A COMPARISON WITH THE SPANISH REGULATION OF ADMINISTRATIVE PROCEDURES.

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Abstract

The emergence of due process requirements in Spain is neither a recent phenomenon, nor one that depends mainly on the influence played by European institutions, unlike other parts of the national administrative system. Nor is it directly related to the increasing activism of government. Indeed, between the end of the Nineteenth century and 1975, the legislative regulation of administrative procedures aimed at preserving citizens' rights and interests and thus ensured the legality of the administrative process. Only later have different views of administrative procedures been accepted, including particularly those views emphasizing interest balancing. Only after the Constitution of 1978 was adopted, moreover, have administrative procedures been considered as instruments for achieving citizens' participation. The renewed attention for procedures in terms of accountability of public bodies and the impact of new technologies are the most recent trends that emerged in the last twenty years.

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1. Antecedents and the development of a Common Administrative Procedure Act.

Spanish administrative law emerged in the first half of the nineteenth century. Its development was deeply influenced by French administrative law. As early as 1889 an Outline Act, known as "Ley Azcárate", was adopted which regulated the bases for administrative procedures.[1] This attempt to unify administrative procedure was a significant step in the development of Spanish administrative law.

In the following years, it was implemented by each Ministerial Department that established its own rules of procedure. Therefore, in spite of the fact that the Outline Act aimed at bringing together and systematizing scattered procedural provisions, the situation evolved into an inflated and disordered body of rules governing different administrative actions.

In the context of the important reforms of Spanish administrative law that took place in the 1950s, a new Administrative Procedure Act was passed in 1958 in order to standardize and simplify administrative procedure and to ensure common action in the internal functioning of all Ministerial Departments[2]. The new Act also improved both citizen participation in administrative proceedings and their procedural rights of defence. Standardisation of the procedure was seen, in fact, as an instrument for individuals' protection.

Adopted in a political environment in which fundamental civil liberties were not guaranteed, the 1958 Administrative Procedure Act became an important instrument for the protection of citizens against public authorities' actions infringing those individual rights, such as property, which were generally recognized by the regime. In spite of the autocratic context in which it operated, the highly technical quality of this statute allowed a form of "State of administrative law" or "Administrative rule of Law" to develop where respect for

[1] *Ley de Bases sobre el procedimiento Administrativo*, 19 October 1889.

[2] M.F. Clavero Arévalo, *Ámbito de aplicación de la Ley de Procedimiento Administrativo,* Revista de administración pública 29 (1959); R. Entrena Cuesta, *El proyecto de Ley de revisión de la Ley de Procedimiento Administrativo,* Documentación administrativa 68 (1963); F. Garrido Falla, *El procedimiento administrativo de 1950 a hoy,* Revista de administración pública 150 (2000).

procedure was the cornerstone for the protection of individual rights.

So, even where there was not a recognition of fundamental rights and political freedoms, the area of administrative activity on economic issues (property, licences of trade and commerce, industrial development, building licences, etc) was under a very strict legal review. It was an area which deeply impacted the Franco´s regimen dominant classes, specially the financial sector, that created a strong industrial investment asset.

The consequence of this approach was a extremely formalized approach to Spanish Administrative Law. Administrative decisions, as product of a dictatorial government, couldn't be challenged on the merits, but it was possible to oppose the infringement of economic interests by burdensome legal requirements.

In doing so, the main scope of legal doctrine on administrative procedure was to enable a judicial decision to declare void and null an administrative act, due to formal infringements on procedural rights.

Three decades later the 1978 Constitution proclaimed Spain as a social and democratic State, subject to the rule of law, renewing the foundations of Spanish administrative law and, therefore, of administrative procedure[3].

In the Preliminary Title, where the articles referring to general issues are placed, article 9.3 develops the general principle of the rule of law stated in article 1, bringing many specific principles of public law to the constitutional level. In this section it is declared that: "the Constitution guarantees the principle of legality, the normative order, the non-retroactivity of punitive provisions which are not favourable to, or which restrict individual rights, legal security and the interdiction of arbitrariness of public powers".

