JUSTIÇA ADMINISTRATIVA: O FUTURO DOS TRIBUNAIS BRASILEIROS

ADMINISTRATIVE JUSTICE: THE FUTURE OF BRAZILIAN COURTS

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ÁREA(S): processo civil; direito constitucional; direito comparado.

RESUMO: O artigo pretende demonstrar que no atual cenário social brasileiro o Poder Judiciário não mais pode ser responsável, de forma exclusiva, pela resolução dos conflitos, impondo-se a efetiva participação do Poder Executivo no sistema de adjudicação de justiça.

***ABSTRACT**: This paper aims to demonstrate that in our current society the judiciary branch cannot be alone responsible for the system of justice adjudication, and that the active participation of the executive branch in granting some sort of administrative adjudication is critical.*

PALAVRAS-CHAVE: resolução extrajudicial de conflitos; agências reguladoras; doutrina da exaustão dos remédios administrativos e comportamento judicial.

***KEYWORDS**: administrative adjudication; regulatory agencies; theory of exhaustion of administrative remedies, judicial behavior.*

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INTRODUCTION

99.7 million[2]. That was the number of lawsuits pending to be reviewed by Brazilian courts in 2015. In a country with an officially estimated population of 204 million[3] in the same year, that means almost one lawsuit for every two persons.

The United States, whose population in 2016 was nearly twice as big as Brazilian, being officially established in 323 millions[4], has nevertheless a significantly smaller judicial docket, estimated in 2015, with a decreasing trend, at 88 million[5]. The comparative analysis of both judicial systems also reveals the much smaller role of civil cases in American state courts, corresponding to only 18% with a decreasing trend of – 5%, whereas in Brazil they are responsible for more than 72% of the state total caseload[6].

The systematic analysis of the Brazilian judicial docket that has been undertaken since the creation of the Brazilian Administrative Council of Justice in 2004, which is the entity responsible for the national management of federal and state courts regarding the establishment of goals, docket control and evaluation programs, also revealed that the public sector and banks are responsible for 76% of this immense caseload[7]. The Brazilian National Judge Association – AMB arrived at a similar conclusion in a study published in 2015[8], which revealed that the financial sector was the most common defendant in the state courts – the ones that concentrate the largest number of lawsuits.

To face these chaotic numbers, there is a total of 17.338[9] judges in Brazil, according to a 2016 official report.

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2 Executive summary-Court in Figures, 2015, elaborated by the Brazilian National Council of Justice.

3 From the Brazilian Institute of Geography and Statistics (available at http://www.ibge.gov.br/home/estatistica/populacao/estimativa2015/estimativa_dou.shtm).

4 Available at https://www.census.gov/popclock/.

5 U.S. State Courts Caseload Data/2015. Copy with author, obtained from U.S. Federal Judge Jed Rakoff (NY).

6 Available at http://www.cnj.jus.br/files/conteudo/arquivo/2016/10/50af097ee373472788dd6c94036e22ab.pdf.

7 Survey on the major litigants within the Brazilian judiciary/2012, available at www.amb.com.br.

8 U.S. Federal Courts Indicators/2016. Copy with author, obtained from U.S. Federal Judge Jed Rakoff (NY).

9 Available at http://www.cnj.jus.br/files/conteudo/arquivo/2016/10/50af097ee94036e22ab.pdf.

These relatively recent studies and precise data provided, for the first time, the tools for effective analysis of the Brazilian judicial system, and showed a litigation level rarely seen in other countries. It also made clear, beyond doubt, that such a caseload – which keeps growing every year – is unmanageable with the budget and the number of judges available and, particularly, with the institutional approach that has been given to this issue so far.

Although the measured productivity level of the judge's work in the majority of state and federal courts is high and continues to grow over time, the numbers reveal a dysfunctional litigation system, which in many ways is a consequence of the failure of the executive branch to adequately and efficiently perform its constitutional and legal duties. As a result, the courts are the main and, in most cases, the only law enforcement instrument available to the public regarding areas under the regulatory and supervisory control of administrative agencies and other bodies institutionally linked with the executive branch, such as consumer demands and retail financial operations.

One of the clearest examples of this distortion is the almost nonexistent supervisory role of the Brazilian administrative agencies, notwithstanding expressly established by their statutes. Indeed, the simplest consumer complaint or the request of a contract copy from a bank become lawsuits everyday, as the fundamental interface of the agencies is mostly unknown to the general public, solemnly ignored by lawyers and, alarmingly, also by the majority of the Brazilian judges.

This scenario is also fostered by the Brazilian courts as they predominantly do not require the exhaustion of administrative remedies as a condition of admissibility to hear a case, nonetheless no reason is given by the plaintiff to justify direct litigation or even if the case presents no urgency.

This pattern of executive and judicial response has disastrous effects: the unworkable caseload turns the system slow and consumes ever growing public resources; millions of simple and many times futile cases flood the court's docket preventing judges from efficiently establishing priorities and dedicating themselves to serious and complex lawsuits, including criminal cases. As a result, the Judiciary branch is usually described as a slow, expensive and inefficient structure, dissatisfying the citizenry and scaring investors. At the same time, this litigation model also does not foster the executive branch to perform its services but instead invites the Judiciary to passively accept and execute typical

functions of administrative agencies, such as to hear a demand at first hand and punish the private agent responsible or even the entire sector when facing an illegal or abusive widespread practice, in order to remand to the courts only the controversial claims that could not be solved administratively.

This paper aims to demonstrate that in our current society the judiciary branch cannot be alone responsible for the system of justice, and that the active participation of the executive branch in granting some sort of administrative adjudication is critical. It purports to do so by analyzing the connection between the main sources of litigation in Brazil and the role of the administrative agencies, as well as by pointing out the causes of the chronic malfunction of the executive branch regarding the supervisory role of its agencies. This work regards the requirement of a prior administrative proceeding seeking relief, when available, as a legitimate exercise of judicial restraint.

