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Towards a procedural definition of Administrative Law

Hacia una definición procedimental del Derecho Administrativo

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Those who walk along the way of Santiago de Compostela know very well that its charm is not simply about reaching the Cathedral at the end of the road, but actually traversing the road itself. Walking this route involves the internal attitude of each pilgrim's transformation. The goal is worthy and meaningful once the road has been travelled, once all the landscapes along the way have become parts of the internal views and once the personal life has been understood as a mysterious process with a performative efficacy that becomes a personal substantial change. Would it be the same from a political perspective? Would customs and citizenship practices be part of a process order to reasonableness? Do procedural practices create substantive reasonableness per se?

An administrative law procedural definition implies a link between constitutionally recognized personal and political autonomy, jurisdiction conferred to the administrative agencies by the law, regular procedures and proportioned outcomes that support a reasonableness standard for the administrative decisions. Thus, administrative decisions become reasonable by following a process based on a political and procedural theory of justice, not according to a substantive idea public interest. Additionally, an administrative law procedural definition focuses on the regularity of government action and not on the administrative decision

Lograr una definición procedimental del derecho administrativo requiere establecer un vínculo entre los conceptos constitucionalmente reconocidos de autonomía personal y política, los ámbitos de competencia legal de las autoridades administrativas, los procedimientos que reglan la toma de sus decisiones y la proporcionalidad de los medios dispuestos, sobre lo cual puede evaluarse la razonabilidad de las decisiones administrativas. De este modo, las decisiones administrativas devienen razonables merced a la evaluación de su conformidad con procedimientos fundados en una teoría política y procedimental de jus-

RESUMEN / ABSTRACT

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itself. It is made by means of a non-arbitrary government and, in this endeavor, it seeks to establish a simple model of administrative action of the government and its judicial review.

Key words: Administrative Law, procedural definition, personal autonomy, political autonomy, non arbitrary government, reasonableness standard.

ticia que permite evitar la apelación a los conceptos genéricos y substantivos de "bien común" e "interés público". Así, una definición procedimental del derecho administrativo pretende centrarse en la evaluación de la regularidad de la acción del gobierno como proceso, al tiempo que evita un análisis de tipo exclusivista sobre la decisión administrativa como objeto puntual. De tal forma, en procura de lograr estándares de gobierno no arbitrario, es posible establecer un modelo simple de acción administrativa gubernamental y de adecuada revisión judicial.

Palabras clave: Derecho administrativo, definición procedimental, autonomía personal, autonomía política, gobierno no arbitrario, estándar de razonabilidad.

Introduction: Common Law and Civil Law from an Administrative Law perspective

A) Contemporary profiles of administrative action: paradox & challenge

Government administrative action has contemporarily become wider and vast, in an expansion process likely to continue in the future. In addition to their proper tasks, administrative agencies have developed quasi-legislative and quasi-jurisdictional powers in order to perform their administrative duties more efficiently, an old yet still alive justification for the enhancement of the administrative power[1].

Delegated legislation allows administrative bodies to give themselves broader jurisdiction, which translates into increased discretionary corners to define more and more issues regarding public life (environmental protection, health care, infrastructure development, homeland security, equality policies, market regulation, etc.). Meanwhile, wider discretion demands that officers take executive orders by balancing among many alternatives. This circumstance has changed the parliamentary ex-ante action in outlining the jurisdiction of the officers and the judicial ex post facto supervision of the fairness of administrative outcomes. Thus, a remarkable paradox lies at the very core of this political process, in the sense that increased administrative power ensures efficiency as much as it weakens the institutional burdens that emerge from the imperative crossover control among the three branches as the main guarantee of civil liberties and property rights.

[1] Landis, 1938.

Regarding these facts, the thesis in this paper states that only a procedural model of control over the behavior of administrative agencies allows reasonable and proportional outcomes. This procedure is mainly a concern of political institutions in a broad sense, ever accepting that "it is the task of politics to put power under the moderating influence of the law and thus to order the sensible use of it. Not the law of the stronger, but the strength of the law must prevail"[2].

Government should be understood as the three branches in which government power is separated in modern constitutional and democratic systems, which jointly fulfil the institutional framework within which human beings and companies interact with one another in the civil society and the market, framed by political ethos[3]. Focusing on its specific role, the main but not unique purpose of government action lies in providing institutional public goods, such as legislation, public administration and adjudication, in terms that are similar but not equal to the commitment in provisioning with or regulating economic public goods (no possibility of third-party exclusion and no rivalry in use).