Also included in Title IV is a catalogue of general principles applicable to the activities of public administrations. According to Article 103, the Public Administration serves the general interest with objectivity and according to the principles of efficiency,

[3] T.R. Fernández Rodríguez, *Los principios constitucionales del procedimiento administrativo*, in J. Acosta Sánchez et al. (eds.), *Gobierno y Administración en la Constitución*, Vol. I. (1988).

hierarchy, decentralization, de-concentration and co-ordination, and the principle of legality of Administration.

Furthermore, Article 105 orders the Legislature to regulate the following procedural requirements and rights:

> a) The hearing of citizens directly, or through the organizations and associations recognized by law, in the process of drawing up the administrative provisions which affect them;
>
> b) Access of citizens to administrative files and records, except as they may concern the security and defence of the State, the investigation of crimes and the privacy of individuals;
>
> c) Procedures for taking administrative action, guaranteeing the hearing of interested parties when appropriate.

The Constitution guarantees, therefore, many principles of Administrative Law and, in particular, that Public Administrations are subject to administrative procedure. It also guarantees that individuals enjoy procedural defence rights , including both the right to be heard and the right of access to administrative files, in order to protect their substantive rights and legitimate interests.

Outside of the constitutional principles on administrative procedure, there is another important regulation concerning the division of constitutional competences between the State and the Autonomous Communities. In article 149, 1,18ª the State has the competence to establish: "The bases of the legal system of the public administrations and the statutory system for its officials which shall in every case guarantee that the administered will receive a common treatment" and "a common administrative procedure".

So in the Spanish case, administrative procedural State law is not a law of general principles, but an extensive legal compilation of 146 articles, plus additional, final and transitory clauses. In addition, the interpretation done by the Constitutional Court on the 18th clause of article 149,1, is that it is not an usual competence which divides a subject between the legislative or executive power of the State and the Autonomous Communities. Rather it foresees the organization of the Spanish State as a whole. Under this view, the State is the one in charge of making the

operative rules for the functioning of the different public administrations.

But what should be strongly emphasised is that the administrative procedural principles placed in the Spanish Constitution were already applied by the legislation, doctrine and jurisprudence of the pre-constitutional period, especially during the 1960´s.

So there are two important aspects to be highlighted. First of all, on the Spanish developments reflect the importance of legal doctrine in applying comparative models. The principles of administrative procedure used in Spain under the dictatorial regime combined techniques for the most accurate control of administrative resolutions from the received traditions of French, Italian and German law.

Secondly, we must not commit the error of thinking that this is an example of uselessly placing administrative procedure rules in the Constitution. On the contrary, we know that in the pre-constitutional period the principle of legality was only applied to economic activity, property, licences, condemnation, etc. Only after the Constitution was the relationship between individuals and public authorities adequately governed by administrative procedural rules, because of the new legal status afforded to citizens.

This demonstrates the importance of a constitutional basis for administrative procedures, and the more specific the basis the better it is. Even in the absence of such specific rules, it is always possible to find in the Constitution other rules that will condition the reach of a singular conception of administrative procedure. Such rules include: fundamental rights; principles of internal organization of public administrations; principles and rules for the cooperative functioning of multiple levels of government; and specially the constitutional rules on the institutional conception of public administration as a constitutional power.

Another indicator of the necessity of constitutional rules on administrative procedure is shown by the fact that in many cases the administrative law institutions that may be referred in the Constitution each has its own interpretative culture and legal history. This is due to their distinct sources of law, civil servants, public domain, administrative infringements, causes of public utility or social interest, etc.. In the end, this requires some

balance understanding of their differences that in many cases should be expressed in an administrative procedure.