1 AN OVERVIEW OF THE BRAZILIAN JUDICIARY DOCKET

The unprecedented role granted to the Brazilian Judiciary branch by 1988's Constitution was not accompanied by a previous structural analysis on how and if the courts could cope with the amplitude and complexity of attributions that their were assigned. It is certainly true that the same assertion could be made to the other branches, as the legislative until now have not enacted all the statutes determined by the Constitution, and the executive is far beyond compliance with its mandatory obligations. Nevertheless, many public policies prescribed by the constitutional text were indeed implemented by the executive both in federal and state level, a phenomenon that created an inflated executive body that extended from nation-wide costless health care, social security and airport management, to retail financial operations by public banks.

This constitutional and political scenario, together with the gradually increasing awareness of social rights also expressly established in the Constitution and its vast set of general principles open to interpretative individualization, provided the courts with a large variety of hermeneutic tools. The statement made about the new Civil Code, passed in 2001 and also principle-based, regarding it as a "*code for judges*", can also be appropriately addressed to the 1988's Constitution. This political power was not exercised with particular restraint, and as judges started revisiting prior statutes in order to adapt their meaning to a compatible constitutional interpretation, several individual and social rights were defined. This is a phenomenon that had a major impact in the

citizenry, which over time perceived the judiciary as an open venue to address every conflict.

Although a similar social process also happened in the United States, in North America other factors remained constituting strong barriers to ligation, such as high judicial costs and attorney fees, the existence of parallel institutions where legal redress could be sought – as administrative agencies –, and the decisive predominant understanding that this extrajudicial venue should be exhausted before litigation.

> *Deeply influenced by the conjuncture of the civil rights movement on the one hand, and a Supreme Court that elaborated expansive understandings of individual and group rights on the other, there emerged an American citizen characterized both by a heightened state of "rights consciousness" and by an increasing turn to courts to vindicate those rights.*[10]

2 THE REGULATORY AGENCIES

Under Brazilian 1988's Constitution, for instance, the main guarantees and rights attributed to citizens when engaged in a lawsuit are also expressly established for administrative procedures, such as the reasonable duration of a trial[11], an adversary procedure enabling parties to cross-examine witnesses and oppose documents as well as comprehensive means of defense, including appeals.

The administrative venue, as such, would not deprive citizens from typical judicial procedural rights, at least in a formal perspective, along with the fact that administrative procedures are usually costless in Brazil – and this is the case with all of consumer claims, which encompass a significant part of Brazilian lawsuits due to the broadly construed Consumer's Act[12].

If a wide concept of administrative justice can be traced back to chancery courts, it is also true that they were then endowed only with the typical

[10] Sean Farhang, *The Litigation State, Public Regulation and Private Lawsuits in the U.S*. 14 (Princeton University Press eds., 2010).

[11] Constituição Federal (C.F.) [Constitution], art. 5, LXXVIII (Braz).

[12] Lei n. 8.078, de 11 de setembro de 1990, Diário Oficial da União [DOU] de 12 de setembro de 1990 (Braz).

adjudication function, while modern agencies exercise broad normative and inspection powers as well. The question then comes to why did the United States Congress, after the enactment of the Constitution – which did not endorse a system of both chancery and law courts – over time decided to delegate adjudication and other broad powers to administrative bodies, rather than – at least regarding the adjudication function – leaving it for common law courts alone?

One possible reason is the alleged inadequacy of the judicial process in dealing with legislative and executive policies, as well as with regulatory issues. Indeed, judges were considered to be ineffective instruments of enforcement of the regulatory statutes enacted in the late 19th and 20th centuries, as they would act mainly as impartial umpires rather than officers committed with the effective implementation of a given policy.

The inherent "upper hand" of an enacted legislative or executive policy which would place the burden of a challenge in the private company or individual would be substantially undermined within the traditional judicial process, which would rather see both sides as conflicting parties in the same level.

Furthermore, the individualistic trend of judicial behavior was regarded incompatible with the enforcement of regulatory laws endowed with considerable social and economic impact. The judge's inherent aim of providing a just and adequate solution to a given individual case under a rigid body of procedural norms was seen as an automatic provider of resistance towards the implementation of broad policies and goals chosen by other branches, leading the legislator to choose the administrative rather than the judicial venue to exercise that function.

There must also be mentioned, as another great difficulty with the courts for that matter, the costly and cumbersome procedures traditionally employed by them. The judicial venue is usually seen as an expensive and time-consuming choice, thus presenting a strong deterrent effect to the average citizen and business in general. Conversely, administrative agencies were originally intended to comply with their normative and adjudication duties in a much cheaper and fast manner, both for the government and the citizenry.

In Brazil, however, the logic is the opposite, to the extent that the judiciary branch is concerned. The judicial system in general does not present a deterrent

effect regarding costs, as judicial gratuity is granted massively. In addition, as the administrative venue and its adjudication possibilities are immensely underused by the citizenry and by lawyers themselves, even the considerable duration of a judicial process do not seem to constitute a reason to avoid the court system.

Indeed, the possibility of obtaining *in limine* orders, which can address the merits and are commonly granted just after the filing of a lawsuit, apart from reinforcing the idea that the administrative venue is unnecessary, reveals one of the most problematic aspects of the Brazilian judicial culture, namely the relation with other branches of government, particularly the executive.

In a comparative analysis with the American courts' behavior, Brazilian judges in general pay very little deference to administrative bodies' regulations and administrative decisions.

This systematic institutional disregard is demonstrated by the rareness of agency consultation prior or during a judicial procedure, as well as by the fact that decisions on the merits are often delivered without the administrative record. In this sense, if the administrative analysis is seen by judges as an unnecessary step, it is indeed not surprising that it is largely ignored by lawyers.

This judicial behavior clearly incentives litigation, as it channels the demands to the judiciary alone. It presents the disastrous effect of not only underscoring the administrative venue as irrelevant, but also the fact that even if that was not so, the judiciary can overlap it anyway. Conversely, in the United States judges pay considerable deference to regulatory agencies, allocating the burden of a challenge of the administrative record or decision on the plaintiff.

Such a reciprocal institutional consideration has a strong effect on the justice system, as the administrative decision is not perceived as a mere formal step that can be overlapped by its judicial counterpart, but as an informed act of an expert agency responsible for the regulation of an specific field that, as such, must be defied on specific grounds and with strong evidence within the agency itself and, if the issue remains disputed, in the judicial system, which then would not focus mainly on plaintiff's claim, but rather on the agency's procedure and decision.

