and 37 new cases were filed with those same courts, respectively.⁶³ In Bolivia, in 2012, 4,619 actions were pending before the Supreme Court of Justice (Tribunal Supremo de Justicia), 3,972 before the Departmental Courts (of Justice) (Tribunales Departamentales de Justicia), 176 before the Agricultural/environmental Court (Tribunal Agroambiental), and 9,004 before the Courts for Review of Direct Tax Collection by Public Authorities (Juzgados Administrativo Coactivo Fiscal y Tributario). In 2014, there were 1,151 cases before the Supreme Court of Justice, 5,446 before the Departmental Courts (of Justice), 434 before the Agricultural/environmental Court, and 9,929 cases before the Courts for Review of Direct Tax Collection by Public Authorities.⁶⁴

3. Challenges Related to the Judicial System

3.1. Historical Reasons for the Identity Crisis of the Judicial System

In reality, the excessive judicialization is related to the system of organization of administrative dispute resolution in Latin America: the Continental European legal traditions inherited by the former Iberian colonies are in conflict with the U.S. constitutionalist model that influenced the independence movements which, in the early 19th century, began expelling the Iberian colonial powers from Latin America.⁶⁵

In *common law* countries, there are no courts that specialize in administrative law. As a result, in their *closed judicial review*, they tend to refrain from detailed examination of the *factual* grounds for administrative decisions.⁶⁶ Such *judicial deference* is made up for by the availability of dispute-resolution mechanisms within the government agency's organizational structure (administrative tribunals,

⁶¹ Corte Suprema de Justicia de la República de Nicaragua, Sala de lo Contencioso Administrativo 2015.

⁶² Tribunal de lo Contencioso Administrativo de la República Oriental del Uruguay 2016.

⁶³ Centro Electrónico de Documentación e Información Judicial de Honduras 2015.

⁶⁴ Consejo de Magistratura de Bolivia 2012 and Consejo de Magistratura de Bolivia 2014.

⁶⁵ See Perlingeiro 2016.

⁶⁶ See Asimow 2015.

administrative judges, administrative bodies) which are endowed with quasi-judicial powers and sufficient independence to provide citizens with guarantees of due process of law and a fair hearing.⁶⁷

In most Continental European legal systems (with *civil law* origins), in contrast, the courts have both a general law division and an administrative law division, which tend to have broad powers to review the factual grounds for administrative decisions (*open judicial review*). Such broad powers of review are intended to counterbalance the traditional absence of internal dispute-resolution mechanisms in the administrative authorities themselves.⁶⁸

The Latin-American systems of administrative dispute resolution are therefore undergoing an identity crisis, because their laws of procedure and the corresponding interpretations are unsuccessfully attempting to reconcile the characteristics of the European and U.S. models.

Most Latin-American countries have adopted a system of *unified jurisdiction* (i.e., a system without a specialized jurisdiction for adjudication of administrative disputes). Out of the eighteen countries studied, thirteen have a unified jurisdiction system in general: Argentina,⁶⁹ Bolivia,⁷⁰ Brazil, Costa Rica,⁷¹ Chile,⁷² El Salvador,⁷³ Ecuador,⁷⁴ Honduras,⁷⁵ Nicaragua,⁷⁶ Panama,⁷⁷ Paraguay,⁷⁸ Peru,⁷⁹ and Venezuela.⁸⁰ Colombia,⁸¹ Guatemala,⁸² and

⁶⁷ See Cane 2011, at 96. See also Strauss 1989.

⁶⁸ On the subject of European models of administrative justice, see Fromont 2006, at 120 et seq. See also Ziller 1993. The Russian Federation has adopted a system of unified jurisdiction as shown by Articles 1.1 and 17 of the Code of Administrative Justice of the Russian Federation.

⁶⁹ See Mairal 1984, at 124–126.

⁷⁰ Article 179 of the Bolivian Constitution (Constitución Política del Estado Plurinacional de Bolivia de 2008).

⁷¹ Costa Rican Constitution (Constitución Política de la República de Costa Rica de 1949).

⁷² See Vergara Blanco 2005, at 159–161.

⁷³ Article 131.31 of the Salvadoran Constitution (Constitución de la República de El Salvador de 1983).

⁷⁴ Articles 188.3 and 173 of the Ecuadorian Constitution (Constitución Política del Ecuador de 2008).

⁷⁵ Constitution of Honduras (Constitución del Estado de Honduras de 1982).

⁷⁶ Article 163 of the Law partially amending the Constitution of the Republic of Nicaragua (Constitución Política de la República de Nicaragua de 1987). See Corte Suprema de Justicia de República de Nicaragua 2016.

⁷⁷ Article 206 of the Panamanian Constitution as amended in 2004 (Constitución Política de la República de Panamá de 1972).

⁷⁸ Article 248 of the Paraguayan Constitution (Constitución Nacional de la República del Paraguay de 1992). On the 'judicialist' Paraguayan system in which the Judiciary exercises jurisdiction over administrative disputes, see Chase Plate 2007, at 1212.

⁷⁹ Huapaya Tapia 2006, at 335.

⁸⁰ See Brewer-Carías 1997, at 21 et seq.

⁸¹ Article 231 of the Constitution of Colombia (Constitucion Politica de Colombia de 1991).