In this new constitutional framework, Act 30/1992, was enacted on 26th November 1992 to update the Administrative legislation prior to the 1978 Constitution[4]. Act 30/1992 regulates the bases of the Public Administrations' legal regime, the common administrative procedure and the system relating to the liability of Public Administration.

Act 30/1990 on the Common Administrative Procedure (hereafter ACAP) is central to the Spanish administrative system. It establishes the common elements and standards of administrative procedure applying to all Public Administrations, and stipulates the minimum guarantees that citizens must enjoy when affected by administrative action. However, such regulation does not exhaust State, Autonomous Community or local authorities' competences to establish specific procedures for any given matter but in any event, the specific procedures must respect the Act's guaranties.

Article 3 ACAP enshrines the general principles which govern any Public Administrations' actions: the principles of legality, efficacy, respect for hierarchy, decentralisation, de-concentration and coordination among different administrations. I In their relations with citizens, in particular, Administrations must also act in accordance with the principles of transparency and public participation, and their actions must respect the principles of good faith and legitimate expectation.

This list of principles is completed in Article 4, devoted to the principle of institutional loyalty among Spanish Public Administrations.

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[4] E. Garcia De Enterría, *Algunas reflexiones sobre el Proyecto de Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*, Revista Española de Derecho Administrativo 75 (1992); S. Muñoz Machado, *Los principios generales del procedimiento administrativo comunitario y la reforma de la legislación básica española,* Revista Española de Derecho Administrativo 75 (1992); F. López Menudo, *Los principios generales del procedimiento administrativo,* Revista de Administración Pública 129 (1992); L. Parejo Alfonso, *Objeto ,ámbito y principios generales de la Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común,* in J. Leguina & M. Sánchez Morón (eds.), *La nueva Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común* (1993).

Furthermore, under the heading "The activity of Public Administrations" Title IV of Act 30/1992 contains the regulation of basic citizens' rights in administrative proceedings[5]. The following should be highlighted as significant improvements:

(i) It includes some rights directed at improving citizens' participation in Administrative procedures such as the right to bring pleas and submit documents at any stage of the proceedings prior to the hearing, or the right of citizens to use the official languages of their Autonomous Communities.

(ii) It also regulates procedural rights that aims to bring transparency into administrative action, such as the right to identify the authorities and officials responsible for conducting the proceedings, the right to know at any time about the state of the proceedings in which a citizen is classified as an interested party, and the right of access to information in administrative files and registers and the right to receive information and guidance.

Even though there are other administrative principles that have to be found in specific legislation, such as the precautionary principle which can be found in health and environmental law, there are also even broader principles, such as the proportionality principle, which has a broader scope than the one pictured in the Act 30/1992.

The reforms enacted later in 1999, were essentially technical details to improve formal mechanisms, such as an administration's silence, end of official administrative procedures, etc.

But coming again to the importance of placing in the Constitution administrative procedural rules, even if there is a consistent development of the constitutional principles in ordinary law, any fundamental Constitutional right that grants to the citizen "the right to effective protection of the judges and courts" or "the right to an effective hearing before public administrations", the citizens' legal guarantees will be much more real and the protections deeper.

Under the control of the Constitutional Court, the fundamental right of "*nulla poena sine lege*" demonstrates how

[5] A. Embid Irujo, *El ciudadano y la Administración (*1994).

constitutional principles can improve the merits of a legal institution using administrative infringements procedural claims.

2.- Administrative procedure: meanings and main elements.

The characteristic of citizens' guarantees is usually the way in which the administrative procedure is noticed. As an element this characteristic shows the formality of the rule of law or to say the "legality principle"[6].

The main idea of this approach is to prove that the administrative decisions have been adopted properly, so they can resist any plea during the latter judicial review process.

This has been the main option of the Spanish legislature concerning administrative procedure and also is the most important option of the Italian law nº 241/1990.

There have been permanent, intensive and extensive import of the techniques of the judicial review, which are, in concert with the constitutional function of the judiciary, based upon the legal control of all elements of administrative procedure.

