THE PRINCIPLE OF LEGALITY AND ADMINISTRATIVE DISCRETION IN PUBLIC ADMINISTRATION

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ABSTRACT

Administrative law is the set of legal rules governing the organization, powers and functions of public institutions, whose activities are aimed at achieving the social welfare of citizens. Administrative law not only focuses on the legal relationship between the Public Administration and the citizens, but also includes the rules regulating public services.

The Public Administration is the set of state agencies whose activities are aimed at satisfying public needs, however, in order to avoid arbitrariness or abuses in the Public Administration by those who hold power, it is essential that their actions are developed on the basis of the principle of legality as a fundamental rule of the Rule of Law.

The principle of legality guarantees that all actions of the Public Administration are subject to the law and are controlled by the Judicial Power through the Third Chamber of the Supreme Court of Justice, which exercises the control of legality in relation to administrative acts and must ensure an effective judicial protection that protects the rights of citizens.

After addressing the principle of legality, the issue of administrative discretion arises, which translates into the reasonableness that must be exercised by officials in accordance with their powers, to resolve situations whose particularities are not contemplated in the regulations, and which require immediate attention.

Our society evolves, but the regulations do not necessarily go at the same pace, therefore, administrative discretion is the core of the problem of administrative law, however, such discretion in function of the Public Administration is not limited to the automatic application of laws, but to its essential purpose which is to satisfy public needs.

The discretionary power appears as a margin of arbitration of public institutions, which represents an opportunity to dictate an administrative act for reasons of public interest, which is always subject to judicial control, in order to ensure the protection of fundamental rights.

In the face of administrative discretion, the motivation of administrative acts plays an important role, in which the competence in accordance with the law, the background, object and cause in fact and in law, which supports as far as possible the rational justification of the administrative act in accordance with the functions of the Public Administration, must be stated.

Keywords: Administrative law, discretion, due process, legal system, official, principle of legality, Public Administration, public authorities.

DEVELOPMENT

When we approach the subject of administrative law, it is worth specifying that it is a branch of public law, which frames the set of legal rules governing the organizational structure, powers and functions of public institutions, which are called to work for the welfare of the community. In this sense, we can observe how administrative law regulates the legal relations between the institutions of the public sector and between them and the citizens. For the Spanish jurists Eduardo Garcia de Enterria and Tomas Ramon Fernandez, quoted by the jurist Luis Jose Bejar Rivera (2010, p. 219), in his writing *"Concept of Administrative Law: A teleological vision"*, he points out that,

> Administrative law is understood as Public Administration, not in the sense closed to the Executive Branch (which was its initial conception), but as the system of law that applies to all public authorities in their administrative performance.

The professors in question point out:

> *"... administrative law, which is neither the proper law of some organs or of a power, nor the proper law of a function, but a law of a statutory nature, insofar as it is directed to the regulation of the singular species of subjects that are grouped under the name of Public Administrations, subtracting these singular subjects from the common law."*
> Administrative law is the internal public law par excellence of the State.

This concept of administrative law calls us to reflect on whether the Public Administration only refers to the Executive Branch or whether it includes the Legislative and Judicial Branches. In this line of ideas, we cite the concept of Public Administration established in numeral 8, article

201 of Law 38 of July 31, 2000:

> Public administration. From an objective point of view, it is the set of heterogeneous activities whose purpose is to achieve social welfare, such as the provision of public services, measures to stimulate social activities and measures to curb such activities. From a subjective point of view, it is the set of state agencies or dependencies that are part of the Executive Branch, whose activity is aimed at achieving social welfare. Within this organ of the State, the activity of government, which is a purely political activity, is excluded.

It is also noted that Public Administration is explained from a diversified conception between Central, Decentralized and Local Administration, as defined in paragraphs 4, 6 and 7 of Article 201 of Law 38 of 2000, which we quote:

> Central Administration. The central administration is composed exclusively of all the ministries of the State, headed by the President of the Republic, which also includes the Vice-Presidents of the Republic. Decentralized Administration. A set of state entities with legal personality and autonomy, created by law to assume administrative functions originally assigned to the central administration. Decentralized administration includes autonomous and semi-autonomous entities and state enterprises.
> Local administration. A set of administrative bodies or entities that exercise their functions in an area to serve local communities, of which the municipalities, communal boards and local boards are part.