In the United States, given the premises mentioned supra, and as the idea of avoiding the judicial branch took momentum, in the absence of any favorable perspective of enforcement of regulatory laws in an era of continuous

growth of the executive's role, the concept of endowing adjudication power to administrative agencies, which could be staffed with executive or legislative appointees, was seen as the best solution.

Another main advantage was that these bodies were conceived to be formed by experts able to devote themselves exclusively to the particular specialized field of the agency and, as such, at least in theory, they could provide adjudication in a more expeditious way, as it usually happens with specialization in general.

The creation of administrative bodies within the executive branch – presenting different levels of autonomy – endowed with normative, regulatory and adjudicative power along with inspection functions is intertwined with the necessity of fast and efficient implementation of executive policies in the first half of the 20th century, particularly after the first world war, as well as with the widespread view at the time that the judicial branch was not able to address this task. The regulatory agencies are thus a direct consequence of the growth of the administrative state and of the new agreement on the distribution of powers between the branches of government. As the pace for the implementation of the executive's policies increased and could not be matched by the traditional legislative process, Congress delegated a set of powers to specialized executive bodies – particularly the normative power.

After more than a century, the administrative agency's experience in the United States can be regarded as successful, as even with the growing political predominance and strength of the courts, administrative adjudication was maintained with the agencies. Indeed, the old judge-made rule regarding the request of the exhaustion of the administrative venue prior to judicial litigation ultimately represents a judicial deference to administrative procedure and adjudication, and the fundamental issue here is of course the proper allocation of adjudication authority between courts and administrative agencies.

It is indeed possible to argue that the advantages of a decision by administrative organs – namely expedition, freedom from the bonds of judicial procedure technical rules and the consequent potential ability to give effect to the regulatory laws as well as legislative and executive policies – are reached at the cost of the main characteristics of the judicial function, such as the impartiality of the judge, certainty and predictability.

The doctrine of the exhaustion of administrative remedies, even in its original broader conception, only precluded access to the courts when available administrative appeals were voluntarily disregarded, and even so the doctrine was always understood to present many exemptions, as it will be seen in detail infra.

Secondly, the absence of impartiality does not necessarily leads to an incorrect or poor reasoned and biased-driven administrative decision, as many of them are uphold everyday by the judiciary.

Furthermore, even from the procedural aspect the administrative adjudication must observe the adversary system and due process. As such, even if the analysis of the administrative officer is probably biased at some level as he is not an impartial third uninterested party – but indeed represents the organ which either practiced the controversial act or is responsible for its regulation or inspection –, and the administrative procedure may not grant the number of witnesses, phases or prerogatives that the judicial venue provides, administrative adjudication can be regarded as a fair procedure endowed with sufficient tools to attend the citizenry in a satisfactory manner. In sum, administrative adjudication justifies itself, and the same can be said about the United States, whose administrative adjudication model has been running nonstop for more than a century.

Regarding certainty and predictability, although internal administrative acts and regulations establishing the interpretation of a statute and its policy may indeed vary with the changing governments if the agency is not completely independent and its top directors are not granted a fixed mandate, in general it is possible to see the establishment of administrative precedents, as a general rule.

The administrative trends of interpretation must indeed be at least relatively stable over time in order to enable the proper functioning of the agency and its adjudication venue, which in the United States has been addressing literally millions of persons for many decades.

It is then not accurate the view that the citizenry cannot predict administrative adjudication outcomes, as agencies can construe a body of relatively steady jurisprudence that can be accessed and studied.

From an economic perspective, the allocation of simple claims in the administrative venue is cheaper for the citizenry, as all of these costs are

ultimately handled with public money. Each judge's hour of work is extremely expensive and as such should be used wisely with claims that truly demand an specialized, impartial and tenured public servant.

Indeed, in Brazil judges receive one of the largest salaries of public service, and although there's no comparative study addressing the administrative agency's costs as a whole, it is at least unreasonable and economically unproductive to spend hours of work of the most expensive public servant – a judge – with millions of simple claims that could be easily analyzed by much lower-cost officers.

The birth of the mass consumer society and the claims inherent to it directly affected the functioning and internal procedures of administrative agencies, which through their normative and regulatory power commanded private companies to increasingly improve their methods of consumer support in various platforms in such a way to remand to the agencies only truly controversial issues.

In fact, the pattern that can now be observed in the United States is that dispute resolution – and its costs – should first be addressed by the private companies that profit from their mass-consumer activities; if this venue does not provide a satisfactory solution, successively agencies and, as the ultimate resort, courts, will come into play.

In Brazil, this private interface that should be the first to address millions of claims does not work properly due to the timid exercise of the agency's regulatory and inspection powers. This administrative behavior can be at least partly explained by the awareness of the court's broad acceptance of these claims even when no prior attempt to solve the dispute was made either in the private sector or with the agency.

In this way, the private venue does not filter the majority of the claims and they are virtually in total further channeled to the courts, as the adjudication within the agencies is practically non-existent if compared with the number of lawsuits that could be addressed by them.

Thus, the implementation of a proper allocation of adjudication between the administrative and judicial venue will demand from the agencies an intertwined and efficient exercise of their normative and adjudication powers, in order to command private companies to establish broad, effective and expeditious dispute-resolution platforms in a feasible but short period of time,

within a plan submitted to close – and also effective – inspection, as well as punishment for noncompliance.

Presently, it is indeed understandable the recklessness of the agencies regarding this issue, as the claims not properly addressed in the private venue are not later received by them, but instead by the judiciary branch. As such, a change in judicial behavior demanding the exhaustion of the administrative remedies as in the United States or, at least, a previous administrative request within the agency, will almost certainly cause an immediate reaction in the administrative venue, which will then have an immense incentive to exercise its broad powers towards the private sector in a much stronger way, considering the prospect of receiving a much larger number of complaints than they are used to.

In the long term, the requirement of previous administrative analysis will indeed remand the majority of the claims received by the judiciary to the agencies, and time should be used wisely by the heads of the agencies. The administrative venue will be clogged only if it remains, as now, largely inert regarding the duties of the private sector and ineffective towards the broad powers of regulation and inspection that the agencies possess.

The administrative agencies, as such, because uniquely endowed with legislative, executive and adjudication powers, possess the tools to reasonably handle the dispute resolution processes that come along with the economic field that they have the duty to regulate, supervise and punish.