⁸² Constitutions of Guatemala of 1945 (Article 164), 1956 (Articles 193 and 194), 1965 (Article 255) and 1985 (Article 221).

the Dominican Republic⁸³ are the only examples of countries with 'dual jurisdiction', i.e., divided into general courts of law and specialized administrative law courts, with three levels of authority (courts of first instance, courts of appeal, and a supreme court). The only country with an extrajudicial administrative tribunal is Uruguay.⁸⁴

Mexico is in a class by itself because its Constitution adopts the unified judicial system while at the same time authorizing legislators to create administrative tribunals outside the judicial system⁸⁵ whose decisions can only be appealed through the judicial remedy of *amparo* in relation to constitutional issues.⁸⁶ In that respect, Mexican administrative tribunals are similar to Uruguay's Tribunal for Administrative Dispute Resolution (Tribunal do Contencioso Administrativo).⁸⁷

On the model of the legal systems of *common law* countries,⁸⁸ procedural due process vis-à-vis administrative authorities has been adopted as a **prerequisite** for the enforcement of any administrative decision that restricts individual rights in the Constitutions of Brazil,⁸⁹ Colombia,⁹⁰ Ecuador,⁹¹ Nicaragua,⁹² the Dominican Republic,⁹³ and Venezuela,⁹⁴ and in statutes of Argentina,⁹⁵ Bolivia,⁹⁶ Peru,⁹⁷ and Uruguay.⁹⁸

⁸³ Articles 164 and 165 of the Constitution of the Dominican Republic (Constitución Política de la República Dominicana de 2010).

⁸⁴ Articles 307 to 321 of the Constitution of Uruguay (Constitución de la República Oriental del Uruguay de 1967).

⁸⁵ Article 73 XXIX, 94, 116 V and 122 *Base Quinta* of the Mexican Constitution. On the nature of the Federal Administrative Tax Court, see Margáin Manautou 2009, at 2 et seq.

⁸⁶ Article 107 IV and V (b) of the Mexican Constitution (Constitución Política de los Estados Unidos Mexicanos de 1917). On the subject of judicial review of the public administrative authorities in general, see Fernández Ruiz 2005, at 462–463.

⁸⁷ On the nature of the 'autonomous tribunal' relative to the Judiciary of the administrative tribunals of Mexico and Uruguay, see Perlingeiro 2016, at 269.

⁸⁸ U.S. Constitution Amendments V and XIV. On the origin of due process of law in the Magna Carta, see Mckechnie 1914, p. 377. On the application of due process of law in U.S. administrative law, see U.S. Supreme Court, *Murray's Lessee v. Hoboken Land & Improvement Co.* 59 U.S. 272 (Judgment of 19 February 1856); U.S. Supreme Court, *Goldberg v. Kelly*, 397 U.S. 254 (Judgment of 23 March 1970), and also see the Administrative Procedure Act (5 U.S.C. Subchapter II) of 11 June 1946.

⁸⁹ Article 5 LIV and LV of the Brazilian Constitution (Constituição da República Federativa do Brasil de 1988).

⁹⁰ Article 29 of the Colombian Constitution (Constitución Política de Colombia de 1991).

⁹¹ Articles 23, 27 and 76 of the Ecuadorian Constitution.

⁹² Article 34 of the Nicaraguan Constitution.

⁹³ Article 69 of the Constitution of the Dominican Republic.

⁹⁴ Article 49 of the Venezuelan Constitution (Constitución de la República Bolivariana de Venezuela de 1999).

⁹⁵ Article 1 f) of the Argentine Law of Administrative Procedure (Ley de Procedimiento Administrativo / Law No. 19.549, of 3 April 1972).

⁹⁶ Article 4 (c) of the Bolivian Law of Administrative Procedure.

⁹⁷ Article IV 1.2 of the Peruvian Law of Administrative Procedure (Ley del Procedimiento Administrativo General / Law No. 27.444, of 21 March 2001).

⁹⁸ Article 5 of the General Laws of Administrative Action and Regulation of Extrajudicial Procedure in the Central Administration of Uruguay (Normas generales de actuación administrativa y regulación del procedimiento en la Administración Central / Decree No. 500, of 27 September 1991).

According to the Supreme Court of Argentina, “the constitutional guarantees of due process and the right to a fair trial must be respected, without exception, in all proceedings, including in administrative procedures of a disciplinary nature – whether there is a preliminary investigation phase or not – so as to guarantee that the person accused will have an opportunity to be heard and to prove such facts as he believes will result in his acquittal.”⁹⁹

Nevertheless, such (extrajudicial) procedural due process is not implemented effectively, since the actual situation of the Latin-American administrative authorities is irreconcilable with the adoption of the independent or quasi-independent administrative dispute-resolution bodies typical of administrative justice in common law countries.

The title of Article 3.11 of the Law of Administrative Procedure of the Dominican Republic expressly refers to **independence**:

11. Principle of impartiality and independence. The civil servants of a public administrative authority shall refrain from any action that is arbitrary or might lead to preferential treatment for any reason and shall act objectively in the service of the public interest; it is prohibited for such civil servants to participate in any matters in which they, or their friends and relatives, hold any interest or in which there may be a conflict of interest.¹⁰⁰

As may be observed, however, the article is misleading, because despite the express reference to *independence* in the title, the body of the text describes *impartiality*.

The few examples of Latin-American *quasi-judicial bodies* concern the right of access to official information, with the support of the *Model Inter-American law on Access to Public Information*.¹⁰¹ Such quasi-judicial bodies are found in Chile,¹⁰² El Salvador,¹⁰³ Honduras,¹⁰⁴ and Mexico.¹⁰⁵

⁹⁹ National Supreme Court of Justice, Argentina (Corte Suprema de Justicia de la Nación), *Jueces Nacionales en lo Criminal y Correccional Federal de la Capital Federal s/ avocación*. S. 1492.95 (Judgment of 2 July 1996), at 1160.

¹⁰⁰ Article 3.11 of the Law of Administrative Procedure of the Dominican Republic (*Ley del Procedimiento Administrativo* / Law No. 107–13, of 3 April 2013).

¹⁰¹ Organização dos Estados Americanos 2010.

¹⁰² Consejo de Transparencia (Articles 31–44 of the Chilean Law of Access to Official Information [*Ley sobre Acceso a la Información Pública* / Law No. 20.285, of 20 August 2008]).

¹⁰³ Instituto de Acceso a la Información Pública (Articles 51–60 of the Law of Access to Information of El Salvador [*Ley de Acceso a la Información Pública* / Decree No. 534, of 2 December 2010]).

¹⁰⁴ Instituto de Acceso a la Información Pública (Articles 8–11 of the Law of Access to Information of Honduras [*Ley de Transparencia y Acceso a la Información Pública* / Legislative Decree of Honduras No. 170, of 30 December 2006]).