In this context, the so-called model of control over the regularity of government administrative behavior could be defined as both political and procedural, i.e. as a model that puts aside considerations of common good, public interest, public utility or public service in order to justify administrative decisions. Instead, the new model focuses on the institutional framework within which a fair development of the agencies' jurisdictional powers is possible. It implies a structure of basic principles of justice that grant respect to personal and political autonomy under constitutional rules, ensuring a deliberative democratic system.

The structure described may be seen as an institutional background that allows the consideration of the reasonableness of administrative decisions in a performative way, which means evaluating them not in accordance with an objective public interest but from their faithful attachment to the rules that have been fixed by the principles of justice (not from a systematic approach)[4].

B) Administrative Law from a substantive to a procedural outline

In this context, the contemporary development of the administrative law in civil law and common law systems remains a clear manifestation of the differences between two conceptual standing points to get the government submitted to the law. Common law in the administrative law perspective is deeply rooted in eight centuries of history, all filled with struggles to obtain the moderation of the kings' powers and shows the way it spread across the commonwealth and the US. Civil law, from an administrative law perspective,

[2] Ratzinger, 2018, 184.

[3] Habermas, 1992.

[4] Schmidt-Assmann, 2003, 15.

is the unique product of the work conducted by the Conseil d'Etat and its broad expansion across Europe and Latin America.

Besides their difference in terms of historical background, a marked anthropological gap is evident between the two of them: it is Locke against Rousseau from a political philosophy perspective[5]. Both systems are committed to freedom and property rights preservation but in very different ways. From the reign of the law, characteristic of the civil law system, which rationally expresses the decision of the majority (with unanimous vocation) and fixes the schedule of a powerful public administration, to the empirical action of the courts in judicial review ordered to avoid the abuse of power as a way to keep the rule of law[6], in the common law system.

In the system of common law, inside the field of public law litigation, standing (cause of action) is not required in order to get access to judicial review, as opposed to what occurs in private law litigation. Nonetheless, in order to be reviewed by the Courts, permission of the tribunal or of the court in accordance with ancient royal prerogatives becomes imperative. When a person requests judicial review, the starting point is not his or her "legal right" (as it happens in private law actions of contracts and torts) but the necessity of proving the existence of "sufficient interest".

Thus, the main purpose of judicial review is controlling the administrative power, not granting a right. This is also the reason why the remedies accorded by the courts in judicial review are discretionary: mainly quashing orders (certiorari); mandatory orders (mandamus) and prohibiting orders (orders of prohibition), but also declarations, interim declarations and injunctions; all of them jointly referred to as "prerogative rights" until 1938. Attention should also be given to how public law/private law fields are settled from a jurisdictional point of view, as it is the evaluation of whether a "legal right" exists that defines the procedures and the remedies available to get access to the courts.

Consequently, the statement "remedies precede rights" could be understood as a procedure for controlling administrative action to avoid arbitrary government, which implies an administrative remedial model against abuse of power[7]. The core idea is to maintain the regularity in government action by submitting it to the rule of law. This task is developed by the judiciary, strongly influenced by the stare decisis logic. Even when it also involves procedural fairness and substantive control of the administrative decisions, it is government performance, either by action or inaction of its officers, that gets scrutinized by the tribunals and courts. Therefore, it is not a question of substantive justice or "legal right" but rather an issue connected with the bureaucratic jurisdiction of the agency and the procedures they should follow as a guide to reasonable decisions.

[5] Locke, 2016 [1713].

[6] García de Enterría, 1994.

[7] Cassese, 2014.

On the other side, the administrative law model of civil law systems focuses on the recreation of government power, as the corollary of a public administration that cannot be subjected either to the jurisdiction of the judicial courts or to the civil rules that apply to all citizens. Thus, it became historically imperative to create a jurisdiction inside the administrative branch and to have a new body of rules performed by this jurisdiction by case law while adjudicating. In this scenario, the Conseil d'Etat has created a framework of conditions that should be fulfilled by the agencies' administrative decisions considered as subject matter of court jurisdiction. These rules, called "regime administratif", are understood as the proper and specific public law of government administration in a substantive way, i.e. norms that confer powers that would be unconceivable in private law because of their exorbitance. Thus, the administrative law in the civil law system is thought as a categorical model and not as a remedial one[8].

As it can be seen, the administrative law field designed from the system of civil law is connected not with actions and remedies in order to avoid arbitrary government but with concrete public duties accorded by the law to a powerful administration to pursue an objective public interest identified with the service public. Administrative agencies cannot be interfered by the judicial branch in this task. Additionally, this lacuna of rules requires the creation of new legal categories for government contracts and liability of public authorities, which is different from the rules applied to citizens and companies in the private law sector.