Even regarding the internal agency's proceedings, after more than a century of administrative adjudication in the United States the concept was never addressed with such a level of criticism that truly jeopardized its maintenance, and presently still runs in a rather satisfactory way along with judicial adjudication.

Economy, simplicity, and dispatch are indeed characteristics of proper administrative agency's functioning – particularly, as the United States example evidences, if the adjudication power is exercised in connection with the normative power.

Indeed, one outstanding characteristic of the administrative agencies is the possession of powers which are both legislative and judicial in nature. They are vested with the authority to promulgate rules and regulations and to

render decisions affecting the person or property of particular individuals and companies.

Although the registration of a complaint is currently extremely facilitated by all main agencies, which provide simple and fast access through their internet webpages, telephone or regular mail, as well as a reasonable time-limit for a response – usually 10 days –, the inexistence of a systematic and nationwide publicity about the role of these administrative bodies and how they may serve the citizenry – in many cases much faster than the judiciary itself to deliver the same relief –, strongly contributes to prevent the public from being aware and deploying an alternative law enforcement instrument maintained with public resources, thus empowering a culture of general ignorance of the functioning of the administrative structures that conceive the judiciary as the only existing institution available and responsible for law enforcement.

When confronted with this reality, the heads of the agencies usually justify the timid supervisory activity on economic grounds, stating that the infliction of administrative penalties such as fines and suspension could affect the financial health of the companies.

This administrative culture reveals that effective supervision is seen with hesitation and institutional distrustfulness, not only being a matter of budget or insufficient staff, as usually stated in lawsuits by the agencies when asked to justify their omission towards illegal practices.

It is then clear that two elements of the regulatory cycle are defective, as the agencies implement in a regular basis only the normative function, systematically neglecting their inspection and punitive attributions. Indeed, even when an administrative complaint is registered within the agencies, their procedure is usually circumscribed to the forwarding of it to the company, without the imposition of sanctions when the latter does not comply with the law or other administrative enactments. Thereby, besides undermining any deterrent effects of fines and suspension of services and as such fostering future litigation, the agencies do not have a systematic record of sanctioning actions in order to inform future inspections and foresee mass demands.

The fundamental role of the agencies as law enforcement bodies is not only generally ignored by the population but is also nationwide underused by judges and lawyers, and as such the legal culture is still mainly connected to the judiciary alone.

3 THE THEORY OF EXHAUSTION OF ADMINISTRATIVE REMEDIES

The exhaustion doctrine "*origin[ated] in rule adopted by courts of equity to the effect that a petitioner will be denied equitable relief when he has failed to pursue an available administrative remedy by which he might obtain the same relief.*"[13] The doctrine started being construed with consistency in the early part of the twentieth century, when courts were still using other equitable doctrines such as the "irreparable injury" and "no adequate remedy at law" to decide cases that would later be considered exhaustion precedents.

By 1938, the court in *Myers v. Bethlehem Shipbuilding Corp.*[14] expressly referred to the "*rule requiring exhaustion of the administrative remedy*"[15]. Indeed, *Myers* is largely regarded as the landmark decision on the exhaustion doctrine as it also redefined the rule, extending it beyond equity. After stating that the exhaustion rule "*has been most frequently applied in equity*"[16], citing several eighteen century Supreme Court precedents, the court established that "*because the rule is one of judicial administration – not merely a rule governing the exercise of discretion – it is applicable to proceedings at law as well as suits in equity*"[17].

Thus the court for the first time described the exhaustion doctrine as a rule of "*judicial administration*", a concept and an expression since then disseminated in court opinions.

The theory's origin in judge-made law mirrors the outbreak of administrative agencies in the United States in the late nineteenth century[18], which, by its turn, intended to avoid common law regulation of administrative affairs. Indeed, the agencies and their normative power were regarded as an alternative regulation model from the courts, by then seen with suspicion as to their capacity to develop administrative law in the rapid and rather unpredictably changing conditions of the time[19].

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13 Louis L. Jaffe, *Judicial Control of Administrative Action* 425 (Little, Brown and Company eds., 1965).

14 See note 50, *supra*.

15 *Id.* at. 50-51.

16 *Id.* at. 51.

17 *Id.* at. 51.

18 See Pittsburgh &C. Ry v. Board of Pub. Works, 171 U.S. 32 (1898), Stanley v. Supervisors of Albany, 121 U.S. 535 (1887) First Nat'l Bank v. Weld County, 264 U.S. 450 (1924).

19 John F. Duffy, *Administrative Common Law in Judicial Review*, 77:113 Tex. L. R., 114-214 (1998).

The doctrine has its main roots in the principle of separation of powers, as well as in the concepts of administrative improvement and judicial efficiency. The agencies belong to the executive branch – although may present different levels of autonomy – and as such run under executive appointees whose regulatory and decision-making attributions were established by a legislative act. As such, at least *a priori*, absent a challenge of the constitutionality of this legislative delegation of power, the agencies should have the first word regarding the issues within their competence, and the courts should pay deference to duly enacted legislative and executive determinations.

This aspect also raises the controversy, which however exceeds the scope of this study, regarding how much deference should courts actually pay to the agencies in an era of mass regulation of almost all areas of private life. In Brazil the judiciary is traditionally criticized – perhaps correctly – for too much interference in executive's attributions, specially regarding administrative rulings of agencies and other government bodies. If it is admissible – and it would be rather unrealistic to assume otherwise – that the legislative and executive branches may issue bad laws and policies, maybe judicial restraint should take place absent absurd results or plain formal unconstitutionality, as the mere replacement of the questioned policy with the one regarded as ideal of preferable by the courts is not a democratically legitimate option. This is particularly so when the administrative act under review involves the exercise of the agency's discretionary power, and this issue should be kept in mind when the admitted exceptions of the exhaustion requirement are analyzed, *infra*, one of them being the unreasonable delay of the administrative remedy.

This scenario of a judicially developed doctrine was altered when, in 1949, Congress enacted the Administrative Procedure Act – APA[20], establishing statutory rules for judicial review of certain types of administrative action. Section 10 of the statute prescribed when there may be judicial review and how far the court may go in examining into a given case. Nevertheless, in the United States, even after the passing of the statute, judicial review of agency action remained largely dominated by judge-made law, as one can also perceive by the nomenclature commonly used, originated in judicial decisions as the leading cases Chevron and Vermont Yankee[21], which was found nowhere in statutory

[20] 5 U.S.C (1946).