¹⁰⁵ Instituto e os Organismos Garantes (Articles 8 III and IV, 30 and 37–42 of the Mexican Law on Access to Information).

Thus, in Latin America, administrative dispute resolution tends to be concentrated in general courts of law which, however, do not include a specialized structure to that purpose.

3.2. The Extremes: Judicial Deference to Administrative Authorities and Open Judicial Review

The adoption of a judicial system with courts of general jurisdiction within a predominantly Continental European legal culture has led to the following situation in Latin America.

At one extreme, in courts of general jurisdiction, Latin-American judges are tempted to imitate the U.S. courts by refusing to review questions of fact underlying the challenged administrative decisions, merely checking for possible violations of the principles of legality and (above all) procedural due process.¹⁰⁶ Such deference to administrative authorities makes Latin Americans feel vulnerable vis-à-vis the immunity of the State, since their administrative authorities lack the prerogatives that would allow them to exercise their duties independently, without having to fear negative repercussions from other authorities.

At the other extreme, the broad powers of review of administrative decisions enjoyed by Latin-American courts, based on the European model, may paradoxically lead to undermining the effectiveness of judicial protection. Given the absence of specialized administrative courts, judges with excessively broad powers are able to rule on cases involving government agencies as though they were disputes between individuals, without due consideration for public interests; in other words, they tend to apply principles of private law and civil procedure to disputes with administrative authorities.¹⁰⁷ This is especially true in Brazil, which, to this very day, still has no general code of judicial procedure for administrative adjudication. As a result, claims involving issues of general interest, which are essentially public affairs, are treated in a fragmented, individual manner and therefore tend to multiply.¹⁰⁸

¹⁰⁶ U.S. Supreme Court, *Chevron U.S.A., INC, v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (Judgment of 25 June 1984). On the subject of deference in various judicial systems, see in general Jordão 2016.

¹⁰⁷ Dicey was in favor of “the possibility of suing government officials in the ordinary courts according to principles of private law to be a element of the rule of law,” which is now facilitated in common law systems by a fair hearing in the administrative phase (Cane 2011, at 44), and does not yet exist in practice in Latin America.

¹⁰⁸ On the subject of the inadequacy of the principles of civil procedure to conflicts of administrative justice and the resulting increase in repetitive claims, see Clementino 2016. See also Alves 2016. The Supreme Court of Chile advised the Ministry of Justice to consider drafting a bill providing for the creation of a specialization in administrative adjudication within the Judiciary and to draw up a single specialized code as an alternative to the legal uncertainty and excessive litigation (Supreme Court of Chile (Corte Suprema), Acta 176, 24 October 2014).

One example of a decision in which judges exercise (excessively) broad powers over the administrative authorities and take a private-law approach to typical public-law relationships is the enforcement of a judgment involving expropriation of public assets (in favor of the claimant) without considering the resulting risks of injury to public interests.¹⁰⁹ Another example is a court judgment that awards a public procurement contract to the claimant in a competition without considering the other candidates or interested parties.¹¹⁰

Litigation settlement agreements provide examples of both of the above-described consequences of the absence of specialized administrative courts. As an example of undue interference, judges are sometimes hostile to any form of consensual conflict-resolution involving the public administrative authorities (arbitration, mediation, settlement); availing themselves of a broad interpretation of *inalienable rights*, they tend to confuse the public interest with the interests of the public administrative authorities, despite the fact that various administrative sectors are already capable of promoting such agreements successfully. As an example of undue deference, judges sometimes uphold settlement agreements that do not comply with precepts of administrative law such as the principles of legality and equality before the law, making them prone to distorted interpretations and inconsistent conduct that compromise the very concept of effective judicial protection.

3.3. Credibility Thanks to Specialized Courts

In a judicial system that grants broad powers of review over government agencies despite the absence of specialized administrative courts, judicial decisions may lose credibility in the eyes of the public administrative authorities. Consequently, such authorities may be reluctant to enforce, *erga omnes*, a judgment in favor of an individual claimant in a case involving a question of general interest for other individuals.

Administrative authorities tend to resist judicial measures that they consider attributable to the judges' lack of technical expertise.¹¹¹

The administrative authorities' mistrust of the Judiciary is also expressed by the continued existence of laws of procedure that deviate from the principle of equality of arms, such as those that grant the administrative authorities more favorable time limits for submissions and that make the enforceability of a trial court judgment

¹⁰⁹ See Souza 2016; see also El Nacional Web 2016. In Italy, it is sometimes permissible for an ordinary (civil) court to issue enforcement orders (including orders to pay a certain amount) against the public administrative authorities in private-law cases, but only through the '*guidizio di ottemperanza*', which can intervene only if public-law issues are involved in the enforcement phase (see Clarich 2013, at 302–303).

¹¹⁰ CERS Curso OnLine 2016.

¹¹¹ See Catanho 2016; G1Rio 2016.

against an administrative authority conditional on confirmation by the appellate courts.¹¹²

3.4. Are Repetitive Claims Really Individual?

The Code of Administrative Justice of the Russian Federation has created an advanced system specific to class actions in administrative disputes, establishing a rule of procedural jurisdiction (*competence*) that takes into account the nature and scope of the challenged administrative decision (Articles 17, 19, 20, and 21); class actions at the initiative of the public prosecutor's office or of government agencies and associations for the protection of diffuse interests in which the specific beneficiaries are unidentifiable (Articles 39 and 40);¹¹³ and class actions at the initiative of the individual claimants themselves, to protect homogeneous individual interests of a certain group of persons (Article 42). In this last case, the legislator was concerned with the need for equal treatment of all members of the group (Article 42.1(4)),¹¹⁴ insofar as the substantive issue involves administrative acts that affect the general public (Article 42.1(3)).¹¹⁵

Such concerns have pushed certain Latin-American legislators in the same direction, with procedures aimed at equal treatment of repetitive individual claims (i.e., involve identical issues) in administrative matters, such as the *Proceso Unificado*¹¹⁶ (joinder of similar proceedings) in Costa Rica, the concentration of dispute resolution to rule on individual claims based on issues of general interest and the effectiveness *erga omnes* of a judgment that annuls an administrative decision with general effect in Nicaragua,¹¹⁷ or the *Incidente de Demandas Repetitivas* (interlocutory proceeding for repetitive claims) in Brazil.¹¹⁸ Similar provisions may be found in Article 44 of the Euro-

¹¹² Roque et al. 2015. The Brazilian Code of Civil Procedure grants administrative authorities the following procedural prerogatives (privileges): differentiated procedural time limits (Article 183); the enforceability of a judgment is conditional on confirmation by the court of appeals (Article 496).