From the analysis of the aforementioned definitions, we can understand that the Public Administration according to our regulations is made up of state agencies whose functions are aimed at achieving social welfare, these institutions being part of the Executive Branch. This limits the scope of action of the Public Administration only to the Executive Branch, leaving aside the Legislative and Judicial Branches, without losing sight of the fact that both branches of government perform administrative tasks.

On this point, the jurist Luis Jose Bejar Rivera (2010, p. 216) refers to the work of the Argentinean Miguel Marienhoff, when entering into the conceptions of administrative law, for which he develops an executive criterion that reads:

> This position or criterion consists of identifying administrative law as the law of the Executive Branch, a situation that most doctrinarians deny, since it is evident that, in principle, administrative activity is not limited to this Branch, and both the Legislative and the Judicial Branch carry out in their respective spheres activities of an

administrative nature, which are the object of study by our science.

When defining administrative law, we cannot concentrate only on the relationship between the Public Administration and the citizens, since it goes beyond that, including also the regulatory norms of public services. The exponent of the French Realist School, Leon Duguit, quoted by jurist Jaime Orlando Santofimio Gamboa (2011, p. 44), states that, *"public administrative law is the set of rules relating to public services. Every civilized country has public services, and to regulate the operation of these services there are necessarily special legal rules".*

From the concepts outlined on administrative law we must emphasize its importance, by focusing the activities of the Public Administration aimed at satisfying public needs, however, to avoid arbitrariness or abuses by those who hold power, the principle of legality arises as a fundamental rule of the Rule of Law. The principle of legality represents a balance between the power of certain officials and the rights of citizens. It is precisely the principle of legality that calls upon us to respect the legal system in force, which establishes limits to administrative actions.

Through the principle of legality, differences are made between the public and private sectors, where officials must carry out their actions in accordance with the law, i.e. based on the principle of legality, while citizens may do whatever they want as long as the law does not prohibit it, i.e. based on the principle of free will.

The principle of legality further reinforces the recognition of other principles governing administrative actions such as due process, uniformity, impartiality and transparency. It is important for public institutions to train officials in the regulations that govern them, in order to more clearly identify their attributions and limitations, which helps to avoid arbitrariness. The civil servant must be clear that the objective of the Public Administration is to serve the citizens, so their actions must be efficient and transparent, in accordance with the legal system.

Even our Magna Carta develops the principle of legality when Article 18 establishes the following:

> Individuals are only liable before the authorities for infringement of the Constitution or the Law. Public servants are so for the same causes and also for exceeding their functions or for omission in the exercise thereof.

The principle of legality establishes the limits or brakes that officials holding high public office have, so that their actions seek to satisfy the interest of the community above any particular

interest. Failure to comply with the principle of legality may result in serious administrative, civil and criminal consequences for the official.

The importance of the principle of legality is based on guaranteeing the fundamental rights of citizens vis-à-vis the Public Administration, who are at a disadvantage due to the supremacy of the Public Power. That is why, the Spanish jurist Joan Manuel Trayter Jimenez (2015, ps.153-154) states that,

> The principle of legality imposes that no administrative action can be outside the law, but that, precisely, it must be within it and in accordance with it. Therefore, and in parallel, the plenary control of the courts over administrative actions and the corresponding right of citizens to the real protection of judges and courts against possible violations is recognized.

The principle of legality guarantees that all actions of the Public Administration are subject to the law and are controlled by the Judicial Power. Doctrinally, the principle of legality is the core element of the Rule of Law, since all actions of the Public Administration are subject to compliance with the law and are controlled by the Judicial Power, through the Third Chamber of the Supreme Court of Justice. This Chamber exercises the control of legality in relation to administrative acts and must ensure an effective judicial protection that protects citizens in their fundamental rights.

When we go into the principle of legality, the problem arises in those cases with particularities not contemplated in the regulations and that require an immediate response. Administrative discretion can never conflict with the principle of legality, since, if the law is clear on the form and procedure to resolve a controversy, the official must respect the law, which does not give room for discretion. However, on many occasions the law does not keep pace with the changes demanded by our society, therefore, the official, in accordance with his competencies, must apply reasonableness to concrete situations whose conditions require a response.

