

# Litigation against the Public Power: a revision of the doctrine of reversing the burden of proof to the detriment of the private individual

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DOI: <https://doi.org/10.48143/rdai/11.tbd>

Keyword: Due to legal process, Burden of proof, Presumptions, Administrative act, Veracity

## resume

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The present study critically analyzes the commonplace that the individual bears the burden of proof when it alleges the unjust performance of the Public Administration. The writing begins with the conditions of possibility for the edition of a valid legal act, especially the administrative procedurality and the duty to state reasons. Then, using an interdisciplinary approach, the research seeks to reveal the limitations of exclusively procedural or administrative approaches, showing how the dynamics of the production of the administrative act and its challenge in court have dynamics and assumptions different from those focused exclusively on the traditional explanation of the burden of proof and prerogatives performance of the Public Power. Finally, an itinerary about the judicial cognition of the claim for invalidity of an administrative act is presented, clarifying elements that are minimally necessary for a correct justification of the jurisdictional act. All as a way of contributing to a concrete promotion of access to justice.

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## References

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ALEXY, Robert. Discursive constitutionalism. Trad. Luís Afonso Heck. Porto Alegre: Livraria do Advogado, 2007.

ANDRADE, Fábio Martins de. From the offense of the double vote to the constitutional principles of equality and the Democratic Rule of Law. Federal Law, 94, 2014.

AROCHENA, José Fernando Lousada. The proof of discrimination and sexual and moral harassment in the labor process. Available in: [www.ccoo.es/5ca3e826c96c3b2dd1c36c52bd79c94c000001.pdf]. Accessed on: 30.12.2018.

BANDEIRA DE MELLO, Celso Antônio. Administrative law course. 33. ed. São Paulo: Malheiros, 2016.

BEDAQUE, José Roberto. Law and process: influence of material law on the process. 6. ed. São Paulo: Malheiros, 2011.

CARNELUTTI, Francesco. Truth, Doubt, Certainty. Journal of Procedural Law, v. XX (Series II), p. 4-9, 1965.

CARVALHO FILHO, José dos Santos. Administrative law manual. 23. ed. Rio de Janeiro: Lumen Juris, 2010.

CREMASCO, Susana Santi. The dynamic distribution of the burden of proof. Rio de Janeiro: GZ, 2009.

DIDIER JR., Fredie; BRAGA, Paula Sarno; OLIVEIRA, Rafael Alexandria de. Civil procedural law course. Salvador: JusPodivm, 2016. v. two.

DI PIETRO, Maria Sylvia Zanella. Administrative law. 20. ed. São Paulo: Atlas, 2007.

ENTERRÍA, Eduardo García de; FERNÁNDEZ, Tomás-Ramón. Administrative law course. Trad. José Alberto Froes Cal. Review by Carlos Ari Sundfeld. São Paulo: Ed. RT, 2014. v. 1 and 2.

FIGUEIREDO, Lúcia Valle. Administrative law course. 9. ed. São Paulo: Malheiros, 2008.

FRANCE, Phillip Gil. Administrative act and public interest: public management, judicial control and administrative consequentialism. São Paulo: Ed. RT, 2013.

FURTADO, Lucas Rocha. Administrative law course. Belo Horizonte: Forum, 2007.

GASPARINI, Diogenes. Administrative law. 17. ed. São Paulo: Saraiva, 2012.

GORDILLO, Agustín. Administrative law treaty: the administrative act 5. ed. Buenos Aires: Administrative Law Foundation, 2000. t. 3.

GUEDES, Demian. The presumption of veracity of the acts of the public administration and the administrative process: the duty to inspect proving. Public Interest Magazine, Porto Alegre, n. 35, p. 99-125, Jan.-Feb. 2006.

HEÑIN, Fernando Adrián. Las pruebas difíciles. In: WAMBIER, Luiz Rodrigues; ARRUDA ALVIM WAMBIER, Teresa (Org.). Essential Doctrines - Civil Procedure: Evidence. São Paulo: Ed. RT, 2011. v. 4.

JUSTEN FILHO, Marçal. Administrative law course. 10. ed. São Paulo: Ed. RT, 2014.

KNIJNIK, Danilo. Evidence in civil, criminal and tax courts. Rio de Janeiro: Forensics, 2007.

KOCH, Deonísio. Administrative tax process and entry. 2. ed. São Paulo: Malheiros, 2012.

MAFFINI, Rafael. Elements of administrative law. Porto Alegre: Livraria do Advogado, 2016.

MARINELA, Fernanda. Administrative law. 11. ed. São Paulo: Saraiva, 2017.

