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Burden of proof on civil procedure law and its application and inversion in the administrative process

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***Abstract*—** *With the elaboration of this article, it is expected to contribute to the discussion and reflection on the burden of proof of Brazilian civil procedural law and its application in the administrative process, including the possibility of its inversion. This will be dealt with in the development of the article, which will use the deductive method, based on bibliographic and exploratory research, and on the examination of constitutional and legal texts, having as a theoretical framework the constitutional model of process. After the study, it can be inferred that in the Brazilian legal system, the existence of the constitutional right to proof, as a result of the fundamental rights of contradictory and ample defense, was enshrined in the Constitution of the Federative Republic of Brazil, in its art. 5th, Inc. LV (BRAZIL, 1988). In the same sense, the right to proof, also not explained, is one of the guarantees inherent to due process of law, since there is no due process of law without the interested party being able to exhaust its right of defense with the production of the necessary evidence to prove it. of the alleged facts. Therefore, in light of these considerations, proof means demonstrating the allegations made by each of the parties, whether in the judicial process or in the administrative process.*

I. INTRODUCTION

With the preparation of this article, it is expected to contribute to the discussion and reflection on the burden of proof of Brazilian civil procedural law and its application in the administrative process, including the possibility of its inversion.

This will be addressed in the development of the article, which will use the deductive method, based on bibliographical and exploratory research, and on the examination of constitutional and legal texts, having the constitutional model of process as a theoretical framework.

This work is structured, starting, initially, from the understanding of the legal institute of evidence in civil proceedings, from the concept, object, means and sources and the definition of fundamental right. Next, the study of the burden of proof in civil proceedings. Then, to understand the theory of the burden of proof in the administrative process. Afterwards, the reversal of the burden of proof in the administrative process will be dealt

with. In the final considerations, an attempt will be made to summarize the application of the burden of proof and its inversion in the administrative process.

II. THE PROOF LEGAL INSTITUTE

For a better understanding of the legal institute of evidence in civil proceedings, as well as the object, means and source and, subsequently, the development of the theme within the scope of the Constitution of the Republic, as a fundamental right (BRASIL, 1988).

With regard to the term legal institute, the clarification of Ronaldo Brêtas, citing Arruda Alvim: "the legal entity is called the legal figure, created by a legal command, which involves a legal regime, of certain complexity, thanks to which they can emanate, or, where juridical relationships, 'based' or 'reported' to that reality, are conjugated. This is the abstract and indicative designation of such a reality, which differs from the institution, which in turn, must be considered as a legal institute hosting a certain value (of special significance and, generally, with great historical weight).” (BRÊTAS, 1998, p. 94, note 163).

Next, it is possible to understand evidence in civil proceedings, based on the concept, object, means and sources and the definition of fundamental right.

2.1 PROOF: CONCEPT, OBJECT, PRODUCTION AND SOURCES

It is important to note that, morphologically, Moacyr Santos teaches, proof derives from the Latin "probatio" which means proof, essay, verification, inspection, examination, argument, reason, approval, confirmation, coming from the term probare (probo, as, are) with meaning to prove, rehearse, verify, examine, recognize by experience, approve, be satisfied with something, persuade someone of something, demonstrate (SANTOS, 1952, p.3-4).

For Rosemiro Pereira Leal, the juridical institute of the evidence must be configured by the “conjunction-guarantee of the legal principles of equality, broad defense, contradictory and due process of law”. Therefore, “the right to process rights claims through the normative connection of a democratic source and not through the legal relationship between the procedural subjects” (LEAL, 2005, p. 53).

The evidence "is a factor of visibility of legal arguments", as it imposes "the procedural logical participation of the parties in the preparation of the provision (sentence and not as taxable persons deprived of procedural freedom)" (LEAL, 2005, p. 54-55).

Rosemiro Pereira Leal understands that a legal institute is “a set of principles that are unified by the normative connection of their meaning and application”. So:

The evidence, therefore, as a legal institute, to fulfill its purpose of “fixing the facts in the process”, is enunciated by the logical contents of approximation of the following principles: a) indictability (characterized by the integrative elements of the reality objectified in space); b) ideation (intellectual exercise of apprehending elements through the means of thinking about time); c) formalization (means the instrumentation of reality conceived by the legal form). (LEAL, 2018, p. 268-269).

In the legal sense, the word proof, as Moacyr Amaral dos Santos puts it, can mean “the production of acts and the means by which the parties or the judge intend to assert the truth of the alleged facts (actus probandi); it means the action of proving, of making the test” (SANTOS, 1952, p. 11).