¹¹³ Article 39 "The public prosecutor is entitled to refer administrative claims to the courts in defense of the rights, liberties and legal interests of the citizens, of an indefinite group of persons or the interests of the Russian Federation, constituent entities of the Russian Federation, municipal bodies, and in such other cases as are provided for by federal law." Article 40.1 "In the cases provided for by federal constitutional law, by the present Code and by other federal laws, government bodies, officials, the Commissioner for Human Rights of the Russian Federation, and the commissioner for human rights of a constituent entity of the Russian Federation, may resort to the courts in defense of the rights, liberties and legal interests of an indefinite set of persons and of public interests."

¹¹⁴ Article 42.1(4) "all members of the group must use the same means of defense of their rights."

¹¹⁵ Article 42.1(3) "availability of the general administrative defendant (administrative co-defendants)."

¹¹⁶ Article 48 of the Code of Administrative Justice of Costa Rica.

¹¹⁷ Article 36 and Article 95 §1° of the Law of Administrative Justice of Nicaragua.

¹¹⁸ Articles 976 to 987 of the Brazilian Code of Civil Procedure.

American Model Code of Administrative Jurisdiction¹¹⁹ and Article 57 of the Model Code of Administrative Procedure and Administrative Justice for Ibero-America.¹²⁰

One of the main causes of administrative claims that are repetitive is that individuals file separate claims regarding matters of general interest. The Judiciary should not be instrumentalized to circumvent the duties of the public administrative authorities to treat all claimants equally.¹²¹ Since a decision involving a question of general interest can only benefit the individual claimant, the other citizens in the same factual circumstances will naturally feel encouraged to file identical court claims.

In administrative law cases, however, neglecting the concept of proportionality sometimes leads the courts to violate the principle of equal treatment under administrative law¹²² on the grounds that judges are free to decide differently and that the litigants are entitled to seek out the best procedural channels to support their arguments and claims. In cases in which a constitutionally legitimized judge rules on an individual claim based on a question of general interest, it would be incompatible with the principle of the *judge predetermined by the law* (predetermined objective rules of procedural jurisdiction) for a different court to rule on the same question, whether concurrently or subsequently, even in reference to different litigants.

In that respect, diffuse control of constitutionality or legality (as opposed to concentrated review) does not mean that the legal system has to tolerate contradictory judicial decisions. In fact, diffuse review assigns jurisdiction to all judges, but once one of them happens to have been selected to decide the case, he should remain the *judge predetermined by the law* for that same dispute, even if the same conflict reappears in other types of proceedings:

The laws of procedure should prevent different judicial bodies from having jurisdiction to try a given case, unless the defense of *lis alibi pendens* is capable of preventing contradictory decisions. **The territorial and subject-matter jurisdiction of the judicial bodies should take into consideration the general and individual nature of the challenged acts, as well as the extent of their effects. . . .** If it is found that different claimants have **identical cases**, with the same subject matter and cause of action, jurisdiction to try the case that was initiated second should be transferred to the judicial body that tried the case that was initiated first. The above rules are applicable, **even if the parties are different, to challenges, through direct channels, of the same**

¹¹⁹ Perlingeiro & Sommermann 2014, at 19.

¹²⁰ Grinover & Perlingeiro et al. 2014, at 117.

¹²¹ See Moraes 2016a and Moraes 2016b.

¹²² Perlingeiro 2012, at 217–227.

general administrative act or decision – whether abstract or concrete – and to the orders to perform or refrain from an action, likewise through direct channels, based on the same diffuse or collective interest. ... If it is possible for a decision on the legality or illegality of a general administrative act or its interpretation, or any other form of conduct by the administrative authorities might affect a large number of disputes, the judicial body should refer the relevant issue to the judge who should, through direct channels, rule on the challenge of the general administrative act, requiring a referral for a preliminary ruling and suspension of the original trial for a reasonable period pending the final decision. The decision on the referred issue shall be effective *erga omnes*.¹²³

Moreover, too much confidence should not be placed in class actions as an alternative to repetitive individual claims in administrative justice. Class actions, which are typical of private law and have their origins in *common law*,¹²⁴ lack the necessary degree of sensitivity to issues of administrative law (especially when opt-ins and opt-outs are involved). For example, the rule of *res judicata secundum eventum litis* under Article 33 of the Model Code of Class Action for Ibero-America¹²⁵ fails to consider the frequent tensions (not always visible) between interests in the administrative law cases, which should be decided in favor of the prevailing public interest according to the principle of proportionality.

In fact, class actions are not even necessary in administrative justice, because individual claims based on administrative acts having a general impact are essentially claims which, if granted, impose a duty – of a moral nature, in particular – on the administrative authority to extend the favorable effects of the judgment to everyone in the same factual situation.¹²⁶ Nevertheless, since there are defects in the rules of procedural jurisdiction (*competence*) allowing more than one judge to rule on the same (substantive) issue (on the merits), it is understandable that the administrative authorities resist such a *duty* to extend the effects of a judgment to third parties because they nourish hopes that a judgment to the contrary that is more favorable to their interests will be delivered in another trial.

¹²³ Perlingeiro et al. 2008, at 253–263. On the subject of the ‘referral for a preliminary ruling on legality’, see Article 20.1 of the Euro-American Model Code of Administrative Jurisdiction (Perlingeiro & Sommermann 2014, at 12).