Both, common law or regime administratif are original models, applicable to their own historical and political backgrounds. Nonetheless, on the scenario described at the beginning, only procedural systems are able to ensure appropriate boundaries in order to get regular administrative behavior. It is true that both systems share many similarities and that freedom and its development on property rights are equally protected (judicial protection of real state property and personal freedom in French Administrative law)[9] but there is an important difference between acting as the watchdog of a process and acting as the controller of a final decision. This is more than a matter of plain stress: it is a different perspective from which political reality can be observed. A substantive system allows the belief in the possibility of reaching an objective public interest because the statutes reflect the unanimous will of the people and because they are rationally and geometrically built so as to direct administrative action to ultimately attain this public objective interest. Granted, it is a system that could fail, and that is the only reason why its outcome, the decision itself, should be made under administrative jurisdictional scrutiny.

[8] *Ídem.*

[9] Truchet, 2015.

On the contrary, procedural judicial scrutiny has a very different starting point. No trust is placed in angelical guardians of the common. Human beings are as rational and reasonable as they can be, from a moderate anthropological standpoint. Therefore, the accent should be placed on the procedure to avoid any bias, by means of impartial hearings and giving reasons. Even when this also happens in the substantive model, the point of departure is different in this case because of the factual assumption of the despotic tendencies of power employed by the government (it is not Napoleon's administrative empire) and the slow process of building fences for freedom inside the political ethos. It is a political process based on the real experience of the biased kings' behavior.

Thus, the procedural administrative law model provided by common law seems to offer more proper and accurate solutions for the forthcoming forms of government, considering that the law of due process is the judges' best contribution to administrative law[10].

I. Control over the regularity of administrative behavior

A) Foundations of the procedural model

The Federalist offers a crystal-clear introduction as to the need for boundaries with respect to the decisions taken by those who govern, stating that, in a republic, "[a]mbition must be made to counteract ambition"[11]. It seems evident that the anthropological conception behind this statement, far from being angelical, is nothing but pessimistic. Without institutional breaks for cushioning arbitrariness, the human empirical behavioral tendency would lean towards abusing government power and displaying biased or despotic conducts.

The separation of powers is the basic model for limiting government action. Cross-controls among the branches are an essential part of the constitutional boundaries, in addition to enquiries conducted by independent authorities. The active defense of freedom and property rights led by civil society groups offers another valuable constraint. Thus, in order to have a non-arbitrary government, ensuring the space of civil society and its wide range of interests (friendship, sports, science, spiritual pursuits, recreation, culture, art, etc.) as well as the political position of the market as a juridical place, with enough room for the exchange of goods and services, becomes crucial. Therefore, in the world of realpolitik, defining the premises on the basis of which a government is to be considered "non-arbitrary" is an imperative imposed by the necessity of preserving freedom in all its forms (not to be subject to the arbitrary will of the government)[12].

[10] Endicott, 2018.

[11] Hamilton & Jay, 2016, 51.

[12] Pettit, 2012, 93.

According to Rawls' Theory of Justice, a non-arbitrary government should be a public decision maker that rules considering structural conditions of justice. This implies undeniable considerations about personal and political autonomy. These requirements allow the connection of citizens' rational and reasonable behavior and, consequently, getting an overlapping political consensus among all reasonable doctrines[13]. From this political philosophy approach, the idea of consensus can be attained as long as all citizens accept the basic principles of justice that establish fair political treatment and formal criteria of equality for the distribution of positions and goods in society. The comprehensive doctrines sustained by different groups are reasonable if they accept the basic ideas of personal and political autonomy, i.e. the agreement that democracy demands political relativism (although not ethical relativism).

Rawls' conception is both political and procedural. It is political in the sense that there is no direct implication between the principles of justice and the truth or the good in essential terms. The principles have been defined by means of an imaginary exercise, which requires boundaries in the knowledge that the original settlers have with respect to themselves (standing behind a veil of ignorance) as a test of impartiality. It is procedural because the principles only state a fair way or a basic point of departure for the development of a law system with a Constitution at the beginning (or at the top)[14]. It could be stated that the theory is procedural even by accepting the moral objectivity of the notion of personal autonomy. Personal autonomy is the basic condition by which political autonomy can be accepted as a sine qua non requisite for deliberative democracy. Therefore, under these principles of justice, constitutional developments are able to fix boundaries to the government in order to avoid arbitrariness. In that sense, citizens' commitment to the procedural path established from the basic principles of justice spontaneously leads to fair social outcomes, a fact that proves the political primacy of the formal idea of right (or fair) over the substantive idea of good (common good).

