Writ of mandamus against denial or grant of injunction

Writ of mandamus against denial or granting of preliminary injunction

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resume

It was established the understanding - quite correct, in fact - that, to prevent irreparable damage, it is possible to apply for security, obviously with a request for an injunction, against a serious judicial decision under liquid and certain law, when there is no appeal with suspensive effect. That said, it is interesting to discuss here only the issue of security clearance against the judicial decision that, in a writ of mandamus, grants or denies an injunction request. The question to be addressed concerns whether the speaker has the legal freedom to grant the injunction or not and, in the event of having it, whether such "freedom" is sufficient to remove judicial control through a writ of mandamus. . "Article 7 of Law 1533, of 12.31.51 - law of the writ of mandamus - clarifies that: When dispatching the initial, the judge will order:" I - (...

It would be a gross error to imagine that the magistrate is entitled to "freedom" to grant or not this measure of caution and that to grant or deny it is a matter of "intimate forum", purely subjective. In effect, the granting of a preliminary injunction is not an "act of magnificence", a "liberality", a gesture of "grace", granted by a munificent feeling of the State in relation to any jurisdiction. No. Like any other jurisdictional act it is mere and mandatory application of the right to the specific case. In the case of jurisdiction, the legal title to decide is to say the right: juris dictio. What the magistrate does when granting an injunction request (or rejecting it) is the the same thing you do when you deliver a sentence or when you deliver orders that decide controversial claims in the course of a dispute: it is to affirm that, in contrast to the norm with the facts submitted to it, the law imposes such a solution, which it expresses as the oracle of law in the specific case. Nor is it said that the examination of an injunction request presupposes an analysis of assumptions that involve a certain estimate freedom. The same phenomenon occurs with any jurisdictional decisions. Also, in order to pronounce a sentence, the judge needs to weigh facts, assess whether and to what extent they fit precisely in the rule of law that 'estimate' to be the proper one for the regency of the species, whenever it is also disputed about the norm effectively pertinent or about the extension of your reach. The logical judgment you have to make is of an identical nature and composure in both cases. The fact that the injunction is provisional, with the consequences derived therefrom,

Even if it were maintained that the consideration of an injunction request poses a problem that would result in freedom corresponding to that of the public administrator in cases of discretion, even so, a decision on the injunction would be controllable, as the discretion, as we know, has limits, in addition of which there will be pure and simple violation of the law, that is, illegitimacy. Indeed, when the law results in discretion for the administrator, this does not mean that it is up to him to adopt unreasonable solutions, not supported by the facts submitted to his judgment, or that they overflow the significant field of words used by the standard to baptize him. performance or that, in any way, compromise the purpose protected by it and according to which - in order to serve it well - the "freedom" of appreciation was granted. Only a jejunum in administrative law would imagine that the discretion assumed in the norm - that is to say verifiable at the level of the applicable rule - gives the agent an identical field of freedom in the face of the concrete fact, giving him the opportunity to adopt any solutions among those abstractly behaved, even if "in concrete "proves to be clearly out of step with the objective presiding over discretion. Indeed, as we have said before ("Judicial control of administrative acts", RDP 65/27 and ff.), The real situation in which the Administration is placed restricts the field of choice of possible legal behaviors. In the legal rule, the scope of freedom appears broader, because one wants to be limited in view of real situations.

It would be absurd to understand that, in binding cases, the law aims for an optimal solution (the one predetermined entirely in advance) whereas, in cases of discretion, it conforms to any abstractly possible solution, even if incompatible with the interest that law came to guard. The granting of discretion means the opposite. of this. It means that since the rule of law cannot establish, in advance, what would be the ideal measure to assist the interest that it proposes to protect, but precisely because it wants it, it was decided to adopt a rigid formula, capable of compromising in concrete the realization of legal asset that you want to see protected. Precisely for this reason (because it only wants the solution excellently justified to the protected purpose), the law imposes on the agent, who is the one who faces concrete cases,