Moacyr Amaral Santos, therefore, proof is the conviction of the truth, generated by certain means and with obedience "to certain principles, many of them provided for by law, others enshrined in the doctrine, whether in terms of availability, form, or its probative value, constituting what can legitimately be called 'probative right'” (SANTOS, 1952, p. 17).

Eduardo Cambi summarizes:

Legally, the word "evidence" is multi-significant, as it can be referred to in more than one sense, alluding to the represented fact, the evidentiary activity, the means or source of evidence, the procedure by which the procedural subjects obtain the means of evidence or, still, to the result of the procedure, that is, to the representation that derives from it (more specifically, to the judge's conviction) (CAMBI, 2001, p. 41).

From this approach to meanings presented by Moacyr Amaral, three categories of evidence appear, namely, proof as a means, proof as activity and proof as a result.

Regarding evidence as activity, first category, Hernando Devis Echandía defines evidence as: "activity of the judge and the parties or as the various methods used to obtain the judge's conviction about the existence or non-existence of the facts about which he will pronounce their decision, the evidences are procedural legal acts, because they involve the human will” (ECHANDÍA, 1976, p.19). Still with this notion, Francesco Carnelutti understands proof as the action of proving the existence of a fact, that is, the procedure used to verify the accuracy of what is stated (CARNELUTTI, 2000, p. 495-496). Note also, as taught by Vinícius Lott Thibau, adherence to the notion of proof as an activity by the following authors: Giuseppe

Chiovenda, José Alberto dos Reis, James Goldschimidt, Adolf Schönke and Antonio Dellepiane (THIBAU, 2011, p. 31-33). Therefore, for these defenders, says Camilla Paolinelli, "evidence is human activities developed by different subjects, through which the means of evidence communicate when judging knowledge of the facts, in an appropriate way to influence the judgment" (PAOLINELLI, 2014, p.43).

The second category, called proof as a means, teaches Rosemiro Pereira Leal: “to prove in law is to represent and demonstrate, instrumenting, the elements of proof by the means of proof” (LEAL, 2018, P. 270). Enrico Tullio Liebman defines them as means that serve to give knowledge of a fact, and therefore provide the demonstration and to form the conviction of the truth of a specific fact (LIEBMAN, 2003, p. 80). Camilla Paolinelli states that “evidence would be all the means of communication that transmit the evidential facts to the knowledge of the jurisdictional body. These are testimonies, documents, personal testimonies of the parties, expert reports” (PAOLINELLI, 2014, p. 44). Other exponents, Vinícius Lott Thibau pointed out, adopt this notion in the same sense, namely, Eduardo Couture, Antônio Carlos de Araújo Cintra, Ada Pellegrini Grinover, Cândido Rangel Dinamarco, Luiz Guilherme Marinoni, Sérgio Gruz Arenhart and Eduardo Talamini (THIBAU, 2011, p. 31-33).

As for the third category, considered proof of result, Camilla Paolinelli defines that “evidence would not be an act or an activity that would lead to a result regarding the facts stated in the procedure, nor would proof be a means or a set of means tending to obtain this result. ”. But, conceptualized “as the very result to which action and means tend” (PAOLINELLI, 2014, p. 44). This current, thesis Vinícius Lott Thibau, is adopted by João de Castro Mendes, Tércio Sampaio Ferraz Júnior and Misael Montenegro Filho (THIBAU, 2011, p. 31-33). These authors who support this theory, concludes Rui de Freitas Rangel, “are based on the device principle that dominates our process, concluding that the proof is not discovery, but confirmation of something that was previously formulated” (RANGEL, 2006, p. 36).

Ronaldo Brêtas de Carvalho Dias argues that the test is directed at the process as the main and direct recipient, since “it is in the process - understood as a shared, cognitive and argumentative procedural space - that each part presents its factual narratives and respective evidence [...]” (BRÊTAS, 2015, p. 190-191).

In the Brazilian legal system, the existence of the constitutional right to proof can be inferred since 1891, but it was enshrined in the Constitution of the Federative Republic of Brazil, in its art. 5th, inc. LV (BRASIL, 1988), as a result of the fundamental rights of the adversary and the broad defense (CAMPOS, 2016, p. 78).

The production of proof builds the technical structure that identifies the procedure, the proof is not only incorporated into the procedure, but it is constituted as its morphological unit, from a technical and scientific point of view. Based on the Constitution, it is advocated that the right to proof is the foundation of the Democratic State of Law (SANTOS, 2017, p. 42).

Therefore, in light of these considerations, proof means demonstrating the allegations signed by each of the parties, whether in the judicial process or in the administrative process.

Once the proof is conceptualized, it is necessary to define, in sequence, what must be the object of proof in a process, including registering the controversy regarding what exactly it is.