The political primacy of fairness (correctness) over good is based on the unrestricted respect of personal autonomy beside the fact of pluralism[15], i.e. the general acceptance that citizens should have participation by representation in the rule-making process as a form of authority of the law. Thereby, a non-arbitrary government implies a government limited by principles of justice that have a structural design and operate procedurally, without a link with a substantive definition of good or truth as its foundation or ultimate goal. These principles perform the basis of the constitutional law and serve as the point of departure of a practice that is continued by the enactment of laws, the provision of delegated legislation (by-laws) by the agencies, administrative decisions as executive orders, the courts' adjudication role in statutory or

[13] Rawls, 2005, 54.

[14] Cuadros, 2010, 80.

[15] Popper, 1992, [1962], 678.

common law jurisdiction, the tribunals' decisions and the citizens' customs and habits in contributing to rule of law (law as a manifestation of practical reason).

In this respect, the concept of common good could be defined in two different senses: a) according to a metaphysical conception, a doctrine on good and truth obtainable by intelligence and will; or b) according to procedural rules established by political agreement (constitution) and based on personal and political autonomy. The second approach implies seeing "the common good behind the veil of ignorance"[16], an idea that reveals the concept in black-and-white terms if political liberalism is accepted not as a way to put aside the multiple conceptions of good but as a way to explore the possibility of its conciliation in political terms.

B) Administrative procedures, public choice and behavioral economics

What makes an administrative decision reasonable is not an objective notion of reasonability in accordance with an abstract definition of public interest or common good, but a judgment built on a procedural analysis of the reasons from the perspective of structural conditions of justice. It is a path, a process required by the primacy of right over good in a political perspective.

Stating that an administrative decision is unreasonable means that it is not the result of the agency acting within its jurisdiction, by proper procedure, and giving a proportioned outcome. This is why reasonableness control is referred to as "substantive". If that is so, the judgment of reasonability requires to link the attribution of jurisdictional power by means of procedures with the general goal of government action, which is to serve the citizens. Nonetheless, that goal may only be understood by a universal auditorium of citizens provided that it has been previously connected with principles of justice that acknowledge personal and political autonomy, which should be expressed in a Constitution that gives them enough room. On the contrary, "serving the governed" could mean any goal proposed by the government with conformity to abstract considerations of common good.

Following the same ideas, the judgment of proportionality also shows the necessary connection between jurisdiction, procedure and outcome. To say that an administrative decision does not respect proportionality implies that its outcome is out of the scope of the agency's jurisdiction. This could occur on the grounds of excess in the way the decision impact the legal right, the interest or the legitimate expectation of a citizen or a group of people, considering that, under the circumstances, a less impairing decision should have been taken because performing the relation between jurisdiction and outcome with adequacy becomes unsuitable in practice.

The substantive theory demands the acceptance of an ontological dimension of good (an objective common good). At the same time, this concept of objectivity presupposes a great capability of human knowledge for

[16] Tirole, 2016, 16.

accessing the truth (theoretical reason) and its correct derivations into facts (desire of good by practical reason). In addition, the substantive thesis requires adhering to the position of an interpreter that is able to determine what common good is or when or how it has been realized. Finally, this thesis forces to see human beings as rational operators ordered from truth to good.

Notwithstanding, contemporary doctrines in both behavioral economics and public choice show that human beings tend to act according to biases that reflect their feelings, necessities, fears, desires and wishes, among other human concerns, and that they also need to be oriented by means of nudging. Besides, just as companies in the market pursue maximum profits, politicians tend to decide according to the number of votes that they can collect when running for office. So the theory of an attainable objective public good or public interest seems to vanish into many not completely rational considerations[17][18].

Specifically, when it comes to administrative law, the agencies' lack of legitimacy in democratic terms, the concentration of unchecked power that combines the powers of the three traditional branches, and the failure of the regulatory process itself have been described as evidence for the impossibility of considering an objective public interest attainable by means of the public administration[19].

To sum up, procedural control of the regularity of administrative action is imperative as long as boundaries and biases, proper of human understanding, are taken into account in the political decision process. Thus, reasonableness as a desirable connotation of an administrative decision may only be checked by reconstructing the links among jurisdiction, procedure and proportioned outcome in accordance with a political and procedural theory of justice based on private and personal autonomy of each human being. Thus, procedurally defined political practices are able to create reasonableness in a performative way[20]. Additionally, the criteria for reasonableness are connected with anthropological, sociological, political, economic and historical doctrines that have performed the law as it is known nowadays in constitutional democracies[21].

II. Process and substance from an Administrative Law perspective

A) Procedural fairness, jurisdiction and open texture of the law

"Procedural requirements ought to contribute to good substance. The point of procedures is to provide accurate fact finding, faithful application of the law, and responsible exercise of discretionary powers, by the best-placed

[17] Buchanan-Tullock, 1962.

[18] Thaler-Sunstein, 2009.