In fact, this formal approach, as it was said before, was successfully used by the Spanish administrative law developments of the 1960's. During this time, they developed a solid theory of the control of the administrative action, despite working within a non-democratic political system which lacked a constitutional basis for separated and independent powers.

For this reason, there existed an administrative rule of law in the areas of property right and legitimate interests concerning professional status, civil servant careers, public liability for damages, etc., but not in other areas of fundamental rights.

Nevertheless, there are very deep differences and a very distinct constitutional basis between the administrative procedure and the judicial review process. Even within administrative procedure there are distinct constitutional bases in the areas of: freedom and fundamental rights; relations of authority between the individual and the administration; and in the area of delivery of services and social protection aids.

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[6] Different legislative models, in S. Cassese, *La disciplina legislativa del procedimiento amministrativo. Una analisi comparata,* F.I., V.27 (1993).

Still, the theory of administrative procedure has not been constructed under a global theory and different stripes of the historical evolution of the Administration can be found even contradicting each other[7].

Let's examine some of those contradictory approaches. On one hand, we could have an Administrative Procedure Theory anchored in an authority relationship with the citizen in which the object of administrative action is a single person, and in a framework of regulation mainly directed to give powers to the Administration. This Theory is radically opposed to a public service delivery relationship, involving a vast plurality of citizens and in a legal environment in which the regulation provides mainly rights to the citizens, slightly contradicting facts found in real life.

Another couple of contradictory theoretical extremes can be found by contrasting the notion of procedure as a regulation governing administrative activity with the notion of procedure as a an organizing principle within the public administration, which essentially guides the administration to perform public policies. In the first case, procedure relates to the formal legal action of the Administration, while in the second the material activity of the Administration, even if not formally regulated, is of great importance as well as evaluating the results in solving the problems (economic, social, cultural, environmental, sanitary, educational) that motivated the public policy.

Lastly, we can propose an Administrative Procedure theory as a theory of the legal will that expresses a unilateral decision within the legality principle and in a positive binding rule and in contrast a theory of the legal will as the expression of negotiated proposal within the democratic principle as in a negative, binding approach.

In truth, these three contradictory couples could be explained also in terms of complementary values and legal general principles, but at core of these, there is a fundamental option of the constitutional role of public administration in respect to the constitutional role of society and the individual. The

[7] M.S. Giannini, *Diritto Amministrativo* (1988, 2nd); A.M. Sandulli, *Il procedimento amministrativo* (1940); F. Benvenuti, *Funzione amministrativa, procedimento, processo,* R. T. D. Pubbl. 118 (1952).

relationship that can be constructed between those two poles is crucial to a theoretical definition of administrative procedure.

The relationship that can be constructed between those two poles is crucial to a theoretical definition of administrative procedure. When we are considering administrative action which impacts a freedom, the most important constitutional basis is freedom as a space to be defined just by individuals in their capacity as citizens, in the absence of public activity,. When we are considering administrative action which impacts a fundamental right, the administrative action is subject to a duty to protect that right and any breach of that duty must be immediately satisfied by expedited remedies.

That is why the Spanish ordinance contemplates the "*amparo*" process as a specific remedy for individuals even before the Constitutional Court. It is also why the Common Administrative Procedure Act of 1992, in 62 declares that decisions of the public administrations are null and void -as absolute nullity- when they infringe constitutionally protected rights and liberties.

Similarly, when we are considering administrative action which impacts relationships of authority, usually we have a single relationship with an individual whose sphere of interest is affected by a public single decision. However, when we are considering administrative action which impacts public service or social protection instrument, assigned target of the administrative action is a group of persons or a collective interest with the goal of providing or making effective an authoritative general policy.