All the facts alleged by the plaintiff constitute objects of evidence, provided that they are accurate, controversial, relevant and pertinent, and notorious facts, confessed by the opposing party, uncontroversial or that have a legal presumption of existence or veracity, are not considered as an object of evidence. according to art. 374, of the CPC 2015 (BRASIL, 2015).

As for the object of the test, Rosemiro Pereira Leal warns that:

It seems wrong to teach that the object of the evidence is the "fact narrated in the action or in the defense", because the object of the institute of evidence is the production of the structure of the procedure as a causality requirement of the legal basis (art. 93, incs. IX and X, CF/1988) of the provision (decisional act), therefore, not being the “fact” which, as we have seen, is merely evidence (LEAL, 2018, p. 270).

In this context, register the academic discussion regarding the object of the test: “because it is not always made up of allegations, it is enough to remember the facts that can be considered by the judge” (NEVES, 2018, p. 729). While another portion understands that they are the claims of fact, as "the veracity exclusively affects the claims of fact, which can be false or true" (NEVES, 2018, p. 729).

Note, however, that the provisions of art. 374, caput, of CPC 2015 (BRASIL, 2015) adopts the first understanding. Thus, the object of proof is the unrecognized or notorious facts (CHIOVENDA, 1965).

Daniel Amorim Assumpção Neves argues that the best, therefore, "is to state that the object of evidence is not the facts or allegations, but the points and/or questions of fact

brought to the process by the parties or ex officio by the judge himself" (NEVES, 2018, p. 729).

Regarding the means of proof, in the process, it should be noted that they must be legally reputable (art. 369, CPC/15). José Carlos Barbosa Moreira teaches that "means are the techniques developed to extract evidence from where it flows" (that is, the source) (MOREIRA, 1996, p. 115). Therefore, "bridges through which facts pass to reach, first, the senses, then the judge's mind" (MOREIRA, 2006, p. 212).

Sources of proof, for José Carlos Barbosa Moreira, are "things, people and phenomena" (MOREIRA, 1996, p. 115).

For Francesco Carnelutti, regarding means and sources of evidence, he emphasizes that "until a better terminology is not proposed, I call on my own means of evidence the activity of the judge through which he seeks the truth of the fact to be proved; and source of proof to the fact that one uses to deduce the truth itself" (CARNELUTTI, 2002, p. 99).

In addition, says Carnelutti, sources of evidence can be classified into two categories: a) sources of evidence in the strict sense, therefore, the "facts that serve to deduce the fact to be proved and that are constituted by its representation"; b) sources of presumption, understood as "facts that serve to deduce the fact to be proved and that are not constituted by its representation" (CARNELUTTI, 2002, p. 99).

Thus, the first, representative facts that directly demonstrate the occurrence of another fact, the second, secondary facts or circumstances that only indirectly point to the possible occurrence of another fact (DIDIER JÚNIOR et al, 2018, p. 50).

Santiago Sentis Melendo adds that "the sources belong to the litigant, apart; the means touch the judge" (MELENDO, 1979, p. 16). Therefore, "it is not the judge's role to look for the sources, this is up to the party. The fonts correspond to the parts; the means, to the judge. It is not that the parties cannot propose or require that certain means of proof be practiced; but it is difficult for the judge to go out in search of sources, as was said, this is not his role [...]. People or things are known by the parties, they are sources, but their inspection or recognition by the judge is a means (MELENDO, 1979, p. 17).

As for the recipient of the evidence, it is intuitive to claim to be the magistrate. The magistrate is not, however, says Cleber Almeida, "the only recipient of the evidence. The parties are also recipients of the evidence, as they are entitled to a decision based on the evidence contained in the file" (ALMEIDA, 2011, p. 53).

For Cleber Almeida, the evidence also has society itself among its recipients. "The evidence, therefore, has an endoprocedural (in relation to the judge and the parties) and an extra-procedural (in relation to society) function. The evidence is a guarantee for the judge, the parties and society of the decision as close as possible to reality" (ALMEIDA, 2011, 54).

Warns Santiago Sentis Melendo, "the test cannot be front one party or for one party; nor for the judge. The proof is for the process. Here we are also faced with the concept of disposition: a part may have a proof; but the moment it produced this proof, the process will have acquired it; there is no proof of either part [...]. The acquisition principle means precisely that the evidence is acquired for the process" (MELENDO, 1979, p. 20).

2.2 FUNDAMENTAL RIGHT TO PROOF

The Constitution of the Federative Republic of Brazil of 1988 includes in items LV and LVI, of art. 5, of Title II - Individual Rights and Guarantees, Chapter I - Individual and Collective Rights and Duties, fundamentally that:

Art. 5 [...]