[19] Breyer and Stewart, 1992, 139 y 148.

[20] Dworkin, 1986, 158, 159, 164 y 165.

[21] Weinrib, 2017, 40.

decision maker, on the basis of all the relevant considerations"[22]. What do these ideas teach about the procedural-substantive tension? "Procedural requirements ought to contribute to good substance". From the perspective of the model of control over the regularity of government administrative behavior, procedural requirements are the bricks used in the construction of the edifice of substance. Therefore, good substance is the performative result of the fulfillment of procedural requisites. In administrative law terms, procedural requirements are due process / representation-jurisdiction (best-placed decision maker not acting ultra vires) / hearing with impartiality and independence fulfilling natural justice conditions (the right to a fair hearing and the rule against bias); and giving reasons that allow the assessment of whether relevant considerations were taken into account.

"Accurate fact finding" means in accordance with all the relevant facts, while "faithful application of the law" implies correctly applying the law to the facts (questions of fact/questions of law). "Responsible exercise of discretionary powers", on its part, means the obligation to avoid abuse of power and to behave in accordance with publicly declared true reasons. However, how could these requirements be considered substantive instead of procedural?

All the powers conferred to an agency demand a degree of discretion in their performance. The explanation lies in the open texture of the language that allows the understanding of why agencies' decision makers should perform balancing roles when exercising their jurisdictional powers. The powers accorded to a decision maker are both limited and mandatory and mainly concerned with subject matter issues (expertise field), even when they also take into account questions of geographical emplacement, the officers' position inside the bureaucracy of the agency and the moment when the decision should be taken.

The situation described above shows that decision makers should perform their duties interpreting concerns that range from the literal and explicit text of the statutes to their implicit and inherent contents. Indeed, in most cases, broad outlines of delegation allow the agencies to attribute themselves important powers in number and quality, with cumbersome judicial review. This shows that officers' decisions ought to be taken in accordance with the open texture of the language. This implies limits of the prospective imagination with respect to cases and situations in the future insofar as a certain degree of discretion is involved[23]. Therefore, the idea of a decision accurately delimited by statute seems to be a fantasy that puts aside all the issues that go hand in hand with the open texture of the language, such as the imperative of balancing preconditions and proportionate means[24].

[22] Endicott, 2018, 227.

[23] Hart, 2012 [1961], 124 y 136.

[24] Endicott, 2018, 251 y 357.

Many circumstances that should be considered by decision makers at the moment of performing their duties, like "appropriate means", "best offer", "most suitable supplier", etc. demand discretionary interpretation, even when the jurisdiction in order to do so has been conferred in all accuracy. In these situations, there will almost always be an unavoidable resultant discretion (parallel to jurisdiction, discretion could be defined as explicit, implicit, inherent or resultant)[25]. This means that the statute will always leave a margin of consideration or leeway to the officer and that judicial review should be conducted carefully, considering all the procedural aspects that involve fact finding, error of law and abuse of power.

In summary, in order to get proper fact finding or to faithfully apply the law, interpretative operations come into play, while the responsible exercise of discretionary powers implies linking outcomes with jurisdiction and procedures in order to avoid abuse of power for private or public considerations. These mental operations are oriented towards attaining procedural fairness as sine qua non concerns in the "process" of obtaining a substantively reasonable decision. All of these are elementary conditions on the way towards getting reasonableness. Therefore, the problem does not seem to lie in the definition of fact finding or error of law as substantive matters or in associating discretion with reasonability rather than jurisdiction because, ultimately, it would simply be a problem connected with the definition and scope of the word procedure in its use. Thereby, if procedure as a juridical concept is opposed to decision, it becomes clear that fact finding, error of law and discretion are matters of the outcome; but, if what is intended is an answer for what reasonableness is, all those operations have a procedural nature, in the sense that they offer not a key definition but actually the means of making the concept of reasonableness attainable.

Therefore, the big issue in terms of political philosophy lies in answering what the right standing point is to appreciate the substantive reasonableness of an administrative decision in order to ensure a non-arbitrary government as principle. This is the main question at stake in the confrontation between procedural and substantive models of administrative law.

B) Reasonableness and non-arbitrary government

It seems fairly easy to agree with the idea that the government should be non-arbitrary or, in other words, reasonable in its decisions. It seems even easier to accept that a non-arbitrary government is a government that serves the governed by means of good administration and responsibility. As it has been stated, "The government acts arbitrarily when not trying to follow the law. The test of conformity to the rule of law is acting with manifest intention to serve the interests of the governed, as expressed by the law and its morally proper interpretation and implementation"[26]. Nevertheless, a precise de-

[25] *Ibídem*.