[21] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) and Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1977).

law *(e.g.,* the "exhaustion" requirement itself). Indeed, APA's initially timid influence can also be perceived by the rather restrict interpretation given by the courts to the statute's provision granting judges broad powers to review issues of law.

For instance, the *Chevron* doctrine required deferential review of an agency's interpretation of a statute it administers[22], apparently contradicting the plain command in Section 706 of the APA stating that courts "*shall decide all relevant questions of law*"[23].

This scenario started to change in late 80's with Justice Powell's influential dissent in Cannon v. University of Chicago (441 U.S. 677, 730 (1979), where he underscored the limits of common law judges in construing the law and their policy-making authority on grounds of separation of powers concerns. This alteration of judicial behavior was particularly significant towards the doctrine of exhaustion of administrative remedies, although effectively implemented only decades later.

Indeed, in 1993, the Supreme Court addressed the APA provision regarding judicial review and, particularly, the exhaustion doctrine, in the case Darby v. Cisneros (509 U.S. 137 (1993) and decided that, in any judicial review of agency action under the APA, the judicial doctrine of exhaustion is no longer applicable.

Darby involved a simple issue: whether a party aggrieved by administrative action must, prior to judicial review, exhaust all administrative appeals. The APA declares agency action to be "final" without regard to whether a person has sought any form of reconsideration or made an appeal to superior agency authority, unless a statute expressly provides otherwise or the agency has, by rule, required the person to appeal to superior agency authority and has provided that the agency action is inoperative during the appeal.

In the specific case, the government did not contest that the agency's action was final within the meaning of the APA, but argued instead that, notwithstanding the fact that it was final agency action, the court should not review it because plaintiff had not exhausted his administrative remedies.

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22 *Chevron,* 467 U.S. at 866.

23 5 U.S.C. § 706 (1994).

The Supreme Court acknowledged that the judicial doctrine of exhaustion of administrative remedies is conceptually distinct from the doctrine of finality, but also noted that the availability of an exhaustion requirement was dependent upon congress's will. Because the doctrine of exhaustion was judicially created, statutory language could amend or repeal it. Consequently, the Court turned to the first sentence of Section 704, which states that final agency action for which there is no other adequate remedy is subject to judicial review.

Having decided that the action disputed was "final agency action," the Court found that Section 704's language precluded judicial imposition of an exhaustion requirement, because the language mandated without exception that "final agency action" be subject to judicial review.

As even the Court observed, it was surprising that it took over forty--five years for anyone to discover this meaning of Section 704. It is also worth noticing that during this period there were dicta in some of the Court's cases that tended to support the government's interpretation in Darby that Section 704 only addressed the *timing* of review, not the exhaustion requirement. Anyhow, the Court stated that the text of the APA leaves little doubt that when an agency action is final for the purposes of [Section 704], it is then subject to judicial review.

Conversely, the judge-made doctrine of exhaustion gave a different answer, as it originally required a party to exhaust all administrative remedies, including intra-agency appeals, that are *"(a) available to him on his initiative (b) more or less immediately and (c) will substantially protect his claim of right."*[24]

That is to say that if a statute does not expressly requires exhaustion and the agency has not by rule required a party to appeal to a higher agency authority as a pre- condition to judicial review and stayed the effect of the agency action pending the agency appeal, then no exhaustion can be required. If, however, the case does not arise under the APA, then the traditional doctrine of exhaustion as designed by courts survives.

It is interesting to notice that despite the recent restricted interpretation of the exhaustion doctrine under Darby – which nevertheless addressed only the necessity of the utilization of *all* the administrative appeals available, and not the validity of the prior administrative requirement itself –, doctrine saw the

[24] Louis L. Jaffe, *Judicial Control of Administrative Action*, 424 (Little, Brown and Company eds.,1965).

original "*judicial creativity" as a "special strength*" of administrative law[25], and the original rationale of the judicial doctrine regarding administrative and judicial efficiency was not undermined.

Indeed, under current American law, as defined in Darby, prior administrative adjudication is mandatory regarding regulatory agencies action. The exhaustion of *all* administrative appeals, however, is not necessary unless the agency requires the appeal by rule and suspends the effect of the administrative action pending the appeal, as stated in the APA.

In Darby, the private party ignored the voluntary administrative appeal system and proceeded directly to court. The Supreme Court, interpreting Section 704 of the Administrative Procedure Act, found that the complainant's action was proper because the agency action was final.

The requirement praises the expected administrative expertise in a particular field, usually not encompassed by generalist courts of law. The agency's personnel, due to their specific training and knowledge of questions of fact and law involving the issues under their responsibility are presumably qualified to give a primary response to a claim.

Furthermore, the requirement potentially reduces public spending by preventing unnecessary lawsuits. Notwithstanding the inexistence of precise data about the cost of an administrative procedure, it is reasonable to assume that it is far less than a judicial lawsuit which necessarily involves lawyers fees and costs usually not required in the agency's proceedings.

Judicial efficiency is also fostered in at least three ways. First, the judicial restraint would allow for the correction of wrongs within the agencies themselves, improving the administrative procedures and decision-making process and, as such, increasing efficiency, foreseeability of administrative behavior and, in the long term, promoting the development of internal institutional consistency towards regulatory and supervisory practices. Also, as stated by the U.S. Supreme Court, "*(…) if the agency has the opportunity to correct its own errors, the case may become moot and never reach the courts.*"[26]

Secondly, by allowing courts to reach an informed decision, as when the case comes to court there will already be substantial information and analysis of

[25] Kenneth Culp Davis, *Administrative Law Treatise*, 142 (K.C. Davis Pub. Co., 2d ed., 1978).

[26] Mc Carthy v. Madigan, 503 U.S. 140 (1992).

law and fact that would not be available if the judiciary was the first to hear it. That is to say, the previous administrative procedure will produce a better record for judicial review. This is a particularly relevant point if it is considered that in many cases, apart from the information brought to the court by the plaintiff, the agency possess other elements of information that may greatly influence the decision. These elements may be intentionally omitted because contrary to the party's interest or even due to unawareness, but in either case the judicial procedure can be greatly impaired by its absence, specially when urgency is alleged and the courts are pressed to present a decision in a short amount of time.