LV - litigants, in judicial or administrative proceedings, and the accused in general, are assured of an adversarial and full defense, with the means and resources inherent to it;

LVI - evidence obtained by illegal means is inadmissible in the process; (BRASIL, 1988).

As for the contradictory and broad defense principles, they are intrinsically inserted in the context of the principle of due process, as a way to guarantee the litigious parties the full exercise of the right of defense. In the same sense, the right to proof, also not explained, is one of the guarantees inherent in the due process of law, as there is no due process of law without the interested party being able to exhaust its right of defense with the production of evidence necessary for proof of the alleged facts.

In fact, the importance of due legal process, espoused in constitutional law is followed in CPC/2015, when in art. 7 of Chapter I - Of the Fundamental Rules of Civil Procedure, provides that: "The parties are guaranteed parity of treatment in relation to the exercise of procedural rights and faculties, the means of defense, the burden, the duties and the application of procedural sanctions, it is up to the judge to ensure the effective adversary" (BRASIL, 2015).

Articles 8, 9 and 10 of CPC/2015, enshrine guarantees to litigants, so that they are observed the constitutional principles inherent to due legal process, as well as proportionality, reasonableness, legality, publicity and efficiency (BRAZIL , 2015).

In this context, "the purpose of the evidence is the facts deduced by the parties in court, and the legal order provides for the legal means of production of evidence in order to obtain the truth about the facts on which the request or defense is based". Therefore, says Fernando César da Silva, “this set of rules establishes the basis for evidentiary instruction and forms an orderly system that guarantees, on the one hand, the production of evidence, effectiveness of the process and the search for the truth, and on the other, the prohibition of the use of illicit means of proof” (SILVA, 2017, p. 18).

Take note, also, that in the context of civil proceedings, the right to proof may be abstracted from the content of article 8, item I, of the 1969 American Convention on Human Rights (Pact of San José de Costa Rica), whose content was approved by the National Congress on May 26, 1992, pursuant to Legislative Decree 27, with full compliance determined by Decree 678, of November 6, 1992.

Registering that the taking of evidence, avoiding an affront to the principle of due process of law, there will be observance of guarantees provided for in the constitutional order or contrary to the provisions of procedural rules.

III. BURDEN OF PROOF IN THE CIVIL PROCESS

It should be noted that onus is what implies an overload, giving someone a disadvantage. De Plácido e Silva states that: “burden has as a legal technical meaning, any charge, duty or obligation that weighs on a thing or a person, by virtue of which he is obliged to respect or comply with them. It is a encumbrance” (DE PLACIDO E SILVA, 1982, p. 282-283).

Currently, teaches Camilla Paolinelli, “the conceptual autonomy of the aforementioned category is recognized. However, for a long period of time, the institute was confused with the notions of obligation, duty, subjective law, faculty [...]” (PAOLINELLI, 2014, p. 50). However, the idea of incumbent is confused with the common sense of the expression onus (PAOLINELLI, 2014, p. 50) which, etymologically, includes the notion of “charge, burden, obligation or duty” (CREMASCO, 2009, p. 23).

But, according to Luiz Eduardo Boaventura Pacifico, “the conceptual autonomy of the onus is a relatively recent achievement, although its notion already existed in Roman law, precisely due to the principles then in force regarding the burden of proof”. He further informs that “in the Middle Ages, the referred notion was restored by glossers and post-glossers; and, in the Modern Age, it would influence the Napoleonic Code and the other civil codes of the 19th century” (PACÍFICO, 2001, p. 20-21).

Luiz Pacífico clarifies that, only in the 20th century, the onus concept was cleared:

[...] it started in Austria and Germany, due to the difficulty encountered by the doctrine of these countries in reconciling the Roman notion - inherited from common law, which identified the burden of proof with the need to prove (necessitas probandi) - with the reality of a process in which broad instructive powers were recognized for the judge and given extreme freedom in the assessment of the evidentiary result. (PACIFIC, 2001, p. 21).

And, later, the concept started to be studied also in Italy and France, which predominated the dispositive principle (PACÍFICO, 2001, 21).

For Hernando Echandía, the concept of procedural burden is highlighted with the definition of process as a legal relationship (ECHANDÍA, 1976, p.8), which, in turn, is structured as a reflection of the obligatory relationship of private law (PAOLINELLI, 2014 , p. 51). When it comes to procedural burden, James Goldschmidt made an important contribution to the study, as he conceptualized it as an imperative of its own interest (GOLDSCHMIDT, 1936, p. 201-203).