[26] Raz, 2019, 7.

finition of what serving the governed means becomes essential as a pattern for reasonableness in political society. In this task, as it has been stated, two different approaches may be considered: a substantial approach and a procedural approach.

Substantively, all the concepts connected with public interest, such as public utility or public service, lead to the ultimate idea of common good. In other words, the objective creation of the best social conditions for the development of human beings would be the way on the basis of which to judge a government decision as reasonable or not. Thus, the government would serve the governed if its decisions contributed to the attainment of the ultimate realm of common good. Reasonableness, then, is a term that should be appreciated in the perspective of common good as an end that offers the best way to serve the governed[27].

Nonetheless, the theory of common good seems to be weak when confronted with the trouble rooted in the fact of pluralism (Popper): millions of human beings, each with different conceptions of good and truth in current multicultural political societies. On the other hand, the acceptance of the substantial common good theory could be welcomed in a democratic system where decisions taken by majority were considered as final expressions of the general will. Nonetheless, it could clearly serve as a main entrance to arbitrariness, enhancing government powers against personal and political autonomy.

As Rawls states, the only possibility of living all together seems to be to accept the principles of justice that allow an overlapping consensus among many different comprehensive doctrines. This idea requires a political (not metaphysical) and procedural theory of justice that could embrace a conception of reasonableness that has been constructed over the notion of fairness. Similarly, serving the governed within a constitutional framework should mean serving the people, considering each person with the utmost seriousness, i.e. in their personal and political aspirations as autonomous beings.

Accepting justice as fairness as the political and procedural basis, the purpose of a non-arbitrary government could focus on the constitutional grounds that create the structural issues for developing all the powers in each jurisdiction inside the government bureaucracy. Thus, a constitutional framework would allow the building of a government on the principles of freedom and equality in accordance with personal and political autonomy. In order to respect human rights, then, a non-arbitrary government ought to be defined according to the constitutional principles of: a) comity (separation and correct allocation of powers, subsidiarity and deference); b) the rule of the law (legality, due process, legal certainty, relativity/equilibrium); and c) accountability (open government/transparency/e-government).

[27] Finnis, 2011, 154 y 156.

Therefore, if being reasonable means acting in accordance with reasons, procedural reasons are connected with principles of justice that embrace personal and political autonomy and that have a performative efficacy to get a substantially just outcome in political terms.

Conclusion: facing the challenge from a procedural point of view

A) The procedural model design at work

Even when, at first sight, the different judicial review structure seems to be what determines the core and main profile of each system (the classical Wade/Hauriou discussion), a deeper analysis of the subject leads to the remarkable consideration that the main contraposition between the procedural and the substantive models lies in their different point of departure and the way they work considering their aims.

Thus, in the common law, the Crown has prerogatives because its use of power is intended to serve its citizens. Nonetheless, considering that abuse of power is a fact empirically proven by history, the Courts have designed a number of remedies to avoid government arbitrariness. These remedies consist in giving citizens the possibility of requesting judicial review supervisory jurisdiction over the administrative action.

The Courts have discretion to grant permission, making a comity/accountability balance, or, otherwise, to issue remedies. Citizens are not required to demonstrate a "legal right" such as cause of action (standing), as it occurs when they sue the government by means of contract and tort actions. Citizens need only to prove the existence of "sufficient interest" or a "legitimate expectation". This is the crucial distinction between private and public law actions, as well as the best way to understand how a procedural system works: it is the government's action or inaction that will become scrutinized under the prism of avoiding arbitrary government in accordance with the stare decisis (and not under certain prelisted categories with claimed objectivity). This analysis does not put aside the central role of tribunals, whose integration and operation is similar to that of courts, only without the requirement of permission and with no supervisory jurisdiction.

Thus, administrative law in the common law system is the case law enacted by the Courts in judicial review for avoiding arbitrary government under the historical experience of abuse of power. This is why it is referred to as a procedural system, i.e. remedies that build fences against government arbitrariness, and that is exactly where its "public condition" lies, without any interference with property rights in contracts and torts (soft public/private law distinction).

By contrast, in the regime administratif, government prerogatives were originally part of the constitutional design after the French Revolution in 1789, bearing in mind the primary purpose of building a solid and effective

administration. Thus, the original model stressed the idea of a power consolidated by the efficient administrative action of the executive branch. This way, in accordance with historical and political reasons, the judiciary was prevented from interfering with the administrative action, which is why its field of adjudication was circumscribed to the private law (including personal freedom and property rights when threatened by administrative action).

Thus, administrative law in the civil law system is the law of the executive branch, its own rules created in a praetorian way by its own tribunals since the late 19th century. This is the result of having analyzed the lawfulness of administrative decisions and, then, the notion of service public as an administrative government aim. Finally, the service public justifies the intervention in property rights when confronted with the objective public interest in contract or tort (the exorbitant note on which the hard public/private law distinction is based).