MARQUES NETO, Floriano de Azevedo. Principle of administrative law. Crumbs. Published on 22.11.2004. Available at: [www.migalhas.com.br/dePeso/16,MI8323,41046-Principios+do+Processo+Administrativo]. Accessed on: 20.12.2018.

MARMELSTEIN, George. Still the “fundamental right to get high”: the decision of the German Constitutional Court. Available at: [<https://direitosfundamental.net/2008/05/28/ainda-o-direito-fundamental-de-ficar-doidao-a-decisao-da-corte-constitucional-alema> ]. Accessed on: December 31, 2018.

MARTÍNEZ, Gema Tomás. The burden of proof in civil claims of discrimination based on sex. Available at: [www.esade.edu/itemsweb/research/ipdp/capitulo93.pdf]. Accessed on: 30.12.2018.

MAURER, Harmut. General administrative law. Trad. Luís Afonso Heck. Barueri: Manole, 2006.

MEDAUAR, Odete. Procedurality in Administrative Law. 2. ed. São Paulo: Revista dos Tribunais, 2008.

MEDAUAR, Odete. Modern administrative law. 21. ed. Belo Horizonte: Forum, 2018.

MEDAUAR, Odete. The evolving administrative law. 2. ed. São Paulo: Ed. RT, 2003.

MEIRELLES, Hely Lopes. Brazilian administrative law. 38. ed. São Paulo: Malheiros, 2012.

MOREIRA NETO, Diogo de Figueiredo. Administrative law course. 16. ed. Rio de Janeiro: Forensics, 2014.

GRANDSON, Alejandro. Administrative sanctioning law. 5. ed. Madrid: Tecnos Editorial, 2012.

OSÓRIO, Fábio Medina. Administrative sanctioning law. 5. ed. São Paulo: Ed. RT, 2015.

OLIVEIRA, Carlos Alberto Alvaro de Oliveira. Presumptions and fictions in the evidence law. WAMBIER, Luiz Rodrigues; ARRUDA ALVIM WAMBIER, Teresa (Org.) Essential doctrines - Civil procedure: evidential activity. São Paulo: Ed. RT, 2011. v. 4.

OLIVEIRA, Rafael Carvalho Rezende. Administrative law course. 6. ed. São Paulo: Method, 2018.

OLIVEIRA, Ricardo Mariz de; SOUZA, Henrique Coutinho de; BARBOSA, Marcos Engel Vieira. Tax Procedure and the Civil Procedure Code / 2015. In: MACHADO, Hugo de Brito (Org.). The tax process and the 2015 Civil Procedure Code. São Paulo: Malheiros, 2017.

OTERO, Paulo. Legality and Public Administration: the sense of administrative link to legality. Coimbra: Almedina, 2011.

RIVERO, Jean; WALINE, Jean. Administrative law. 15. ed. Paris: Dalloz, 1994

SANTOS, Adriano Vitalino dos. The diabolical evidence and its influence on the presumption of legitimacy of the administrative act. Doctrine Review TRF4. Available at: [[www.revistadoutrina.trf4.jus.br/index.htm](http://www.revistadoutrina.trf4.jus.br/index.htm)? [http://www.revistadoutrina.trf4.jus.br/artigos/edicao067/Adriano\\_dosSantos.html](http://www.revistadoutrina.trf4.jus.br/artigos/edicao067/Adriano_dosSantos.html) ]. Accessed on: 26.11.2018.

SCARTEZZINI, Ana Maria Goffi Flaquer. The Public Power and the inversion of the burden of proof. In: MEDINA, José Miguel Garcia; CRUZ, Luana Pedrosa de Figueiredo; CERQUEIRA, Luís Otávio Sequeira de et al. (Coord.). The powers of the judge and the control of judicial decisions: studies in honor of Professor Teresa Arruda Alvim Wambier. São Paulo: Ed. RT, 2008.

SILVA, Carlos Augusto. The civil process as a power strategy: a reflection of the judicialization of politics in Brazil. Rio de Janeiro: Renew, 2004.

SILVA, Ovídio Araújo Baptista da. Process and ideology: the rationalist paradigm. 2. ed. Rio de Janeiro: Forensics, 2006.

SIQUEIRA, Natercia Sampaio; SIQUEIRA, Ana Luísa Sampaio. Broad defense and contradiction in the constitution of the tax credit: for a fair taxation. In: MACHADO, Hugo de Brito (Org.). The tax process and the 2015 Civil Procedure Code. São Paulo: Malheiros, 2017.

SUNDFELD, Carlos Ari. Administrative law for skeptics. 2. ed. São Paulo: Malheiros, 2014.

VITTA, Heraldo Garcia. The sanction in administrative law. São Paulo: Malheiros, 2003.

VITTA, Heraldo Garcia. Police power. São Paulo: Malheiros, 2010.

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