To clarify the distinction between burden and obligation, the doctrine of Gian Antonio Micheli: "is precisely that of burden understood as a legal entity distinct from obligation, in the sense that in certain cases the rule sets the conduct that is necessary to observe, when a subject wants to achieve a legally relevant result”. And it defends "a certain behavior of the subject is necessary for the legal purpose to be reached, but, on the other hand, the subject is free to organize his own conduct as best he sees fit and, consequently, also possibly in the opposite direction to that foreseen by the norm” (MICHELI, 1961, p. 60).

For Hernando Devis Echandía, onus "is a power or a faculty (in a broad sense), to perform, freely, certain acts or adopt a certain conduct provided for in the norm for benefit and self-interest." And, more, “without subjection or coercion and without another subject who has the right to demand its observance, but whose non-compliance will entail unfavorable consequences” (ECHANDÍA, 2000, p. 195).

James Goldschmidt asserts that burdens are “situations of need to perform a certain act to prevent a procedural loss. In other words, these are 'self-interest imperatives'”. Therefore, "the procedural burdens are closely related to the procedural 'possibilities', since every 'possibility' imposes on the parties the burden of being diligent to avoid their loss" (GOLDSCHMIDT, 1936, p. 203).

The study of the procedural burden, in Brazil, is conceptualized by Pontes de Miranda as a relationship in itself, whose satisfaction is that of the interest of the encumbered itself (MIRANDA, 1982, p. 322).

The distribution of the burden of proof, in the Brazilian Code of Civil Procedure, became the object of the legislative proposal of Alfredo Buzaid, then Minister of Justice, approved in 1973, which argues the admissibility in the distinction between constitutive, modifying, impeding and extinctive oriented by the Italian procedural legal system (BUZAID, 1972, p. 76-77).

Once these considerations regarding the procedural burden are noted, according to Fredie Didier Júnior, the burden of proof is "the burden attributed to a subject to demonstrate certain factual allegations". And he adds, “the attribution made by the legislator is prior and static (invariant according to the peculiarities of the cause); the distribution made by the judge or by the parties is considered dynamic, because it is made in light of a concrete situation” (DIDIER JÚNIOR, et al., 2018, p. 126).

In the definition of Cândido Rangel Dinamarco, “the burden of proof is the burden attributed by law to each party, to demonstrate the occurrence of facts of its own interest for the decisions to be rendered in the process” (DINAMARCO, 2009, p. 73).

In this context, the 2015 Code of Civil Procedure now provides:

Art. 373. The burden of proof is:

I - to the author, as to the fact constituting his right;

II - to the defendant, as to the existence of an impeding, modifying or extinguishing fact of the author's right.

§ 1 In cases provided for by law or in the face of peculiarities of the case related to the impossibility or excessive difficulty of fulfilling the charge under the terms of the caput or the greater ease of obtaining proof of the contrary fact, the judge may assign the burden of proof in a manner otherwise, provided that it does so by reasoned decision, in which case it must give the party the opportunity to discharge the burden assigned to it.

§ 2 The decision provided for in § 1 of this article cannot generate a situation in which the discharge of the charge by the party is impossible or excessively difficult.

§ 3 The different distribution of the burden of proof may also occur by agreement of the parties, except when:

I - fall on the party's unavailable right;

II - make it excessively difficult for a party to exercise the right.

§ 4 The convention referred to in § 3 may be entered into before or during the process. (BRAZIL, 2015)

It is noted that the aforementioned article maintained the wording, in its caput, of art. 333, of CPC/73; however, the four added paragraphs defined the theme of evidence in the Brazilian civil procedure. It should be noted that this dissertation will have as reference the first and second paragraphs, which deal with the standardization of the technique of distribution of the burden of proof.

In this sense, §1 of art. 373, of the CPC (BRASIL, 2015), in this case, if one of the parties is in a better position to produce evidence, the court may redistribute the evidential burden.

It is noteworthy, as to §2 of art. 373, of the CPC (BRASIL, 2015), which establishes the impossibility of dynamization in case it generates a situation of impossible or excessively impossible discharge, prohibiting redistribution in case of “diabolical evidence”.

In this sense, the plaintiff will be responsible for proving what it alleges and the defendant will be responsible for proving, recognizing the existence of the fact alleged by the plaintiff, the impeditive, extinguishing or modifying matter.

For a better understanding of the issue, it is fundamental to understand, below, the theory of the burden of proof in the administrative process, as it is important for proceduralists and administrators.

IV. BURDEN OF PROOF IN THE ADMINISTRATIVE PROCESS

Note that the administrative process, governed by Law n. 9,784/99 (BRASIL, 1999), as well as the judicial process (Law n. 13.105/15), has the right to proof one of its constitutional postulates, therefore, of greater importance. It is provided for in art. 5, item LV, of CR/88, and reissued in the Administrative Procedure Law, especially in arts. 2, item III, 36 and 37 (BRASIL, 1999).