The corollary to all this is that the model of procedural control over the regularity of administrative behavior is able to shift the paradigm of the administrative systems based on civil law and cooperate more efficiently with fair government practices by putting aside considerations of public interest. This sort of practices, very importantly, is usually used for the enhancement of ministerial powers, to the detriment of civil liberties and property rights, at least in a number of Latin American countries where the civil law administrative law model has no direct correspondence with its historical roots or its constitutional model origins.

Stated more clearly, neither the public interest notion as a rhetorical device nor the definition of common good as a desirable state in the political life represent objects of criticism in this paper. The criticisms are factually connected with the way in which politicians act when appealing to the possibility of achieving an objective public interest, which is an umbrella opportunity to support the most diverse government policies. Of course, this is not a matter of speech but of accountability. Thus, constructing the judicial review in the perspective of an objective public interest is probably the best way to untie the discretionary government machine and lead it to the margins of the rule of law, to areas where the ambiguity could tolerate administrative bias in favor of private interests.

To sum up, the model of procedural control over the regularity of administrative behavior shows itself as a more effective tool in fighting public bodies' corrupt practices and government arbitrariness.

B) Proposal for Latin American countries[28]

According to the model of procedural control over the regularity of administrative behavior, administrative law institutions in Latin America could be revisited as follows:

[28] The reference to Latin American countries works just as a geographical context of debate.

1. By accepting a comprehensive criterion for reasonableness, associated with justice as fairness to be implemented by individual deliberative and constitutional democracies. Thus, the first step in getting a procedurally designed administrative law system under the rule of law in accordance with political autonomy is ensuring the key role of the statutes in political terms. Deliberative democracy is the way to enforce plural political participation in terms of rational discourse, aiming at an idea of reasonableness as the exercise of prudence by means of practical reason. At the same time, constitutional principles serve as guarantees for personal autonomy. Thereby, the main purpose of the procedural model can be achieved by substituting the intended substantive concept of public interest for the notion of control over the regularity of government behavior as the means of ensuring a non-arbitrary government.

2. By redefining jurisdiction on the report of the ideas of representation and accountability. More specifically:

a) Rethinking the organicist theory when naming officers acquires absolute importance. Even when officers could occasionally act as servants, they often exercise statutory powers, i.e. they act on behalf of the public administration, as its representatives. The concept of representation proves exceptionally useful in understanding a key concept in the government structure in the political ethos: the rule of law claims a juridical corporative approach to bureaucracy in order to justify liability and accountability of the juridical corporation.

b) At the same time, the juridical corporation must be understood in the pragmatic use of the concept in accordance with political action[29]. Otherwise, the control of public power by the rule of law could easily turn into a chimera. The notion of jurisdiction explains the officers' personal and public commitment in exercising their powers and thus the need for crossover administrative controls for accountability and final liability purposes.

c) Certainly, the idea of state implies more than a juridical corporation: it is a bureaucracy expressing principles of justice shared by its people within a territory under sovereign power. Nonetheless, bureaucracy is the formal expression of a non-arbitrary government or of any government that serves the governed.

3. By putting aside the theory of administrative decisions and, instead, supporting a procedural perspective that emphasizes the intrinsic relationship among jurisdiction, procedure and outcome. An ex post facto analysis of the administrative decision as a type of after-the-fact outlook seems to hold little value or use for accountability purposes. More importantly, behind all the formal requisites listed in the administrative procedure acts, there lies a triple standard of reasonableness: a) jurisdiction; b) procedures; c) proportionali-

[29] Hart, 1983 [1953], 40 y 47.

ty. Thus, the control over the reasonableness of an administrative decision, called "substantive control", should be considered in the light of procedural requirements, i.e. within the logic of the powers conferred to the agency by the law, the formal requirements established for their exercise, and the proportionality of the outcome.

Once the decision has been taken inside this scope, its content may be fulfilled by the agency at random, i.e. considering opportunity, merit or convenience, without interference by the courts, for comity reasons.

From this conception, judicial review could be understood in all its procedural magnificence. This new perspective means considering that the main task of the judicial review is avoiding arbitrary government, not dissecting an administrative decision (judgment of the decision - regime administratif). In addition, embracing the procedural model would allow a visible regularity in terms of accountability.