In fact, it will happen in many cases that despite the law contemplating the possibility of a choice between two behaviors - exactly so that the physical circumstances are considered, as an unbearable requirement for the correct attendance of the protected interest - these same circumstances show, beyond any doubt, that only suitable behavior can be achieved to achieve the legal objective. In this case, said behavior is mandatory and cannot be adopted another. The same is said, similarly, when the law allows the production of a given act instead of fixing it as mandatory. In short: both in connection and discretion, the law also imposes and always the duty to adopt the behavior that rigorously satisfies the normative purpose. In both cases, there is adherence to the duty to produce the appropriate act to comply with the scope of the legal rule. Whoever does not meet the purpose of the law, does not meet the law. Transgress it. Hence, your act has to be done away with.

The difference between both situations is that, in linking, the behavior that will lead to full compliance with the legal purpose is already predetermined and in discretion its definition is later, since it will depend on the concrete situations, as it has not been pre-

established. Therefore, the problem of the validity of the behaviors practiced as an administrative discretion becomes, to a large extent, a problem of proof or of a rational, argumentative exhibition, which demonstrates the unfamiliarity - therefore, illegality - of the adopted measure. This does not mean suppressing the "merit" of the administrative act - which is the sphere where freedom of choice really arises in a given situation - but merely recognizing its boundaries. Undoubtedly, in many cases, which will perhaps be the majority, there is more than an impossibility to demonstrate that the solution, as it is, is not the right one. It is impossible to know which is truly correct in view of the purpose of the law. It is that, as admirably said Bernatzik, quoted by Queiró (Reflections on the Theory of the Misuse of Power, Coimbra Editora, 1940, p. 31), in the face of certain decisions "there is a limit beyond which third parties can never verify the accuracy or not the conclusion reached. It may be that third parties are of another opinion, but they cannot pretend that only they are in truth, and that others have a false opinion ". Then, and only then, will there really be discretion, a field that the Judiciary cannot invade. But it is up to the Judiciary to recognize where the boundaries of this field are. In others, of exemplary physiognomy, it will be possible to verify,

From what has been exposed, it appears that, even assuming that there is a discretionary judgment in the assessment of the request for the issuance of a discretionary judgment, qualified by law in the same way as the administrator's discretionary judgment - which would already be a mistake - it would still result it is unreasonable to draw from this the conclusion that a preliminary injunction is granted or denied due to an intimate matter, according to the personal subjectivity of each judge and that, therefore, the legal and juridical validity of his decision is inapferable. If there was a margin of discretion, it would be located within certain legally contrasting limits by the higher court. In parallel with this - it should be noted - to make the grant or denial of an injunction equivalent to a discretionary act, with legal characterization equivalent to the discretion of an administrator, I would end up assuming that a sentence or a judgment is also a discretionary act (and not an interpretation of the law to say it in the specific case), since the logical judgment that results from any of these jurisdictional acts - as it was noted - is strictly the same. Indeed, if art. 7 of Law 1,533, of 31. 12. 51, stipulated - as it does - that the judge will order the suspension of the contested act, when the substantiation of the request is relevant and the measure may be ineffective if the injunction is not granted, the judge will have to grant it once such assumptions occur. The rule did not grant the judge the freedom to choose between two behaviors: he imposed only one in the event that the requirements mentioned were fulfilled. for the logical judgment that results from any of these jurisdictional acts - as it was noted - is strictly the same. Indeed, if art. 7 of Law 1,533, of 31. 12. 51, stipulated - as it does - that the judge will order the suspension of the contested act, when the substantiation of the request is relevant and the measure may be ineffective if the injunction is not granted, the judge will have to grant it once such assumptions occur. The rule did not grant the judge the freedom to choose between two behaviors: he imposed only one in the event that the requirements mentioned were fulfilled. for the logical judgment that results from any of these jurisdictional acts - as it was noted - is strictly the same. Indeed, if art. 7 of Law 1,533, of 31. 12. 51, stipulated - as it does - that the judge will order the suspension of the contested act, when the substantiation of the request is relevant and the measure may be ineffective if the