¹²⁴ See Redish 2003.

¹²⁵ Grinover et al. 2004, at 7, 20.

¹²⁶ See Perlingeiro 2012, at 217–227.

4. Challenges Related to Administrative Authorities

4.1. Primary Administrative Functions

In Latin America, the principle of administrative legality is still confused with strict legality;¹²⁷ in practice, the administrative authorities do not review the legality of their own decisions from the perspective of compliance with the provisions of the constitution and international human rights conventions, and they are incapable of protecting fundamental rights whenever doing so would require an interpretation that goes beyond the strict letter of the law.

There are two main reasons for this.

First of all, because the public administrative authorities are still subordinate to the Government in Latin-American legal culture, so that civil servants are appointed to key positions more for political reasons than for their technical qualifications. The second reason is that civil servants still adhere to the prevailing dogma that they owe a greater commitment to their hierarchical superiors than to legality, and many of them are afraid to protect fundamental rights by challenging a literal interpretation of the law, because they might be accused of *official misconduct*.

Consequently, public administrative authorities are incapable of handling claims for public welfare services or benefits that depend on the enforcement or interpretation of fundamental rights; such claims must be referred to the Judiciary if they are to have any chance of success.

In fact, the prior request to the administrative authority as a condition precedent for bringing an action in court¹²⁸ involves rights which, in order to be claimed, depend on information possessed only by the claimant, and the administrative authorities are under no obligation to provide the corresponding services or benefits until they are provided with such information. The prior request is not a condition precedent for interim relief, however,¹²⁹ and may be replaced by (direct) filing of a judicial action in cases in which it may be taken for granted that the administrative authority will deny the claim (e.g., because it would be required to interpret or enforce the law in a manner contrary to the rules established by its hierarchically superior authority).

¹²⁷ Article 9 (a) of the Argentine Law of Administrative Procedure merely presents statutory provisions defining the principle of administrative legality from the perspective of law in the broadest sense (including constitutional law and international treaties); similarly, the laws of Costa Rica (Article 6 of the General Public Administration Act), Peru (Article V (2)(1) and (2)(2) of the Peruvian Law of Administrative Procedure), and the Dominican Republic (Article 3.1 of the Law of Administrative Procedure of the Dominican Republic).

¹²⁸ On the obligatory prior administrative request, see Article 30 of the Argentine Law of Administrative Procedure. On the subject of the distinction between the prior administrative request and preliminary administrative objection proceedings, see Federal Supreme Court of Brazil, Recurso Extraordinário 631.240 (Judgment of 3 September 2014).

¹²⁹ Article 33 of the Euro-American Model Code of Administrative Jurisdiction (Perlingeiro & Sommermann 2014, at 15).

For administrative authorities to be endowed with independent decision-making powers they must have the necessary prerogatives for freedom of action within their respective spheres of authority, which means being free from hierarchical subordination (in terms of disciplinary actions, career incentives (promotions and benefits), and the employee recruitment system).

According to the I/A Court H.R., being independent means being “autonomous in every aspect of its jurisdictional performance, with the powers to decide without the influence of other bodies of the State – or any external authority – the actions brought before it, autonomy which must not only be enshrined in the laws governing judicial procedure (i.e., the Constitution and secondary laws) but also guaranteed by the actual situation in which the decision-maker acts.”¹³⁰

This means that a civil servant with decision-making powers should not be guided in the exercise of his activities by any motive other than his technical evaluation, without prejudice to imposing further limitations on his decision-making powers based on rules clearly delineating the various spheres of administrative authority, in order to safeguard the coherence of the administrative operations.

4.2. Secondary Administrative Functions

Independence is also necessary in secondary administrative functions (i.e., dispute-resolution functions performed by the public administrative authority itself) and is a prerequisite for impartiality. A lack of independence therefore creates serious risks of a corresponding lack of objective impartiality and fosters widespread distrust of extrajudicial administrative proceedings among the citizens, as is generally the case in Latin America.

This situation encourages individual claimants to try their luck in court if the government agencies refuse to enforce judgments favorable to the claimants when they believe that the judicial decisions against them are attributable to the lack of technical expertise on the part of the judge. In addition, the current situation justifies laws of procedure that make the Judiciary play the role of the *long arm of the administrative authorities* to enforce administrative decisions restricting individual rights, as in the case of judicial enforcement of decisions by the tax agencies, in flagrant contradiction with the principle of *self-enforceability of administrative actions*, according to which administrative agencies are entitled to enforce their decisions without judicial intervention.¹³¹

¹³⁰ Inter-American Court of Human Rights, *Case of Palamara Iribarne v. Chile* (Judgment of 22 November 2005). Concurring opinion of Judge Sergio García Ramírez on the Judgment, para. 9 (c).

¹³¹ Laws providing judicial tax enforcement: Article 653 of the Venezuelan Organic Tax Code (Código Orgánico Tributario da Venezuela / Decree No. 1.434, of 17 November 2014); Brazilian law on tax enforcement (Law on Judicial Collection of Outstanding Tax Claims of the Public Authorities / Law No. 6.830, of 22 September 1980). In contrast, for the admissibility of tax enforcement by the public

Incidentally, the concept of *self-enforceability* has always been resisted in Brazil; for example, the tax authorities are denied the right to expropriate a delinquent taxpayer's property, on the grounds that such authorities are not properly structured for such enforcement activities.¹³² In Argentina, the Supreme Court struck down as unconstitutional a statute¹³³ allowing tax collectors to seize funds and securities on the taxpayer's bank accounts, arguing that it violated the principle of separation of powers.¹³⁴

Cases may also be found in which administrative authorities filed claims in court to annul their own decisions when they generated effects favorable to individual claimants, as has occurred in Bolivia,¹³⁵ Costa Rica,¹³⁶ El Salvador,¹³⁷ Honduras,¹³⁸ and Paraguay,¹³⁹ which is incompatible with the administrative power of *autotutela* (i.e., self-governance, including the power of the administrative authorities to declare their own decisions and regulations null and void). Further evidence of the impotence of administrative authorities to discipline their own ranks is provided by the petitions in Brazil for a declaration of *improbidade administrativa* (administrative dishonesty), where citizens resort to the courts to impose civil and disciplinary penalties on corrupt civil servants.