Indeed, specially in areas with a high level of administrative specialization and regulation, such as health, environment and social security, as well as in areas in which issues of fact abound, as in mass consumer claims, it may be easier to convince a generalist uninformed court of law than an expert staff member in an agency's counter with an available database and prior record.

Administrative expertise is precisely the main reason that justified the only consistent use of the doctrine in Brazilian courts, which regards social security payments. In a majority opinion issued in September, 2014, the Brazilian Supreme Court ruled that requests of social security benefits should be first addressed to the respective executive entity[27]. The court reasoned that, as a rule, issues of fact should always be presented in the administrative venue for primary analysis, considering the specialization of executive entities as well as the fact that the judiciary is generally unprepared to perform such a scrutiny and in fact courts should not be expected to perform it anyway.

Indeed, the underutilization of the administrative structure already in place by its replacement with lawsuits consumes immense resources of the judiciary branch that could be better allocated in other areas – for instance, computer modernization, an expensive task in an era of paper replacement with virtual records, still in course specially in state courts, that imply high costs in a permanent basis.

In the same opinion the court also analyzed the cost of previous administrative request from the individual point of view, as the administrative

[27] STF, RE n. 631240, Relator: Min. Roberto Barroso, 03.09.2014 (available at http://www.stf.jus.br, Braz.).

proceedings of this kind, as opposed to the judicial, do not bear costs to the claimant.

The decision was clearly grounded on policy argument, expressly mentioning the massive judicial caseload and the fact that this specific executive entity was the biggest litigant in federal courts. The majority's position, regarding standards of efficiency and economics as reasonable tests for the evaluation of judicial behavior – in this case, justifying judicial restraint –, constitutes a significant institutional change in the Brazilian legal culture, since it allows the balance of individual rights – namely, access to the justice system, highly stressed by the dissent – with social nationwide goals, such as the improvement of administrative and judicial performance.

Nevertheless, one severe setback of the opinion, mentioned as *dictum*[28], is the differentiation of an active and passive posture of the claimant. The court stated that in claims such as the social security's, as the pursued payment necessarily depends on an active behavior of the claimant both within the administrative or judicial sphere – as the executive do not grant these social benefits *ex officio* and the relief usually depends on factual finding –, there can be no harm or threat to a right before the request. In that manner, the constitutional provision granting access to the judicial system in these cases is being complied with.

To clarify this point, the opinion mentioned that, conversely, when the executive acts first – giving the example of an incorrect electricity bill, an area under supervisory power of an administrative agency –, the claimant could sue the company directly in court, as the judge would be the only one to provide appropriate relief, that is, the correction of the bill[29].

In fact, in this very case the company itself and the regulatory agency have the power to grant the sought relief, be it the replacement of the bill with an accurate one or the declaration that nothing is due. As with other regulatory agencies and executive bodies, the claim can easily be made through different medias. The administrative proceedings, which ordinarily last from 10 to 90 days, would be decided much more rapidly than a judicial procedure, which in average will be sentenced in more than a year, except when *in limine* orders

[28] *Id.* at 5.

[29] *Id.* at 5.

are granted. Moreover, as mentioned above, the complainant would also be beneficiated financially, as these administrative proceedings are costless.

Absent evidence of urgency that cannot wait the administrative deadline for a decision – already considerably short –, the argument supporting replacement of the administrative with the judicial adjudication is unsound. In fact, although agencies can perform their inspection power *ex officio*, a large field for supervision is constituted by individual complaints as a reaction from a company's behavior or omission when the company takes the first step in a given issue.

To maintain, as the court exposed in *dictum*, that in theses cases the complainant could sue directly is to disregard the existence, expertise and expeditiousness of executive structures whose duty is, among others, precisely to grant this sort of ordinary and rather simple relief, and also, as a consequence, to allow the flooding of the judiciary with unnecessary lawsuits that, absent urgency, will consume much more public and private resources and time than the administrative procedure to be decided.

The statement that the mere incorrect charging is a harm to a right also does not stand, as that would be so, apparently, only if it is in fact mistaken. In this way, only after the administrative or judicial analysis and decision this allegation could be ascertain and, since it usually will depend of findings of fact, the administrative hearing as a primary response should prevail, saving human and economic judicial energies to disputed issues and properly allocating responsibilities between agencies and courts.

The reasoning of the *dictum* represents the Brazilian predominant legal culture regarding the role of the administrative agencies, in which they are virtually ignored as co-participants of a modern system of alternative dispute resolution which could grant effective and expeditious relief. This view underestimates the agency's capacities and render as useless the administrative instruments already available to grant relief in a vast majority of cases.

The concern expressed by the dissent about the sort of judicial restraint represented by the exhaustion doctrine, as if it would in fact impede access to effective relief, is unrealistic. As Justice Powell once stated, the requirement was based on "*sound considerations. It does not defeat federal- court jurisdiction, it merely*

defers it. It permits the States to correct violations through their own procedures, and encourages the establishment of such procedures.[30]"

The mere act of filing a lawsuit does not mean access to a justice system if the proceeding takes too long as to render the relief, even if granted, as useless. The current system, apart from violating the intertwined right of a speedy judicial hearing also granted by the constitution[31], largely fails to provide access to justice in substantial grounds as it lacks general expeditiousness, predictability and uniformity.

In a vain attempt to embrace all demands of society, the predominant legal culture, even within the judiciary, fails to see that for many years now the judicial system has been unable to attend the massive demands it eagerly welcomes with institutional vanity, and that its resistance in fostering alternative methods of mass conflict resolution fuels the unworkable caseload and the general criticism with which is usually regarded.

The constitutional provision proscribing any law preventing judicial review in the case of harm to a right cannot be read disconnected from the historical context in which it was written. In the 80's, the judiciary branch was the sole entity responsible for all dispute resolution, and the number of lawsuits was incomparably inferior. Nowadays, there are different institutional bodies apt to provide rapid and efficient relief, being the judiciary one of the entities of a much broader system of justice. As long as an adequate and efficient remedy is available, the question of its actual source – executive or judicial – should become secondary, absent the presentation of sound reasons.