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The law does not, and could not, demand that the plaintiff be right. It just demands that the foundation be relevant. It is worth mentioning that this is not an allegation of minor, sparse legal verisimilitude, less cabalable. If the collected fundament has legality issues, it is presented as important, in order to include a possible protection (although this is not confirmed, in the end, after a more thorough analysis) it is evident that the first requirement will be present. If it were not to be understood in this way, the writ of mandamus - constitutional guarantee - would be the most brittle and fragile of the guarantees, absolutely useless to fulfill the loan to which it came. Finally, it must be said that the concessive or denial injunction in an injunction cannot under any circumstances be considered as an expressive act of discretion, similar to what happens in administrative acts. The reason for this is simple. More than simple, it is obvious. Namely: the proper thing for the courts is to say the law. Their qualifying legal title is exactly and precisely the same: to express what the law is in the specific case; not what the right can or could be. There is, therefore, an opposition between such acts and the discretionary acts, since the latter presume alternatives.

When someone uses discretion, they are making a decision that, under the law in force, can be as much, as much as it could be otherwise. In jurisdictional pronunciation no. The decision taken expresses that someone is entitled to a given action; that it is someone's right; which is due to the postulant what he asked for, or, conversely, which is not due. It would never result from a jurisdictional decision to assert that such a right "can be recognized" as much as "it might not be recognized". It would be absurd to say, in a given concrete case and in view of the applicable rule, that someone has or has not given right. Which are alternatives equally supported by law. Therefore, the court, when deciding, affirms that the right that it pronounced pre-exists and that the given solution is appropriate and is the only one, excluding any other, because he speaks on behalf of what is already resolved in the law, of which he is the spokesman in the specific case. The design may (or may not) be difficult; it may require recourse to general principles, but, by law, its pronunciation is the oracular expression of what the applicable rules "want" in that case. This is the specific, specific characteristic of the jurisdictional function. For this reason, when a court reform a first degree decision, it will not make it sub color that the sentence or injunction was inconvenient or inopportune and that the reviewing body knows or knew how to choose the best or the most convenient. On the contrary, the High Court will decide that the sentence or the preliminary injunction did not correspond to

the solution that the law determined and, therefore, that the Court comes to deliver the solution that the law imposes. In short: the jurisdictional function expresses itself - if we can say so - the "legal truth", the "legal truth" in the specific case. There is no room for two "truths of law" in the same struggle, especially when they are antinomic. Hence, when reforming a sentence or revoking an injunction, the Court that considers them will be based on the fact that the revised decision was "wrong", that is, that "it did not express the right due", although it had intended to It is, by definition, excluded that both decisions (the reformed and the reformed) are alternatives equally comforted by the legal order, which would be the situation that characterizes administrative discretion. truths of law "in the same case, all the more so when they are antinomic. Hence, when reforming a sentence or revoking an injunction, the Court that examines them will do so based on the fact that the revised decision was" wrong ", or that is, that "he did not express the right due", although he had intended to express it. It is, by definition, excluded that both decisions (the reformed and the reformed) are alternatives equally comforted by the legal order, which would be the situation that characterizes administrative discretion. truths of law "in the same case, all the more so when they are antinomic. Hence, when reforming a sentence or revoking an injunction, the Court that examines them will do so based on the fact that the revised decision was" wrong ", or that is, that "he did not express the right due", although he had intended to express it. It is, by definition, excluded that both decisions (the reformed and the reformed) are alternatives equally comforted by the legal order, which would be the situation that characterizes administrative discretion. although he intended to express it. It is, by definition, excluded that both decisions (the reformed and the reformed) are alternatives equally comforted by the legal order, which would be the situation that characterizes administrative discretion. although he intended to express it. It is, by definition, excluded that both decisions (the reformed and the reformed) are alternatives equally comforted by the legal order, which would be the situation that characterizes administrative discretion.