Another demonstration of the inadequacy of the extrajudicial administrative proceeding (hearing) is that the citizens' claims often prove to be *no better than trying to draw water from a dry well*¹⁴⁰ and that torrents of national legislation have defined judicial appeals of administrative decisions as an option rather than as a condition

authorities themselves, see: Articles 98–101 of the Colombian Law of (Judicial and Extrajudicial) Administrative Procedure; Article 3 of the Chilean Law of Administrative Procedure; Article 149 of the General Public Administration Act of Costa Rica; Article 145 (1) of the Mexican Federal Tax Code; Article 69 (1) of the Tax Code of the Dominican Code (Código Tributario de la República Dominicana / Law No. 11, of 16 May 1992).

¹³² See Duarte 2005, Erdelyi 2007, Vasconcellos 2012 and Branco 2016.

¹³³ Article 92 et seq. of the Tax Code (*Ley de Procedimiento Tributario*) of 1978.

¹³⁴ National Supreme Court of Justice, Argentina (Corte Suprema de Justicia de La Nación), *Case of Administración federal de ingresos públicos c/ intercorp S.A. s/ ejecución fiscal* (Judgment of 15 June 2010).

¹³⁵ The Bolivian Constitutional Court has ruled as follows: "In order to ensure stability, administrative decisions granting rights cannot be suspended within the administrative authority" (Bolivian Plurinational Constitutional Court (Tribunal Constitucional Plurinacional), *Sentencia Constitucional Plurinacional 0584/2013*. Exp: 02569-2013-06-AAC (Judgment of 21 May 2013)).

¹³⁶ Article 10.5 of the Code of Administrative Justice of Costa Rica.

¹³⁷ Articles 7(b) and 8 of the Law of Administrative Justice of El Salvador.

¹³⁸ Article 15 of the Law of Administrative Justice of Honduras.

¹³⁹ The Tax Court of Paraguay (Judgment 280 of 18 April 2002) confirmed that a judicial action is needed to reverse (an administrative decision favorable to an individual claimant), arguing that the dispute concerning the nullification of such decisions must be settled by an impartial 'third-party'.

¹⁴⁰ Cassagne has pointed out the precedent-setting judgment of the Constitutional Section of the Supreme Court of Costa Rica in the 'Fonseca Ledesma' case, according to which a prior administrative request was equivalent to 'draw[ing] water from a dry well,' in light of the fact that the hierarchically superior administrative bodies rarely modify the lower authorities' decisions (Cassagne 2012, at 75).

precedent for filing a claim in court.¹⁴¹ Even in the rare laws that impose such a condition precedent for access to the courts¹⁴² it is considered optional whenever there is a risk of danger in delay, in which case the claimants may apply for *judicial* interim relief, even without completing the *extrajudicial* administrative hearing.¹⁴³

Finally, it should be pointed out that the courts' powers of open review over the decisions issued in extrajudicial administrative proceedings is really based on the premise that such proceedings are merely optional for the citizens and the administrative authorities themselves, which means that they could be eliminated and entirely replaced by judicial action.

5. Diffuse Conventionality Control Vis-à-Vis the Administrative Authorities

The Latin-American countries' incorporation of the doctrine of *diffuse conventionality control* established by the I/A Court H.R. is currently the key to the fulfillment of the administrative authorities' duty to protect fundamental rights, although, to do so, it is necessary to overcome unconstitutional laws.

Mac-Gregor argues as follows:

[T]he expression 'conventionality control', however, was first used by Judge García Ramírez in his separate opinions in cases such as *Myrna Mack Chang v. Guatemala* (which followed the *Barrios Altos* precedent). Ramírez stated[,] '[A]t the international level, it is not possible to divide the State, to bind before the Court only one or some of its organs, to grant them representation of the State in the proceeding – without this representation affecting the whole State – and excluding other organs from this treaty regime of responsibility, leaving their actions outside the 'conventionality control' that involves the jurisdiction of the international court.' The idea was further developed in *Tibi v. Ecuador*: "[I]f constitutional courts oversee 'constitutionality', the international human

¹⁴¹ Binding Precedent 89 (*Súmula 89*) of the Brazilian Superior Court (Superior Tribunal de Justiça). See also Article 32 of the Euro-American Model Code of Administrative Jurisdiction (Perlingeiro & Sommermann 2014, at 15).

¹⁴² There are examples of a prior administrative request as a prerequisite for filing a claim in court: according to Article 70 of the Bolivian Law of Administrative Procedure, a prior attempt at extrajudicial resolution of any administrative dispute is a prerequisite for applying for judicial review. It is also worth mentioning Article 4.3 of the Code of Administrative Justice of the Russian Federation, which provides for the possibility of legislators, in certain cases, to make access to the courts conditional on completing an extrajudicial administrative objection procedure: "If, in certain categories of administrative affairs, federal law requires following obligatory pre-judicial procedures for the settlement of administrative disputes or certain other public disputes, then access to the courts shall be possible after complying with such procedures."