Those examples allow us to point out the essential and different orientation of administrative procedures. These procedures can be conceived of as an ensemble of general legal principles regarding citizens guaranties for the scope of respect of the legality principle and of the judiciary function, or these procedures can be viewed as an instrument of the executive function in which what is relevant is the way in which the administrative activity is regulated to promote the policy objectives and public interest which are delegated to a given administrative body.

Apart from the principles of citizens' rights and interest guaranties, the principles governing administrative procedure include principles such as the following principles: preventive or

precautionary principles coming from environmental law and extending to all risky activity; principles and techniques circumscribing the material activity of the administration; principles governing organizational relationships as coordination, cooperation and hierarchy; and through specific rules restricting the power to command citizens and promote cooperative elements of the procedure.

Under this approach, the main constitutional element that conforms the role of the Administration is the articulation of different social interests under the concept of public or general interest, taking into account the legislative mandate to every piece of the organization, even those organizations working in politically decentralized countries of federal or regional constitutional structure.

This view of the administrative procedure, as a manifestation of the executive function of expressing public or general interest, insures that the general rules contained in any General or Common Administrative Procedure Act will have to be combined with or fulfilled by other specific rules. In fact, in the Spanish case, together with the Common Administrative Procedure Law, there are nearly 2.000 other special procedures dealing with such varied areas of administrative activities as diplomacy, health, building, environment, teaching, etc.

Also, the manifestation of the executive function may have itself a specific constitutional basis when the authority is acting in sectors requiring the establishment of a specific category of administrative body such as the independent authorities, which also requires the establishment of specific procedural rules. These specific rules will meet the requirements of the special functionality and legitimacy of such authorities such as the intensity, the proximity, the neutrality or the permanent and continuous administrative relation through information between the independent authority and the individuals or companies it regulates.

This approach of the relationship between administrative procedures and the goals or functions attributed to a certain administrative body or to a specific administrative activity may also be recognized in Community Law. This is the case in the area of Common Agriculture Policy, in the IPPC Directive on integrated environmental permits for main industrial installations

and also in the special use of the concept of effectiveness in the procedures of administrative sanctions in which the description of the misleading actions are not required to be expressed in a parliamentary Act in order to be punished[8].

This means that the organizational and functional peculiarities of Community Law can be expressed as procedural rules to make effective the larger complexity of this legal ordinance[9].

To be successful, this methodology of functional administrative procedure should replace the classical or more traditional approach to Community Law based in the "case Law", that aims to be descriptive and maintains a low critical profile. This will be aided by the study of the administrative positive procedural rules that are placed in Community Regulations and Directives[10].

3. Citizen's participation in administrative procedure, accountability, and transparency.

Returning to the idea of administrative procedures as an instrument for reinforcing the democratic legitimacy of administrative action, the procedures must use a keener set of instruments which combine the value of democratic legitimacy with other constitutional values such as the rule of law, pursuit of general interest, and satisfaction of citizens' social needs[11].

First of all, the constitutional position of public administration is based on its vicarious dependence on representative democracy: by submission to the Parliament's constitutional power to create Law and to control the political activity of the Government and Administrative Agencies. From

[8] E. Chiti, *Decentralization and integration into the Community Administration: a new perspective on European Agencies,* 10 European Law Journal 402 (2004).

[9] G. Della Cananea, *The European Union´s mixed administrative proceedings,* 68 Law and Contemporary Problems 197 (2004).

[10] L. Ortega & C. Plaza, *On the transformations of the Spanish (procedural) Law under the inflñuence of European Law*, in J. Schwarze (ed.), *Bestand und Perspektiven des europäischen Verwaltungsrechts* (2008).

[11] M. Sanchez Moron, *La participación del ciudadano en la Administración Pública (*1980); S. Fernandez Ramos, *La información y participación ciudadana en la Administración local: Barcelona* (2005).

this point of view, participatory democracy is oriented to a deeper manifestation of democracy itself and must be based on this deeper manifestation, but not to reverse the constitutional relationship between the Parliament and the executive branch. It is essential, from my point of view, to apply to participatory democracy some of the essential principles of democracy itself including accountability and transparency.