Well, as already mentioned, whether to sentence or to grant or deny a preliminary injunction, the judge evaluates facts, under different circumstances and "estimates" that a given rule demands the protection of a certain situation. The judgment that needs to be formulated in both cases is of the same logical composure. That is not why the sentence is said to be discretionary. Therefore, there is also no reason to say that the injunction is. The fact that the latter is provisional - with the inherent consequences - in no way interferes with the identity of the logical structure of the court claimed, either for sentencing or for assessing the injunction. In effect, also in this case what is being examined is whether or not there is what the law establishes for granting. It should be noted that the person examined by the judge, in order to decide whether to grant the injunction, is not the same person who has to examine it in order to pass the sentence. The composition of the sub examine objects is not the same; the analysis that you will have to make in both hypotheses - each focused on the respective object lied - is identical. In both mental operations, pronunciation is based on what the law requires. There will always be a question of legitimacy and not of opportunity, of "options", better or worse. In summary: when assessing the request to grant or deny an injunction, the court does not ask whether it should be granted or not, but whether, by law, the applicant is entitled to it, that is, whether or not the granting assumptions. If so, there is nothing but grant it. If

they are not, you cannot defer it. And the conclusion to be reached will never be that "they may or may not be fulfilled", because their pronunciation is the very voice of Law, it is the very expression of the law in casu, which is, presumably, claiming that that is the due solution, to the exclusion of any other and above all that is antagonistic to it. Ditto, when making a sentence. Whence it is proposed, axiomatically, as the only admissible decision and, therefore, as the "right", the "true" decision - never as the one that was simply the most convenient. Therefore, there is none, in favor of the judge , as there would not be for the Court, before an injunction request, any peculiar, specific, qualified - or any name that could be given - to diversify its position in relation to that which it has to assume (and assumes) when the final decision of the dispute.

The law, in the specific case, speaks through the court. Your decision, the instant it is delivered, proposes to be - repeat - the only "right" decision. If it is reformed, the pronouncement of the higher authority is that it will qualify as "right" and "wrong" the previous one, although from the logical point of view there is no guarantee that the second decision is that it has the "substantial truth" . What we are talking about is "legal truth", not absolute truth, which is inapferable. Legally, the "truth of the specific law", the "applied legal truth", will be the one contained in the final decision. The same phenomenon occurs when a Court changes its orientation in characterizing the significant field of a given rule and, consequently, appropriate solutions when it comes to this. The "legal truth" expressed by the Judiciary is in the case. That is why it can vary, as it varies over time, in its relation to an ideal, absolute, constant truth, whose discovery will never be known if it was made or in what decision it was. In short: when the judge is faced with a request for an injunction in a writ of mandamus, he will have to check only whether or not the conditions for granting it are present. And they will be or not. Tertium non datur. Do not say that such verification involves a free assessment, as the same phenomenon occurs with any other jurisdictional decisions, without, for the purpose of these others, considering that the magistrate decided "discretionarily" when sentencing. expressed by the Judiciary in the case. That is why it can vary, as it varies over time, in its relation to an ideal, absolute, constant truth, whose discovery will never be known if it was made or in what decision it was. In short: when the judge is faced with a request for an injunction in a writ of mandamus, he will have to check only whether or not the conditions for granting it are present. And they will be or not. Tertium non datur. Do not say that such verification involves a free assessment, as the same phenomenon occurs with any other jurisdictional decisions, without, for the purpose of these others, considering that the magistrate decided "discretionarily" when sentencing. expressed by the Judiciary in the case. That is why it can vary, as it varies over time, in its relation to an ideal, absolute, constant truth, whose discovery will never be known if it was made or in what decision it was. In short: when the judge is faced with a request for an injunction in a writ of mandamus, he will have to check only whether or not the conditions for granting it are present. And they will be or not. Tertium non datur. Do not say that such verification involves a free assessment, as the same phenomenon occurs with any other jurisdictional decisions, without, for the purpose of these others, considering that the magistrate decided "discretionarily" when sentencing. whose discovery will never be known if it was made or in what decision it was. In short: when the judge is faced with a request for an injunction in a writ of mandamus, he will have to check only whether or not the conditions for granting it are present. And