It is important to remember, at this moment, the meaning of the test, which, for Felipe de Almeida Campos, consists of “rebuilding, in the democratic procedural environment, the acts or facts that have already taken place in time. Therefore, it is through proof that the past is presented in the process” (CAMPOS, 2016, p. 94).

The Administrative Procedure Law (Law n.9.784/99), in art. 29, deals with and regulates the institute of evidence, aiming to delimit the facts alleged in the process:

Art. 29. Instructional activities aimed at ascertaining and verifying the data necessary for decision-making are carried out ex officio or upon impulse by the body

responsible for the process, without prejudice to the right of interested parties to propose evidentiary actions.

§ 1 The competent body for the instruction will include in the records the data necessary for the decision of the process.

§ 2 The acts of instruction that require the action of interested parties must be carried out in the least onerous way for them. (BRASIL, 1999).

This guarantee is administered before the Public Administration, allowing for the production of evidence, in addition to having the allegations against the interested party proven.

What, for Felipe de Almeida Campos, "is certain that the participation of interested parties in the administrative process must occur in an unrestricted way, in perfect harmony with the institutional principles of the process" (CAMPOS, 2016, p. 94). Therefore, as explained, provided for in the Due Constitutional Process.

About the burden of proof in Law n. 9,784/99, provides article 36:

Art. 36. It is up to the interested party to prove the facts that he has alleged, without prejudice to the duty attributed to the competent body for the investigation and the provisions of art. 37 of this Law.

Art. 37. When the interested party declares that facts and data are registered in documents existing in the Administration responsible for the process or in another administrative body, the competent body for the instruction will provide, ex officio, to obtain the documents or respective copies. (BRASIL, 1999).

Nelson Nery Costa states that, in the administrative process, "the burden of proof is on the person alleging the fact. If the administrator, it is up to him to prove what he claims" (COSTA, 2011, p. 230).

Therefore, the burden of proof, provided for in Law n. 9784/99 (BRASIL, 199), which deals with the administrative process, is also in the same sense as the Code of Civil Procedure, in its art. 373 (BRASIL, 2015).

Thus, it is the responsibility of the party, with the purpose of instructing the process with evidence and arguments.

V. REVERSAL OF THE BURDEN OF PROOF IN THE ADMINISTRATIVE PROCESS

The reversal of the burden of proof as a result of the principle of presumption of legitimacy of administrative acts is defended by Romeu Felipe Bacellar Filho, as he maintains that "the legal system assumes, until proven otherwise, the regularity of the exercise of the state function. This is a result of the principle of presumption of regularity of legal norms issued by the State [...]". Furthermore, he understands that it is "an important feature of normative discourse: the reversal of the burden of proof". (BACELLAR FILHO, 2014, p. 186).

The author understands that, despite being the Public Administration who accuses, the act is considered as if it had already been proven, exempting it from the duty to prove it (BACELLAR FILHO, 2014, p. 189). However, Romeu Bacellar Filho warns that the burden of proof lies with the administrator only as long as there is no doubt on the part of the Administration about the inaccuracy of the act (BACELLAR FILHO, 2014, p. 192).

Maria Sylvia Di Pietro alleges that the presumption of veracity reverses the burden of proof in administrative proceedings: "From the presumption of veracity there are certain effects: 3. the presumption of veracity reverses the burden of proof; [...]; in this case, [...], the judge will assess the nullity if argued by the party" (DI PIETRO, 2011, p. 241-242).

Marçal Justen Filho defends, regarding the challenge of an administrative act, that the presumption of legitimacy:

[...] is relative, which is equivalent to an inversion of the burden of proof. It means, therefore, that the Public Administration does not need to prove that the content of the act is legitimate, with the third party having the burden of proving that it is illegitimate. (JUSTEN FILHO, 2015, p. 397).

Marçal Justen Filho states, with regard to the occurrence or not of facts asserted by the Administration, that it would not be up to the accused to prove the existence of the fact either, as no evidence of negative or unfounded facts is produced. (JUSTEN FILHO, 2015, p. 397).

In the words of Daniel Ferreira, the burden of proof is on the Administration, in view of the guarantee of the presumption of innocence of the accused until proof to the contrary. And, in addition, he adds that: "it is always the Public Administration, so that if the typicality is not well proven (substantially objective [and subjective, as the case may be]), the competent authority must decide to archive the fact. The reason, then, is evident: in dubio pro reo" (FERREIRA, 2009, p. 280). However, for the plaintiff, even in acts of God or force majeure, if the accused is insufficient, the burden of proof cannot be his responsibility, it being the duty of the Public Administration to prove the defendant's capacity (FERREIRA, 2009, p. 294 , 324).