In the United States, despite its name, the doctrine does not necessarily demands the true "exhaustion" of the administrative procedure until a final decision, with resort to appeals or petitions for reconsideration, as that varies and depends on the specific agency's statute or regulation. Absent a particular provision, "*additional steps following the first decision after a hearing are not expressly made prerequisite to judicial review.*"[32] Nevertheless, the administrative request must substantially comply with the agency's proceedings in order to render

[30] Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982).

[31] Constituição Federal (C.F.) [Constitution], art. 5, LXXVIII (Braz).

[32] Ralph F. Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 Ind. L. J. 817, 872 – footnote 48 (1976).

possible the analysis of the claim, and a mere vague or generic objection does not satisfy the exhaustion requirement.[33]

Accordingly, as the essential premise is that all issues of fact be presented to the agency prior judicial review, and as the administrative appellate instance usually analyzes only questions of law – absent clear error –, it seems reasonable to admit as a disputed issue ready for judicial review a claim that has been decided in the first instance of the administrative structure.

Although exhaustion of administrative remedies is generally required before seeking judicial review of an agency action, there are exceptions to the traditional rule.

Indeed, prior administrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.

American Courts have identified three main circumstances where the interests of the individual are particularly strong, thus potentially authorizing exceptions to the exhaustion requirement. One involves the situation where requiring exhaustion of administrative relief may actually prejudice subsequent court action, as when the administrative procedure would delay resolution for an unreasonable time. Another involves the situation where the agency cannot grant effective relief, making exhaustion a futile and unreasonable request, as when a party claims that the agency's foundational statute is unconstitutional or when demanding redress for emotional-distress damages that were not agreed upon by the company in an attempt settlement in a consumer's complaint, for instance.

A third situation is where the agency's procedure or decision-maker is shown to be unfair or prejudiced, as when there's evidence of unreasonable delay.

Despite the identification of these general situations, courts generally recognize that the balancing of interests is case-specific, because it turns on the nature of the claim presented and the characteristics of the particular administrative procedure provided.

[33] *Id.* at. 868.

4 A STEP TOWARDS INSTITUTIONAL COLLABORATION

The consensus regarding Brazilian unmanageable judicial caseload has so far lead to two main institutional responses, namely the gradual implementation of conciliation and, as the main bulk of the docket relies on civil cases, the alteration of the civil procedure statutes.

Notwithstanding the merits and the good results of mediation and conciliation so far implemented sparsely as voluntary projects by the judiciary branch in extrajudicial and judicial procedures, both initiatives consume time, personnel and resources of the courts.

Although conciliation is indisputably regarded as a better alternative to litigation, the Brazilian model, placing these practices within the judiciary, burdens even more its institutional capacity of management, as it implies relocation of staff, development of software, acquisition of computer equipment in large scale and the hiring of remunerated personnel. In this way, in the best scenario, that is, when an agreement is achieved, the judiciary only replaces a traditional adversary process with a conciliation hearing, but it keeps attracting all disputes to itself. The strategy is thus basically circumscribed, although in a substantial level, to the alteration of the proceedings.

The allocation of claims to the private sector, which greatly profits from its activities, as well as to the administrative venue, which has specialized staff able to deliver an informed decision for simple complaints, as well as a wide range of normative and adjudication powers, are the most important tools toward judicial efficiency.

The predominant legal culture, apart from the necessary awareness of the collapse of the current justice system and of the secondary and insufficient effects of the alternatives so far implemented, must walks towards a new concept of legal redress that actively involves the executive branch and the actors in the judicial process.

As analyzed supra, the executive and its governmental bodies are one of the biggest litigants both in federal and state courts. When sued directly, the main allegations address failure to comply with constitutional, statute or administrative obligations, and a considerable number of lawsuits are ruled for the complainants. Federal and state executive also stands as main litigant in tax cases, as plaintiffs. Notwithstanding official initiatives from the Administrative Council of Justice fostering the implementation of a faster and more efficient

administrative proceeding for tax recovery, as these lawsuits amounted to almost 27 million in 2010[34], the executive still remains using litigation for that purpose.

Moreover, if considered the cases which, although between private parties, involve companies under direct supervision of administrative agencies or other executive bodies, it is possible to ascertain that the Brazilian judiciary works mainly as a venue for executive demands.

This disproportionate participation of the executive branch on litigation must be compensated by the fulfillment of the role of its bodies as supervisory institutions. Indeed, these organs must execute its statutory responsibilities, analyzing disputes under their attribution and granting the possible administrative adjudication in an efficient manner, remanding for the judiciary only the residual disputed issues, as prescribed by the exhaustion doctrine.

The systematic adoption of prior administrative requirement, apart from improving the record for future judicial review, providing grounds for better informed decisions, would also submit to court appreciation the agency's behavior itself, allowing in the long term the construction of a precise external evaluation of these largely unknown public bodies as well as the level of efficiency, costs and setbacks of its proceedings and internal structures.

The executive branch, in this way, already is a main component of the Brazilian system of justice, as directly or indirectly involved in the vast majority of pending and incoming lawsuits. It now must also be part of the resolution of these disputes, in order to grant citizenry the efficient and rapid redress that the constitution demands.

The change of the current legal culture cannot be implemented without a change in the judicial behavior, as judicial restraint in any level is usually seen by judges with suspicion. The premise that "jurisdiction is power" manifests itself in Brazilian courts and jurisprudence in different levels. As judges cannot hear cases *ex officio*, litigation assures court's last word in dispute resolutions and transform the judiciary branch in the main catalyzer of political and social issues. A legitimate concern with judicial dignity and importance, however, does not necessarily have to be connected with a minimum level of judicial restraint,

[34] Available at http://www.cnj.jus.br/files/conteudo/arquivo/2016/03/2d53f36cdc1e27513af9868de9d072dd.pdf.

but instead could be better expressed by its employment in a responsible and republican manner in order to better attend constitutional goals.

It is time for Brazilian courts to acknowledge the existence of the administrative venue, its powers legitimately delegated by congress and their adjudication procedures, as well as to pay deference to their decisions absent clear error or law violation.