¹⁴³ Articles 23 (a) and 9 of the Argentine Law of Administrative Procedure. See also Article 32.3 of the Euro-American Model Code of Administrative Jurisdiction (Perlingeiro & Sommermann 2014, at 15).

rights court decides on the 'conventionality' of those acts'; and, finally, in *Vargas Areco v. Paraguay*, which highlighted that the 'control of compliance [is] based on the confrontation of the facts at stake and the provisions of the American Convention.' Later, Judge Cançado Trindade also referred to conventionality control as a mechanism for the application of international human rights law at the national level.¹⁴⁴

That doctrine was initially addressed to *all national judges*,¹⁴⁵ but it was later agreed that, within their respective spheres of authority, "all authorities and bodies of a Signatory Nation of the Convention have the obligation to exercise conventionality control."¹⁴⁶ According to the I/A Court H.R., "[t]he conventional obligations [of a] Signatory Nation are binding on all branches and bodies of the State, meaning that all the Branches of Government (Executive, Legislative, Judicial, and other branches of public power) and other public or state authorities, of any level, including their highest courts of justice, have a duty to comply with international law in good faith."¹⁴⁷

The *duty of conventionality* proposed by the I/A Court H.R. has four characteristics: it is exercised (a) *ex officio*; (b) in compliance with the **interpretation** (of the provisions of the relevant conventions) as formulated by the I/A Court H.R., i.e., it is subject to a "forced adherence to the Inter-American Court's interpretations;"¹⁴⁸ (c) by authorities who exercise such 'control' independently of their hierarchical status, rank, amount in dispute, quantity or subject-matter jurisdiction assigned to them by domestic law; and (d) by administrative authorities and judges even if they do not have jurisdiction for constitutionality control, which does not necessarily imply opting to apply the conventional provisions or case law while ceasing to enforce the national laws, rather it means, first and foremost, trying to harmonize the provisions of national law with those of the Convention, by means of a 'conventional interpretation' of the national law.¹⁴⁹ The I/A Court H.R. explains this point as follows:

¹⁴⁴ See Mac-Gregor 2015.

¹⁴⁵ Inter-American Court of Human Rights, *Case of Cabrera García and Montiel Flores v. Mexico*, opinion of Eduardo Ferrer Mac-Gregor Poisot, ad hoc Judge (Judgment of 26 November 2010), para. 33.

¹⁴⁶ Inter-American Court of Human Rights, *Case of personas dominicanas y haitianas expulsadas v. República Dominicana* (Judgment of 28 August 2014), para. 497.

¹⁴⁷ Inter-American Court of Human Rights, *La sentencia de supervisión del cumplimiento en el caso Gelman v. Uruguay* (Judgment of 20 March 2013), para. 59.

¹⁴⁸ A *block of conventionality* (forced adherence to the Inter-American Court's interpretations), as recommended by the Inter-American Court of Human Rights, would be incompatible with the constitutional court precedents of certain European countries. On the supremacy of the national constitution over human rights conventions, see the Russian Federal Constitutional Court Ruling No. 21 of 14 July 2015 (with references to precedents of the constitutional court precedents of Germany, Italy, and Austria).

¹⁴⁹ See Inter-American Court of Human Rights, *Case of Cabrera García and Montiel Flores v. Mexico*, opinion of Eduardo Ferrer Mac-Gregor Poisot, ad hoc Judge (Judgment of 26 November 2010), para. 33–35, 37, 42, 44, 59.

[B]y contrast, the intensity of 'diffuse conventionality control' will diminish in those systems that do not permit 'diffuse constitutionality control' and, therefore, not all judges have the authority to not apply a law to a specific case. In these cases it is obvious that judges who lack such jurisdiction will exercise 'diffuse conventionality control' with less intensity, *without this implying that they cannot do so* 'within their respective jurisdictions.' This means that they may not suspend application of the law (since they do not have that power), and will, in any case, make a 'conventional interpretation' of it, i.e. a 'compliant interpretation,' not only of the national Constitution, but also of the American Convention and the associated case law. This interpretation requires a creative effort in order to ensure compatibility between the national standard and the conventional parameter, thereby guaranteeing the effectiveness of the right or freedom in question, with the greatest possible scope in terms of the *pro homine* principle.¹⁵⁰

However, in case of absolute incompatibility,

where no 'conventional interpretation' is possible, if the judge lacks the authority to suspend the rule, he is limited merely to indicating its non-compliance with the Convention or, where appropriate, 'calling into question its conventionality' before other competent courts within the same national legal system so that they can exercise 'conventionality control' with greater intensity. Thus, the reviewing judicial bodies will have to exercise that 'control' and disregard the rule or declare it invalid based on its non-compliance with the Convention.¹⁵¹

Regarding a new paradigm for contemporary administrative law, Ernesto Jinesta points out the following:

[T]he diffuse conventionality control exercised by the administrative courts ostensibly broadens the dimension of legitimacy which should be substantially adopted to the administrative conduct, resulting in a reformulation of the sources of administrative law by incorporating the 'block of conventionality' as a benchmark, which might possibly lead to a *common* system of administrative law.¹⁵²

¹⁵⁰ See Inter-American Court of Human Rights, *Case of Cabrera García and Montiel Flores v. Mexico*, opinion of Eduardo Ferrer Mac-Gregor Poisot, ad hoc Judge (Judgment of 26 November 2010), para. 37.

¹⁵¹ Inter-American Court of Human Rights, *Case of Cabrera García and Montiel Flores v. Mexico*, opinion of Eduardo Ferrer Mac-Gregor Poisot, ad hoc Judge (Judgment of 26 November 2010), para. 39.

¹⁵² Jinesta 2015, at 47 et seq.

In Mexico, the doctrine of diffuse conventionality control is considered to be the inspiration for the 2011 amendment of the Constitution, in which Article 1 was reworded thusly: “[A]ll authorities, within their respective spheres of authority, must comply with a series of human rights obligations.”¹⁵³

Moreover, in harmony with the case law of the I/A Court H.R., the Mexican National Supreme Court of Justice ruled as follows:

[T]he administrative authorities are not empowered to perform any type of constitutional control, whether concentrated or diffuse; this means that they cannot declare a certain law null and void and refuse to enforce it, not even by arguing that they are marking reparations for a human rights violation, since that would involve disregarding the statutory conditions precedent for filing a defense, which must be fulfilled before any judgement may be delivered on the merits of the case. In any case, statutory provisions must be interpreted in the sense most favorable to individuals, but not at the cost of ignoring the powers and duties to be exercised within the bounds of the respective spheres of authority. To accept otherwise would create legal uncertainty in patent violation of other human rights such as legality, due process, and legal certainty, guaranteed by Articles 14 and 16 of our Constitution.¹⁵⁴