In order to reinforce this doctrinal position, Sérgio Ferraz and Adilson Abreu Dallari affirm "that the probandi onus of the illicit act falls on the Administration, since the imposition of a sanction is only constitutionally admitted upon observance of the due legal process, including the right to motivation and decision based on firm evidence" (FERRAZ; DALLARI, 2012, p. 205).

This, then, is the legal basis on which the dynamic distribution of the burden of proof in the administrative process must be examined.

VI. CONCLUSION

After the study, it can be inferred that in the Brazilian legal system, the existence of the constitutional right to proof, as a result of the fundamental rights of contradictory and ample defense, was enshrined in the Constitution of the Federative Republic of Brazil, in its art. 5th, Inc. LV (BRAZIL, 1988).

In the same sense, the right to proof, also not explained, is one of the guarantees inherent to due process of law, since there is no due process of law without the interested party being able to exhaust its right of defense with the production of the necessary evidence to prove it. of the alleged facts.

It is noteworthy that it will be up to the plaintiff to prove what he claims and to the defendant to prove, recognizing the existence of the fact alleged by the plaintiff, the impeding, extinguishing or modifying matter.

The Administrative Procedure Law (Law n.9.784/99), in art. 29, deals with and regulates the institute of evidence, aiming to delimit the facts alleged in the process. This guarantee of the administered before the Public Administration, to allow the production of evidence, in addition to having the allegations against the interested party proven.

Then, the burden of proof, provided for in Law no. 9,784/99 (BRASIL, 199), which deals with the administrative process, is also in the same sense of the Civil Procedure Code, in its art. 373 (BRAZIL, 2015).

Therefore, in light of these considerations, proof means demonstrating the allegations made by each of the parties, whether in the judicial process or in the administrative process.

REFERENCES

[1] Almeida, C. L. de. (2011) Proof as a human right and a fundamental right of the parties to the judicial process. 209f. Thesis (Doctorate) – Federal University of Minas Gerais – Graduate Program in Law – Faculty of Law. Belo Horizonte.

[2] Bacellar Filho, Romeo Felipe. (2014) Administrative law treaty: administrative act and administrative procedure. São Paulo: Revista dos Tribunais, 2014. Coordination Maria Sylvia Zanella Di Pietro. v. 5.

[3] Brazil. Constitution of the Federative Republic of Brazil, 1988. [Online exclusive]. Available at: http://www.planalto.gov.br/ccivil_03/Contitucao/Contitucao.htm.

[4] Brazil. Law no. 9784, of January 29, 1999. Brasília, DF: Presidency of the Republic.

[5] Brazil. Code of Civil Procedure (2015). Law no. 13.105, of March 16, 2015. Establishes the Code of Civil Procedure. [Online exclusive]. Available at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm.

[6] Brêtas, R. C. D.; Soares, C. H.; Rúa, M. M. B.; Giraldo, L. D. P.; Andrade, F. R. D. (Orgs.). (2016) Evidence Law: current issues. Belo Horizonte: D'Plácido.

[7] Brêtas, R. C. D. (2018). Constitutional Process and Democratic Rule of Law. 4. ed. revised, updated and expanded, with references to the 2015 Code of Civil Procedure. Belo Horizonte: Del Rey.

[8] Brêtas, R. C. D. (2015). The constitutionalization of the new Code of Civil Procedure. In: Brêtas, R. C. D.; Soares, C. H.(Orgs.). New Code of Civil Procedure 2015 – Law n. 13.105/15 with amendments to Law 13.256/2016. Belo Horizonte: D'Plácido.

[9] Brêtas, R. C. D.. et al. (2016) Systematic study of the NCPC: with the amendments introduced by Law No. 13,256, of 2/4/2016. 2. ed. Belo Horizonte: D'Placido.

[10] Brêtas, R. C. D. (1998). Fraud in Civil Procedure. Belo Horizonte: Del Rey.

[11] Buzaid, A. (1972). The burden of proof. Studies in Law. São Paulo: Saraiva, v. 1.

[12] Cambi, E. (2001). Constitutional right to proof. São Paulo: Revista dos Tribunais. (Current themes of civil procedural law collection; volume 3).

[13] Campos, F. A. (2016). The theory of evidence and the administrative process from the perspective of the 2015 Code of Civil Procedure. 119f. Dissertation (Masters in Law). Minas Gerais Education and Culture Foundation - FUMEC – Faculty of Human, Social and Health Sciences, Postgraduate Law Program, Belo Horizonte, 2016. [Online exclusive]. Available at: http://www.fumec.br/revistas/pdmd/article /view/5632/2803.