At no time does administrative discretion mean that the official must get involved in matters that are not within his competence by law, however, in the face of the challenges that the evolution of our society entails, he must deal with situations that will depend on his interpretation of the regulations. For this purpose, the civil servant may consult the Office of the Attorney General of the Administration, which is the legal advisor of the civil servants in their administrative actions, however, in the absence of law or its inapplicability in time, administrative discretion arises.

Administrative discretion not only revolves around the interpretation that an official may

make in the face of a peculiar circumstance within its competencies, but also in those cases where a range is given for the application of a sanction. In this sense, the official, based on his experience and reviewing each particular case, must establish the amount of a fine taking into consideration the nature of the offense and the recidivism, if any.

If we define the discretionary powers of the Public Administration, we can point out that they are those attributed to officials in accordance with the legal system, which give them a range to make decisions taking into account certain elements for their exercise. As expressed by the jurist Juan Carlos Cassagne (2016, p.240), discretion is the core of the problem of administrative law, and he points out,

> In the legal-cultural and historical context that discretion in the function of the Public Administration is not limited to the automatic application of laws, but to its essential purpose which is to satisfy the public needs of the population.

In the doctrine developed by the jurist Juan Carlos Cassagne, the term *"indeterminate legal concepts"* arises, which limit discretion by allowing the full judgment of certain administrative decisions that consisted in applying the positive law in a generic way. Indeterminate legal concepts are a technique that reduces discretion, since this does not imply a free choice between two or several possibilities, but a problem of application of the law that reduces the decision framework to a single fair solution.

For a better understanding, we define indeterminate legal concepts as those that explain a legal rule in a generic or abstract manner. Their importance lies in the fact that they oblige the Public Administration to adopt a fair decision in accordance with the law, at least in principle, however, they also allow for the evaluation of two or more solutions that may also be fair. The application of this category of indeterminate legal concepts is a response to the assertion that in the rule of law the public administration must always abide by the law and is subject to judicial control.

These indeterminate legal concepts may appear in the Constitutions of the countries, however, the law is the one that develops them in greater detail or depth. This allows the official to make a fair decision in the face of a fact, however, there may be facts or circumstances that allow several fair solutions, in that sense, the Public Administration must rule in accordance with the law to safeguard the public interest and the protection of the rights of each citizen.

Now, it is important to point out the limits of the discretionary power, which are found in the legal norms that establish the requirements and procedures to be followed in order to safeguard the

rights of citizens and avoid arbitrariness on the part of the Public Administration. The discretionary power is important because it allows the official to choose, according to the circumstances of each case, a fair solution in accordance with the law. Jurist Juan Carlos Cassagne states that there is no single fair solution for difficult cases, and develops three types of discretion:

a. Cases in which the margin of arbitration or freedom is not limited by determined or indeterminate legal concepts, and in which the administrative body is empowered to choose a solution among equally fair possibilities (typical discretion);
b. The cases where the discretion is limited by an indeterminate legal concept of value that, although it admits a single fair solution, in some circumstances it may have a margin of several fair possibilities (atypical discretion); and
c. Cases in which the area of freedom is restricted to the predetermined assumptions of the objective norm, where discretion is limited to the power to choose one of the solutions already provided for in the law.

The language of law plays an important role in administrative discretion, that is to say, everything involved in its creation and application, since there may be ambiguity in the wording, which gives way to a regulation based on certain discretionary in the face of the confusion of concepts taking into account that there are very technical issues that make it impossible for the Legislative Power to determine all possible situations, leaving a space for discretionary in the Public Administration to manifest itself in the face of confusing, incomplete or empty regulations.