It is also worth mentioning here that the Ibero-American Institute of Procedural Law, in its Model Code of Administrative Procedure and Administrative Justice for Ibero-America, adopted the *doctrine of diffuse conventionality control* by stipulating that it is the duty of administrative authorities, whenever faced with unconstitutional or anti-conventional laws, to request a preliminary ruling on constitutionality from the appropriate court of law or competent administrative authority.¹⁵⁵

6. Certain Organizational Prospects for Administrative Justice

In the search for an organizational model for administrative justice adapted to the peculiarities of the judicial system in force in Latin America, two considerations merit attention: (a) institutional guarantees for the administrative authorities, within their respective spheres of authority and in the exercise of the primary executive functions, should be guided by the principle of the rule of law, that is to say, the supremacy of fundamental rights; (b) independent adjudication of administrative

¹⁵³ Article 1 of the Mexican Constitution (Constitución Política de los Estados Unidos Mexicanos).

¹⁵⁴ Mexican National Supreme Court of Justice (Suprema Corte de Justicia de la Nación de México), Amparo directo en revisión 1640/2014 (Judgment of 13 August 2014).

¹⁵⁵ Article 2 (single paragraph) of the Model Code of Administrative Procedure and Administrative Justice for Ibero-America (Grinover & Perlingeiro 2014, at 111).

disputes should be provided not only by the Judiciary, but also by the administrative authorities themselves.

According to the Inter-American Court of Human Rights, the obligation of effective judicial protection is applicable not only to the courts but also to the administrative authorities, and on two different levels: (a) in the case of administrative dispute-resolution functions performed by the authorities themselves in which the decision is final (not subject to subsequent judicial review), the authorities must be competent, independent, impartial, pre-established, and attentive to procedural due process;¹⁵⁶ (b) in the case of a public administrative authority's purely executive functions and the equivalent (such as the adjudication of disputes subject to full judicial review), the authorities must comply with Article 8.1 of the American Convention on Human Rights **only to a sufficient extent** to prevent an arbitrary administrative decision.¹⁵⁷

This means that, from the human rights perspective, legislators have sufficient powers of policy-making to assign dispute-resolution functions (adjudication) to the administrative authorities, to make them subject to the same requirements as those applicable to courts of law, while reducing the courts' field of action accordingly. In addition, it may be inferred from the I/A Court H.R. precedents that administrative functions of a purely executive nature must be exercised by administrative authorities which have the necessary degree of independence and technical expertise to base their decisions not only on the strict letter of law but also on an analysis of fundamental rights.

7. Closing Considerations

After over two centuries of a judicial system consisting solely of courts of general jurisdiction, it would not seem the best option at this point to start discussing specialization of the courts. Indeed, the future of Latin-American administrative justice depends on guaranteeing procedural due process in the administrative sphere, based on the U.S. model imported in recent decades, in order to make up for the lack of specialized administrative courts in our judicial systems.

¹⁵⁶ According to the I/A Court H.R., "[N]ational legislation should ensure that the officials who are legally authorized to exercise jurisdictional functions meet the requirements of impartiality and independence applicable to any public authority which, through its decisions, determine[s] individual rights and obligations of individuals ..." (Inter-American Court of Human Rights, *Case of Vélez Loor v. Panama* (Judgment of 23 November 2010), para. 108). Moreover, in the case of *Barbani Duarte et al. v. Uruguay*, the I/A Court H.R. treats the Uruguayan 'Tribunal do Contencioso Administrativo' as a court of law despite the fact that it is an administrative dispute-resolution authority external to the judicial branch of the Uruguayan government.

¹⁵⁷ Inter-American Court of Human Rights, *Case of Claude-Reyes et al. v. Chile* (Judgment of 19 September 2006), para. 118 and 119. The judgment of that case was reversed by the I/A Court H.R. as a baseless, arbitrary judgment that is exemplary of an arbitrary decision (para. 120).

Moreover, the case law of the I/A Court H.R. on *diffuse conventionality control* by the national administrative authorities would be compatible with the creation of an administrative structure with institutions similar to the *quasi-judicial bodies* or *administrative tribunals* typical of *common law* systems, which would require independence and impartiality, as well as adjudicators with sufficient legal expertise to take human rights conventions and the constitution into account in their decisions.

Against this backdrop, administrative decisions should be subject to limits imposed by the rules clearly demarcating the spheres of administrative authorities, based on the following criteria:

1) the distinction between a) an *interpretation according to the constitution* and the American Convention on Human Rights and b) a *declaration of unconstitutionality and anti-conventionality* (due to an act or omission), and

2) the extent of the impact of the challenged administrative act or decision.

This would prevent the legal uncertainty that is generated by contradictory court rulings and facilitate the understanding that, as soon as a court grants a petition to reverse an administrative authority's decision in favor of the claimant, the benefits of that ruling should extend to all individuals (even if not directly parties to the dispute) in the same factual situation.

In fact, the required degree of administrative specialization in the Judiciary is inversely proportional to the abilities of the administrative authorities to play their role properly: the more effectively the administrative authorities protect fundamental rights, the greater the citizens' confidence in those authorities, and the greater the judicial deference shown to government agencies, the less it is necessary for the Judiciary to specialize in administrative law. In any case, it is imperative to change the rules of procedural jurisdiction in such a way as to prevent contradictory court rulings on a given administrative act challenged by different claimants.

Thus, it is not fair to blame the focus of the judicial system and the laws governing judicial proceedings as the only causes of the excessive litigation and ineffectiveness of the administrative justice system; on the contrary, Latin America needs to accept the reality of its judicial system with general jurisdiction over both private and administrative cases, while gradually reducing the courts' powers of review through an administrative reform based on the precept of *diffuse conventionality control* established by the precedents of the Inter-American Court of Human Rights. Such a reform would ensure that the administrative authorities respect fundamental rights in their executive and adjudicative actions by forcing them to act as an instrument of expression of the public interest, rather than as an end in themselves or as agents protecting their own temporary political and financial interests.

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