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Nor does it matter for the case to admit that the rules contain more than one interpretation, which would result in there being, in the injunctions, sentences and judgments, a component of discretion, comparable to what occurs in administrative acts of this kind, as Kelsen maintains. Indeed, the fact that the phenomenon is logically the same does not follow that it receives the same legal qualification. As well as the aforementioned "substantial truth", the qualifications that the Law attributes to the evaluations that the court makes and to those that the administrator makes, when each one decides in the exercise of their respective duties, are not legally the same. What matters is that the Law characterizes jurisdictional decisions, always and always, as the Law says: the only one so qualified in the specific case, because this is the attribute corresponding to the identity of the acts of jurisdiction; identity that excludes the possibility that they are simply alternative "opinions", better or worse options, but equivalently comforted by the legal system. This is exactly what the de jure distinction translates between the discretion of the administrator and the performance of the magistrate. Jurisdictional decisions, whatever they may be, confirmed or reformed, persistent or overcome by new jurisprudential guidance, are always rendered as acts bound to say the law. Therefore, there is no supposition that the judge has discretion to grant or reject an injunction request. Such discretion by definition does not exist or, if it exists, it does not express a phenomenon in anything and for nothing other than that which occurs when a sentence or judgment is passed. It is distinguished from administrative discretion by virtue of the legal quality that covers the jurisdictional act: consisting of a proposed solution as the only one comforted in the rule applied in the specific case, since it is the very voice of the law for the current situation. It follows that the denial of an injunction or its granting, if badly decided, give rise to security clearance before the higher court, as well as any violations of liquid and certain law.

Let it be said, just in passing, that it would be silly to assume that this obvious conclusion would be embargoed normatively, given the principle included unius exclusoalterius, given the fact that Law 4.438, of 26. 6. 64, provides in its art. 4. the revocation of security, at the request of a person of public law, in view of the serious risk of injury to public order, health, safety and economy, however, not providing for individuals, the same measure when the decision has been made to them unfavorable. From the outset, it should be noted that the aforementioned law addresses another issue other than that mentioned. In effect, what is available in it refers to the increase in the knowledge of the matter in the same case, in the same case records, and has in view a peculiar situation:

revocation of security by the President of the Court to which the appeal would be referred and in the face of an exceptional situation. In contrast, the introduction of security against denial or the granting of an injunction is simply the use of a specific constitutional remedy, which has nothing to do with raising, in the original warrant, the matter discussed for the appreciation of the President of the jurisdiction. In view of what has been said, it should be noted, in the end, that it would correspond to an error of teratological proportions - for not knowing the very essence of the jurisdictional activity - to suppose that the granting or denial of an injunction in an injunction is insusceptible to be questioned by a writ of mandamus, before a higher court, on the grounds that the latter will not be able to meet him or grant him without incurring the invasion of a hypothetical discretion by the judge (October / 89). that has nothing to do with raising, in the original warrant, the matter discussed for the appreciation of the President of the authority. In view of what has been said, it should be noted, in the end, that it would correspond to an error of teratological proportions - for not knowing the very essence of the jurisdictional activity - to suppose that the granting or denial of an injunction in an injunction is insusceptible to be questioned by a writ of mandamus, before a higher court, under the allegation that the latter will not be able to meet him or grant him without incurring the invasion of a hypothetical discretion of the judge (October / 89). that has nothing to do with raising, in the original warrant, the matter discussed for the appreciation of the President of the authority. In view of what has been said, it should be noted, in the end, that it would correspond to an error of teratological proportions - for not knowing the very essence of the jurisdictional activity - to suppose that the granting or denial of an injunction in an injunction is insusceptible to be questioned by a writ of mandamus, before a higher court, under the allegation that the latter will not be able to meet him or grant him without incurring the invasion of a hypothetical discretion of the judge (October / 89).

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1 2 > >>