4. By introducing a new and better basis for understanding administrative sanctions, which also means understanding the relationship between criminal law and administrative law differently. A commonplace in the Latin American administrative law field, "administrative sanctions" are typically treated as a chapter of the administrative law subject. Nonetheless, in the context of a procedural model, many implications with respect to the sanctions imposed by the agencies ought to be taken into consideration:

a) First of all, it is important to differentiate sanctions applied by agencies as punishments imposed to citizens or companies from contractual sanctions and from sanctions delivered to government civil servants as employees. Contractual sanctions are part of the contract own regulations for breaching this agreement. Sanctions imposed to civil servants are not punishments in social terms but rather matters of the labor relationship.

b) The constitutional basis for delivering a sanction as punishment that has been ordered by an agency is implied in the laws that give this agency its jurisdiction. The reasons on which the statute grants this sort of jurisdiction to the agencies are mainly linked with two factors: 1. Efficacy of the administrative action itself (for example, the decision to close a public place in the event of a hazard). In these situations, the sanction appears as an unavoidable continuation of the administrative action. 2. Expertise or know-how of the agency officers with respect to the specifics of the regulated market, of the industry or of the subject matter (for example, in the environmental area).

c) The reasonableness or non-reasonableness in the allocation of jurisdiction to the agencies for imposing sanctions is a question that should be treated in a separate stage. Nevertheless, it seems clear that certain sanctions, such as deprivation of liberty, should not be imposed by means of administrative procedures (except, probably, for flagrant behavior, preservation of social order and risk for third-party, which are mainly police duties). As a

matter of fact, administrative sanctions could only be imposed by administrative procedures only when connected with the two factors exposed above.

d) The administrative procedure for imposing sanctions should be strict and fair in order to guarantee the sanctioned the broader exercise of their right of defense (broad hearings and clear reasons). At the same time, judicial review should be guaranteed fully, and its scope should include an analysis of proportionality. This position implies that administrative sanctions should be scrutinized by considering the same general conditions of administrative decisions, i.e. jurisdiction; procedures/transparence; reasonableness/proportionality.

5. By introducing a new and better basis for the comprehension of delegated legislation. The non-contrastable existence of delegated legislation implies a wide source of self-determined powers created by the agencies themselves, which requires specific attention. These by-laws create a wide range of possibilities for discretionary performance of powers. They are enacted by the agencies developing duties that have been delegated by the legislative branch under broad formulas that make surveillance by the parliament and supervision by judicial review (questions of opportunity, efficacy, limits, etc.) very complex.

6. The judicial review from the procedural point of view is focused on a non-arbitrary government. It is from the judicial review perspective that the possibility of implementing effective control over the regularity of administrative behavior becomes real and concrete. It is also true that all the administrative instances of control contribute to the same goal, but the judicial review constitutes the final instance of control and the most important one in terms of checks and balances. The conditions imposed by the procedural model are linked with:

a) The redesign of standing conditions from the perspective of basic and pragmatic ideas (e.g. legal right, sufficient interest or legitimate expectations) as general criteria, avoiding the abstract categories that come from subjective right theories for persons, associations and ombudsmen.

b) The redefinition of the jurisdiction of administrative courts from the perspective of the theory on control over the regularity of administrative behavior, rather than using conceptual constructions about what administrative law is objectively.

c) Requirements and conditions for judicial review may vary, but the action should be unified without considering decisions, facts, omissions or inactions proper of the agencies.

d) All the terms should be reasonable in order to ensure the citizens' proper access to courts, and interim relief should be adequate and opportune and ought to be appreciated by the courts in accordance with prudence criteria.

e) The scope of the judicial control could be supervisory z depending on the circumstances and the kind of administrative decisions subjected to control.

f) The courts' decisions could deliver discretional remedies according to the subject and the necessities of a proper control over the behavior of the agencies, which could imply the substitution of the outcome, if it is an imperative condition of effectiveness.

g) The courts' decisions should aim at cooperating towards a non-arbitrary government without resigning the constitutional dialogue allowed for the comity constitutional principle[30]. They should comprehend the analysis of reasonableness. Courts should be allowed to do "substantive" control of the administrative decision as the performative result of jurisdiction/procedures/proportionality rules, with the limits imposed by stare decisis.

h) Just as the test of constitutionality of the statutes should be limited on the grounds of comity reasons, for the defense of personal autonomy (substantive limit), guard of democracy rules and procedures, and preservation of stare decisis (formal limits for elections, decision-making process and court role); the test of "constitutionality" or fairness applied to an administrative decision should be limited to the core idea of controlling the regularity of administrative action in order to avoid an arbitrary government.

7. The institutions of the market (property rights, contracts and liability) should be allocated properly, i.e. in accordance with the common rules of land, contracts and torts. These are institutions of the market as part of the political ethos. Thus, the same government that creates the market by law as a juridical space for the exchange of goods and services is subject to its own rules, under the same conditions as private persons.

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