In this sense, there should be special rules providing information access regarding the workings of the civil organizations that play a participative role, in order to know their financial, or political relationship with public authorities or economic groups.

The social structure of the United States and the relations between Society, Market and State that take place over there are not the same relations that operate in certain European countries in which social organizations that collaborate with Administrative bodies have a minimum of autonomy.

In fact there are a great number of social non governmental organizations that are fully dependant economically on the public aids governed by the same Administration with whom they collaborate. That places this type of NGO's in a similar position to the trade unions that are in league with the bosses.

On some occasions, participatory democracy is a consequence of a preconceived plan of the Administration which uses the process to legitimate their policies. Again, it is not appropriate to compare Americans NGO's that do not participate in the delivering of social benefits, with the Europeans that do collaborate in this delivery.

Another issue that must be solved is to identify those areas where the level of participation is so complex that the such participation is structually impossible for all but a few citizens. In fact, a minimum cultural participatory level is required in many cases far higher that the cultural level for representative democracy. In such cases there should be a hard look on the transparency and the accountability of the participatory democracy, because it can create, in the end, a new form of oligarchic democracy.

Broad administrative participation is important to clearly express each sector of society's interest and to show pluralism of democratic society. However, the eventual agreement between

different social groups has to be formulated under the guarantee of the legal principles of equality and balance of power

4. Administrative procedures and new technologies

Now I want to turn to the implications of new computer and communications technologies on the development of new perspectives in the public administrative agencies and in Administrative Law, especially in administrative procedure[12].

First, perhaps the most important conceptual elements to consider are the evolving concepts of space and time. In fact, those technologies that allow a new connection between organizations and citizens and other organizations allow for instant bridging of vast distances in unlimited quantities[13].

We must consider the effects of this new technical reality for the theory of administrative procedure which assumed a need for spatial proximity of administrative bodies with the citizens.

Now, any administrative body can be reached from any computer. The administrative window is the screen of the computer. Therefore, administrative procedural concepts such as access to information, in either original or digital copies, are deeply implicated at its theoretical foundations[14].

The possibility of a full programmed automation of certificates or of the delivering of the information within the administrative archives, linked to the electronic signature, opens a debate on the legal expression of the administrative will and the subject of the level of responsibility needed, especially if we operate in a net administrative management system[15].

Again in the field of administrative procedure, new technologies allow significant improvements in areas of efficiency and effectiveness, but require us to always adequately guaranty that procedures avoid the digital gap and the digital divide. It should be required that Administrative agencies implement new

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[12] G. Arena, *E-Government y nuevos modelos de Administración,* 1 Revista de Administraciòn Publica 413-430 (2004); J. Barnés, *Una reflexión introductoria sobre el Derecho Administrativo y la Administración Pública en la Sociedad de la Información y el Conocimiento,* 40 Revista Andaluza de Administración Pública 25-76 (2000).

[13] M. Castells, *La era de la información (*1996).

[14] J. Valero, *El régimen jurídico de la e-Administración* (2008).

[15] A. Masucci, *L'atto administrativo informatico* (1993).

technologies as normal process within public administration, but without developing a structural division of citizens according to their computer culture and allowing the digital divide to divide the field of legal guaranties before administrative bodies[16].

It must be also taken into account that while channelling the relationship between citizens and administration through new technologies, we reinforce fundamental rights such as protecting anonymous communications and the guaranty of privacy. In the same way, other rights such access to information and data protection have new dimensions unforeseen just a few years ago[17].

This is why any new administrative procedural law must include the rules for electronic administrative procedure, not as an exception or a peculiarity, but as an ordinary, alternative method of administrative action.

[16] G. Duni, *Amministrazione Digitale* (2008).
[17] S. Muñoz Machado, *La regulación de la red* (2003).