[14] Carnelutti, F. (2000). Civil Procedural Law System. Translation: Hiltomar Martins Oliveira. 1st ed. São Paulo: Classic Book.

[15] Carnelutti, F. (2002). The civil evidence. Lisa Pary Scarpa (trans.). 2nd ed. Campinas: Bookseller.

[16] Costa, N. N. (2011). Instruction and evidence in the federal administrative process. In: Nohara, I. P.; Moraes Filho, M. A. P. (org.). Administrative process: controversial issues of Law n. 9,784/99. São Paulo: Atlas.

[17] Cremasco, S. S. (2009). The dynamic distribution of the burden of proof. Rio de Janeiro: GZ.

[18] De Placid e Silva, O. J. (1998). Legal Vocabulary. 15th ed. Rio de Janeiro: Forensics.
[19] Didier Jr, F.; Braga, P. S.; Oliveira, R. A. (2018). Civil procedural law course. Evidence theory, evidentiary law, decision, precedent, res judicata and provisional relief.13 ed. Salvador: Jus Podivm, v. two.
[20] Denmark, C. R. (2009). Civil procedural law institutions. 6. ed. São Paulo: Malheiros. V. II.
[21] Di Pietro, M. S. Z. (2011). Administrative procedure law: its driving idea and scope. In: Moraes Filho, M. A. P.; Nohara, I. P. (Org.). Administrative process: controversial issues of Law n. 9,784/99. São Paulo: Atlas.
[22] Echandía, H. D. (1976). General Theory of Judicial Prueba. Buenos Aires: Victor P. de Zavalia. t. 1.
[23] Echandía, H. D. (2000). Compendio de la prueba judicial. Buenos Aires: Rubinzal-Culzoni Editors. t. I.
[24] Ferraz, S.; Dallari, A. A. (2012). Administrative process.3. ed. São Paulo: Malheiros.
[25] Ferreira, D. (2009). General Theory of Administrative Infraction from the Federal Constitution of 1988. Belo Horizonte: Forum.
[26] Goldschmidt, J. (1936). Civil procedural law. Buenos Aires: Editorial Labor.
[27] Justen Filho, M. (2015). Administrative Law Course. 11. ed. São Paulo: Revista dos Tribunais.
[28] Leal, R. P. (2018). General theory of the process: first studies. 14. ed. Belo Horizonte: Forum.
[29] Leal, R. P. (2005). Unconstitutional Relativization of the Judged Thing. Belo Horizonte: Del Rey.
[30] Liebman, E. T. (2003). Civil procedural law manual. Translation: Cândido Rangel Danish. Palmas: Intellectus. v. I, II and III.
[31] Moreira, J. C. B. (1996). Typical evidence. Review of Process. São Paulo: RT, n.76.
[32] Moreira, J. C. B. (2006) Notes on the title "On the Proof" of the New Civil Code. Reflections of the New Civil Code on Procedural Law. Salvador: Jus Podvium.
[33] Melendo, S. S. (1979). La prueba: the great themes of evidentiary law. Buenos Aires: Ediciones Juridicas Europa-America.
[34] Micheli, G. A. (1967). La cargo de la prueba. Buenos Aires: Legal Editions Europe-America.
[35] Miranda, F. C. B. (1982). Comments to the code of civil procedure. Volume IV. Rio de Janeiro, Forensics.
[36] Neves, D. A. A. (2018). Civil procedural law manual. 10. ed. rev, ampl. and update. Salvador: JusPodivm.
[37] Pacific, L. E. B. (2001). The burden of proof. 2. ed. São Paulo: Revista dos Tribunais.
[38] Paolinelli, C. M. (2013). The burden of proof in the democratic process. 220f. Dissertation (Masters) Pontifical Catholic University of Minas Gerais. Graduate Program in Law. Belo Horizonte.
[39] Rangel, R. M. F. (2006). The burden of proof in civil proceedings. 2. ed. Coimbra: Almedina.
[40] Santos, A. L. (2017). The legal institute of evidence in the democratic rule of law. Belo Horizonte, 116f. Dissertation (Masters) Pontifical Catholic University of Minas Gerais. Graduate Program in Law.
[41] Santos, M. A. (1952). Civil and Commercial Judicial Evidence – General Part. 2. ed. São Paulo: Max Limonad, v. I.
[42] Silva, F. C. D. (2017). Proof: the responsibility for constructing the truth in civil proceedings. 98f. Dissertation (Masters in Law). Eurípedes de Marília University Center – UNIVEM. Marília, SP.
[43] Thibau, V. L. (2011). Presumption and evidence in democratic procedural law. Belo Horizonte: Arraes.