In the actual scenario, the minimal level of judicial restraint so far employed by courts makes a statement against the judiciary branch and its capacity, and a stubborn institutional posture that fails to see and react towards rapid and substantial social changes not only does not improve the justice system but also contradicts the historical role that courts have had in the development of law itself, as "*Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions;*"[35].

Indeed, prior administrative requirement does not proscribe judicial review, but in fact refines it, potentially promoting better judicial reasoning and allocation of institutional inputs. Litigation would remain an alternative for unresolved disputed issues or even for direct resort in urgent cases where no adequate administrative redress is available.

The exhaustion doctrine potentially pledges the replacement of late judicial response with expeditious and sufficient administrative adjudication, when available. If considered that it would address nothing less than several million of pending lawsuits and also the majority of the several thousand filed every month, its effects in short and long term can not be disregarded.

This traditional consensus of minimum judicial restraint also expresses itself in the praised "judicial intellectual independence", which in Brazil has the disastrous effect of conceptualizing every judge as a microcosm disconnected from the judicial system to which it belongs. Intellectual freedom is regarded as a value in itself, to such a level that judges do not feel compelled to follow superior court's prior opinions or even their own.

As a result, law as the courts declares it lacks uniformity and, as predictability is reduced to a minimum, litigation is fostered in a prodigious manner, as the success in a claim will basically depend on the judge, who cannot

[35] Jerome Frank, *Law and the Modern Mind* 7 (Anchor Books eds., 1963).

be constrained by precedent in his capacity as an independent finder of fact and law.

Civil law judges, due to their institutional independence conception, analyze cases in an individual basis, and still largely perceive themselves as providing a legal outcome restricted to the dispute presented. The consequences of this phenomenon can be seen in the massive disregard of the administrative venue as an alternative law enforcement mechanism that could address more than half of the Brazilian judicial docket, as the judiciary do not consider the judicial function as a system, neither its large scale inputs and outputs.

Moreover, lawyers themselves cannot properly exercise their role advising clients in such a way to prevent litigation, as there is no safe pattern of conduct.

Indeed, a reasonable level of legal predictability not only prevents litigation because it promotes adequate and previous planning, but also because it incentives settlements, as largely seen in the United States, where clients and lawyers carefully consider their probabilities of success before and even during litigation. Furthermore, predictability incentives parties to more easily accept a ruling even when contrary to their interests, as it presents itself as a non--subjective decision.

In the Brazilian system, the individualized rulings, sometimes unrelated to prior decisions of the same judge as well as to superior court's rulings, incentive litigation as an attempt to find the "right" judge and also, for the same reason, the interposition of appeals, thus increasing the docket also within the system.

If courts do not even pay deference to each other's decisions, it should not indeed strike as a surprise that they also virtually disregard administrative processes and rulings.

In this way, as Brazil already possesses a structure of administrative agencies endowed with adjudication powers since the 90's – thus roughly for more than 20 years now –, the adoption of the exhaustion doctrine, even in its mitigated form of a mere previous requirement, presents itself, now more than ever, as a necessary tool to reduce the judicial docket and enable judges to proper implement the major legal change established by Congress.

The maintenance of this system of almost exclusive judicial adjudication, in flagrant unbalance with the administrative venue – as well as with the private venue, largely due to the agency's omission – may cause this changes

to be largely disregarded or misinterpreted, and the system will keep lacking uniformity and predictability.

CONCLUSION

The growth of the administrative state must necessarily encompass direct and indirect administrative adjudication. Indeed, mass consuming society demands mass regulation and adjudication, which cannot be provided by the judiciary branch alone and its devised internal techniques, such as conciliation, small claims courts and class actions alone.

Mass litigation must be faced, as the United States' example evidences, with alternatives *outside* the judicial system, where the role of administrative agencies is indeed extraordinary. Created to broadly regulate specific areas of modern society, they were given broad powers through legislative delegation in order to run their fields efficiently. These powers encompass, both in the United States and in Brazil, the regulation, inspection and adjudication of a given economic area under state control or supervision.

The examination of the Brazilian courts' caseload of more than 100 million lawsuits, as well of the small number of complaints received in the administrative venue evidences that the regulatory agencies not only do not work at their full potential, but also perform systemic omission regarding broad inspection measures. This scenario undermines the significant deterrent effect that agency's behavior may and must have towards economic and legal actors.

Through their normative and inspection powers, administrative agencies can determine the private sector, which profit from its activities, to implement an efficient platform to face simple claims, in way to prevent them to enter public adjudication at all. The agency's adjudication mechanisms themselves can be devised as a second or at least as an alternative layer to provide legal redress, and if – and only if – both of them are employed without success, judicial litigation should be open, apart from the justified exceptions analyzed *supra* and others that of course can be construed by the courts over time.

The process of requiring at least prior administrative request to file a lawsuit demands a significant change in judicial behavior, for it involves the letting go of a predominantly paternalistic view of law and legal institutions, that do not correspond to the current reality of an internet era. The judicial branch must also truly acknowledge the existence of the administrative agencies

and their broad powers, paying deference to their acts and decisions absent clear error in questions of fact and unequivocal illegality or unconstitutionality.

The massive absence of such deference also fosters litigation, as the administrative venue is as much disregarded by private parties and lawyers as it is by judges.

If the literal exhaustion of the administrative venue may be regarded a too large step to start with, considering Brazilian legal tradition, prior administrative requirement presents justifications on grounds of policy and principle. It fosters administrative and judicial efficiency and promotes active collaboration of the two branches of government responsible for law enforcement in order to build a broader and integrated system of justice able to grant society uniformity and predictability in law and right's vindication.

On principle grounds, it guarantees access to the justice system and to legal redress, both administrative and judicial, in a more expeditious and efficient manner. It could also cause the agencies to allocate dispute resolution of simple claims and its costs within the private companies, as a first interface with consumers, in a much broader and efficient manner, as a display of a wise and republican employment of their regulatory and normative powers.

The requirement also constitutes a legitimate exercise of judicial restraint, as it is informed by the concept of optimization of public resources, structure and expertise in order to provide the citizenry and the legal community with a reliable and cost-effective system of justice, which by its turn also complies with the constitutional standards of efficiency and expeditiousness of administrative and judicial adjudication.

The exhaustion requirement presents itself as a means of reducing the court's docket and providing a more balanced allocation of adjudication between the administrative and judicial venue.

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