Although it is important in the process of drafting laws that the deputies present projects whose study and thoroughness reflect a response to a given problem, this cannot be separated from the support that must be provided by the respective public institution that knows the details of the day to day. It is necessary to work on clear laws whose application is really effective and produce the results expected by citizens. Although the separation of the Public Powers must be respected, we cannot ignore the fact that there are issues in the public sector that the deputies are unaware of the existing particularities. In this sense, what is stated in Article 2 of our Political Constitution is of vital relevance: *"Public Power emanates only from the people. It is exercised by the State in accordance with this Constitution, through the Legislative, Executive and Judicial Bodies, which act in a limited and separate manner, but in harmonious collaboration".*

The discretionary power of the Public Administration may also imply an arbitrary act, if the legal language of the regulation lends itself to misunderstandings, especially if it is a subject where those who worked on the regulation did not agree on certain concepts. Confusing meanings in linguistic terms give the official the opportunity to choose one solution in preference to another

when applying the rule.

For Juan Carlos Cassagne (2016, p. 264), arbitrariness is defined as *"an act contrary to reason, product of the mere will or whim of an official, which is the sense of greater conventional use in the legal world"*. However, the concept of arbitrariness should not be confused with discretion, since legal hermeneutics proposes rules such as sound criticism that include the criteria of knowledge, logic and experience, as well as the adoption of jurisprudence and doctrine, which allow to interpret and support a fair solution attached to due process on a specific situation.

> We now cite numeral 101 of article 201 of Law 38 of July 31, 2000, Healthy criticism. System of evidentiary assessment adopted by this Law, which is based on standards of criteria based on logic and experience, which must be applied by the authority in charge of deciding, without excluding the solemnity of documents of certain acts and contracts.

It is important to mention that in the Public Administration, reasonableness and the prohibition of arbitrariness are recognized, which leads to the fact that any administrative action will always be subject to the control of legality by the Third Chamber of the Supreme Court of Justice, as a consequence of the principle of effective judicial protection established in international covenants and which guarantees the protection of fundamental rights. In the same line of thought, the jurist Gregorio Baden (2006, p.121) makes an approach on reasonableness, arguing that the essence of reason must be based on the foundations of justice.

In the face of discretion, the motivation of the administrative act plays an important role, since the Public Administration must point out the background, object and cause of fact and law, in which the rational justification of the administrative act is supported as far as possible, in accordance with the functions of the Public Administration. According to what Juan Carlos Cassagne (2016, p. 276-277) points out, the following is stated:

> As is known, the motivation, as an expression of the reasons and purposes that lead the Administration to issue the administrative act (which must also consign the factual and legal background) constitutes an essential formal requirement for the validity of the administrative act insofar as it translates its rational justification to the external plane.

In the decisions or discretionary elements of the acts issued by the Administration, the obligatory nature of the motivation obeys to two fundamental reasons. The first, as Fernandez points out, makes it possible to separate discretion from arbitrariness, since in the absence of motivation the administrative act appears, in the legal world, *"as a product of the sole and exclusive will of*

the organ that dictates it, which is incompatible with the rule of law", which is the government of the law and not of men. The second reason has to do with effective judicial protection and, more precisely, with the guarantee of defense, because if the act is not motivated, the individual is prevented from exercising the powers that make up the so-called adjective due process (the right to be heard, to offer and produce evidence and to a well-founded decision).

In this sense, the Administration is obliged, under penalty of absolute nullity, to provide the reasons why it opted for a decision among two or more possible ones. Strictly speaking, the motivation of discretionary decisions is a guarantee of compliance with the purposes of public interest pursued by the Administration, which must be externalized at the time the administrative act is issued.

In Panama, the discretionary powers in the Public Administration are limited by the provisions of the Constitution and the laws, which make mention of the principle of legality, due process and separation of public powers, so that every official is obliged to guarantee the fundamental rights of citizens in any administrative act. It is important to point out that discretion in the public function is developed when the competent Public Administration of a subject, has several options to consider, so it must issue a duly motivated administrative act applying objectivity and reasonability, to obtain the fairest possible solution that benefits society.

To conclude, we must highlight the importance of administrative law, which helps us to understand the role of the Public Administration, made up of state agencies whose activities are aimed at achieving social welfare. In order to avoid abuses or arbitrariness on the part of officials, the principle of legality arises, which establishes that administrative actions must be in accordance with the law, which offers a balance between the Public Administration and the citizens. Administrative actions are subject to judicial control, which must guarantee the protection of citizens' rights. Administrative discretion does not represent arbitrariness, but the opportunity for the official, in accordance with his competencies, to decide what is most convenient for a society that requires a response.

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